BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ASHLEIGH SCHILD (LINDEMANN), Claimant, v. BUCK KNIVES, Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants.	**IC 2014-011087** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** **Filed 8/17/18**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers. In lieu of a hearing, the parties agreed to having this matter decided on the record and briefing. Claimant, Ashleigh Schild nka Lindemann, appeared *pro se.* Kirsten Ocker of Boise represented Employer and its surety, the State Insurance Fund. The parties submitted briefs with attachments and this matter is now ready for decision. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law, and order.

ISSUES

On or about March 19, 2018, the Referee assigned to this matter held a telephone conference with the parties to discuss calendaring of the case for hearing. Following this telephone conference, the Referee entered an Order bifurcating the case and submitting certain

issues to the Commission on the briefs of the parties alone. The Referee's March 20, 2016 Order reflects that the following issues are before the Commission: (1) Whether Claimant has complied with the Notice of Limitations as set forth in Idaho Code § 72-448 and; (2) if not, whether Defendants have been prejudiced by such failure.

However, in their answer filed December 5, 2017, Defendants conceded that Claimant gave timely notice of the manifestation of her occupational disease. Rather, Defendants contended that the claim was barred pursuant to the provisions of Idaho Code § 72-706. Further, from the briefs of the parties it appears that the central issue revolves around the provisions of Idaho Code § 72-706. From their briefs, we conclude that the parties have acceded to the submission of the following issues to the Commission for consideration:

1. Whether compensation has been paid to Claimant, or on her behalf, such as to implicate the five year period of limitation referenced at Idaho Code § 72-706(2);
2. Whether Claimant's misdiagnosis by Dr. Ludwig tolls the statute of limitations;
3. Whether Claimant was "misled" to her prejudice by Dr. Ludwig's misdiagnosis such as to toll the limitation provisions of Idaho Code § 72-706(1).

As developed *infra*, we conclude that "compensation" has been paid to Claimant, or on her behalf, such as to implicate the provisions of Idaho Code § 72-706(2). Therefore, we do not reach the balance of the issues raised by the parties.

CONTENTIONS OF THE PARTIES

Claimant contends that she developed work-related bilateral CTS and timely reported the same to Employer, who arranged for an IME conducted by Michael Ludwig, M.D. Dr. Ludwig initially diagnosed an aggravation of bilateral CTS; however, when an EMG performed later

came back negative, Dr. Ludwig changed his mind and opined that Claimant did not have bilateral CTS after all.

Claimant was not satisfied with Dr. Ludwig's opinion and saved money to retain a physician of her own choosing who diagnosed bilateral CTS notwithstanding her negative EMG. Claimant argues that Employer/Surety mislead her to her prejudice when Dr. Ludwig reported that she did not have CTS, so the statute of limitation is tolled.

Defendants contend that their payment for an IME does not constitute payment of compensation so the one-year filing requirement applies. Therefore, Claimant had one year from the filing of her claim within which to file her Complaint. Claimant failed to do this and her claim is untimely.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's Opening Brief and Exhibits 1-2 attached thereto.
2. Defendants' Brief and Exhibits A-G attached thereto.
3. Claimant's Reply Brief.

FINDINGS OF FACT

1. Claimant began her employment with Buck Knives as a receptionist in late 2012. In mid-January, 2014, Employer added attaching sticky anti-theft bar codes to shipping cards to her duties. As a result of this new duty, Claimant's hands begin to bother her so she contacted her primary care physician, Dr. Burns, who prescribed anti-inflammatories.

2. On March 10 or 11, Claimant informed her supervisor of the problems she was having with her hands and was informed, basically, to deal with it as the labeling was now part of Claimant's job duties.

3. Claimant's hand pain worsened and she returned to Dr. Burns on March 25, 2014 at which time Dr. Siemers, in the same clinic as Dr. Burns, diagnosed bilateral CTS and recommended either a CTS injection or oral anti-inflammatories in the event that wrist bracing was unsuccessful.

4. Claimant wore her wrist splints every day yet her hand pain increased. Claimant so informed her supervisor, but her duties were not changed. On or about April 24, 2014, Claimant went to Employer's HR Department for the purpose of filing a "complaint" about her condition, hoping to obtain treatment. This evidently led to the preparation of the Employer's First Report of Injury or Illness prepared by Employer on April 28, 2014. (See Defendants' Exhibit A). Per Defendants, Employer, not Surety, "arranged" for Claimant to see Michael Ludwig, M.D., on April 25, 2014. (See Defendants' Brief at 2). The record does not reflect whether this visit was noticed or set pursuant to the provisions of Idaho Code § 72-433. Dr. Ludwig's notes from the April 25, 2014 first visit with Claimant reflects that his was a consult requested by the State Insurance Fund, Buck Knives (Defendants' Exhibit C). Dr. Ludwig took a history from Claimant and conducted an examination. On exam, Claimant had no elbow or wrist effusion, intact grip strength, and positive Tinel's and Phalen's signs. Dr. Ludwig gave Claimant an "industrial diagnosis" of "bilateral carpal tunnel – industrial aggravation." He endorsed the following plan:

> Ashleigh is seen today with bilateral hand pain, numbness and tingling. This is a result of repetitive use of her hands at work. She is wearing wrist splints, continue to use these. Modify duty with limited grasping and repetitive use. Recommend bilateral upward extremity EMG/NC, most likely bilateral carpal tunnel.

Claimant's Exhibit 1. Defendants paid for Claimant's evaluation by Dr. Ludwig. (Defendants' Brief at 2).

5. Although Dr. Ludwig recommended electrodiagnostic testing on April 25, 2014, this testing was not accomplished until July 23, 2014. Defendants paid for this testing as well. (Defendants' Brief at 2). The electrodiagnostic tests were read as a normal study, with no electrodiagnostic evidence of bilateral carpal tunnel syndrome (Defendants' Exhibit D). The negative electrodiagnostic studies prompted an inquiry from Defendants to Dr. Ludwig. On or about September 12, 2014, Dr. Ludwig stated that following his review of the negative electrodiagnostic studies, he could no longer support a diagnosis of carpal tunnel syndrome for Claimant, and recommended that she be evaluated for a possible cervical spine problem on a non-industrial basis. (See Defendants' Exhibit F).

6. By letter dated September 19, 2014, Defendants advised Claimant that her April 28, 2014 claim was being denied for the reason that medical evidence failed to substantiate that her condition constituted an "occupational disease." (See Defendants' Exhibit G).

7. The record does not reflect that Defendants had, at any time prior to September 19, 2014, taken any action to accept or deny the claim. Rather, the record appears to reflect that Defendants first acted to accept or deny the claim on or about September 19, 2014.[1]

8. Claimant resigned from Buck Knives in February 2015.

9. As Claimant was still experiencing hand pain, she began saving money to pay for a consultation with a physician of her choice. On January 18, 2016, Claimant presented to Gregory Keese, M.D., a board certified hand specialist. Dr. Keese reviewed Dr. Ludwig's report and examined Claimant. Dr. Keese assessed: "Bilateral carpal tunnel syndrome on a clinical basis with negative electrodiagnostic studies. There is a known incidence of negative

[1] Although not at issue in this case, Defendants' September 19, 2014 decision to deny the claim appears to be untimely. (See Idaho Code § 72-304). Further, the record is devoid of any explanation as to why Claimant was compelled to wait three months before the electrodiagnostic

electrodiagnostic studies for carpal and cubital tunnel syndrome in the presence of the disease." Claimant eventually underwent bilateral carpal tunnel releases as recommended by Dr. Keese at her own expense.

10. Based on Dr. Keese's report, Claimant asked Defendants to reopen her claim. On February 11, 2016, Defendants denied Claimant's request.

11. Claimant filed her Complaint on November 3, 2017.

DISCUSSION AND FURTHER FINDINGS

Idaho Code § 72-706(1) provides:

> **Limitation on time on application for hearing**.
>
> (1) When no compensation paid. When a claim for compensation has been made and no compensation has been paid thereon, the claimant, unless mislead to his prejudice by employer or surety, shall have one year of the date of making claim within which to make and file with the commission an application requesting a hearing and an award under such claim.

Idaho Code § 72-706(2) provides:

> (2) When compensation discontinued. When payments of compensation have been made and thereafter discontinued, the claimant shall have five (5) years from the date of the accident causing the injury or date of first manifestation of an occupational disease within which to make and file with the commission an application requesting a hearing for further compensation and award.

12. Defendants assert, *inter alia*, that the provisions of Idaho Code § 72-706(1) govern the timeframe within which Claimant must file a complaint because no "compensation" has been paid to Claimant, or on her behalf, in connection with this claim. Defendants evidently concede that if it is determined that "compensation" has been paid in connection with this case, that would be sufficient to bring the claim within the ambit of Idaho Code § 72-706(2), and allow Claimant five years from the date of first manifestation within which to file her complaint, in

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testing recommended by Dr. Ludwig was accomplished.

which the case the instant complaint would be timely filed. Therefore, we must determine whether or not "compensation" has been paid to or on behalf of Claimant within one (1) year following the date of first manifestation. Idaho Code § 72-102(7) defines "compensation" as follows:

> "Compensation" used collectively means any or all of the income benefits and the medical and related benefits and medical services.

Therefore, if medical care or services have been provided to Claimant within one (1) year following the date of first manifestation, the five-year statute of limitations found at Idaho Code § 72-706(2) applies to this case. Defendants contend that such compensation has not been paid, even though they concede that they paid for Dr. Ludwig's evaluation, along with the electrodiagnostic testing he recommended. Defendants contend that this conclusion follows from the Court's decision in *Bunn v. Heritage Safe Co.*, 148 Idaho 760, 229 P.3d 365 (2010). According to Defendants, *Bunn* stands for the proposition that where employer schedules a medical appointment for an injured worker, this does not amount to the payment of compensation contemplated by Idaho Code § 72-706(1). Defendants contend that as in *Bunn*, they merely "scheduled" a medical appointment for Claimant for the sole purpose of establishing whether Claimant's complaints were work related. (See Defendants' Brief at 4). A closer examination of *Bunn*, however, reveals that it is inapposite to the facts of this case.

13. Bunn was employed as a lock installer, a job which required the frequent twisting of his wrist. He asked his employer to schedule a doctor's appointment for him so that his wrist might be evaluated. Employer acquiesced and scheduled an appointment for claimant at the Lakeview Clinic. Bunn was seen at the clinic and diagnosed with carpal tunnel syndrome. This evidently led employer to file an Employer's First Report, but employer/surety denied the claim. The decision does not reflect that employer, or its surety, paid any of the charges associated with

the Lakeview Clinic visit. Bunn filed a complaint, but not within one (1) year following the manifestation of his alleged occupational disease. The Industrial Commission eventually ruled that his complaint was not timely filed.

14. On appeal, Bunn argued that employer's act of scheduling a doctor's appointment constituted the "payment of compensation," thus invoking the five-year statute of limitations found at Idaho Code §72-706(2). The Court rejected this argument:

> The record in this case establishes that Bunn asked his employer to schedule a doctor's appointment to examine his wrist. Heritage acquiesced, and scheduled an appointment with the Lakeview Clinic. From this, Bunn argues that the employer's act of calling the medical provider to set up a doctors' appointment constitutes "payments of compensation" under Idaho Code section 72–706(2), invoking that provision's five-year statute of limitations. The Industrial Commission held that Heritage's actions did not amount to "payments of compensation," rendering the five-year limitation provision inapplicable. An employer's mere act of scheduling a doctor's appointment, without more, is insufficient to constitute the payment of compensation under Idaho Code section 72–706(2). A contrary holding would provide a disincentive for an employer to schedule doctor's appointments for its employees in fear that the call, in and of itself, might automatically subject the employer to liability for workers' compensation benefits. We decline to subject an employer to the risk of making the legal and medical determinations of whether an injury is compensable under workers' compensation laws when scheduling a doctor's appointment.

Id. at 763-764, 368-369. Therefore, where the evidence only established that employer had taken the laboring oar to assist claimant in scheduling a medical appointment (but had not paid for any medical services) employer's gratuitous action does not constitute the payment of compensation. The facts of *Bunn* are in no wise analogous to those currently before the Commission. While it might be true that Defendants scheduled Claimant's visit with Dr. Ludwig, they also paid for it, an additional fact that was not before the Court in Bunn.

15. The record does not reflect what direction Employer gave Dr. Ludwig, if, indeed, Employer did communicate with Dr. Ludwig prior to the exam. Interestingly, although the FROI

was not prepared by Employer until April 28, 2014, Dr. Ludwig's report of April 25, 2014 reflects that his services had been requested by the "State Insurance Fund, Buck Knives," admitting the possibility that Surety may have had something to do with arranging for Claimant's evaluation. However, as noted, Surety appears to acknowledge that the exam was arranged by Employer. (See Defendants' Brief at 2). We do not quarrel with the proposition that part of Employer's purpose in scheduling and paying for Dr. Ludwig's evaluation may have been to assess whether or not Claimant suffered a compensable occupational disease. Dr. Ludwig's report reflects that he did address this threshold issue of causation, concluding on the basis of the medical evidence before him, that Claimant did suffer from a condition that was, at least in part, related to her employment. However, Dr. Ludwig also weighed-in on treatment recommendations for Claimant, including the continuation of splinting and modification of job duties. This case is therefore more like a number of prior Commission cases which have addressed the question of whether employer's payment for an Idaho Code § 72-433 exam constitutes the payment of "compensation" sufficient to implicate the five-year statute of limitations found at Idaho Code § 72-706(2).

16. In *Rose v. JR Simplot* 1994 IIC 0088 (January 1994), Rose claimed to have suffered injuries in January of 1992 to his right knee, back, and right shoulder. A notice of injury and claim for benefits was filed on February 12, 1992. In the year following February 12, 1992, no worker's compensation benefits were paid, although defendants did arrange for claimant's evaluation pursuant to the provisions of Idaho Code § 72-433. It was argued that defendants' payment for the Idaho Code § 72-433 exam constituted the payment of "compensation" sufficient to implicate the provisions of Idaho Code § 72-706(1). Treating this argument, the Commission stated:

> Claimant's medical panel examination in Boise was accomplished under the provisions of Idaho Code, Section 72-433 which requires an employee to submit for examination to a qualified physician when requested by the employer or ordered by the Commission. In determining whether payment of the costs of a medical panel examination requested by employer constitutes the payment of a "medical and related benefit and medical service" so as to bring the payment within the definition of compensation contained in the Worker's Compensation Law, we must keep in mind that the Law is to be interpreted liberally in favor of the claimant.
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> The panel examination was arranged by employer to assist the employer in determining its obligations to claimant under the Worker's Compensation Law. The panel was asked to express its opinion as to whether claimant's complaints were related to the alleged January 13, 1992, accident and whether claimant required further medical treatment. In addition to its comments about the cause of claimant's conditions, the panel reported on claimant's medical status. The panel's opinions concerning its diagnosis and claimant's need for further treatment would be of value to other physicians including treating physicians who may be called upon to treat claimant in the future. It is therefore a medical benefit or service to claimant. Employer accounted for the expenditure in its claim records as a medical payment rather than a legal or investigatory expense.
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> The Referee concludes that employer paid claimant a medical benefit which must be considered to be compensation under the Worker's Compensation Law. Claimant, therefore, had five years from the date of his alleged accident within which to file his complaint and his Complaint is timely filed.

Therefore, based on the finding that the medical examination was, to some extent, of benefit to claimant or his treaters, the payment of expenses associated with the Idaho Code § 72-433 exam did constitute the payment of "compensation." Further, the Commission noted that the Idaho Code § 72-433 exam was paid by defendants as a medical expense rather than as a legal or investigatory expense.

17. The issue was again addressed in *Kammeyer v. Tidyman Foods*, 1997 IIC 1174 (December 1997). There too, the question was whether the payment of expenses associated with an Idaho Code § 72-433 evaluation constituted "compensation" sufficient to avoid application of Idaho Code § 72-706(1), and implicate the provisions of Idaho Code § 72-706(2). As in *Rose*,

the evaluation in *Kammeyer* was undertaken pursuant to Idaho Code § 72-433, which requires a claimant to submit to evaluation at the request of employer. In *Kammeyer*, claimant alleged that she suffered an injury to her elbow in December of 1993 as a result of the repetitive demands of her work. She filed a timely notice and claim with employer in December of 1993. Surety investigated the claim and issued a denial letter in January of 1994. Claimant filed a complaint with the Industrial Commission in January of 1994. In defense of the complaint, surety required claimant's attendance at an Idaho Code § 72-433 panel evaluation. The adjuster assigned to the case testified that the panel exam was undertaken to defend the assertion that claimant's condition was causally related to her employment. The panel exam was paid from medical reserves. On the facts before it, the Commission came to a different conclusion in *Kammeyer* than it had in *Rose*, reasoning as follows:

> While recognizing the validity of the Commission's decision in the *Rose* case and fully considering the arguments set forth by Claimant in her brief, the Referee does not conclude that ordering an evaluation conducted under Idaho Code, Section 72-433, or the payment of the charge for such an examination, would automatically constitute payment of compensation in the form of a medical benefit. Rather, the determination of whether such an examination or payment constitutes compensation within the meaning of Idaho Code, Section 72-706, is necessarily a case-by-case determination based upon the totality of the surrounding facts and circumstances. To conclude otherwise would place a defendant in the position of having no means to evaluate a contested medical condition for litigation purposes without running the risk of extending the applicable statute of limitations from one year to five years.
>
> Although not an exhaustive list, factors to be considered by the Commission in making this determination may include: the purpose for which the examination is ordered, whether the results of the examination are used in determining appropriate medical treatment of the claimant, whether the report of the examination is provided to the claimant's treating physician(s), whether the examination is used by the defendant in determining what benefits to pay the claimant, the timing of the examination vis-a-vis the litigation of the case, the manner in which the defendant accounts for the payment of the examination in its business records, the category of funds from which the payment is made, and

> whether the examination is arranged by defendant's legal counsel. No single factor or combination of factors is dispositive of this issue. Rather, the Commission will consider this information, along with any other relevant evidence, in making its determination.
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> Based upon the above criteria, the Referee concludes that the Surety's ordering of and payment for an independent medical evaluation conducted on Claimant did not constitute the payment of benefits as contemplated by Idaho Code, Section 72-706(1), and as defined in Idaho Code, Section 72-102(16). The examination in this case was clearly conducted for litigation purposes and not for medical treatment. As a result, Claimant did not timely file her Amended Workers' Compensation Complaint.

Id.

18. Considering the factors referenced above, the Commission concluded that even though the exam was paid as a medical expense, it was nevertheless clearly undertaken for the purposes of defending the complaint brought by claimant, and not for the purpose of providing medical care to claimant. Therefore, the Commission concluded that surety's payment of expenses associated with the Idaho Code § 72-433 exam did not constitute the payment of compensation sufficient to implicate the five-year statute of limitations.

19. Applying the considerations outlined in *Kammeyer* lead to a different conclusion in this case. First, the record contains nothing that would allow us to conclude that Dr. Ludwig's evaluation of Claimant was noticed and set pursuant to the provisions of Idaho Code § 72-433. There is no evidence that Claimant was required by Defendants to attend this exam. To the contrary, Claimant asserts that when she went to Employer on April 24, 2014 to inquire about the filing of a "complaint," i.e., employer's first report, she did so in the hope of obtaining treatment. (Claimant's Opening Brief at 4). Employer, not Surety, appears to have arranged for Claimant to be seen by Dr. Ludwig on April 25, 2014, several days before the employer's first report of injury was actually prepared. These facts lend little-to-no support to the proposition that the Employer's intention in arranging for this exam was purely to test the compensability of the

claim. Nor did Dr. Ludwig limit his evaluation to the question of whether or not Claimant suffered from a condition related to the demands of her employment. He also made recommendations for the treatment of Claimant's condition. Finally, the record is silent on how Surety characterized the payment of Dr. Ludwig's bill; it is unknown whether it was paid as a medical benefit or as an expense associated with the investigation or defense of the claim.

20. From the foregoing, we conclude that the facts of this case are substantially dissimilar from those at bar in *Kammeyer*. The examination by Dr. Ludwig was sought by Claimant, and he made recommendations relating to the treatment of her condition which were of benefit to her. From the facts before us, it cannot be said that the timing of the exam is only consistent with Surety's preparation for defense of the claim; the actual claim does not appear to have been filed until after Dr. Ludwig's exam.

21. Surety's payment of the expenses associated with Dr. Ludwig's exam constitute the payment of "compensation" such that Claimant has five years from the date of the manifestation of her alleged occupational disease within which to file a complaint. Therefore, the complaint is timely filed.[2]

22. Having so ruled, we do not reach the other issues raised by the parties.

CONCLUSIONS OF LAW AND ORDER

1. The payment of the expenses associated with Dr. Ludwig's exam constitutes the payment of "compensation" as that term is used in Idaho Code § 72-706(2);

2. Claimant's complaint is timely filed pursuant to Idaho Code § 72-706(2);

3. All other issues are moot.

4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all

[2] Of course, we make no judgment as to whether Claimant has satisfied the requirements

matters adjudicated

DATED this ___17th___ day of _____August_____, 2018.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

_____/s/_____
Thomas P. Baskin, Commissioner

_____/s/_____
Aaron White, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __17th__ day of August, 2018, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

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_____/s/_____

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of a compensable occupational disease.