

7-16-2013

Corgatelli v. Steel West Clerk's Record v. 1 Dckt. 41012

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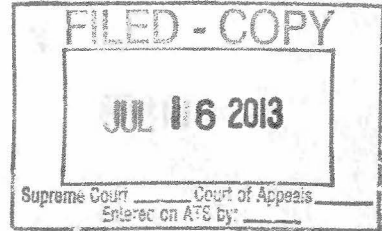
BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

GARY R. CORGATELLI,)
)
 Claimant-Appellant-Cross Respondent,)
)
 v.)
)
 STEEL WEST, INC., Employer, and IDAHO)
 STATE INSURANCE FUND, Surety,)
)
 Defendants-Respondents-Cross)
 Respondents,)
)
 and)
)
 STATE OF IDAHO, INDUSTRIAL SPECIAL)
 INDEMNITY FUND,)
)
 Defendant-Respondent-Cross)
 Appellant.)
 _____)

SUPREME COURT NO. 41012

AGENCY'S RECORD

LAW CLERK



Attorney for Claimant-Appellant-Cross Respondent:

Fred J. Lewis
PO Box 1391
Pocatello, ID 83204-1391

Attorney for Defendants-Respondents-Cross Respondents:

M. Jay Meyers
PO Box 4747
Pocatello, ID 8.205-4747

Attorney for Defendant-Respondent-Cross Appellant.

Paul B. Rippel
PO Box 51219
Idaho Falls, ID 83405-1219

41012

COPY

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

GARY R. CORGATELLI,)
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 Claimant-Appellant-Cross Respondent,)
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 v.)
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 STEEL WEST, INC., Employer, and IDAHO)
 STATE INSURANCE FUND, Surety,)
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 Defendants-Respondents-Cross)
 Respondents,)
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 and)
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 STATE OF IDAHO, INDUSTRIAL SPECIAL)
 INDEMNITY FUND,)
)
 Defendant-Respondent-Cross)
 Appellant.)
)

SUPREME COURT NO. 41012
AGENCY'S RECORD

Attorney for Claimant-Appellant-
Cross Respondent:

Fred J. Lewis
PO Box 1391
Pocatello, ID 83204-1391

Attorney for Defendants-Respondents-
Cross Respondents:

M. Jay Meyers
PO Box 4747
Pocatello, ID 8.205-4747

Attorney for Defendant-Respondent-
Cross Appellant.

Paul B. Rippel
PO Box 51219
Idaho Falls, ID 83405-1219

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NOTICE OF INTENT TO FILE A WORKERS’ COMPENSATION COMPLAINT AGAINST
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ORDER TO CLARIFY, filed April 5, 2013.....89

ORDER VACATING AND RESETTING HEARING, filed July 13, 2011.....14

WORKERS’ COMPENSATION COMPLAINT, filed July 13, 20091

WORKERS’ COMPENSATION COMPLAINT AGAINST THE INDUSTRIAL SPECIAL
INDEMNITY FUND, filed January 28, 20118

EXHIBITS LIST

Reporter's Transcript:

Reporter's Transcript taken November 23, 2011 will be lodged with the Supreme Court.

Joint Exhibits:

- A. Lee Chiropractic
- B. Gail E. Fields, D.O.
- C. New Day Physical Therapy, Dale C. Wheelwright, P.T.
- D. Intermountain Neurosurgery / Spine Idaho, Clark Allen, M.D., Scott Huneycutt, M.D., Ryan Hope, M.D.
- E. Anesthesia Associates, Patrick Farrell, M.D.
- F. Pocatello Physical Therapy Clinic, Ric Benedetti, P.T.
- G. Mary Himmler, M.D.
- H. Rehab Authority, Robert Black, P.T.
- I. Douglas P. Norman, M.D.
- J. Donald Whitley, Ph.D.
- K. David Simon, M.D.
- L. Mary Barros-Bailey, Ph.D., CRC, CDMS, CLCP, NCC, D/ABVE
- M. Nancy Collins, Ph.D.
- N. Peter Schossberger, M.D.
- O. Kevin Hill, M.D.
- P. Scott Rudeen, M.D.
- Q. Industrial Commission Rehabilitation Case Notes
- R. Industrial Commission Claims Information Reporting
- S. Personnel File
- T. Transcript of the Oral Deposition of Gary R. Corgatelli
- U. Lump Sum Settlement Agreement of March 7, 1996
- V. Idaho State Insurance Fund

Claimant's Exhibits:

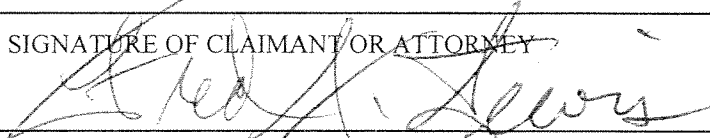
- W. Wage and Tax Statements
- X. Job Search Journal
- Y. Picture from Yearbook

Depositions:

1. David C. Simon, MD., taken December 7, 2011
2. Mary Barros-Bailey, Ph.D., taken December 9, 2011
3. Nancy Collins, Ph.D., taken December 9, 2011

Additional Documents:

1. Claimant's Post-Hearing Brief, filed January 18, 2012
2. Defendant Employer and Surety's Post-Hearing Brief, filed February 6, 2012
3. ISIF Post-Hearing Brief, filed February 8, 2012
4. Claimant's Post-Hearing Reply Brief, filed February 28, 2012
5. Referee Alan Taylor's Findings of Fact, Conclusions of Law, and Recommendation, dated June 8, 2012

PHYSICIANS WHO TREATED CLAIMANT (NAME AND ADDRESS) Portneuf Medical Center Emergency Room Dr. Clark Allen, Pocatello, Idaho		
WHAT MEDICAL COSTS HAVE YOU INCURRED TO DATE? Unknown		
WHAT MEDICAL COSTS HAS YOUR EMPLOYER PAID, IF ANY? \$Unknown		WHAT MEDICAL COSTS HAVE YOU PAID, IF ANY? \$Unknown
I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. <input checked="" type="checkbox"/> YES <input type="checkbox"/> NO		
DATE 7-8-09	SIGNATURE OF CLAIMANT OR ATTORNEY 	
PLEASE ANSWER THE SET OF QUESTIONS IMMEDIATELY BELOW <u>ONLY IF CLAIM IS MADE FOR DEATH BENEFITS</u>		
NAME AND SOCIAL SECURITY NUMBER OF PARTY FILING COMPLAINT	DATE OF DEATH	RELATION TO DECEASED CLAIMANT
WAS FILING PARTY DEPENDENT ON DECEASED? <input type="checkbox"/> YES <input type="checkbox"/> NO		DID FILING PARTY LIVE WITH DECEASED AT TIME OF ACCIDENT? <input type="checkbox"/> YES <input type="checkbox"/> NO

CLAIMANT MUST COMPLETE, SIGN AND DATE THE ATTACHED MEDICAL RELEASE FORM

CERTIFICATE OF SERVICE

I hereby certify that on the 9 day of July, 2009, I caused to be served a true and correct copy of the foregoing Complaint upon:

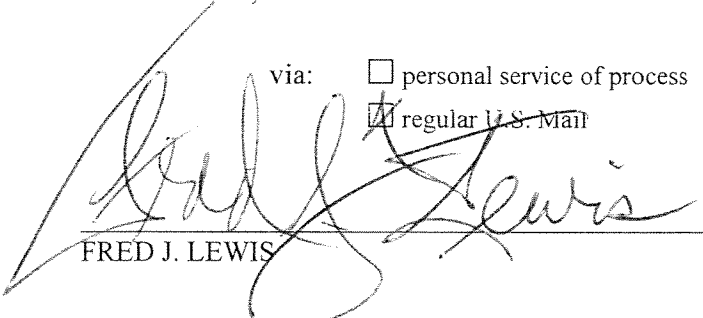
EMPLOYER'S NAME AND ADDRESS	SURETY'S NAME AND ADDRESS
-----------------------------	---------------------------

Steel West Inc
 5690 Industry Way
 Chubbuck, ID 83202

State Insurance Fund
 P.O. Box 83720
 Boise, ID 83720-0044

via: personal service of process
 regular U.S. Mail

via: personal service of process
 regular U.S. Mail



 FRED J. LEWIS

NOTICE: An Employer or Insurance Company served with a Complaint must file an Answer on Form I.C. 1003 with the Industrial Commission within 21 days of the date of service as specified on the certificate of mailing to avoid default. If no answer is filed, Default Award may be entered!

Further information may be obtained from: Industrial Commission, Judicial Division, P.O. Box 83720, Boise, Idaho 83720-0041 (208) 334-6000.

INDUSTRIAL COMMISSION
P.O. BOX 83720
BOISE, ID 83720-0041

Patient Name: Garv R. Corcatelli
Birth Date: [REDACTED]
Address: 238 Mingo Lane, Chubbuck, Idaho 83202
Phone Number: 208-237-5548
SSN or Case Number: [REDACTED]

<i>(Provider Use Only)</i>	
Medical Record Number: _____	
<input type="checkbox"/> Pick up Copies	<input type="checkbox"/> Fax Copies
# _____	
<input type="checkbox"/> Mail Copies	

AUTHORIZATION FOR DISCLOSURE OF HEALTH INFORMATION

I hereby authorize _____ to disclose health information as specified:
Provider Name - must be specific for each provider

To: _____
Insurance Company/Third Party Administrator/ Self Insured Employer/ISIF, their attorneys or patient's attorney

Street Address _____

City _____ State _____ Zip Code _____

Purpose of need for data: _____
(e.g. Worker's Compensation Claim)

Information to be disclosed: _____ Date(s) of Hospitalization/Care: _____

- Discharge Summary
- History & Physical Exam
- Consultation Reports
- Operative Reports
- Lab
- Pathology
- Radiology Reports
- Entire Record
- Other: Specify _____

I understand that the disclosure may include information relating to (check if applicable):

- AIDS or HIV
- Psychiatric or Mental Health Information
- Drug /Alcohol Abuse Information

I understand that the information to be released may include material that is protected by Federal Law (45 CFR Part 164) and that the information may be subject to redisclosure by the recipient and no longer be protected by the federal regulations. I understand that this authorization may be revoked in writing at any time by notifying the privacy officer, except that revoking the authorization won't apply to information already released in response to this authorization. I understand that the provider will not condition treatment, payment, enrollment, or eligibility for benefits on my signing this authorization. Unless otherwise revoked, this authorization will expire upon resolution of worker's compensation claim. Provider, its employees, officers, copy service contractor, and physicians are hereby released from any legal responsibility or liability for disclosure of the above information to the extent indicated and authorized by me on this form and as outlined in the Notice of Privacy. My signature below authorizes release of all information specified in this authorization. Any questions that I have regarding disclosure may be directed to the privacy officer of the Provider specified above.

Garv R. Corcatelli
Signature of Patient

7-8-09
Date

[Signature]
Signature of Legal Representative & Relationship to Patient/Authority to Act

7-8-09
Date

Signature of Witness

Date

ANSWER TO COMPLAINT

I.C. NO. 05-501771

INJURY DATE January 3, 2005

- The below-named employer or employer/surety responds to Claimant's Complaint by stating:
- The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

CLAIMANT'S NAME AND ADDRESS Gary R. Corgatelli 238 Mingo Lane Chubbuck, ID 83202	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS Fred Lewis Racine, Olson, Nye, Budge & Bailey P.O. Box 1391 Pocatello, ID 83204-1391
EMPLOYER'S NAME, ADDRESS, AND TELEPHONE NUMBER Steel West, Inc. P.O. Box 5427 Pocatello, ID 83202	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Idaho State Insurance Fund P.O. Box 83720 Boise, ID 83720-0044
ATTORNEY REPRESENTING EMPLOYER OR EMPLOYER/SURETY (NAME AND ADDRESS) M. Jay Meyers Meyers Law Office, PLLC P.O. Box 4747 Pocatello, ID 83205	ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS) N/A

IT IS: (Check One)	
Admitted	Denied
<input checked="" type="checkbox"/>	
<input checked="" type="checkbox"/>	
<input checked="" type="checkbox"/>	
	<input checked="" type="checkbox"/>
N/A	
<input checked="" type="checkbox"/>	
	<input checked="" type="checkbox"/>
<input checked="" type="checkbox"/>	

1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
2. That the employer/employee relationship existed.
3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
4. That the condition for which benefits are claimed was caused partly entirely by an accident arising out of and in the course of Claimant's employment.
5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
7. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, § 72-419: \$Under Investigation.
8. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

9. What benefits, if any, do you concede are due Claimant?
Defendants allege that all due benefits have been paid.

(Continued from front)

10. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.


1. Defendants deny each and every allegation of Claimant's Complaint not admitted herein.
2. Defendants deny that Claimant suffers any further permanent disability or impairment as a result of the injury alleged in Complaint over benefits paid to date.
3. Pending discovery, Defendants allege that Claimant is seeking to recover compensation for conditions attributable in whole or in part to a pre-existing injury, condition, or infirmity and Claimant's compensation, if any, should be apportioned pursuant to I.C. § 72-406.
4. Pending discovery, Defendants allege that Claimant's current condition may be the result of subsequent activity, injury, condition, or infirmity and therefore, is not related to the alleged injury.
5. Defendants reserve the right to amend this Answer and/or raise additional defenses based on information discovered subsequent hereto.

Under the Commission rules, you have 21 days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule 3.D., Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C. 1002.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. YES NO

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF SO, PLEASE STATE.

No.

Amount of Compensation Paid to Date			Dated	Signature of Defendant or Attorney
PPI/PPD	TTD	Medical		
\$19,412.25	\$16,407.95	\$62,338.44	July 17, 2009	M. Jay Meyers 

PLEASE COMPLETE

CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of July, 2009, I caused to be served a true and correct copy of the foregoing Answer upon:

CLAIMANT'S NAME AND ADDRESS

EMPLOYER AND SURETY'S
NAME AND ADDRESS

INDUSTRIAL SPECIAL INDEMNITY FUND
(if applicable)

Claimant c/o Fred Lewis

P.O. Box 1391

Pocatello, ID 83204-1391

via: personal service of process
 regular U.S. Mail

via: personal service of process
 regular U.S. Mail

via: personal service of process
 regular U.S. Mail

M. Jay Meyers

Signature 

Print Form

COPY

**NOTICE OF INTENT TO FILE
A WORKERS' COMPENSATION COMPLAINT
AGAINST THE INDUSTRIAL SPECIAL INDEMNITY FUND**

Claimant's Name and Address Gary Corgatelli 238 Mingo Lane Chubbuck, Idaho 83202	Employer's Name and Address Steel West, Inc. 5690 Industry Way Chubbuck, Idaho 83202
Claimant's Attorney's Name and Address Fred J. Lewis Racine, Olson, Nye, Budge & Bailey, Chartered P. O. Box 1391 Pocatello, Idaho 83204-1391	Employer's Attorney's Name and Address M. Jay Meyers P.O. Box 4747 Pocatello, Idaho 83205
Claimant's Social Security Number [REDACTED]	Surety's Name and Address (Not Adjuster's) State Insurance Fund P. O. Box 83720 Boise, Idaho 83720-0044
Claimant's Date of Birth [REDACTED]	
IC Number of Current Claim 2005-501771	Claimant's Occupation Truck driver and office assistant
Date of the Most Recent Injury 1-3-2005	Claimant's Weekly Wage \$980.77
Nature and cause of pre-existing impairment or condition. Submit documentation. Claimant previously injured his low back moving steel off of a truck in 1995. This resulted in three bulging discs in his lumbar spine.	
What factors render the Claimant totally and permanently disabled? Submit documentation. Following the most recent injury, the Claimant is not able to sit for long, stand for long, has increased frequency for both bowel and bladder, has chronic pain in his back radiating to his left leg, the bottom of his feet get sore and his legs are weaker. All of this in combination with his pre-existing back condition renders the Claimant totally and permanently disabled.	
What impairment ratings has the Claimant received and from whom? Submit documentation. Dr. Gale Fields provided a 5% whole person impairment rating following his 1995 accident. In regard to this most recent accident, the Claimant was initially assigned a 19% whole person impairment from Dr. Mary Himmler and since then he has had a four level lumbar fusion surgery and has not yet reached his maximum medical improvement.	

Certificate of Service

I certify that on 9-22-10, I served a true and correct copy of the Notice of Intent upon:

Industrial Special Indemnity Fund
Department of Administration
P.O. Box 83720
Boise, ID 83720-7901

Claimant's Name and Address
Gary Corgatelli
238 Mingo Lane
Chubbuck, Idaho 83202

FILED

NOV 05 2010

INDUSTRIAL COMMISSION

Employer's Name and Address
Steel West, Inc.

5690 Industry Way

Chubbuck, Idaho 83202

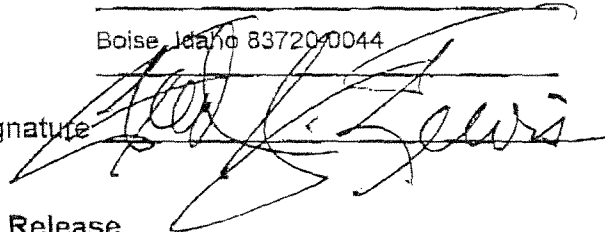
Dated 9-22-2010

Surety's Name and Address
State Insurance Fund

P. O. Box 83720

Boise, Idaho 83720-0044

Attorney's signature



Medical Release

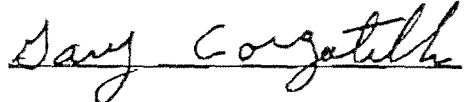
I hereby authorize any defendant and defendants' legal counsel, at their sole expense to examine, inspect, receive or take copies of any medical reports, records, x-rays, or test results of hospitals, physicians or any other person, or to receive information from any person having examined me and their diagnosis, relative to my past, present, and future physical and mental condition.

I also authorize and direct that a duplicate set of all documents or written records provided to said law firm, or any individual member thereof, also be provided to me or my attorney, . The defendant requesting my records shall bear the expense incurred in production of such duplicate set.

I further authorize that copies of this authorization may be used in lieu of the original. THIS AUTHORIZATION IS VALID ONLY FOR THE DURATION OF THE PENDING LITIGATION. It is further understood that all information obtained under this authorization shall be regarded as confidential and maintained as such.

Dated 9-22-10

Claimant's signature



This form is to notify the Industrial Special Indemnity Fund that you intend to file a formal Workers' Compensation Complaint Against the ISIF after a period of 60 days. This time period allows the ISIF to adjudicate the claim on a more informal basis and to avoid or limit necessary litigation costs. If you wish to file a Complaint Against the ISIF after 60 days, you may do so by the standard service process. You do not need to file a copy of this form with the Industrial Commission.

**WORKERS' COMPENSATION
COMPLAINT AGAINST THE
INDUSTRIAL SPECIAL INDEMNITY FUND (ISIF)**

ORIGINAL

CLAIMANT'S NAME AND ADDRESS GARY R. CORGATELLI 238 MINGO LN CHUBBUCK, ID 83202	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS FRED J. LEWIS, ESQ. RACINE, OLSON, NYE, BUDGE & BAILEY, CHTD P.O. BOX 1391, POCATELLO, ID 83204-1391
EMPLOYER'S NAME AND ADDRESS STEEL WEST, INC 5690 INDUSTRY WAY CHUBBUCK, ID 83202	EMPLOYER'S ATTORNEY'S NAME AND ADDRESS M. JAY MEYERS 300 N. 7TH P.O. BOX 4747 POCATELLO, ID 83205-4747
I.C. NUMBER OF CURRENT CLAIM I.C. No. 05-501771	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTERS) NAME AND ADDRESS STATE INSURANCE FUND P.O. BOX 83720 BOISE, ID 83720-0044
DATE OF INJURY 1/3/2005	

NATURE AND CAUSE OF PHYSICAL IMPAIRMENT PRE-EXISTING CURRENT INJURY OR OCCUPATIONAL DISEASE

Claimant has had a lumbar fusion. Claimant had a pre-existing low back injury. Notice of Intent has been filed with the ISIF more than 60 days ago. Claimant's medical records sent to ISIF.

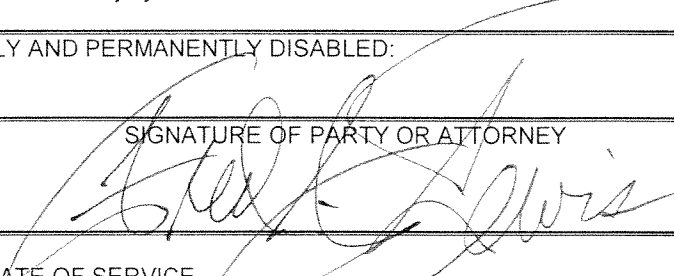
STATE WHY YOU BELIEVE THAT THE CLAIMANT IS TOTALLY AND PERMANENTLY DISABLED:

Cannot work an 8 hour day and no employer will hire Claimant.

DATE

1-26-2011

SIGNATURE OF PARTY OR ATTORNEY




CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of January, 2011, I caused to be served a true and correct copy of the foregoing Complaint upon:

Manager, ISIF	PO Box 83720	via:	<input type="checkbox"/>	personal service of process
Dept. of Administration	Boise, Idaho 83720-7901		<input checked="" type="checkbox"/>	regular U.S. Mail
Claimant's Name	<u>GARY R. CORGATELLI</u>	via:	<input type="checkbox"/>	personal service of process
Address	<u>238 MINGO LN, CHUBBUCK, ID 83202</u>		<input checked="" type="checkbox"/>	regular U.S. Mail Address
Employer's Name	<u>STEEL WEST, INC, c/o M. JAY MEYERS</u>	via:	<input type="checkbox"/>	personal service of process
Address	<u>P.O. BOX 4747, POCATELLO, ID 83205-4747</u>		<input checked="" type="checkbox"/>	regular U.S. Mail
Surety's Name	<u>STATE INSURANCE FUND c/o M. JAY MEYERS</u>	via:	<input type="checkbox"/>	personal service of process
Address	<u>P.O. BOX 4747, POCATELLO, ID 83205-4747</u>		<input checked="" type="checkbox"/>	regular U.S. Mail

I have not served a copy of the Complaint upon anyone.

Fred J. Lewis



NOTICE: Pursuant to the provisions of Idaho Code § 72-334, a notice of claim must first be filed with the Manager of ISIF not less than 60 days prior to the filing of a complaint against ISIF.

You must attach a copy of Form IC 1001 Workers' Compensation Complaint, to this document.

An Answer must be filed on Form IC 1003 within 21 days of service in order to avoid default.

ANSWER TO COMPLAINT

I.C. NO.: 05-501771

INJURY DATE: On or about January 3, 2005

CLAIMANT'S NAME AND ADDRESS Gary R. Corgatelli 238 Mingo Ln Chubbuck, ID 83202	CLAIMANT'S ATTORNEY'S NAME AND ADDRESS Fred J. Lewis, Esq. P. O Box 1391 Pocatello, Idaho 83204-1391
EMPLOYER'S NAME AND ADDRESS Steel West, Inc. 5690 Industrial Way Chubbuck, Idaho 83202	WORKERS' COMPENSATION INSURANCE CARRIER'S (NOT ADJUSTOR'S) NAME AND ADDRESS Idaho State Insurance Fund P. O. Box 83720 Boise, Idaho 83720-0044
ATTORNEY REPRESENTING EMPLOYER OR EMPLOYER/SURETY (NAME AND ADDRESS) M. Jay Meyers P. O. Box 4747 Pocatello, Idaho 83205-4747	ATTORNEY REPRESENTING INDUSTRIAL SPECIAL INDEMNITY FUND (NAME AND ADDRESS) Paul B. Rippel Hopkins Roden Crockett Hansen & Hoopes, PLLC 428 Park Ave. P. O. Box 51219 Idaho Falls, ID 83405-1219

- The above-named employer or employer/surety responds to Claimant's Complaint by stating:
- The Industrial Special Indemnity Fund responds to the Complaint against the ISIF by stating:

IT IS: (Check One)

Admitted	Denied
<input type="checkbox"/>	<input checked="" type="checkbox"/>
<input type="checkbox"/>	<input checked="" type="checkbox"/>
<input type="checkbox"/>	<input checked="" type="checkbox"/>
<input type="checkbox"/>	<input checked="" type="checkbox"/>
<input type="checkbox"/>	<input checked="" type="checkbox"/>
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<input type="checkbox"/>	<input checked="" type="checkbox"/>
<input type="checkbox"/>	<input checked="" type="checkbox"/>

1. That the accident or occupational exposure alleged in the Complaint actually occurred on or about the time claimed.
2. That the employer/employee relationship existed.
3. That the parties were subject to the provisions of the Idaho Workers' Compensation Act.
4. That the condition for which benefits are claimed was caused partly entirely by an accident arising out of and in the course of Claimant's employment.
5. That, if an occupational disease is alleged, manifestation of such disease is or was due to the nature of the employment in which the hazards of such disease actually exist, are characteristic of and peculiar to the trade, occupation, process, or employment.
6. That notice of the accident causing the injury, or notice of the occupational disease, was given to the employer as soon as practical but not later than 60 days after such accident or 60 days of the manifestation of such occupational disease.
7. That, if an occupational disease is alleged, notice of such was given to the employer within five months after the employment had ceased in which it is claimed the disease was contracted.
8. That the rate of wages claimed is correct. If denied, state the average weekly wage pursuant to Idaho Code, Section 72-419: \$ _____.
9. That the alleged employer was insured or permissibly self-insured under the Idaho Workers' Compensation Act.

10. What benefits, if any, do you concede are due Claimant?
 This Defendant does not presently concede that Claimant is due any workers' compensation benefits from Defendant, ISIF. Also see No. 11, below.

(Continued from front)

11. State with specificity what matters are in dispute and your reason for denying liability, together with any affirmative defenses.

Counsel for the ISIF has recently received file information and a copy of the Complaint Against the ISIF in this matter. At this time, answering counsel is without sufficient knowledge to admit or deny most, if any facts in this matter, and therefore has denied the same, but reserves the opportunity to further respond either through an amended pleading, or through the calendaring process or through conferences with the Referee/Commission in which issues are defined or narrowed. Without limiting the foregoing, the ISIF alleges that if Claimant is now totally and permanently disabled, that it is not due to a combination of injuries from the industrial accident and preexisting permanent physical impairment, nor from the aggravation and acceleration thereof.

Under the Commission rules, you have twenty-one (21) days from the date of service of the Complaint to answer the Complaint. A copy of your Answer must be mailed to the Commission and a copy must be served on all parties or their attorneys by regular U.S. mail or by personal service of process. Unless you deny liability, you should pay immediately the compensation required by law, and not cause the claimant, as well as yourself, the expense of a hearing. All compensation which is concededly due and accrued should be paid. Payments due should not be withheld because a Complaint has been filed. Rule III(D), Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, applies. Complaints against the Industrial Special Indemnity Fund must be filed on Form I.C. 1002.

I AM INTERESTED IN MEDIATING THIS CLAIM, IF THE OTHER PARTIES AGREE. YES NO Not at Present

DO YOU BELIEVE THIS CLAIM PRESENTS A NEW QUESTION OF LAW OR A COMPLICATED SET OF FACTS? IF SO, PLEASE STATE.

NO.

Amount of Compensation Paid to Date			Dated	Signature of Defendant or Attorney
PPD	TTD	Medical		
\$0.00	\$0.00	\$0.00	02/16/11	Paul B. Tzamal

PLEASE COMPLETE

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of February, 2011 I caused to be served a true and correct copy of the foregoing Answer upon:

CLAIMANT

Fred J. Lewis, Esq.
P. O. Box 1391
Pocatello, Idaho 83204-1391

EMPLOYER AND SURETY

Steel West, Inc. & State Ins. Fund
c/o M. Jay Meyers, Esq.
P. O. Box 4747
Idaho Falls, Idaho 83205-4747

INDUSTRIAL SPECIAL INDEMNITY FUND

Jim Kile, Manager
P. O. Box 83720
Boise, ID 83720-7901

- personal service
- regular U.S. Mail
- facsimile transmission

- personal service of process
- regular U.S. Mail
- facsimile transmission

- personal service of process
- regular U.S. Mail
- facsimile transmission

Paul B. Tzamal
Signature

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY R. CORGATELLI,)
)
 Claimant,)
)
 v.)
)
 STEEL WEST, INC.,)
)
 Employer,)
)
 and)
)
 STATE INSURANCE FUND,)
)
 Surety,)
)
 and)
)
 STATE OF IDAHO, INDUSTRIAL)
 SPECIAL INDEMNITY FUND,)
)
 Defendants.)
 _____)

IC 2005-501771

ORDER VACATING AND
RESETTING HEARING

FILED

OCT 13 2011

INDUSTRIAL COMMISSION

Pursuant to the telephone conference held on July 11, 2011, in the above matter, the Industrial Commission of the State of Idaho hereby ORDERS that the hearing set for August 16, 2011, in the above-entitled matter is VACATED and RESET for hearing on **November 23, 2011, at 9:00 a.m., for one (1) day** at the Industrial Commission Field Office, 1070 Hiline, Suite 300, Horizon Plaza, in the City of Pocatello, County of Bannock, State of Idaho, on the following issues:

1. Whether, and to what extent, Claimant is entitled to disability in excess of impairment.
2. Whether apportionment for a pre-existing or subsequent condition pursuant to Idaho Code § 72-406 is appropriate.

3. Whether Claimant is entitled to permanent total disability pursuant to the odd-lot doctrine or otherwise.


4. Whether the Industrial Special Indemnity Fund is liable pursuant to Idaho Code § 72-332.

5. Apportionment under the Carey Formula.

6. Pursuant to Idaho Code § 72-406(2), upon a subsequent injury to the same body part for which income benefits were previously paid and now culminating in total permanent disability, is there a deduction for the previously paid income benefits received for the previous injury to the same body part and, if so, does that deduction inure to the Employer/Surety or to the Industrial Special Indemnity Fund (ISIF)?

DATED this 13th day of July, 2011.

INDUSTRIAL COMMISSION



Alan Reed Taylor, Referee

ATTEST:



Assistant Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of July, 2011, a true and correct copy of the foregoing **ORDER VACATING AND RESETTING HEARING** was served by United States Certified Mail upon each of the following:

FRED J LEWIS
PO BOX 1391
POCATELLO ID 83204-1391

M JAY MEYERS
PO BOX 4747
POCATELLO ID 83205-4747

PAUL B RIPPEL
PO BOX 51219
IDAHO FALLS ID 83405-1219

and by regular United States Mail upon:

SANDRA BEEBE
PO BOX 658
BLACKFOOT ID 83221-0658

and by e-mail transmission upon:

INDUSTRIAL COMMISSION FIELD OFFICE – POCATELLO

sc

Stephanie Christensen

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY R. CORGATELLI,
Claimant,
v.
STEEL WEST, INC.,
Employer,
and
STATE INSURANCE FUND,
Surety,
and
STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND,
Defendants.

IC 2005-501771

FINDINGS OF FACT,
CONCLUSIONS OF LAW, AND
ORDER

FILED
JUL 26 2012
INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Alan Taylor, who conducted a hearing in Pocatello on November 23, 2011. Claimant, Gary Corgatelli, was present in person and represented by Fred Lewis, of Pocatello. Defendants, Steel West, Inc., and State Insurance Fund (Employer/Surety), were represented by Jay Meyers of Pocatello. Defendant State of Idaho, Industrial Special Indemnity Fund (ISIF), was represented by Paul Rippel of Idaho Falls. The parties presented oral and documentary evidence. Post-hearing depositions were taken and briefs were later submitted. The matter came under advisement on February 29, 2012. The case 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

The issues to be decided by the Commission as the result of the hearing are:

1. The extent of Claimant's permanent disability in excess of impairment, including whether Claimant is permanently and totally disabled pursuant to the odd-lot doctrine or otherwise;
2. Apportionment pursuant to Idaho Code § 72-406(1);
3. Whether the ISIF is liable under Idaho Code § 72-332;
4. Apportionment under the formula set forth in Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984); and
5. Whether, pursuant to Idaho Code § 72-406(2), upon a subsequent injury to the same body part for which income benefits were previously paid and now culminating in total permanent disability, there is a deduction for the previously paid income benefits received for the previous injury to the same body part, and if so, whether that deduction inures to the benefit of the Employer/Surety or to the ISIF.

CONTENTIONS OF THE PARTIES

Claimant argues he is totally and permanently disabled due to both the combined effects of his January 3, 2005, industrial accident and his pre-existing 1994 lumbar injury, or due to his 2005 industrial accident alone. He maintains that no deduction pursuant to Idaho Code § 72-406(2) is warranted.

Employer/Surety assert that Claimant has failed to prove he is totally and permanently disabled due to his 1994 lumbar condition and/or his 2005 industrial injury. Employer/Surety also assert that if Claimant is found to be totally and permanently disabled, they are entitled to a deduction for permanent disability benefits previously paid for Claimant's 1994 injury, pursuant to Idaho Code § 72-406(2).

ISIF maintains that Claimant is totally and permanently disabled due to the effects alone of his 2005 industrial accident.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. The testimony of Claimant, Leta Corgatelli, and Dennis Meusborn taken at the November 23, 2011 hearing;
3. Exhibits A through Y admitted at the hearing;
4. The post-hearing deposition of David Simon, M.D., taken by Employer/Surety on December 7, 2011;
5. The post-hearing deposition of Nancy Collins, Ph.D., taken by Claimant on December 9, 2011; and
6. The post-hearing deposition of Mary Barros-Bailey, Ph.D., CRC, CDMS, taken by Employer/Surety on December 9, 2011.

All objections posed during the depositions are overruled.

FINDINGS OF FACT

1. **Claimant's background.** Claimant was born in 1947. He was 63 years old and resided in Chubbuck at the time of the hearing. Claimant was raised on a cattle ranch near Mackay where he helped farm and ranch until graduating from Mackay High School in 1966. His academic performance in high school was below average. He then attended Ricks College where he took general courses and welding classes. He required frequent tutoring in his English classes. Thereafter he attended one term at Idaho State University where he obtained his welding certification.

2. From approximately 1968 through 1971, Claimant served in the U.S. Navy. Thereafter he served in the National Guard. After returning from the Navy, Claimant worked as a welder and truck driver for various potato warehouses.

3. In 1973, Claimant commenced working for Steel West as a fitter and welder. He helped build large tanks, furnaces, and commercial buildings for FMC, Monsanto, and others. In the early 1980's he was promoted to lead man and helped the foreman run construction jobs. Claimant was later promoted to shipping and receiving and paint foreman. He oversaw the receiving, unloading, sandblasting, and painting of all steel. He also drove delivery trucks.

4. **1994 accident.** On October 4, 1994, Claimant injured his back while pushing a load of steel off of a delivery truck for Steel West. He was earning \$12.06 per hour at the time of the accident. On October 20, 1994, Claimant was examined by a Gail Fields, D.O. He presented with complaints of low back and left buttock pain. Following his exam of Claimant, Dr. Fields' working diagnosis was bilateral sciaticneuralgia, worse on the left. He recommended MRI evaluation of the lumbar spine, which was performed on October 25, 1994, and read by radiologist Allen Eng, M.D. Per Dr. Eng, Claimant had a "normal MRI." (See C. Ex. B, p. 6).

On October 31, 1994, Dr. Fields released Claimant to return to restricted duty work effective November 2, 1994, with restrictions against repeated bending, stooping, twisting or turning and lifting more than thirty pounds for one month. Claimant was seen again by Dr. Fields on December 12, 1994 with increasing complaints for six weeks. Dr. Fields took Claimant off work and ordered a bone scan, which was performed on December 20, 1994. That study was read as follows:

There is markedly increased radiotracer uptake involving the left facet, pedicle, and adjacent left disc margin at L3-4. Radiographic and MRI correlation demonstrates mild impaction of the superior vertebral endplate of L4 laterally to the left either due to a longstanding Schmorl's node or a recent mild impaction. There is inflammatory change in the adjacent trabecular bone due to healing response. No evidence of spondylolysis. No evidence of metastatic disease.

D. EX. B, p. 11.

5. By February 14, 1995, Dr. Fields felt that Claimant was approaching medical stability. However, he expressed concern that Claimant would have on-going difficulty if he continued to perform his time-of-injury job. On February 14, 1995, Dr. Fields placed Claimant on permanent restrictions against lifting more than thirty-five pounds. He recommended against bending and stooping on a frequent basis. (*See D. Ex. B, p. 12*)

6. On or about March 3, 1995, Claimant was seen for a second opinion, at his request, by Pocatello Neurosurgeon Peter Schossberger, M.D. Dr. Schossberger had the opportunity to review the original films from the October 25, 1994 MRI, as well as Claimant's bone scan of December 20, 1994. Dr. Schossberger was in significant disagreement with Dr. Eng's reading of the MRI. Dr. Schossberger read the study as follows:

7. MRI lumbar scan from BRMC 10/25/94 shows
 - a. nuclear dehydration at L1-2, L2-3, L3-4, and L4-5 (sagittal T2 #10 of 22);
 - b. evident left posterior superior L4 body Schmorl's node or end plate fracture (sagittal T2 #6 of 22) with increased water signal in the

bone marrow of the surrounding L4 body (sagittal T2 #4, 6, 8, and 10 of 22) and also some increased water signal in the posterior inferior L3 body (sagittal T2 #s 6, 8, 10 and 12 of 22) adjacent to the interspace;

- c. there may be a focal tiny left L3-4 disc herniation (sagittal T2 #8 of 22 and sagittal T intermediate #7 of 22; but question if present on transverse T2 #12 of 22 or transverse T1 #8 of 15);
- d. slight diffuse central L4-5 annulus convexity without definite disc herniation (transverse T2 #7 of 22 and transverse T1 #5 of 15);
- e. normal L5-S1 nuclear hydration, annulus, and canal (sagittal and transverse T2 #3 of 22, transverse T1 #2 of 15);
- f. considerably different reading from the official reading of normal with normal vertebral body signal for pulse sequences used, normal nuclear signal, etc.

D. Ex. N, pp. 7-8.

8. As of March 3, 1995, Claimant's presenting complaints on exam were of low back pain and bilateral lower extremity pain extending down the legs to Claimant's heels. Dr. Schossberger did not think that Claimant was a surgical candidate, and recommended that he follow-up with Kevin Hill, M.D. for work hardening. Dr. Schossberger concluded his evaluation of Claimant with the following comments:

In my estimation, nuclear dehydration at four lumbar levels, multilevel osteophytes, and superior L4 end plate and surrounding bone changes including focally positive bone scan at about left L3-4 are more likely than not of degenerative cause and/or are a result of cumulative life work lifting activities.

D. Ex. N, p. 11.

9. Claimant was seen by Kevin Hill, M.D. on August 17, 1995. Following his review of medical records and examination of Claimant, he stated his impression of Claimant's condition as follows:

1. Chronic mechanical low back pain sub acute secondary to musculoligamentous injury.
2. Degenerative disc and joint disease L1-5. Left facet arthritis L3-4.

D. Ex. O, p. 8. He also considered whether Claimant was entitled to an impairment rating and whether he should have permanent limitations/restrictions:

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 6

IMPAIRMENT: Impairment comes from the Guides to permanent Impairment DRE lumbosacral category complaints and symptoms. The whole person impairment is zero. The patient does have significant [sic] degenerative disc and lumbar spine disease. However this was pre-existing. Recommendation for his further treatment would include nonsteroidal anti-inflammatory medication as needed. He is to continue with his low grade exercise program. He is to use excellence biomechanical technique. Recommendation would be that he be limited to a medium physical demand classification worker, 50 pounds occasionally, 20 pounds frequently and 10 constantly. That he limit his climbing, sitting, kneeling, squatting, crawling on all fours to an occasional basis and that he avoid bending and stooping at all times. He has reached maximum medical improvement at this time and may need to limit his activities as needed for pain relief.

D. Ex. O, pp. 8-9. It seems likely that by these comments, Dr. Hill did not intend to state that Claimant was not entitled to an impairment rating, only that he was not entitled to an impairment rating for the effects of the 1994 accident.

10. On October 11, 1995, Claimant returned to Dr. Fields' office for the purpose of obtaining Dr. Fields' assessment of his permanent physical impairment. Dr. Fields awarded Claimant a 5% whole person rating, without any reference to whether he would revise the permanent limitations/restrictions he gave Claimant on February 14, 1995.

11. In March 1996, Claimant and Employer/Surety executed a lump sum settlement agreement wherein Employer/Surety paid Claimant \$27,500.00 to resolve the 1994 claim. This settlement specified the amount of \$27,348.75 for disputed permanent impairment and permanent disability.

12. Claimant attempted to return to his position as a foreman at Steel West, but could not tolerate the bending, stooping and lifting required. He then accepted a \$3.00 per hour pay cut and a new position as safety director at Steel West. In his new position, Claimant largely did paperwork, inventory, and limited computer work. He did not use, and was never familiar with, Excel, WordPerfect, or Microsoft Word. As the safety director, Claimant had a part-time

employee type out safety meeting agendas. Claimant maintained, correlated, and filed material data safety sheets. He filled out workers' compensation accident reports and helped keep inventory. Claimant still drove delivery trucks and delivered steel within his 35-pound lifting restriction.

13. **2005 accident and later recurrent symptoms.** On January 3, 2005, Claimant was at work for Steel West when he stepped down off of a semi truck and landed on a large snow-covered piece of sheet metal. One foot slipped off the sheet metal and the other foot caught on the bottom step of the truck, which was about three feet above the ground. Claimant did the splits and fell onto his buttocks and back, experiencing immediate back and leg pain. Claimant received some initial chiropractic care before returning to Dr. Fields, who saw Claimant on January 25, 2005. After examining Claimant, Dr. Fields proposed that Claimant was suffering from degenerative disc disease with lumbar sacral strain or sprain with left sciatica neuralgia symptoms or radiculopathy. Claimant continued to be symptomatic, leading Dr. Fields to order an MRI of Claimant's lumbar spine, which was performed on February 15, 2005 and read by D.J. Marc Cardinal, M.D. as follows:

FINDINGS: The canal and foramina are below average in size developmentally. The conus medullaris is normal in appearance and terminates at a normal level at L1. There is a mild dextroconcave scoliosis. T10-11, T11-12, and T12-L1 are unremarkable.

At L1-2, there is mild disc narrowing and disc bulging mildly narrowing the canal and the foramina.

At L2-3 there is advanced disc narrowing with mild to moderate disc bulging causing mild narrowing of the thecal sac and the left intervertebral foramen and moderate narrowing of the right intervertebral foramen.

At L3-4 there is advanced down with mild disc bulging and facet degenerative change and hypertrophy mildly narrowing the thecal

sac and moderately narrowing the intervertebral foramina bilaterally.

At L4-5 there is mild disc narrowing and mild disc bulging. There is a small disc extrusion laterally on the right measuring about 10 x 8 mm. located at the lateral margin of the intervertebral foramen severely narrowing the lateral portio (sic) of the left intervertebral foramen and displacing the left L4 nerve root. There is mild narrowing of the thecal sac and moderate narrowing of the right intervertebral foramen.

L5-S1 demonstrates minor disc bulging causing slight narrowing of the intervertebral foramina and no impingement on the thecal sac.

OPINION:

1. The canal and foramina are developmentally below average in size.
2. L4-5 demonstrates a small disc extrusion laterally at the lateral margin of the left intervertebral foramen severely narrowing the left intervertebral foramen and displacing the left L4 nerve root. Degenerative changes are present mildly narrowing the thecal sac and moderately narrowing the right intervertebral foramen.
3. At L3-4 degenerative changes are present moderately narrowing the foramina and mildly narrowing the thecal sac.
4. At L2-3 degenerative changes are present moderately narrowing the right intervertebral foramen and causing mild narrowing of the thecal sac and left intervertebral foramen.
5. At L1-2 degenerative changes are present mildly narrowing the canal and foramina.

D. Ex. B, pp. 33-34.

14. Reviewing the report, Dr. Fields commented that it demonstrated the presence of degenerative disc disease at all of the lumbar levels along with "something new," i.e. a disc herniation at L4-5. In view of the results of the study, Dr. Fields referred Claimant to Clark Allen, M.D. for neurosurgical consultation.

15. Dr. Allen first saw Claimant on March 1, 2005. From Dr. Allen's note of that date, it does not appear that Dr. Allen was given a history of the low back complaints from which

Claimant had suffered prior to the January 3, 2005 accident. Dr. Allen recommended conservative modalities to treat Claimant's complaints. However, Claimant's complaints proved recalcitrant and Dr. Allen performed a decompressive laminotomy, facetotomy, and excision of herniated disc and L4-5.

16. Dr. Allen advised Claimant that he would see him in three or four years because he anticipated that Claimant's back condition would deteriorate. Claimant returned to his work at Steel West. He continued to handle paper work and make deliveries.

17. Claimant noted mild bladder incontinence and partial sexual dysfunction for which he consulted Mary Himler, M.D., in December 2005. Both conditions arose or worsened after Claimant's 2005 accident. Urologist Douglas Norman, M.D., examined Claimant in 2006 and found no indication of neurogenic bladder.

18. From 2005 until August 2008, Claimant's back and leg discomfort gradually worsened until he was taking 10-12 over-the-counter ibuprofen daily. In August 2008, Claimant noted increased back and leg pain after making a delivery in Wyoming. Steroid injections and physical therapy provided no relief. A lumbar spine MRI in October 2008 revealed previous changes at L4-5, disc bulging and central spinal canal stenosis at L2-3, L3-4, and L4-5, severe neuroforaminal narrowing on the left at L4-5, and near complete effacement of the fat surrounding the exiting L4 nerve root.

19. Claimant was first seen by Scott Huneycutt, M.D., on October 14, 2008. The record does not reflect that Dr. Huneycutt took any history from Claimant concerning the low back difficulties from which he had suffered prior to the date of the January 3, 2005 accident. Dr. Huneycutt examined Claimant and reviewed the most recent MRI ordered by Dr. Allen. He noted that the study revealed tight foraminal stenosis at L4-5 on the left, along with degenerative

changes noted throughout the lumbar spine. By letter dated October 22, 2008, Paula Adams of the SIF, made the following inquiries of Dr. Huneycutt:

Do you feel Mr. Corgetelli's [sic] current symptoms and need for treatment are related to his original injury of January 3, 2005? Or do you feel Mr. Corgetelli [sic] suffered a new injury? Do you feel Mr. Corgetelli [sic] is experiencing pain due to a natural progression of his underlying disc disease? Please explain.

D. Ex. D, p. 42.

20. In his letter of October 29, 2008, Dr. Huneycutt offered the following reply to Ms.

Adams' questions:

- 1.) Activity is unknown. This was taken from subjective portion of encounter.
- 2.) Yes, I believe the patient's current symptoms are related to his original injury.
- 3.) No, there is no evidence of a new injury.
- 4.) Yes, the patient is suffering from progression of his original injury. This is evidenced by his report of return of previous symptoms and his imaging studies that by comparison reveal a continued decline and failure of his injured disk.

D. Ex. D, p. 43. Therefore, in the absence of a history of an intervening event, Dr. Huneycutt was of the view that Claimant's continuing problems at L4-5 represented a natural progression from the original injury. Notably, Dr. Huneycutt did not comment on the genesis or cause of Claimant's degenerative disc disease at levels other than L4-5. Nor does Dr. Huneycutt appear to have been aware that Claimant had findings of disease at L4-5 going back as early as 1994.

21. Surety desired to test Dr. Huneycutt's conclusions, and arranged for an independent evaluation by David Simon, M.D. Concerning the 1994 accident, Dr. Simon noted that the October 25, 1994 MRI was "normal." Though Dr. Simon was evidently aware of the fact that Dr. Schossberger performed a second opinion evaluation at Claimant's request, Dr. Simon did not note Dr. Schossberger's rather emphatic disagreement with the original MRI reading performed by Dr. Eng. Dr. Simon erroneously noted that Dr. Fields assigned Claimant a

12% PPI rating for the 1994 accident. Dr. Simon reached the following diagnoses concerning Claimant's condition:

Diagnosis

1. Left L4 radiculopathy secondary to foraminal stenosis. This radiculopathy has occurred primarily as a result of his previous low back injury and the subsequent surgery.
2. Status-post L4-5 discectomy on 5/4/05 following a work injury on 1/3/05.

D. Ex. K, p 5. As did Huneycutt, Dr. Simon concluded that in the absence of a history of intervening injury or MRI changes consistent with an acute disc herniation, Claimant's L4-5 problems were likely a progression of the problems first noted following the 2005 work injury. Accordingly, Dr. Simon felt that the treatment recommended by Dr. Huneycutt, i.e. injection therapy, was appropriate and related to the 2005 accident.

22. Epidural steroid injections performed at Dr. Huneycutt's instance were not successful in ameliorating Claimant's symptomatology. Claimant met with Dr. Allen on February 18, 2009, for the purpose of discussing surgical options. Noting that Claimant's most recent lumbar MRI showed severe disc collapse at L2-3, L3-4, and L4-5 with accompanying severe neuroforaminal stenosis at all levels, Dr. Allen recommended posterior lumbar interbody fusion from L2 to L5. This procedure was performed on April 6, 2009. The operative report reflects that among the indications for this procedure were the fact that Claimant has severe disc collapse with herniated discs at L2-3, L3-4, and L4-5.

23. Claimant obtained some benefit from surgery; however, his back and leg pain largely persisted. Dr. Allen later diagnosed Claimant with "failed back syndrome."

24. On August 25 and 26, 2009, Claimant underwent a functional capacity evaluation by Corey Rasmussen, PT, DPT, which showed Claimant functioned at a sedentary level, was only able to tolerate 10 minutes of sustained sitting, could carry up to 20 pounds occasionally,

and occasionally lift 10 pounds from floor to waist and from waist to shoulder. Claimant was unable to demonstrate efficiency with hand coordinated tasks.

25. In October 2009, Claimant began receiving Social Security Disability benefits.

26. On August 4, 2010, Dr. Simon found Claimant had reached maximum medical improvement and his condition was medically stationary. All parties agree that Claimant achieved maximum medical improvement no later than August 4, 2010. Dr. Simon diagnosed failed back syndrome and rated Claimant's permanent impairment due to his back condition attributable to his industrial injury at 15% of the whole person. Dr. Simon did not express an opinion on the question of whether Claimant's impairment should be apportioned between the effects of the 2005 accident and Claimant's preexisting condition. Although Dr. Simon stated that a causal relationship existed between Claimant's complaints and the 2005 work injury, he did not state that the 2005 work injury was the exclusive cause of Claimant's failed back syndrome. Indeed, in his subsequent deposition, Dr. Simon proposed that the need for the L2-5 fusion surgery was, in part, causally related to Claimant's multilevel degenerative disc disease, a condition which predated the 2005 accident:

(By Mr. Meyers)

Q On April 6th, 2009, I'm looking at page three of your report just for my reference, April 6th, 2009, Dr. Allen performed a lumbar decompression and fusion from L2 to L5.

You reviewed that operative report?

A Yes, I did.

Q To what extent would that fusion address anatomic findings that pre-existed the 2005 accident?

A Well, the 2005 accident injury affected the L4-5 level and the previous stuff that we talked about back in 1995. The worse level was the L3-4 level.

I'm not a surgeon. I'm not sure why he went up to the L2, but that being closer to the L3-4 level. I mean, that level would also be – you know, that would more likely be related to the pre-existing problems and the problems at the L3-4 level than the work-related L4-5 level.

Simon Depo., 14/12-15/5.

27. Finally, Dr. Simon proposed that Claimant's permanent limitations/restrictions are as set forth in the functional capacity evaluation. He stated that these restrictions are related to the industrial injury. (*See C. Ex. K.*, p. 14).

28. After the 2009 surgery, Claimant and Steel West mutually agreed there were no jobs he could perform at Steel West. Claimant began searching for other employment. His son typed out Claimant's resume and helped him search job listings on the computer system at the unemployment office. Claimant applied for numerous positions by hand-delivering resumes. He maintained a job search log. From February 2010 through November 2011, Claimant inquired and/or applied for work at well over 125 businesses in his geographic area. He obtained fewer than 10 interviews and not a single job offer.

29. Claimant had anticipated working for Steel West until he retired and then working with horses—a life-long interest. However, Claimant has been unable to ride horses since his 2005 accident and reluctantly sold all of his horses when it became apparent that he could no longer ride or care for them.

30. **Credibility.** The Referee found that Claimant, his wife Leta Corgatelli, and his Steel West supervisor Dennis Meusborn, are all highly credible witnesses. The Commission finds no reason to disturb the Referee's findings on credibility.

DISCUSSION AND FURTHER FINDINGS

31. The provisions of the Workers' Compensation Law are to be liberally construed in favor of the employee. Haldiman v. American Fine Foods, 117 Idaho 955, 956, 793 P.2d 187,

188 (1990). The humane purposes which it serves leave no room for narrow, technical construction. Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. Aldrich v. Lamb-Weston, Inc., 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

32. **Permanent disability.** The first issue is the extent of Claimant's permanent disability, including whether Claimant is totally and permanently disabled pursuant to the odd-lot doctrine or otherwise. "Permanent disability" or "under a permanent disability" results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. "Evaluation (rating) of permanent disability" is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430 (1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of accident causing the injury, or manifestation of the occupational disease, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. In sum, the focus of a determination of permanent disability is on the claimant's ability to engage in gainful activity. Sund v. Gambrel, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995). The proper date for disability analysis is the date of the hearing, not the date

that maximum medical improvement has been reached. Brown v. Home Depot, 152 Idaho 605, 272 P.3d 577 (2012).

33. To evaluate Claimant's permanent disability several items merit examination including his permanent impairment, the physical restrictions resulting from his permanent impairment, and his potential employment opportunities—particularly as identified by vocational rehabilitation experts.

34. Permanent impairment. Dr. Simon's August 2010 report rated Claimant's permanent impairment at 15% of the whole person due to his 2005 accident. Dr. Simon testified in his deposition that Claimant suffered a permanent impairment of 15% of the whole person for his lumbar spine, including 5% whole person impairment attributable to his 1994 accident and the balance attributable to his 2005 accident. The Commission finds that Claimant suffers permanent impairment of his lumbar spine of 15% of the whole person, 5% attributable to his 1994 injury and the balance attributable to his 2005 industrial accident.

35. The records of Dr. Himler, who examined Claimant in 2005 and 2006, suggest a 5% permanent partial impairment for mild bladder incontinence and partial sexual dysfunction. Both conditions apparently arose or worsened after Claimant's 2005 accident. Michael Weiss, M.D., reviewed Dr. Himler's records and questioned the propriety of an impairment rating for either condition and whether either condition was related to the 2005 accident. Urologist Douglas Norman, M.D., found no indication of neurogenic bladder in 2006, offered no impairment rating, and did not opine that either condition was caused by the 2005 accident. The record does not indicate that any physician has evaluated either condition since Claimant underwent his 2009 three-level fusion and reached medical stability in 2010. Neither condition

previously limited or currently limits Claimant's capacity to work. No impairment rating is given for either condition.

36. Work restrictions. Claimant's activities are restricted due to his back condition. Dr. Simon concurred in the findings of the functional capacity evaluation that Claimant is restricted to carrying no more than 25 pounds occasionally, lifting no more than 10 pounds occasionally from floor to waist and waist to shoulder, and sitting for only approximately 10 minutes consecutively.

37. Opportunities for gainful activity. Nancy Collins, Ph.D., a vocational rehabilitation expert retained by Claimant, prepared a report assessing Claimant's employability. Dr. Collins noted that Claimant graduated from high school, but is a poor reader and speller and reads the newspaper only with difficulty. He is not computer literate. Dr. Collins noted that Claimant was hindered somewhat by hand tremors of unknown etiology, but that he did not even know how to type. She opined that Claimant now lacks the physical capacity to perform any of his prior occupations, that his office skills are minimal, and that he would not be competitive even for entry level office jobs. Dr. Collins wrote:

In my opinion, at age 63, with poor reading, spelling and no real office skills, Mr. Corgatelli will not find work using his skills. He can no longer drive and with the significant sitting restrictions and need to rest after standing and walking, I can't think of a job that is regularly available in his or any labor market.

Exhibit M, p. 6. In her post-hearing deposition, Dr. Collins re-emphasized that Claimant's extremely limited sitting tolerance precluded virtually all employment opportunities. She concluded that Claimant is totally disabled and not regularly employable in any well-known branch of the labor market.

38. Mary Barros-Bailey, Ph.D., a vocational rehabilitation expert retained by Employer/Surety, prepared a report evaluating Claimant's disability. She noted the increased

limitations in all aspects of Claimant's functioning due to the 2005 accident. Dr. Barros-Bailey opined that based on the limitations from the 2005 injury, Claimant retained no residual transferable skills. She observed that although Claimant's 2009 functional capacity evaluation classified his functional limitations as sedentary, Claimant would not qualify for sedentary work because, by definition, sedentary work requires both lifting up to 10 pounds and prolonged sitting. Dr. Barros-Bailey concluded that Claimant would likely not be employable. In her post-hearing deposition, Dr. Barros-Bailey testified that Claimant has lost access to 100% of the labor market and is 100% disabled. She noted Claimant's extensive and unsuccessful job search, and opined that it would be futile for Claimant to look for work.

39. Employer/Surety asserts that Claimant's hand coordination limitation is the factor most limiting his employability. Dr. Collins noted that Claimant was hindered somewhat by hand tremors of unknown etiology, but that he is not computer literate and did not even know how to type. Dr. Barros-Bailey opined that Claimant's hand coordination limits his employability in sedentary and light work. She testified that light work might require less sitting than sedentary work, but acknowledged that light work would also require lifting up to 20 pounds and that Claimant is limited to lifting no more than 10 pounds. The actual effect of Claimant's limited hand coordination on his employability is immaterial because it is superseded by the effects of his permanent lifting and sitting restrictions.

40. The conclusions reached by Dr. Collins and Dr. Barros-Bailey are thorough, well-reasoned, strikingly similar, and highly persuasive. Based on Claimant's impairment rating of 15% of the whole person, his extensive permanent physical restrictions including his sitting and lifting limitations, and considering his non-medical factors including his age of 57 at the time of the accident, limited formal education, reading and writing deficiency, functional computer

literacy, absence of transferable skills, and inability to return to any of his previous positions, Claimant's ability to engage in regular gainful activity in the open labor market in his geographic area has been eliminated. The Commission concludes that Claimant has suffered a permanent disability of 100%, inclusive of his 15% whole person impairment. Claimant has proven that he is totally and permanently disabled.

41. **Idaho Code § 72-406(1) apportionment.** Inasmuch as Claimant is totally and permanently disabled, the issue of apportionment pursuant to Idaho Code § 72-406(1) is moot.

42. **ISIF liability.** Employer/Surety assert that ISIF is liable pursuant to Idaho Code § 72-332 which provides that if an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by injury arising out of and in the course of his employment, and by reason of the combined effects of both the pre-existing impairment and the subsequent injury suffers total and permanent disability, the employer and its surety will be liable for payment of compensation benefits only for the disability caused by the injury, and the injured employee shall be compensated for the remainder of his income benefits out of the ISIF account. In Dumaw v. J. L. Norton Logging, 118 Idaho 150, 795 P.2d 312 (1990), the Idaho Supreme Court summarized the four inquiries that must be satisfied to establish ISIF liability under Idaho Code § 72-332. These include: (1) whether there was a pre-existing impairment; (2) whether that impairment was manifest; (3) whether the impairment was a subjective hindrance to employment; and (4) whether the impairment in any way combined with the subsequent injury to cause total disability. Dumaw, 118 Idaho at 155, 795 P.2d at 317.

43. In the present case, the first three elements of ISIF liability are clearly established. Claimant was given a 5% impairment for the 1994 accident. It is clear that the impairment was manifest, and it is clear that the impairment constituted a subjective hindrance to Claimant. The

limitations imposed on Claimant were of sufficient magnitude to cause him to abandon his time of injury position in favor of a less demanding job. As is not infrequently the case, the real dispute in the instant matter vis-à-vis ISIF liability lies in determining whether or not the preexisting impairment from the 1994 accident in some way “combines with” the effects of the subject accident to cause Claimant’s total and permanent disability. For the reasons set forth below, we believe it is clear that it is only as a result of the combined effects of the work accident and the preexisting impairment that Claimant is totally and permanently disabled.

44. We recognize that Dr. Simon has stated that the limitations/restrictions defined in the FCE are related to the January 3, 2005 accident. At first blush, this appears to support a conclusion that it is the 2005 accident, standing alone, and without contribution from the preexisting impairment, that renders Claimant totally and permanently disabled. If true, then there can be no “combining with” and the claim against the ISIF would fail on this element of the prima facie case. However, Dr. Simon was not examined about this statement at the time of his deposition, and it is not entirely clear that his intentions in making this statement are as described by the ISIF.

45. What we do know is that Claimant is totally and permanently disabled as a consequence of the fact that the L2-5 fusion surgery he endured was less than successful, such that Claimant carries the diagnosis of “failed back syndrome.” It is equally clear that Claimant’s L2-5 fusion was undertaken because of the L4-5 lesion thought to be related to the January 3, 2005 accident and the multilevel degenerative changes in Claimant’s lumbar spine first noted in 1994, and progressing thereafter. In this regard, it is notable that the only injury identified with the January 3, 2005 accident is the L4-5 disc herniation. However, the February 15, 2005 MRI demonstrates severe degenerative changes at levels above and below the L4-5 level. The

findings at these levels demonstrate significant progression of the degenerative process in the years since the prior 1994 study, a progression that has not been related by any medical expert to the January 3, 2005 accident.

46. Dr. Allen proposed the L2-5 fusion to address not only the L4-5 level, but also the Claimant's severe degenerative disease at levels above and below L4-5. His operative report clearly reflects that the indications for surgery are multifactorial, and not solely related to the need to address L4-5 level. Indeed, it is the experience of the Commission that in the absence of multilevel problems, surgeons typically prefer to limit fusion procedures to levels where it is absolutely necessary in order to preserve lumbar spine motion.

47. Because Claimant's surgery was necessitated by both the subject accident and Claimant's preexisting condition, and because Claimant had a poor surgical outcome, such that he is currently totally and permanently disabled, it is clear that the combining with element of the prima facie case has been met.

48. **Carey Apportionment.** Having determined that the prima facie elements of ISIF liability have been satisfied, it is next necessary to consider how responsibility for Claimant's permanent and total disability should be apportioned between the ISIF and Employer per the formula adopted in Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984). Claimant has been found to have total impairment of 15% of the whole person, 5% attributable to the preexisting condition, and 10% attributable to the subject accident. This leaves disability of 85% to be apportioned between the ISIF and Employer. Per Carey, supra, Employer's liability is calculated as follows: $10/15 \times 85 = 56.7 + 10 = 66.7\%$ disability. 66.7% disability equates to 333.5 weeks of benefits or \$99,599.78 at 2005 rates. With a date of medical stability of August 4, 2010, ISIF responsibility for the payment of total and permanent disability

commences 333.5 weeks subsequent to August 4, 2010.

49. **Idaho Code § 72-406(2) apportionment.** Defendants urge the Commission to apply the provisions of Idaho Code § 72-406(2) to the facts of this case. That subsection provides:

Any income benefits previously paid an injured workman for permanent disability to any member or part of his body shall be deducted from the amount of income benefits provided for the permanent disability to the same member or part of his body caused by a change in his physical condition or by a subsequent injury or occupational disease.

50. Here, Employer/Surety paid Claimant the sum of \$27,348.75 for impairment/disability for his 1994 low back injury. Employer/Surety asserts that in order to avoid a double recovery, they are entitled to have their responsibility for the payment of disability benefits in the instant matter reduced by the amount of the previous payment. In making this argument, they contend that the 1994 accident involved an injury to the same body part as that injured in the January 3, 2005 accident.

51. Idaho Code § 72-406(2) has received only limited treatment by the Industrial Commission. See Ellsberry v. Idaho State School & Hospital, 1987 IIC 0732.1 (1987); Randell v. Nestle Brands Foodservice Company, 2002 IIC 0418.1 (2002). In Randell, claimant was diagnosed with bilateral carpal tunnel syndrome in 1992. She underwent surgical treatment for this condition in 1997. She was subsequently awarded a PPI rating based on her mild entrapment neuropathy at the right wrist for which she was paid the sum of \$5,940.00 by employer/surety. In 1998, claimant suffered a new injury to her right wrist and elbow. She was diagnosed as having suffered a traumatic tear of the scapholunate and lunotriquetral ligaments when her wrist was forcibly dorsiflexed at the time of the accident. Claimant underwent surgery for this injury, and was eventually given a 15% upper extremity rating based on decreased range of motion of the right wrist.

Employer/surety paid this award, valued at \$10,964.25. Claimant was given significant limitations/restrictions following her recovery from the 1998 accident. These restrictions, considered in light of claimant's relevant non-medical factors, eventually led the Commission to make a disability award to claimant of 55% of the whole person, inclusive of impairment. Employer/surety argued that under Idaho Code § 72-406(2) its responsibility to pay the award should be reduced by the amount of impairment previously paid to claimant for her 1997 carpal tunnel impairment. Employer/surety argued that the impairment paid to claimant in 1997 was for injury to the same body part involved in the 1998 claim. The Commission declined to accept this argument, noting that the 1997 impairment rating was given for the residual effects of an entrapment neuropathy, whereas the subsequent impairment rating was given for wrist loss of motion. The Commission reasoned that the 1998 accident did not actually injure the same body part as that injured in connection with the earlier claim. The 1997 claim involved an injury to the median nerve, whereas the 1998 claim involved to the scapholunate ligament and the lunotriquetral ligament. Therefore, the prerequisite to application of the provisions of Idaho Code § 72-406(2) had not been met. However, the Commission noted that had the evidence established that the same body part had been injured in both claims, Defendants would have been entitled to reduce its obligation to pay the 55% disability award by the amount it had previously paid claimant in connection with the carpal tunnel claim.

52. It is notable that the 55% disability award given by the Commission represented claimant's disability from all causes, inclusive of the impairment she received for both the 1997 and 1998 claims. In other words, the disability award did not represent claimant's entitlement to disability solely as a result of the 1998 accident. Where Defendants can meet their threshold responsibility of demonstrating multiple injuries to the same body part, the application of Idaho

Code § 72-406(2) to an award of disability from all causes will prevent Claimant from obtaining a double recovery.

53. To illustrate, consider the application of the statute in connection with a petition for change of condition. Idaho Code § 72-719 provides a mechanism by which an injured worker to whom an award of disability has previously been made may claim additional disability benefits due to a change or deterioration in his condition. If Claimant is successful in persuading the Industrial Commission that his condition has deteriorated, the Claimant will receive additional disability benefits. For example, if the original award of disability was 30% following Claimant's recovery from an L4-5 discectomy, Claimant's disability might be increased to 50% on his petition for change of condition, and following proof that his low back condition had deteriorated such that he had required fusion surgery and the imposition of additional limitations/restrictions. Application of Idaho Code § 72-406(2) to the facts of such a case will allow Defendants to offset their responsibility for the payment of a 50% disability by the 30% rating previously paid in connection with the original claim. In this example, the upward revision of Claimant's disability due to a change of condition to 50% of the whole man represents the entirety of Claimant's disability as a result of both the original accident and the subsequent change in his condition. The award does not represent only the 20% increase in Claimant's impairment as a result of his deteriorated condition. Had the order on Claimant's petition for change of condition been couched in such terms, i.e. had it made an award to Claimant only of an additional 20% disability, it seems clear that the purpose against preventing a double recovery would not be served by allowing Employer/Surety to avoid payment of the award by invoking the provisions of Idaho Code § 72-406(2).

54. The nature of the award in the instant matter should prevent the application of Idaho Code § 72-406(2) to the facts of this case. Assuming, for the sake of argument, that the same body

part was involved in both the 1994 and 2005 accidents, we know that Claimant received a 5% PPI rating following the 1994 accident. He was given a 15% impairment rating following the 2005 accident, with 5% attributable to the 1994 accident and 10% attributable to the 2005 accident. Although Employer/Surety has previously paid \$27,348.75 in connection with the 1994 claim, Employer's current obligation to pay the sum of \$99,599.78 is derived solely from consideration of the additional permanent physical impairment referable to the 2005 accident. In short, the apportionment Employer/Surety seeks has already taken place in the connection with the *Carey* apportionment. Claimant's total and permanent disability has been apportioned between Employer/Surety and the ISIF. Applying the Carey formula, Employer/Surety is obligated to pay a sum certain based on its responsibility for the 10% impairment rating given for the 2005 accident. ISIF liability is based on its responsibility for the 5% rating referable to the 1994 accident. To give Employer/Surety a credit in the amount of \$27,348.75 against their obligation to pay disability entirely referable to a subsequent accident would be a windfall to Employer/Surety, is contrary to the policies underlying Idaho's workers' compensation laws, and is clearly not intended by the provisions of Idaho Code 72-406(2).

CONCLUSIONS OF LAW AND ORDER

Based on the foregoing, it is HEREBY ORDERED that:

1. Claimant has proven that he is totally and permanently disabled;
2. ISIF liability is established;
3. Claimant has permanent physical impairment totaling 15%, with 5% referable to the 1994 accident and 10% referable to the 2005 accident;

4. Per Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984), Employer's liability is calculated as follows: $10/15 \times 85 = 56.7 + 10 = 66.7\%$, or \$99,599.78;

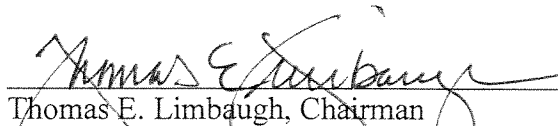
5. ISIF is liable for the payment of statutory benefits commencing 333.5 weeks subsequent to Claimant's August 4, 2010 date of medical stability;

6. Employer/Surety is not entitled to offset its obligation to pay the award by the provisions of Idaho Code 72-406(2).

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

DATED this 26th day of July, 2012.

INDUSTRIAL COMMISSION

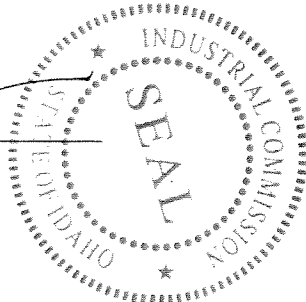

Thomas E. Limbaugh, Chairman


Thomas P. Baskin, Commissioner


R. D. Maynard, Commissioner

ATTEST:


Assistant Commission Secretary



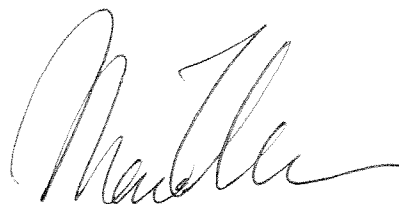
CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of July, 2012, 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:

FRED J LEWIS
PO BOX 1391
POCATELLO ID 83204-1391

M JAY MEYERS
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POCATELLO ID 83205-4747

PAUL B RIPPEL
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 IDAHO STATE BAR NO. 1680

ATTORNEY FOR: Employer and Surety Defendants

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY R. CORGATELLI,)	
	)	I.C. No. 05-501771
Claimant,)	
	)	DEFENDANTS' MOTION
vs.	)	FOR RECONSIDERATION
	)	AND CLARIFICATION
STEEL WEST, INC.,)	
)	
Employer,)	
)	
and)	
)	
IDAHO STATE INSURANCE FUND,)	
)	
Surety,)	
)	
and)	
)	
STATE OF IDAHO, INDUSTRIAL)	
SPECIAL INDEMNITY FUND,)	
)	
Defendants.)	
_____)	

FILED
Aug 14 2012
INDUSTRIAL COMMISSION

COME NOW, the above-named Defendants, Employer and Surety, by and through counsel of record, and hereby respectfully move the Industrial Commission for its

1. DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION

reconsideration and clarification of the *Findings of Fact, Conclusions of Law, and Order* which was issued on July 26, 2012.

This Motion is brought pursuant to Section 72-718, I.C., Section 72-332, I.C., and Carey v. Clearwater County Road Department, 107 Idaho 109, 686 P.2d 54 (1984).

This Motion is based on the grounds and for the reason that Claimant and these Defendants have conflicting assessments as to the Employer/Surety's calculation of income benefit liability identified within *Paragraph 48, Carey Apportionment*, within the issued *Findings of Fact, Conclusions of Law, and Order*.

The identified pro rata liability of the Employer/Surety is found to be 10/15 or 66.7%. For purposes of this Motion, this 66.7% disability is not disputed. Employer/Surety further do not disagree with the mathematical calculation that 66.7% disability equates to 333.5 weeks of benefits or \$99,599.78 at 2005 rates.

However, Employer/Surety's Hearing Exhibit V-5 identifies that Employer/Surety have paid \$22,398.75 in PPI benefit arising out of the 2005 claim. Employer/Surety's remaining income liability should be calculated to be \$99,599.78 minus the \$22,398.75 or \$77,201.30. [This \$22,398.75 income benefit payment came about within the 2005 injury date claim and has nothing to do with the previous payment of \$27,348.75 income benefit payment paid to Claimant arising out of the 1994 low back injury claim.]

According to Claimant's attorney's letter attached within Supporting Affidavit, Claimant asserts that the issued Order awards Claimant both the paid \$22,398.75 in paid permanent impairment income benefit and further, that he is awarded the additional

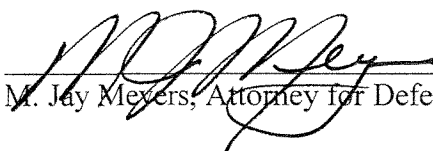
2. DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION

\$99,599.78. in disability benefit from the Employer/Surety. Employer/Surety assert that such a contention, if upheld, would actually be a Permanent Impairment/Permanent Disability Award of \$121,998.53 equating to 408.5 weeks of benefits at 2005 rate.

Defendants, Employer and Surety, respectfully request that the Commission reconsider and clarify its findings as to *Paragraph 48, Carey Apportionment* to Award the Claimant against the Employer/Surety the 66.7% disability of \$99,599.78 less the previously paid \$22,398.75 in paid permanent impairment income benefit for a remaining sum of \$77,201.30.

DATED this 13th day of August, 2012.

MEYERS LAW OFFICE, PLLC


M. Jay Meyers, Attorney for Defendants

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 13th day of August, 2012, I caused a true and correct copy of the foregoing DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION to be forwarded with all required charges prepaid, by U.S. Mail, to the following person(s):

Fred Lewis
Racine, Olson, Nye, Budge & Bailey
201 East Center
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Pocatello, ID 83204-1391

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Hopkins Roden Crockett Hansen
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MEYERS LAW OFFICE, PLLC


M. Jay Meyers

sif/corgatello.gary/pleadings/motion.reconsider.clarify

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IDAHO STATE BAR NO. 1680

ATTORNEY FOR: Employer and Surety Defendants

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY R. CORGATELLI,	)	I.C. No. 05-501771
)	
Claimant,	)	AFFIDAVIT OF
	)	COUNSEL IN SUPPORT OF
vs.	)	DEFENDANTS' MOTION FOR
	)	RECONSIDERATION AND
STEEL WEST, INC.,	)	CLARIFICATION
)	
Employer,)	
)	
and)	
)	
IDAHO STATE INSURANCE FUND,)	
)	
Surety,)	
)	
and)	
)	
STATE OF IDAHO, INDUSTRIAL)	
SPECIAL INDEMNITY FUND,)	
)	
Defendants.)	
_____)	

FILED
AUG 14 2012
INDUSTRIAL COMMISSION

1. AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION

STATE OF IDAHO)
)
) :SS
)
County of Bannock)

M. Jay Meyers, being first duly sworn upon oath, deposes and states as follows:

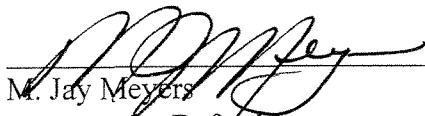
1. That your Affiant is an attorney duly licensed to practice in the state of Idaho and makes this Affidavit in support of Employer/Surety's Motion for Reconsideration and Clarification in the above-entitled matter;

2. Attached hereto is a true and correct copy of correspondence dated August 1, 2012, from Claimant's attorney, Fred Lewis, which asserts that Claimant is entitled to the disability award of \$99,599.78 without recognition nor off-set of the impairment paid arising out of the 2005 injury year claim of \$22,398.75. *Defendants' Hearing Exhibit V-5.*

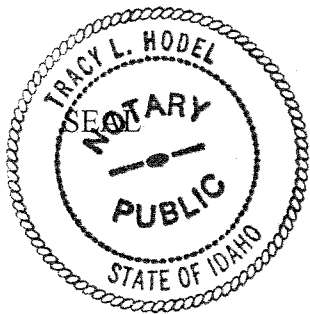
Further your Affiant saith not.

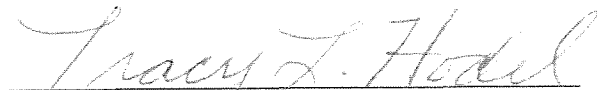
DATED this 13th day of August, 2012.

MEYERS LAW OFFICE, PLLC


M. Jay Meyers
Attorney for Defendants

SUBSCRIBED AND SWORN TO before me this 13th day of August, 2012.




Notary Public for Idaho
Residing at: Pocatello
My Commission Expires: 03/17/2015

2. AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 13th day of August, 2012, I caused a true and correct copy of the foregoing AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION to be forwarded with all required charges prepaid, by U.S. Mail, to the following person(s):

Fred Lewis
Racine, Olson, Nye, Budge & Bailey
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MEYERS LAW OFFICE, PLLC


M. Jay Meyers

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3. AFFIDAVIT OF COUNSEL IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION

LAW OFFICES OF

**RACINE OLSON NYE BUDGE & BAILEY
CHARTERED**

W. MARCUS W. NYE
RANDALL C. BUDGE
JOHN A. BAILEY, JR.
JOHN R. GOODSELL
JOHN B. INGELSTROM
DANIEL C. GREEN
BRENT O. ROCHE
KIRK B. HADLEY
FRED J. LEWIS
ERIC L. OLSEN
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RICHARD A. HEARN, M.D.
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PATRICK N. GEORGE
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DAVID E. ALEXANDER
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CANDICE M. MCHUGH
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JONATHAN M. VOLYN
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August 1, 2012

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LOUIS F. RACINE (1917-2005)
WILLIAM D. OLSON, OF COUNSEL
JONATHAN S. BYINGTON, OF COUNSEL
JEFFREY A. WARR, OF COUNSEL

M. Jay Meyers
300 N. 7th
P.O. Box 4747
Pocatello, ID 83205-4747

Via Facsimile 233-4174

Re: *Gary Corgatelli*
Our File No. 32552

Dear Jay:

This letter will confirm an recent telephone conversation where we discussed the amount of the Fund is required to pay Gary Corgatelli. The Commissioners' decision requires the Fund to pay Gary the sum of \$99,599.78. You suggested that the Fund should have a credit for the 15% impairment they previously paid to Gary in the total sum of \$22,398.75.

Gary came to maximum medical improvement as of August 4, 2010. His TTD benefits ended on that date. In paragraph 48 in the Commissioners' decision, which is found on pages 21-22 of the decision, the Commissioners state that the Fund is required to pay benefits for the 333.5 weeks subsequent to August 4, 2010 under the Carey Apportionment. Gary is entitled to receive his lifetime benefits beginning on August 4, 2010 in the sum of approximately, \$1,919.00 per month. The Fund should not be given a credit for payments made to Gary for PPI benefits they paid out before August 4, 2010, and/or TTD benefits paid prior to August 4, 2010. As we look at the breakdown of PPI benefits paid (I have enclosed a copy of this page for your review), we see that the Fund paid out \$2,986.50 after August 4, 2010. I believe the Fund should be given credit for these PPI benefits paid due to the timing of the payment. Therefore, the back due benefits now owed by the Fund to Gary calculates as follows:

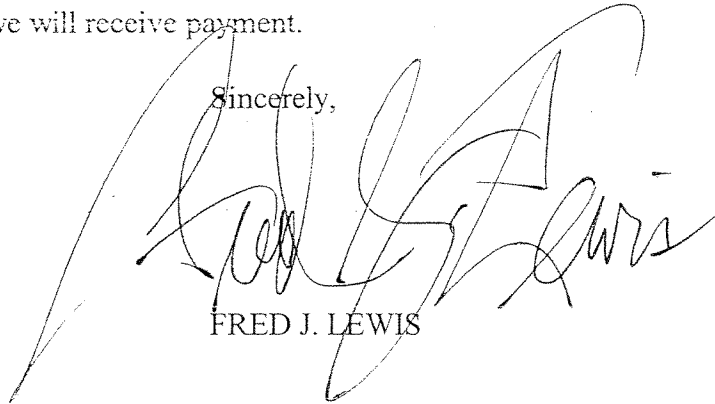
COPY

August 1, 2012
Page 2

1. Back due benefits payable from August 4, 2010 through August 3, 2012 (24 mos @ \$1,919.00 per mo) \$46,056.00
2. Less PPI benefits paid by the Fund to Gary after August 4, 2010 \$2,986.50
3. Net back due benefits due to Gary through August 3, 2012 \$43,069.50

Let me know when we will receive payment.

Sincerely,

A large, stylized handwritten signature in black ink, appearing to read 'Fred J. Lewis', is written over the typed name.

FRED J. LEWIS

FJL/ltz
Enclosure

BREAKDOWN OF BENEFITS

Coverage period for payment	Weeks / Days	Amount Paid
02/01/06 - 02/28/06	Monthly	\$1,297.71
03/01/06 - 03/31/06	Monthly	\$1,297.71
04/01/06 - 04/30/06	Monthly	\$1,297.71
05/01/06 - 05/31/06	Monthly	\$1,297.71
06/01/06 - 06/30/06	Monthly	\$1,297.71
07/01/06 - 07/31/06	Monthly	\$1,297.71
08/01/06 - 08/31/06	Monthly	\$1,297.71
09/01/06 - 09/30/06	Monthly	\$1,297.71
10/01/06 - 10/31/06	Monthly	\$1,297.71
11/01/06 - 11/30/06	Monthly	\$1,297.71
12/01/06 - 12/31/06	Monthly	\$1,297.71
01/01/07 - 01/31/07	Monthly	\$1,297.71
02/01/07 - 02/28/07	Monthly	\$1,297.71
03/01/07 - 03/31/07	Monthly	\$1,297.71
04/01/07 - 04/29/07		\$1,244.31
9-15-10 to 9-30-10		\$692.11
10-1-10 to 10-31-10		\$1,297.71
10-27-10		\$996.68

Total Paid to Date: \$22,398.75

Medicals	\$209,868.27
TTD	\$43,204.64
PPI	\$22,398.75
Total Paid to Date	\$275,471.66

Outstanding Denied Bills	Dates of Service	Amount of Bill
Walgreen Company	04/02/09	\$164.15

Total \$164.15

M. JAY MEYERS
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 POCATELLO, IDAHO 83205
 TELEPHONE: (208) 233-4121
 IDAHO STATE BAR NO. 1680

ATTORNEY FOR: Employer and Surety Defendants

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY R. CORGATELLI,	)	I.C. No. 05-501771
)	
Claimant,	)	BRIEF IN SUPPORT OF
	)	DEFENDANTS' MOTION
vs.	)	FOR RECONSIDERATION
	)	AND CLARIFICATION
STEEL WEST, INC.,)	
)	
Employer,)	
)	
and)	
)	
IDAHO STATE INSURANCE FUND,)	
)	
Surety,)	
)	
and)	
)	
STATE OF IDAHO, INDUSTRIAL)	
SPECIAL INDEMNITY FUND,)	
)	
Defendants.)	
_____)	

FILED
AUG 14 2012
INDUSTRIAL COMMISSION

COME NOW the Employer and Surety, by and through counsel of record, M. Jay Meyers, and ask that the Commission reconsider and/or clarify its decision of July 26, 2012,

1. BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION

to reflect that, the determination of any additional amount owed by the Employer/Surety to Claimant shall take into account all previous PPI payments which the Employer/Surety have paid to Claimant as a result of 2005 injury.

In making its Motion, the Employer/Surety acknowledge that the Commission has explicitly found that the Employer/Surety are not entitled to any credit for benefits previously paid as a result of Claimant's 1994 injury. Within its Motion, the Employer/Surety are not challenging this aspect of the Commission's decision, and are not asserting entitlement to any such credit.

Nonetheless, in communication with Claimant's attorney, it appears Claimant intends to take the position that the Employer is not entitled to assert any credit based upon the PPI payment previously paid as result of the 2005 injury, which forms the subject matter of the Commission's decision. According to Defendants' Hearing Exhibit V-5, the Employer/Surtey have paid permanent impairment of \$22,398.75 within the 2005 injury year claim.

For reasons outlined below, the Employer/Surety respectfully submit that this clearly was not, or should not have been what the Commission intended. To accept the Claimant's position would mean that the Claimant is to receive 408.5 weeks of permanent disability benefits from the Employer/Surety. Such position is contrary to the 66.7% disability award to the Claimant.

2. BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION

It appears that Claimant's confusion may have arisen, at least in part, from the Commission's wording found at paragraph 48 of the decision. (A similar reference is found at paragraph 54 wherein the Commission refers to "The Employer's **current** obligation to pay the sum of \$99,599.78...") In making this determination of liability, it does not appear that the Commission considered that the Employer had previously paid \$22,398.75 in permanent impairment benefit arising out of the 2005 injury date claim. *Defendants' Hearing Exhibit V-5.*

In paragraph 48, the Commission found that Claimant sustained 5% PPI as result of the preexisting conditions **prior** to 2005 attributable to the ISIF and a 10% attributable the Employer/Surety as result of the 2005 injury for a total PPI of 15%. Accordingly, pursuant to the Carey formula, the Commission went on to apportion the **remaining 85%** of Claimant's total disability 10/15 (or 2/3) to the Employer/Surety, (and thus, by necessary implication, 5/15, or 1/3 to the ISIF).

The Commission correctly went on to find that a 66.7% disability, (the amount attributable the Employer) equates to 333.5 weeks of benefits at the 2005 PPI rate (\$298.65) or \$99,599.78. Using these calculations, the Commission then went on to correctly find that that the ISIF's responsibility to pay Permanent and Total Disability (PTD) benefit commences 333.5 weeks from the dated of stability, (which the Commission found to be August 4, 2010.)¹

¹ The decision does not specifically address the timing of the ISIF's obligation in the interim, to pay the differential between the differential between the PPD benefits owed by the Employer and the PTD benefits owed by the ISIF.

3. BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION

While this is a correct statement as to **the date when** the calculation of ISIF's obligation to pay PTD commences, the reference to the \$99,599.78 figure is neither necessary nor relevant to this calculation of Employer's income liability. To the contrary, the only pertinent figure for this calculation of Employer's statutory responsibility is the number of weeks, (specifically, 333.5), not the dollar amount of payments. Nonetheless, it appears Claimant's counsel has latched on the Commission's reference to the \$99,599.78 figure in order to assert that the Employer/Surety owes Claimant **an additional** \$99,599.78, regardless any previous PPI benefits paid as result of the 2005 injury.

The Employer respectfully submit that the Commission clearly could not have intended such a result. Regardless of when the ISIF's obligation commences, it is clear that the Employer cannot, and should not be held liable for more than the 66.7% PPD, which, as noted above equates to \$99,599.78. In fact, it is clear from the Commission's decision, that this amount factors in the 10% PPI which the Commission Found was attributable to the 2005 injury. This is apparent from the closing lines of the Commission's decision toward the end of paragraph 54 wherein the Commission held that

"...and this amount should include, (in other words, the Employer should receive credit for) any amount previously paid for PPI benefits attributable to the 2005 injury."²

WHEREFORE, pursuant to Section 72-332, I.C., Section 72-316, I.C., Section 72-406(2) I.C. and Carey v. Clearwater County Road Department, 107 Idaho 109, 696 P.2d 54

² Defendants acknowledge that the Commission explicitly found that the Employer is not entitle to any credit for amount paid as a result of the prior 1994 injury, and they are not asserting any such entitlement here.

(1984), the Employer should be allowed a credit of \$22,398.75 against the award of \$99,599.78.

Employer's remaining income liability to the Claimant should be determined to be \$77,201.30.

RESPECTFULLY SUBMITTED this 13th day of August, 2012.

MEYERS LAW OFFICE, PLLC


M. Jay Meyers
Attorney for Defendants

5. BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 13th day of August, 2012, I caused a true and correct copy of the foregoing BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION to be forwarded with all required charges prepaid, by U.S. Mail, to the following person(s):

Fred Lewis
Racine, Olson, Nye, Budge & Bailey
201 East Center
P.O. Box 1391
Pocatello, ID 83204-1391

Paul Rippel
Hopkins Roden Crockett Hansen
& Hoopes, PLLC
428 Park Avenue
P.O. Box 51219
Idaho Falls, ID 83405-1219

MEYERS LAW OFFICE, PLLC


M. Jay Meyers

sif/corgatello.gary/pleadings/brief.support.reconsider.clarify

6. BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION

M. JAY MEYERS
MEYERS LAW OFFICE, PLLC
ATTORNEYS-AT-LAW
300 NORTH SEVENTH AVENUE
POST OFFICE BOX 4747
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TELEPHONE: (208) 233-4121
IDAHO STATE BAR NO. 1680

ATTORNEY FOR: Employer and Surety Defendants

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY R. CORGATELLI,	)	I.C. No. 05-501771
)	
Claimant,	)	MOTION TO FILE AN
	)	AMENDED BRIEF IN SUPPORT
vs.	)	OF DEFENDANTS' MOTION FOR
	)	RECONSIDERATION AND
STEEL WEST, INC.,	)	CLARIFICATION
)	
Employer,)	
)	
and)	
)	
IDAHO STATE INSURANCE FUND,)	
)	
Surety,)	
)	
and)	
)	
STATE OF IDAHO, INDUSTRIAL)	
SPECIAL INDEMNITY FUND,)	
)	
Defendants.)	
)	

FILED
AUG 20 2012
INDUSTRIAL COMMISSION

COME NOW the Employer and Surety, by and through counsel of record, M. Jay Meyers, and hereby respectfully request leave to file an **AMENDED BRIEF IN SUPPORT**

- MOTION TO FILE AN **AMENDED BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION**

hand copy

M. JAY MEYERS
MEYERS LAW OFFICE, PLLC
ATTORNEYS-AT-LAW
300 NORTH SEVENTH AVENUE
POST OFFICE BOX 4747
POCATELLO, IDAHO 83205
TELEPHONE: (208) 233-4121
IDAHO STATE BAR NO. 1680

ATTORNEY FOR: Employer and Surety Defendants

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY R. CORGATELLI,)
)
 Claimant,)
)
 vs.)
)
 STEEL WEST, INC.,)
)
 Employer,)
)
 and)
)
 IDAHO STATE INSURANCE FUND,)
)
 Surety,)
)
 and)
)
 STATE OF IDAHO, INDUSTRIAL)
 SPECIAL INDEMNITY FUND,)
)
 Defendants.)
 _____)

I.C. No. 05-501771

MOTION TO FILE AN
AMENDED BRIEF IN SUPPORT
OF DEFENDANTS' MOTION FOR
RECONSIDERATION AND
CLARIFICATION

RECEIVED
INDUSTRIAL COMMISSION
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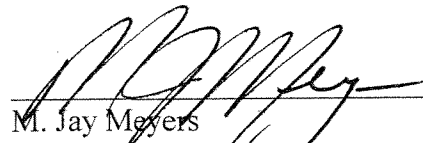
COME NOW the Employer and Surety, by and through counsel of record, M. Jay Meyers, and hereby respectfully request leave to file an **AMENDED** BRIEF IN SUPPORT

1. MOTION TO FILE AN **AMENDED** BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION

OF DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION. This Motion is made due to an incorrect reference made in the original Brief. Defendants apologize for the error and respectfully move the Commission to allow an Amended Brief to be filed.

RESPECTFULLY SUBMITTED this 20th day of August, 2012.

MEYERS LAW OFFICE, PLLC


M. Jay Meyers
Attorney for Defendants

2. MOTION TO FILE AN **AMENDED** BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 20th day of August, 2012, I caused a true and correct copy of the foregoing MOTION TO FILE AN **AMENDED** BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION to be forwarded with all required charges prepaid, by U.S. Mail, to the following person(s):

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MEYERS LAW OFFICE, PLLC


M. Jay Meyers

sif/corgatello.gary/pleadings/motion.file.amended.brief.support.reconsideration

3. MOTION TO FILE AN **AMENDED** BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION

M. JAY MEYERS
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 ATTORNEYS-AT-LAW
 300 NORTH SEVENTH AVENUE
 POST OFFICE BOX 4747
 POCATELLO, IDAHO 83205
 TELEPHONE: (208) 233-4121
 IDAHO STATE BAR NO. 1680

ATTORNEY FOR: Employer and Surety Defendants

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY R. CORGATELLI,)
)
 Claimant,)
)
 vs.)
)
 STEEL WEST, INC.,)
)
 Employer,)
)
 and)
)
 IDAHO STATE INSURANCE FUND,)
)
 Surety,)
)
 and)
)
 STATE OF IDAHO, INDUSTRIAL)
 SPECIAL INDEMNITY FUND,)
)
 Defendants.)

I.C. No. 05-501771

**AMENDED BRIEF IN SUPPORT
 OF DEFENDANTS' MOTION
 FOR RECONSIDERATION
 AND CLARIFICATION**

FILED

AUG 20 2012

INDUSTRIAL COMMISSION

COME NOW the Employer and Surety, by and through counsel of record, M. Jay Meyers, and ask that the Commission reconsider and/or clarify its decision of July 26, 2012,

1. **AMENDED BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION**

M. JAY MEYERS
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 TELEPHONE: (208) 233-4121
 IDAHO STATE BAR NO. 1680

ATTORNEY FOR: Employer and Surety Defendants

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY R. CORGATELLI,)	I.C. No. 05-501771
)	
Claimant,)	AMENDED BRIEF IN SUPPORT
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vs.)	FOR RECONSIDERATION
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STEEL WEST, INC.,)	
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STATE OF IDAHO, INDUSTRIAL)	
SPECIAL INDEMNITY FUND,)	
)	
Defendants.)	
_____)	

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 INDUSTRIAL COMMISSION

COME NOW the Employer and Surety, by and through counsel of record, M. Jay Meyers, and ask that the Commission reconsider and/or clarify its decision of July 26, 2012,

1. **AMENDED BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION**

to reflect that, the determination of any additional amount owed by the Employer/Surety to Claimant shall take into account all previous PPI payments which the Employer/Surety have paid to Claimant as a result of 2005 injury.

In making its Motion, the Employer/Surety acknowledge that the Commission has explicitly found that the Employer/Surety are not entitled to any credit for benefits previously paid as a result of Claimant's 1994 injury. Within their Motion, the Employer/Surety are not challenging this aspect of the Commission's decision, and are not asserting entitlement to any such credit.

Nonetheless, in communication with Claimant's attorney, it appears Claimant intends to take the position that the Employer/Surety are not entitled to assert any credit based upon the PPI payment previously paid as result of the 2005 injury, which forms the subject matter of the Commission's decision. According to Defendants' Hearing Exhibit V-5, the Employer/Surety have paid permanent impairment of \$22,398.75 within the 2005 injury year claim.

For reasons outlined below, the Employer/Surety respectfully submit that this clearly was not, or should not have been what the Commission intended. To accept the Claimant's position would mean that the Claimant is to receive 408.5 weeks of permanent disability benefits from the Employer/Surety. Such position is contrary to the 66.7% disability award to the Claimant.

2. **AMENDED BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION**

It appears that Claimant's confusion may have arisen, at least in part, from the Commission's wording found at paragraph 48 of the decision. (A similar reference is found at paragraph 54 wherein the Commission refers to "The Employer's **current** obligation to pay the sum of \$99,599.78...") In making this determination of liability, it does not appear that the Commission considered that the Employer/Surety previously paid \$22,398.75 in permanent impairment benefit arising out of the 2005 injury date claim. *Defendants' Hearing Exhibit V-5.*

In paragraph 48, the Commission found that Claimant sustained 5% PPI as result of the preexisting conditions **prior** to 2005 attributable to the ISIF and a 10% attributable the Employer/Surety as result of the 2005 injury for a total PPI of 15%. Accordingly, pursuant to the Carey formula, the Commission went on to apportion the **remaining 85%** of Claimant's total disability 10/15 (or 2/3) to the Employer/Surety, (and thus, by necessary implication, 5/15, or 1/3 to the ISIF).

The Commission correctly went on to find that a 66.7% disability, (the amount attributable the Employer/Surety) equates to 333.5 weeks of benefits at the 2005 PPI rate (\$298.65) or \$99,599.78. Using these calculations, the Commission then went on to correctly find that that the ISIF's responsibility to pay Permanent and Total Disability (PTD) benefit commences 333.5 weeks from the dated of stability, (which the Commission found to be August 4, 2010).¹

¹ The decision does not specifically address the timing of the ISIF's obligation in the interim, to pay the differential between the differential between the PPD benefits owed by the Employer and the PTD benefits owed by the ISIF.

3. **AMENDED BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION**

While this is a correct statement as to **the date when** the calculation of ISIF's obligation to pay PTD commences, the reference to the \$99,599.78 figure is neither necessary nor relevant to this calculation of Employer/Surety's income liability. To the contrary, the only pertinent figure for this calculation of Employer/Surety's statutory responsibility is the number of weeks, (specifically, 333.5), not the dollar amount of payments. Nonetheless, it appears Claimant's counsel has latched on the Commission's reference to the \$99,599.78 figure in order to assert that the Employer/Surety owes Claimant **an additional** \$99,599.78, regardless any previous PPI benefits paid as result of the 2005 injury.

The Employer/Surety respectfully submit that the Commission clearly could not have intended such a result. Regardless of when the ISIF's obligation commences, it is clear that the Employer/Surety cannot, and should not be held liable for more than the 66.7% PPD, which, as noted above, equates to \$99,599.78. In fact, it is clear from the Commission's decision that this amount factors in the 10% PPI which the Commission found was attributable to the 2005 injury. This is apparent from paragraph 54 of the Commission's decision wherein the Commission held that "Employer's current obligation to pay the sum of \$99,599.78 is derived solely from consideration of the additional permanent physical impairment referable to the 2005 accident."

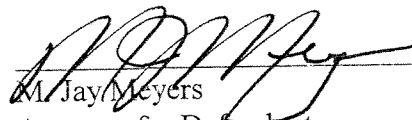
WHEREFORE, pursuant to Section 72-332, I.C., Section 72-316, I.C., Section 72-406(2) I.C. and Carey v. Clearwater County Road Department, 107 Idaho 109, 696 P.2d 54 (1984), the Employer/Surety should be allowed a credit of \$22,398.75 against the award of \$99,599.78.

4. **AMENDED BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION**

Employer/Surety's remaining income liability to the Claimant should be determined to be \$77,201.30.

RESPECTFULLY SUBMITTED this 20th day of August, 2012.

MEYERS LAW OFFICE, PLLC


M. Jay Meyers
Attorney for Defendants


CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 20th day of August, 2012, I caused a true and correct copy of the foregoing **AMENDED** BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION to be forwarded with all required charges prepaid, by U.S. Mail, to the following person(s):

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MEYERS LAW OFFICE, PLLC


M. Jay Meyers

sif/corgatello.gary/pleadings/brief.support.reconsider.clarify.amend

5. **AMENDED** BRIEF IN SUPPORT OF DEFENDANTS' MOTION FOR RECONSIDERATION AND CLARIFICATION

Fred J. Lewis (ISB#: 3876)
RACINE, OLSON, NYE,
BUDGE & BAILEY, CHARTERED
P.O. Box 1391
Pocatello, Idaho 83204-1391
Telephone: (208)232-6101
Fax: (208)232-6109

IN AND BEFORE THE IDAHO INDUSTRIAL COMMISSION

GARY R. CORGATELLI,

I.C. NO. 05-501771

CLAIMANT,

**OBJECTION AND RESPONSE TO
DEFENDANTS' MOTION FOR
RECONSIDERATION AND
CLARIFICATION**

V.

STEEL WEST, INC.,
EMPLOYER,

AND

IDAHO STATE INSURANCE FUND,

SURETY,

STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND

DEFENDANTS.

FILED

AUG 27 2012

INDUSTRIAL COMMISSION

The Claimant, Gary R. Corgatelli, by and through counsel of record, Fred J. Lewis, objects and responds to the Defendants' Motion for Reconsideration and Clarification.

In support of this objection and response, Claimant states the following:

1. Claimant does not dispute that the Defendant Employer/Surety is entitled to a credit for the 5% overpayment made to the Claimant after the 2005 industrial accident. The Claimant was originally awarded a 15% whole person impairment rating attributable to the 2005 industrial accident. However, Dr. Simon later changed his opinion, and the Commission adopted the 10% impairment rating attributable to the 2005 accident and the 5% rating referable to 1994 accident.

Fred J. Lewis (ISB#: 3876)
RACINE, OLSON, NYE,
BUDGE & BAILEY, CHARTERED
P.O. Box 1391
Pocatello, Idaho 83204-1391
Telephone: (208)232-6101
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IN AND BEFORE THE IDAHO INDUSTRIAL COMMISSION

GARY R. CORGATELLI,

CLAIMANT,

v.

STEEL WEST, INC.,
EMPLOYER,

AND

IDAHO STATE INSURANCE FUND,

SURETY,

STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND

DEFENDANTS.

I.C. NO. 05-501771

**OBJECTION AND RESPONSE TO
DEFENDANTS' MOTION FOR
RECONSIDERATION AND
CLARIFICATION**

2012 AUG 29 A 10:33
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INDUSTRIAL COMMISSION

The Claimant, Gary R. Corgatelli, by and through counsel of record, Fred J. Lewis, objects and responds to the Defendants' Motion for Reconsideration and Clarification.

In support of this objection and response, Claimant states the following:

1. Claimant does not dispute that the Defendant Employer/Surety is entitled to a credit for the 5% overpayment made to the Claimant after the 2005 industrial accident. The Claimant was originally awarded a 15% whole person impairment rating attributable to the 2005 industrial accident. However, Dr. Simon later changed his opinion, and the Commission adopted the 10% impairment rating attributable to the 2005 accident and the 5% rating referable to 1994 accident.

("Findings of Fact, Conclusion of Law and Order," paragraph 54, p. 25) Therefore, the employer/surety is entitled to a credit for that overpayment of the 5%, which calculates to the total sum of \$7,466.25.

2. Claimant objects to the issue now being argued by the Employer/Surety. They chose not to argue this offset in their brief filed before the Commission, and they are now trying to take second bite of the apple after losing their 72-406(2) argument. Claimant submits it is now too late to try to take a second bite of the apple and argue that they are entitled to some type of credit for the 10% impairment they paid in 2006 and 2007. That was then, this is now.

3. The Claimant respectfully submits that the Employer/Surety is not entitled an offset for the remaining 10% impairment rating that was paid from February 6, 2006 to January 22, 2007 in the total sum of \$14,932.50. The payment of those benefits was to comply with the employer/surety's obligation to pay out a 10% impairment rating in 2006 and 2007. It would be a windfall to the Employer/Surety to now receive a credit against the total and permanent disability benefits they owe under the Carey Formula beginning on August 4, 2010 and the 333.5 weeks thereafter.

Wherefore, Claimant respectfully requests that the Commission deny the Employer/Surety's Motion for Reconsideration and Clarification.

DATED and Signed this 27 day of August, 2012.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED


FRED J. LEWIS

CERTIFICATE OF SERVICE

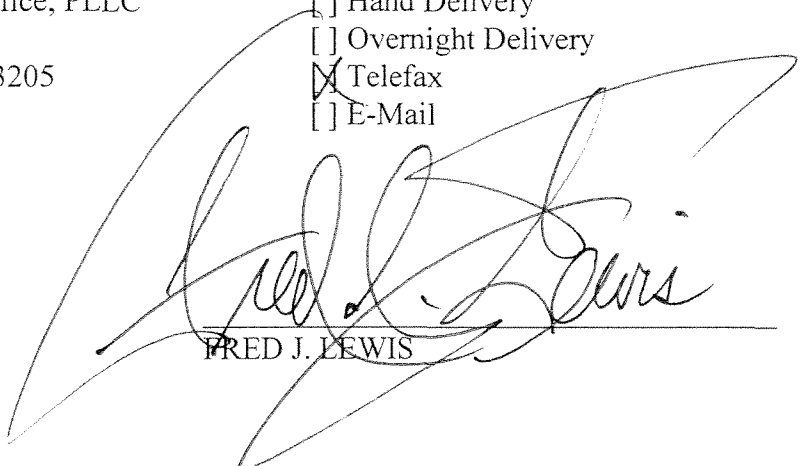
I, HEREBY CERTIFY that on this 27 day of August, 2012, that a true and correct copy of the foregoing was served by first class mail, postage prepaid, and addressed to; by fax transmission to; by overnight delivery to; or by personally hand-delivering to or leaving with a person in charge of the office as indicated below:

Paul B. Rippel
428 Park Ave
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Idaho Falls, ID 83405-1219

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M. Jay Meyers
Meyers Law Office, PLLC
P.O. Box 4747
Pocatello, ID 83205

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FRED J. LEWIS

Fred J. Lewis (ISB#: 3876)
RACINE, OLSON, NYE,
BUDGE & BAILEY, CHARTERED
P.O. Box 1391
Pocatello, Idaho 83204-1391
Telephone: (208)232-6101
Fax: (208)232-6109

IN AND BEFORE THE IDAHO INDUSTRIAL COMMISSION

GARY R. CORGATELLI,

I.C. NO. 05-501771

CLAIMANT,

AFFIDAVIT OF FRED J. LEWIS

v.

STEEL WEST, INC.,
EMPLOYER,

AND

IDAHO STATE INSURANCE FUND,

FILED

AUG 27 2012

SURETY,

INDUSTRIAL COMMISSION

STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND

DEFENDANTS.

STATE OF IDAHO)

: ss.

County of Bannock)

I, FRED J. LEWIS, being first duly sworn upon oath, deposes and states as follows:

1. I am the Claimant's attorney in the above-entitled case.
2. Attached hereto as Exhibit "A" is a true and correct copy of a check dated August 3, 2012, from the State Insurance Fund to the Claimant Gary R. Corgatelli and the same is incorporated by reference as if set forth fully herein. This check paid the Claimant in full for all back due total and

Fred J. Lewis (ISB#: 3876)
RACINE, OLSON, NYE,
BUDGE & BAILEY, CHARTERED
P.O. Box 1391
Pocatello, Idaho 83204-1391
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GARY R. CORGATELLI,

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AND

IDAHO STATE INSURANCE FUND,

SURETY,

STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND

DEFENDANTS.

I.C. NO. 05-501771

AFFIDAVIT OF FRED J. LEWIS

2012 JUN 29 AM 10:33
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INDUSTRIAL COMMISSION

STATE OF IDAHO)

: ss.

County of Bannock)

I, FRED J. LEWIS, being first duly sworn upon oath, deposes and states as follows:

1. I am the Claimant's attorney in the above-entitled case.

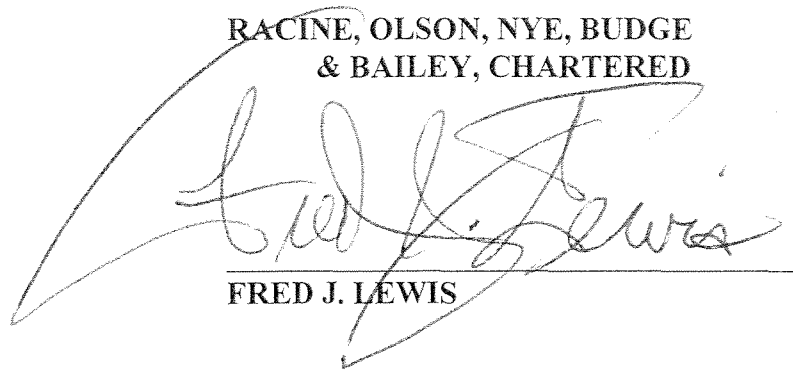
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permanent disability benefits accruing from August 4, 2010 through July 31, 2012.

FURTHER AFFLIANT SAITH NAUGHT.

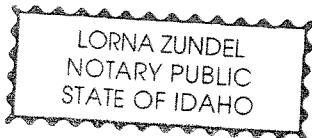
DATED and Signed this 27 day of August, 2012.


**RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED**



FRED J. LEWIS

SUBSCRIBED AND SWORN TO before me this 27th day of August, 2012.




Notary Public, State of Idaho
Residing at Pocatello
Commission Expires: 4-10-2018

CERTIFICATE OF SERVICE

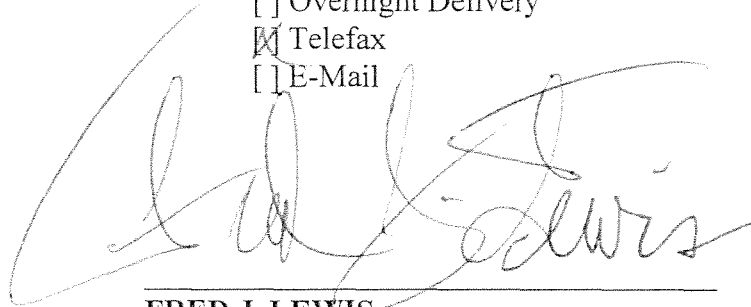
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FRED J. LEWIS



IDAHO STATE INSURANCE FUND
 1215 West State Street
 P.O. Box 83720
 Boise, Idaho 83720-0044

CLAIM NUMBER
 200501397

DATE
 08/03/2012

CHECK NUMBER
 1833258

1833258

Gary R. Corgatelli
 C/O Lewis Fred J
 Racine Olson Nye Cooper & Budge
 PO Box 1391
 Pocatello ID 83204-1391

<u>Compensation Type</u>	<u>Claim Num</u>	<u>From</u>	<u>Through</u>	<u>Amount</u>
LUMP SUM	200501397	08/04/2010	07/31/2012	\$ 31,041.93

<u>Gross Check Amount</u>	<u>Garnishment</u>	<u>Other Reductions</u>	<u>Net Check Amount</u>
\$ 31,041.93	\$ 0.00	\$ 2,584.86	<u>\$ 28,457.07</u>

WARNING: Original document has an artificial watermark on reverse side.



IDAHO STATE INSURANCE FUND
 1215 West State Street
 P.O. Box 83720
 Boise, Idaho 83720-0044

92-372
 123T

1833258

DATE
 08/03/2012

AMOUNT
 \$*****28,457.07
 PLEASE CASH PROMPTLY

PAY
 TWENTY-EIGHT THOUSAND FOUR HUNDRED FIFTY-SEVEN DOLLARS & 07/100

TO THE ORDER OF
 Gary R. Corgatelli

TO: TREASURER
 STATE OF IDAHO - BOISE, IDAHO

US Bank
 Boise, Idaho

EXHIBIT 11/ 78

Fred J. Lewis (ISB#: 3876)
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BUDGE & BAILEY, CHARTERED
P.O. Box 1391
Pocatello, Idaho 83204-1391
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IN AND BEFORE THE IDAHO INDUSTRIAL COMMISSION

GARY R. CORGATELLI,

CLAIMANT,

v.

STEEL WEST, INC.,
EMPLOYER,

AND

IDAHO STATE INSURANCE FUND,

SURETY,

STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND

DEFENDANTS.

I.C. NO. 05-501771

**CLAIMANT'S BRIEF IN SUPPORT
OF HIS OBJECTION AND
RESPONSE TO DEFENDANTS'
MOTION FOR RECONSIDERATION
AND CLARIFICATION**

FILED
AUG 27 2012
INDUSTRIAL COMMISSION

The Claimant, Gary R. Corgatelli, by and through counsel of record, Fred J. Lewis, submits the following brief in support of his objection and response to the Defendants' Motion for Reconsideration and Clarification.

I. INTRODUCTION

The Claimant agrees that the Defendant Employer/Surety is entitled to a credit to their obligation to pay the 333.5 weeks of total and permanent disability benefits. However, the Claimant disagrees with the logic, argument, and amount of the credit set forth in the Employer/Surety's

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**CLAIMANT'S BRIEF IN SUPPORT
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Motion for Reconsideration and Clarification and Brief in support thereof. In paragraph 54 of the decision, the Commission clearly found that based upon Dr. Simon's testimony in his deposition there was only 10% whole person impairment attributable to the 2005 accident and the additional 5% was referable to the 1994 accident. It is clear from the Defendants' Hearing Exhibit V-5 that the Employer/Surety paid the sum of \$22,398.75 for the entire 15% impairment. Under the Commission's Decision, the Claimant is only entitled to be paid 10% in whole person PPI benefits out of the 15% whole person rating. Therefore, the Employer/Surety's overpayment calculates as follows:

1. 15% whole person impairment rating (75 weeks at \$298.65/wk) \$ 22,398.75
2. Less 10% whole person impairment rating attributable to
2005 accident (50 weeks at \$298.65/wk) \$-14,932.50
3. Total overpayment by Employer/Surety (25 weeks at \$298.65/wk) . . \$ 7,466.25

Claimant agrees that the Employer/Surety is entitled to a credit for the \$7,466.25 in overpayment that was paid to him. This is a simple overpayment by the Employer/Surety, and the Employer/Surety should be given a credit for this overpayment. The Claimant sharply disagrees that the Employer/Surety should be give a credit against the total and permanent disability benefits they owe in 2010 because they paid PPI benefits arising out of the 2005 accident. That would be a windfall to the Employer/Surety. The Commission rejected the Employer/Surety's argument that they should receive a credit for the 1994 PPD benefits paid and the Claimant submits the Commission should now reject the Employer/Surety's attempt to overreach yet again by asking for a credit for the 10% rating previously paid.

This case then really comes down to a fight over the PPI benefits that were paid beginning on February 6, 2006 and continuing 50 weeks thereafter to January 22, 2007. During this 50 week period, the Employer/Surety paid the Claimant the sum of \$298.65 per week for a total of

\$14,932.50. This is the amount of money that is now in contention and in dispute. The Employer/Surety contend that they should be given a credit for this \$14,932.50. Claimant respectfully submits that the Employer/Surety had the legal obligation to pay out the 10% PPI rating attributable to the 2005 accident in 2006 and 2007. The Employer/Surety's obligation to pay total and permanent disability benefits in 2010 is a separate obligation. The Employer/Surety should not be given credit by the Commission for PPI benefits paid in 2006 and 2007 against the total and permanent disability benefits owed to the Claimant in 2010.

The Commission found that the Claimant became totally and permanently disabled on August 4, 2010. Under this decision, the Claimant is entitled to total and permanent disability benefits beginning on that date and continuing until the day that he dies. The Commission found that this obligation should be split up pursuant to the *Carey* formula with the Employer/Surety paying the first 333.5 weeks at the rate of \$298.65 per week for a total of \$99,599.78. It is understood by all parties that if the ISIF does not appeal the Commission's decision, they will be obligated to pay the balance of the Claimant's total and permanent disability benefits beginning on August 4, 2010 so that the Claimant receives 67% of the average State weekly wage for each month thereafter until the Employer/Surety has paid out their entire current award of \$99,599.78. Then the ISIF will have to pay for 100% of the Claimant's total and permanent disability benefits until the Claimant dies. Therefore, under the Commission decision the Claimant will receive a check from the ISIF each month and a check from the Employer/Surety each month for the first 333.5 weeks, and then one check per month from the ISIF for every month thereafter until the Claimant dies.

The Employer/Surety's motion is very narrow in scope. They are specifically requesting that they are able to count the PPI benefits they paid from February 6, 2006 to January 22, 2007 in the

total sum of \$14,932.50 two times. First, they want the Commission to give them credit for originally paying these PPI benefits back in 2006 and 2007, and they want the Commission to give them a windfall credit now for the payment of these previously paid PPI benefits against the Employer/Surety's current obligation of paying their fair share of the total and permanent disability benefits. Claimant submits that they cannot have it both ways.

II. ARGUMENT

A. THE EMPLOYER/SURETY ARGUMENT THAT THEY SHOULD RECEIVE A CREDIT FOR THEIR PPI BENEFITS PAID IN 2006 AND 2007 IS TARDY AND SHOULD BE REJECTED BY THE COMMISSION.

One of the issues to be argued before the Commission was clearly identified as a credit for amounts previously paid by the Employer/Surety under Idaho Code § 72-406(2). The Employer/Surety went to great lengths to argue that they should receive a credit for the \$27,348.75 in income benefits they paid out in regard to the 1994 low back injury claim. The Commission rejected this argument. The Employer/Surety did not argue, mention or even identify that it was asserting a benefit for the PPI benefits they paid in relation to the 2005 accident beginning on February 6, 2006 and ending on January 22, 2007. Claimant submits that this is prejudicial to now attempt to litigate an issue and make factual arguments that were not identified prior to the hearing and not at issue at the hearing in this case. The Employer/Surety had the opportunity to raise this argument at the hearing and it failed to do so. It is simply too late now to chew on yesterday's lunch and allow them a second chance to assert yet another misguided credit argument. The Commission should not entertain this tardy argument and should deny the Employer/Surety's Motion for Reconsideration and Clarification the Commission decision. The only credit the Employer/Surety is entitled to is for their overpayment of the 5% PPI in the sum of \$7,466.25.

B. NEITHER CASE LAW NOR ANY SECTION OF THE IDAHO WORKERS COMPENSATION LAW PROVIDES A BASIS FOR THE EMPLOYER/SURETY BEING GIVEN A \$22,398.75 CREDIT FOR PPI BENEFITS PREVIOUSLY PAID AGAINST THE \$99,599.78 OBLIGATION OF THE EMPLOYER/SURETY'S TOTAL AND PERMANENT DISABILITY OBLIGATION TO THE CLAIMANT.

The weakness of the of the Employer/Surety's argument is exposed when you realize they make no reference to any case ever decided by the Idaho Industrial Commission or the Idaho Supreme Court that supports their argument that an Employer/Surety should be given credit for PPI benefits two times. First, they want a credit for when they originally paid the PPI benefits in 2006 and 2007, and then a second credit against the Claimant's total and permanent disability benefits which began to be payable in 2010. Moreover, the Claimant has not been able to find any decision where the Idaho Industrial Commission or Idaho Supreme Court has ever awarded a claimant total and permanent disability benefits "inclusive" of a previously paid impairment rating. It seems curious to the Claimant that the Claimant cannot find where the Employer/Surety's argument has ever been raised by defense counsel in the history of the Idaho Industrial Commission. Obviously, millions and millions of dollars have been paid out in PPI benefits, and then there have been subsequent awards of total and permanent disability benefits and the employer and surety have paid both. This novel argument is simply wrong and falls apart as you look at the Idaho Workers Compensation Law in detail.

The Claimant was given a 10% impairment rating for his low back injury of 2005. The Employer/Surety paid out these benefits beginning on February 6, 2006 and continued paying these benefits at a rate of \$298.65 per week for 50 weeks for a total of \$14,932.50. These benefits ended on January 22, 2007. These are the benefits that are now in dispute in this case.

The Claimant was awarded PPI benefits, and the Employer/Surety was required to pay the

Claimant these PPI benefits pursuant to Idaho Code § 72-422 and § 72-424 and at the rate set forth in I.C. § 72-429. The Commission is the ultimate evaluator of impairment. *Urry v. Walker Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989). Claimant submits that he is now owed total and permanent disability benefits under Idaho Code § 72-408. This section of the Idaho Workers Compensation law does not provide for any offset or credit for previously paid PPI benefits. The Defendants have not cited and Claimant is completely unaware of any decision in the history of the Idaho Industrial Commission which has given a credit to an Employer/Surety for PPI benefits paid to a Claimant for a time period that occurred **prior** to the date a claimant was found to be totally and permanently disabled.

In this case, the Claimant was first found to be a maximum medical improvement on February 6, 2006 and began receiving PPI benefits. (See Dr. Himmler's impairment rating of 13% whole person for Claimant's back, Exhibit G-4. After the lumbar fusion surgery, Dr. Simon raised the impairment to 15% whole person. Exhibit K-13) These benefits continued until January 22, 2007. Claimant then had to undergo a four-level lumbar fusion surgery in 2009 and did not come to his second date of maximum medical improvement until August 4, 2010. (Exhibit K-13) It is undisputed that the Commission then found that the Claimant was entitled to total and permanent disability benefits beginning on August 4, 2010. The Employer/Surety is asking that they be given a credit for the PPI benefits paid from 2006 through 2007 and be able to use these same benefits as a credit a second time against their obligation to pay total and permanent disability benefits in 2010 through 2012. The Commission should reject the arguments being offered by the Employer/Surety and should deny their Motion for Reconsideration and Clarification.

In *Close v. General Construction Co. and State Insurance Fund*, 61 Idaho 689 106 P.2d

1007 (1940), the Idaho Supreme Court held that the Worker's Compensation law provides a special remedy not known to the common law and provides indemnities in lieu of common law rights. (Id at 694). In *Close* the Claimant lost his right leg at the ankle joint. Later the Claimant had to have his right leg amputated below the knee. The State Insurance Fund argued they should receive a credit for the indemnity paid on the first amputation. The Court held "each indemnity" was intended to be separate and independent from every other indemnity.

Here the PPI benefits were payable under I.C. § 72-422 and §72-424, as calculated under § 72-429. The Claimant's total and permanent disability benefits are payable under I.C. § 72-408, a separate indemnity! The State Insurance Fund credit argument was rejected in 1940 in *Close*, and the Commission should reject it again in this case and deny the Employer/Surety's Motion for Reconsideration and Clarification.

Claimant submits the *Carey* formula appropriately apportions the total and permanent disability benefits the Claimant is to receive. The same *Carey* formula gives the appropriate credit to the Employer/Surety in this case. The *Carey* formula does not allow for an additional credit to be given to the Employer/Surety for PPI benefits previously paid. The Claimant submits that the Commission should not now inject this credit into the *Carey* formula. Moreover, I.C. § 72-406 is inapplicable to this case since the very language of this particular section of the Idaho Code specifically states that it is applicable in permanent disability of less than "total" in subsection (1) and only in permanent disability cases in subsection (2). Claimant submits that he is now entitled to **total and permanent** disability benefits under Idaho Code § 72-408, not **permanent disability** benefits payable under Idaho Code § 72-430. Therefore, Idaho Code § 72-406(2) is not applicable to this case and cannot be relied upon by the Employer/Surety as a basis to offset the PPI benefits

paid in 2006 and 2007 against the total and permanent disability benefits due to the Claimant from 2010 through 2012.

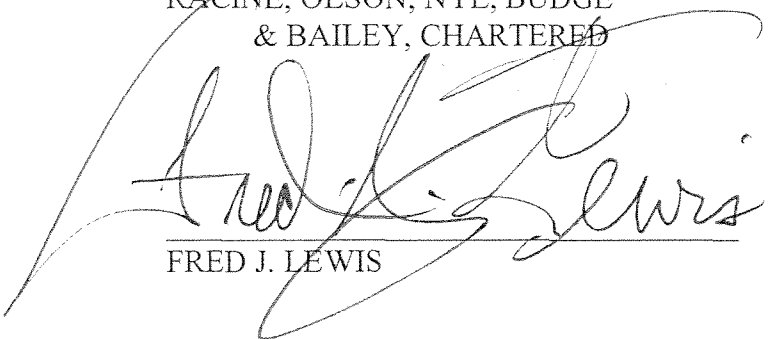
Finally, Claimant submits that the home office of the State Insurance Fund does not believe this argument is going to be successful. They have already paid the Claimant in full for all outstanding total and permanent disability benefits beginning on August 4, 2010 through July 31, 2012. (See Affidavit of Fred J. Lewis dated August 23, 2012.)

III. CONCLUSION

The arguments set forth in the Employer/Surety's Motion for Reconsideration and Clarification and Brief in Support thereof are tardy and should be rejected by the Commission. Even if the Commission gets to the merits of the arguments, Claimant submits that these arguments fall apart of their own weight because Idaho case law and the Idaho code do not support the claims made by the Employer/Surety. These novel arguments should be rejected by the Commission. Claimant respectfully requests the Commission deny the Defendants' Motion for Reconsideration and Clarification.

DATED and signed this 27 day of August, 2012.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED



FRED J. LEWIS

CERTIFICATE OF SERVICE

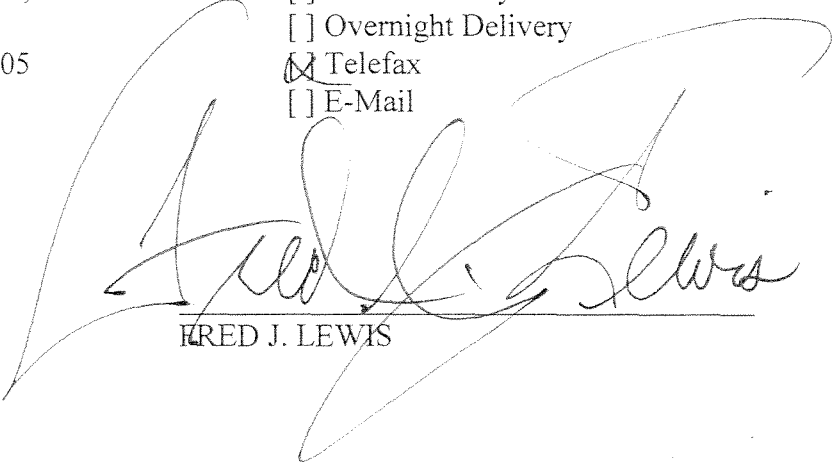
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FRED J. LEWIS

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY R. CORGATELLI,

Claimant,

v.

STEEL WEST, INC.,

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,

STATE OF IDAHO, INDUSTRIAL SPECIAL
INDEMNITY FUND,

Defendants.

IC 2005-501771

ORDER TO CLARIFY

FILED

APR - 5 2013

INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-718, Defendants Employer and Surety (“Defendants”) move for reconsideration or clarification of the Commission’s July 26, 2012 decision in the above-captioned case. In the decision, the Commission found that Defendants as well as the Industrial Special Indemnity Fund (“ISIF”) were liable to pay for Claimant’s total permanent disability benefits. Specifically, Defendants were found liable to pay for 66.7% of Claimant’s disability, which is equal to the amount of \$99,599.78. ISIF was found liable to pay the remainder of Claimant’s disability under the formula adopted in *Carey v. Clearwater County Road Department*, 107 Idaho 109, 686 P.2d 54 (1984).

In their motion, Defendants argue that they should receive credit for permanent partial impairment (PPI) benefits already paid on this claim. Claimant objects to the motion, arguing, first, that Defendants have impermissibly raised this issue post-hearing rather than at hearing, and second, that Defendants have a separate obligation to pay permanent impairment and permanent disability benefits and that it would be a windfall to Defendants to allow an offset for

PPI.

Defendants, however, are correct that they should receive credit for PPI benefits already paid on this claim. Claimant's accident-related permanent impairment is part of his permanent disability. See Idaho Code § 72-425; see also *Eckhart v. ISIF*, 133 Idaho 260, 264, 985 P.2d 685, 689 (1999) ("The evaluation of permanent disability under § 72-425 includes consideration of all physical impairments that were caused by the claimant's work-related injury..."). Because Claimant's disability is inclusive of his accident-related impairment, Defendants are entitled to credit for payments made on that impairment. Holding otherwise would essentially require Defendants to pay benefits on the same impairment rating twice. Claimant's reliance on *Close v. General Construction Co.*, 61 Idaho 689, 106 P.2d 1007 (1940), in arguing this issue is misplaced, because the holding in that case addressed a situation that did not involve the relationship between permanent impairment and permanent disability.

Claimant's argument that this is an issue impermissibly raised post-hearing is unpersuasive. Defendants have asked for clarification of the decision, and they could not have asked, at hearing, for clarification of a decision that did not yet exist. Nothing in the decision should be interpreted to require Defendants to pay disability exclusive of impairment. The \$99,599.78 figure was cited only to illustrate the total amount of disability Defendants owed in this case.

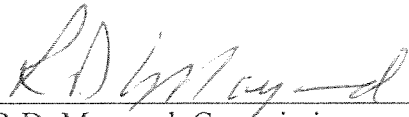
Based on the foregoing analysis, Defendants are entitled to credit on the disability award for permanent impairment benefits already paid on this claim.

IT IS SO ORDERED.

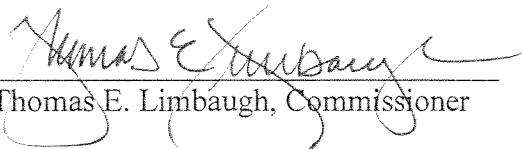
DATED this 5th day of April, 2013.

INDUSTRIAL COMMISSION

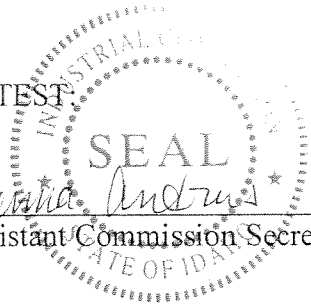
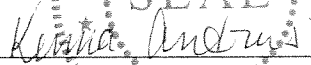

Thomas P. Baskin, Chairman



R.D. Maynard, Commissioner



Thomas E. Limbaugh, Commissioner

ATTEST



Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of April, 2013, a true and correct copy of the foregoing **ORDER TO CLARIFY** was served by regular United States mail upon each of the following:

FRED J LEWIS
PO BOX 1391
POCATELLO ID 83204-1391

M JAY MEYERS
PO BOX 4747
POCATELLO ID 83205-4747

PAUL B RIPPEL
PO BOX 51219
IDAHO FALLS ID 83405-1219

eb



Fred J. Lewis (ISB#: 3876)
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BUDGE & BAILEY, CHARTERED
P.O. Box 1391
Pocatello, Idaho 83204-1391
Telephone: (208)232-6101
Fax: (208)232-6109

IN AND BEFORE THE IDAHO INDUSTRIAL COMMISSION

GARY R. CORGATELLI,

CLAIMANT-APPELLANT,

v.

STEEL WEST, INC.,
EMPLOYER,

AND

IDAHO STATE INSURANCE FUND,

SURETY,

STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND

DEFENDANTS.

I.C. NO. 05-501771

NOTICE OF APPEAL

FILED

MAY 13 2013

INDUSTRIAL COMMISSION

TO: THE ABOVE-NAMED Respondents, Steel West Corporation, and State Insurance Fund AND THEIR ATTORNEY M. Jay Meyers, 300 N. 7th, P.O. Box 4747, Pocatello, Idaho 83205 AND THE INDUSTRIAL SPECIAL INDEMNITY FUND AND ITS ATTORNEY, Paul B. Rippel, 428 Park Ave, P.O. Box 51219, Idaho Falls, Idaho 83405, AND THE CLERK OF THE STATE OF IDAHO INDUSTRIAL COMMISSION

NOTICE IS HEREBY GIVEN THAT:

1. The above-named Appellant appeals against the above named Respondents to the Idaho Supreme Court from the "Order to Clarify" dated April 5, 2013, Thomas P Baskin, Chairman, presiding.

2. The appellant has the right of appeal to the Idaho Supreme Court, and the Order described in paragraph 1 above is appealable is an appealable order under and pursuant to Rule 11 (d) IAR.

3. A preliminary statement of the issues on appeal which appellant now intends to assert in the appeal; provided any such list of issues on appeal shall not prevent the appellant from asserting other issues on appeal, include, but are not limited to, the following:

a. Whether the Idaho Industrial Commission erred in declaring that the Defendant Employer, Steel West, Inc. and Idaho State Insurance Fund were entitled to receive a credit for the permanent partial impairment benefits paid to the Claimant prior to the Claimant being found to be totally and permanently disabled pursuant to I.C. §72-425.

4. Claimant does not appeal from and specifically requests that the Idaho Supreme Court affirm the Findings of Fact, Conclusions of Law and Order filed on July 26, 2012 if it is appealed by any Defendant herein.

5. No Order has been entered sealing all or any portion of the record in this case.

6. (A) Is a reporter's transcript requested? Yes

(B) The entire reporters transcript as defined in rule 25(a) IAR.

7. Appellant requests the following documents be included in the Clerk's Record, in addition to those automatically included under Rule 28, IAR:

a. All exhibits admitted at the Hearing of November 23, 2011;

b. Order To Clarify dated April 5, 2013;

c. Appellant requests inclusion of any and all briefs or memoranda filed by any

party in the Clerk's Record on appeal (main volume and exhibits);

d. Findings of Fact, Conclusions of Law, and Order filed July 26, 2012.

e. The Post-Hearing deposition of Dr. David Simon.

8. I certify:

a. A copy of this Notice of Appeal has been served on the reporter;

b. The Reporter of the Idaho Industrial Commission does not need to be paid the estimated fee for preparation of the transcripts, and she was already prepared as a matter of course in the briefing that followed the Hearing in the case before the Industrial Commission.

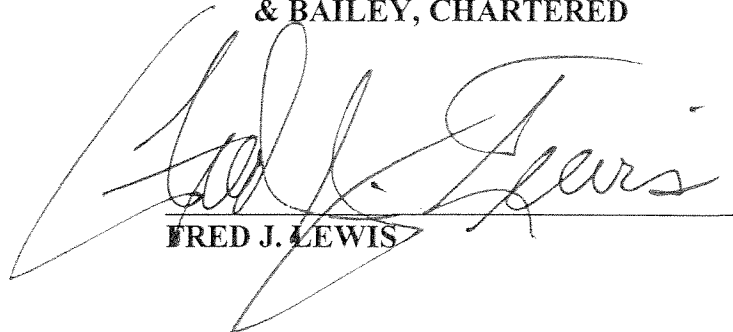
c. That the estimated fee in the amount of \$100.00 has been paid pending the computation of the actual fee;

d. That the Appellant filing fee of \$86.00 has been paid;

e. That services been made upon all parties required pursuant to Rule 20, IAR.

DATED and signed this 9 day of May, 2013.

**RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED**



FRED J. LEWIS

CERTIFICATE OF SERVICE

I, HEREBY CERTIFY that on this 9 day of May, 2013, that a true and correct copy of the foregoing was served by first class mail, postage prepaid, and addressed to; by fax transmission to; by overnight delivery to; or by personally hand-delivering to or leaving with a person in charge of the office as indicated below:

Paul B. Rippel
428 Park Ave
P.O. Box 51219
Idaho Falls, ID 83405-1219

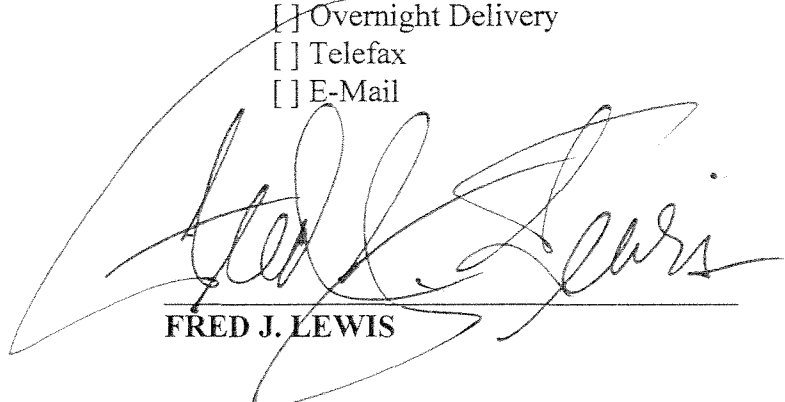
- U.S. Mail
- Hand Delivery
- Overnight Delivery
- Telefax
- E-Mail

M. Jay Meyers
Meyers Law Office, PLLC
P.O. Box 4747
Pocatello, ID 83205

- U.S. Mail
- Hand Delivery
- Overnight Delivery
- Telefax
- E-Mail

Idaho Industrial Commission
700 S. Clearwater Lane
Boise, ID 83712

- U.S. Mail
- Hand Delivery
- Overnight Delivery
- Telefax
- E-Mail



FRED J. LEWIS

Paul B. Rippel, ISBN 2762
Lindsey R. Romankiw, ISBN 8438
HOPKINS RODEN CROCKETT
HANSEN & HOOPES, PLLC
428 Park Avenue
Idaho Falls, ID 83402
Telephone: 208-523-4445
Attorneys for Industrial Special Indemnity Fund (ISIF)

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY R. CORGATELLI;
Claimant,
vs.
STEEL WEST, INC.,
Employer,
and
IDAHO STATE INSURANCE FUND,
Surety, and
STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND,
Defendants.

I.C. No. 05-501771
NOTICE OF APPEAL

FILED
MAY 13 2013
INDUSTRIAL COMMISSION

TO: Claimant, GARY R. CORGATELLI, Employer, STEEL WEST, INC.,
Surety, IDAHO STATE INSURANCE FUND, and their respective
attorneys of record, FRED J. LEWIS, ESQ., and M. JAY MEYERS, ESQ.,
and the CLERK OF THE INDUSTRIAL COMMISSION:

NOTICE IS HEREBY GIVEN THAT:

1. The above named Defendant-Appellant, State of Idaho, Industrial Special Indemnity Fund (hereafter "Appellant ISIF"), appeals against the above-named Claimant to the Idaho Supreme Court from the Findings of Fact, Conclusions of Law, and Order (hereafter the "decision") entered in the above-entitled action on July 26, 2012, Board of Commissioners of the Idaho Industrial Commission, Thomas E. Limbaugh, Chairman, presiding, which became final on April 5, 2013, when the Industrial Commission entered its Order to Clarify following a motion for reconsideration.

2. The Appellant ISIF has a right to appeal to the Idaho Supreme Court from the decision as a matter of right under and pursuant to Idaho Code section 72-724 and Rules 4 and 11(d) of the Idaho Appellate Rules. This appeal is taken upon matters of law and upon matters of fact.

3. A preliminary statement of the issues on appeal which the Appellant ISIF intends to assert; provided, any such list of issues on appeal shall not prevent the appellants from asserting other and additional issues, is as follows: Did the Industrial Commission err in finding ISIF liable under Idaho Code § 72-332 and Idaho case law?

4. No order has been entered sealing any portion of the record.

5. The Industrial Commission is already in possession of a transcript of the hearing of November 23, 2011, and Appellant ISIF therefore does not request the preparation of a separate reporter's transcript as defined in the Idaho Appellate Rules, but instead requests that the referenced transcript be included in the Clerk's Record as a transcript or as an exhibit on appeal under Idaho Appellate Rule 31.

6. The Appellant ISIF requests the following documents to be included in the Clerk's Record in addition to those documents automatically included under Idaho Appellate Rules, Rule 28:

- A. Order Vacating and Resetting Hearing dated July 13, 2011;
- B. Transcript of November 23, 2011, hearing (i.e. as referenced and requested in No. 5, above);
- C. Testimonial deposition of David C. Simon, M.D., taken December 7, 2011;
- D. Testimonial deposition of Mary Barros-Bailey, Ph.D, CRC, CDMS, taken December 9, 2011;
- E. Testimonial deposition of Nancy J. Collins, Ph.D., taken December 9, 2011; and
- F. Proposed Findings of Fact, Conclusions of Law, and Recommendation submitted to the Industrial Commission by Referee Alan Taylor on June 8, 2012.

7. The Appellant ISIF requests the following documents, charts, or pictures offered or admitted as exhibits to be copied and sent to the Supreme Court:

- A. Joint Exhibit A – Records from Lee Chiropractic;
- B. Joint Exhibit B – Records from Gail E. Fields, D.O.;
- C. Joint Exhibit C – Records from New Day Physical Therapy, Dale C. Wheelwright, P.T.;
- D. Joint Exhibit D – Records from Intermountain Neurosurgery/Spine Idaho, Clark Allen, M.D., Scott Huneycutt, M.D., Ryan Hope, M.D.;
- E. Joint Exhibit E – Records from Anesthesia Associates, Patrick Farrell, M.D.;

- F. Joint Exhibit F – Records from Pocatello Physical Therapy Clinic, Ric Benedetti, P.T.;
- G. Joint Exhibit G – Records from Mary Himmler, M.D.;
- H. Joint Exhibit H – Records from Rehab Authority, Robert Black, P.T.;
- I. Joint Exhibit I – Records from Douglas P. Norman, M.D.;
- J. Joint Exhibit J – Records from Donald Whitley, Ph.D.;
- K. Joint Exhibit K – Independent Medical Evaluation Report by David Simon, M.D.;
- N. Joint Exhibit N – Records from Peter Schossberger, M.D.;
- O. Joint Exhibit O – Records from Kevin Hill, M.D.;
- P. Joint Exhibit P – Records from Scott Rudeen, M.D.;
- Q. Joint Exhibit Q – Industrial Commission Rehabilitation Case Notes;
- R. Joint Exhibit R – Industrial Commission Claims Information Reporting;
- U. Joint Exhibit U – Lump Sum Settlement Agreement of March 7, 1996;

8. I certify:

A. That it is unnecessary for a copy of this notice of appeal to be served on the reporter for the reasons stated above in paragraph No. 5.

B. That the Court Reporter was heretofore paid by the Industrial Commission for the preparation of the transcript of the November 23, 2011, hearing.

C. That Appellant ISIF is not required to pay to the clerk of the

Industrial Commission an estimated fee for preparation of the clerk's record.

D. That Appellant ISIF is not required to pay appeal filing fees.

E. That service has been made upon all parties required to be served pursuant to Rule 20, Idaho Appellate Rules.

DATED THIS 10th day of MAY, 2013.

HOPKINS RODEN CROCKETT
HANSEN & HOOPES, PLLC

By Paul B. Rippel
Paul B. Rippel
Attorneys for Appellant ISIF

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served upon the persons named below, by mail, hand delivery, or fax.

DATED this 10th day of MAY, 2013.

Paul B. Rippel

Fred J. Lewis, Esq.
P.O. Box 1391
Pocatello, Idaho 83204-1391

Mail
 Hand Delivery
 Fax

M. Jay Meyers, Esq.
P.O. Box 4747
Pocatello, ID 83205

Mail
 Hand Delivery
 Fax

Attorney for Defendant/Cross Appellant: Paul B. Rippel
PO Box 51219
Idaho Falls, ID 83405-1219

Appealed By: Gary R. Corgatelli,

Cross Appealed By: State of Idaho, Industrial Special Indemnity Fund,

Appealed Against: Steel West, Inc., Employer, and Idaho State
Insurance Fund, Surety,

Notice of Appeal Filed: May 13, 2013

Notice of Cross Appeal Filed: May 13, 2013

Appellate Fee Paid: A check for the incorrect amount was received and
returned to Claimant/Appellant (See attached copy
of letter). The Cross Appellant, ISIF is exempt
from paying the filing fee.

Name of Reporter: Sandra J. Beebe
PO Box 658
Blackfoot, ID 83221

Transcript Requested: A standard transcript was requested. The transcript
was prepared and filed with the Commission.

Dated: May 15, 2013



Assistant Commission Secretary



CERTIFICATION

I, the undersigned Assistant Commission Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing is a true and correct photocopy of the Notice of Appeal from Claimant; Notice of Appeal from ISIF; Findings of Fact, Conclusions of Law, and Order; and Order To Clarify, and the whole thereof, in IC case number 2005-501771 for Gary R. Corgatelli, v. Steel West, Inc., Employer, and Idaho State Insurance Fund, Surety, and State of Idaho, Industrial Special Indemnity Fund.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Commission this 15th day of May, 2013.



Assistant Commission Secretary



M. JAY MEYERS
MEYERS LAW OFFICE, PLLC
Attorneys-at-Law
300 North Seventh Avenue
Post Office Box 4747
Pocatello, Idaho 83205-4747
Telephone: (208) 233-4121
Facsimile: (208) 233-4174
Idaho State Bar No. 1680

Attorney for: Defendants, Employer and Surety

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY R. CORGATELLI,)
))
Claimant,)
))
vs.)
))
STEEL WEST, INC.,)
))
Employer,)
))
and)
))
IDAHO STATE INSURANCE FUND,)
))
Surety,)
))
and)
))
STATE OF IDAHO, INDUSTRIAL)
SPECIAL INDEMNITY FUND,)
))
Defendants.)
_____)

I.C. No. 05-501771
REQUEST FOR
ADDITIONAL RECORD

RECEIVED
INDUSTRIAL COMMISSION
MAY 23 A 10:31

1. REQUEST FOR ADDITIONAL RECORD

TO: THE ABOVE NAMED APPELLANT AND THE PARTY'S ATTORNEY, AND
CROSS-APPELLANT AND THE PARTY'S ATTORNEY, AND THE CLERK OF
THE ABOVE ENTITLED INDUSTRIAL COMMISSION OF THE STATE OF
IDAHO

NOTICE IS HEREBY GIVEN:

1. That the Defendants-Respondents-Cross Respondents, Employer and Surety, in the above-entitled proceeding hereby request that pursuant to Rule 19, I.A.R., the inclusion of the following material in the Industrial Commission's record in addition to that required to be included by the I.A.R. and the notice of appeal. Any additional transcript is to be provided in electronic format.

2. Defendants-Respondents-Cross Respondents, Employer and Surety, believe that their request for additional record may be cumulative and redundant, but make this precautionary request to ensure inclusion of appropriate record.

3. It is presumed that all exhibits admitted from Hearing of November 23, 2011 have been covered within the initial Notice of Appeal filed by Appellant and by Cross-Appellant. However, if not covered within said requests, Defendants-Respondents-Cross Respondents, Employer and Surety, specifically request the inclusion of:

- A. Joint Exhibit L:
Mary Barros-Bailey, PhD, CRC, CDMS, CLCP, NCC, D/ABVE
Pages L-1 through L-27;
- B. Joint Exhibit S:
Personnel File
Pages S-1 through S-150;

2. REQUEST FOR ADDITIONAL RECORD

C. Joint Exhibit V:
Idaho State Insurance Fund
Pages V-1 through V-10.

4. I certify that a copy of this request was served upon the Clerk of Industrial Commission for the State of Idaho and upon all parties required to be served pursuant to Rule 20.

RESPECTFULLY SUBMITTED this 21st day of May, 2013.

MEYERS LAW OFFICE, PLLC



M. Jay Meyers
Attorney for Defendants

3. REQUEST FOR ADDITIONAL RECORD

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 21st day of May, 2013, I caused a true and correct copy of the foregoing REQUEST FOR ADDITIONAL RECORD to be forwarded with all required charges prepaid, by U.S. Mail, to the following person(s):

State of Idaho Industrial Commission
Judicial Division
P.O. Box 83720
Boise, ID 83720-0041

Fred Lewis
Racine, Olson, Nye, Budge & Bailey
201 East Center
P.O. Box 1391
Pocatello, ID 83204-1391

Paul Rippel
Hopkins Roden Crockett Hansen
& Hoopes, PLLC
428 Park Avenue
P.O. Box 51219
Idaho Falls, ID 83405-1219

MEYERS LAW OFFICE, PLLC


M. Jay Meyers

CERTIFICATION OF RECORD

I, Kenna Andrus, the undersigned Assistant Commission Secretary of the Industrial Commission, do hereby certify that the foregoing record contains true and correct copies of all pleadings, documents, and papers designated to be included in the Agency's Record Supreme Court No. 41012 on appeal by Rule 28(b)(3) of the Idaho Appellate Rules and by the Notice of Appeal, pursuant to the provisions of Rule 28(b).

I further certify that all exhibits offered or admitted in this proceeding, if any, are correctly listed in the List of Exhibits. Said exhibits will be lodged with the Supreme Court upon settlement of the Reporter's Transcript and Agency's Record herein.

DATED this 11th day of June, 2013.

Kenna Andrus
Assistant Commission Secretary



BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

GARY R. CORGATELLI,)
)
 Claimant-Appellant-Cross Respondent,)
)
 v.)
)
 STEEL WEST, INC., Employer, and IDAHO)
 STATE INSURANCE FUND, Surety,)
)
 Defendants-Respondents-Cross)
 Respondents,)
)
 and)
)
 STATE OF IDAHO, INDUSTRIAL SPECIAL)
 INDEMNITY FUND,)
)
 Defendant-Respondent-Cross)
 Appellant.)
 _____)

SUPREME COURT NO. 41012
NOTICE OF COMPLETION

TO: STEPHEN KENYON, Clerk of the Courts;
Fred J. Lewis, for Claimant-Appellant-Cross Respondent;
M. Jay Meyers, for Defendants-Respondents-Cross Respondents; and
Paul B. Rippel, for Defendant-Respondent-Cross Appellant.

YOU ARE HEREBY NOTIFIED that the Agency's Record was completed on this date, and,
pursuant to Rule 24(a) and Rule 27(a), Idaho Appellate Rules, copies of the same have been served
by regular U.S. mail upon each of the following:

Fred J Lewis
PO Box 1391
Pocatello, ID 83204-1391

M. Jay Meyers
PO Box 4747
Pocatello, ID 83205-4747

Paul B Rippel
PO Box 51219
Idaho Falls ID 83405-1219

YOU ARE FURTHER NOTIFIED that, pursuant to Rule 29(a), Idaho Appellate Rules, all parties have twenty-eight days from this date in which to file objections to the Agency's Record, including requests for corrections, additions or deletions. In the event no objections to the Agency's Record are filed within the twenty-eight day period, the Reporter's Transcript and Agency's Record shall be deemed settled.

DATED this 11th day of June, 2013.

Kenna Andrews
Assistant Commission Secretary