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IN THE SUPREME COURT OF THE STATE OF IDAHO

GARY R. CORGATELLI,	)	
	)	Supreme Court No. 41012
Appellant / Cross Respondent,	)	
	)	Industrial Commission No. 05-501771
vs.	)	
	)	
STEEL WEST, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety,	)	
	)	
Respondents / Cross Respondents,	)	
	)	
and	)	
	)	
STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,	)	
	)	
Cross Appellant / Respondent.	)	

EMPLOYER/ SURETY - RESPONDENTS' BRIEF

Appeal from the Industrial Commission of the State of Idaho
Chairman, Thomas P. Baskin, Presiding

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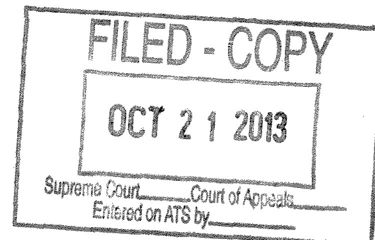

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STATEMENT OF THE CASE

This claim presents to the Supreme Court upon Appeal of Claimant and Cross-Appeal of the Industrial Special Indemnity Fund, of a Decision from the Industrial Commission determining payment of worker's compensation benefit.

A succinct review of Claimant's employment and injury history is relevant to the legal issue presented by the Claimant and to the anticipated insufficient factual evidence challenge of the Cross-Appellant, Industrial Special Indemnity Fund.

Claimant was born in 1947. He is a high school graduate and subsequently obtained a welding certification from Idaho State University. R., p. 20, (see para. 1).

In 1973, this Claimant began working for the Employer as a fitter and welder. In the early 1980's he was promoted to lead man and helped the foreman run construction jobs. He was later promoted to shipping, receiving and paint foreman. He oversaw seating, unloading, sandblasting, and painting of all steel. He also drove delivery trucks. R., p. 20, (see para.3).

In 1994, Claimant first injured his low back while pushing a load of steel off of a delivery truck. Claimant underwent a course of treatment. During the course of treatment, Dr. Gail Fields 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 repsonse. No evidence of spondylolysis. No evident of metastatic disease. R., p. 21.

Claimant was seen for second opinion, at his request, by Pocatello Neurosurgeon Peter Schossberger, M.D. 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. R., p. 22.

Claimant did go on to see Kevin Hill, M.D. on August 17, 1995. Following his review of medical records and examination of Claimant, Dr. Hill 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. R., p. 22.

While there existed difference in medical opinion as to whether Claimant had acute injury or degenerative cause and/or the result of cumulative life work lifting activities, both a Dr. Gail Fields and a Dr. Kevin Hill agreed that in 1995, Claimant had a 5% whole person impairment rating. Dr. Fields placed Claimant on permanent restrictions against lifting more than 35 pounds and recommended against bending and stooping on a frequent basis. Dr. Hill recommended that

Claimant be limited to a medium physical demand classification worker, 50 pounds occasionally, 20 pounds frequently and can constantly. Further, 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. R., pp. 20-23.

Based thereon, in 1996, Claimant and Employer/Surety entered into a Lump Sum Settlement Agreement wherein Claimant was paid $27,348.75 to resolve the disputed permanent impairment and permanent disability of 3 filed claims. R., p. 23.

Claimant attempted to return to work to his position as foreman at the Employer. He could not tolerate the bending, stooping, and lifting required of the position. Claimant accepted a three dollar per hour pay decrease and moved into a new position as safety director. Within this new position, Claimant largely did paperwork, inventory, and limited computer work. On occasion, Claimant still drove delivery truck within his 35-pound lifting restriction. R., pp. 23-24.

In 2005, Claimant again re-injured his low back and returned to Dr. Fields. The initial MRI report documents the continued degenerative disc disease but also a new finding of disc herniation at L4-5 spine vertebrae level. R., pp. 24-25. Claimant was referred to Dr. Clark Allen, M.D. for neurosurgical consultation. When conservative modalities proved ineffective, Dr. Allen performed a decompressive laminotomy, facetomy, and excision of herniated disc at L4-5 level in May, 2005. R., pp. 25-26. In September, 2005, Dr. Allen noted that Claimant had returned to office work and running parts. R., p. 26.

A Dr. Himmler provided Impairment Rating in December, 2005. In taking subjective history from Claimant, Dr. Himmler was not advised of the prior 5% impairment rating. Based upon Claimant's subjective history, Dr. Himmler arrived at a 13% impairment rating for the back and an additional 10% whole man for loss of sexual function. Jt. Hg. Ex. G-1 to G-4.

Upon correspondence with the medical consultant for the Surety, by letter dated January 18, 2006, Dr. Himmler changed her impairment rating opinion to a 5% whole man impairment pre-existing the 2005 injury, 8% whole man impairment for the back related to the 2005 low back injury, and expressly deferred opinion as to the sexual function impairment rating. Dr. Himmler recommended urology evaluation by different physician. Jt. Hg. Ex. G-8.

Following review of that urology evaluation, Dr. Himmler by letter dated June 7, 2006, restated her opinion of Claimant's permanent impairment arising from the 2005 injury to be 8% for the whole back and 0% for loss of sexual function. Jt. Hg. Ex. G-10.

The Industrial Commission has found no impairment rating for either a neurogenic bladder or partial sexual dysfunction and has affirmatively found that neither condition previously limited or currently limits Claimant's capacity to work. R., pp. 32-33.

Beginning February 1, 2006 and continuing through April 29, 2007, Claimant was paid 14 months of permanent impairment benefit of $1,297.71 each, and 1 month of $1,244.31, by the State Insurance Fund. Jt. Hg. Ex. V-5. For convenience, this sum is $19,412.25. At 2005 statutory permanent physical impairment rate, this equates to a 13% whole person PPI rating.

Claimant's back and leg discomfort gradually worsened. In August, 2008, Claimant had increased back and leg pain after making a delivery into Wyoming. Claimant went on to consultation with a Dr. Scott Huneycutt in 2008. This surgeon was of the opinion that in the absence of a history of intervening injury since 2005, Claimant's problems were likely a progression of the problems first noted following the 2005 injury. Claimant went on to posterior lumbar interbody fusion from L2 to L5 level in 2009. Claimant's back and leg pain largely persisted. R., pp. 26-28.

In 2009, a functional capacity evaluation showed Claimant functioned had 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.

An IME physician, David Simon, M.D., examined Claimant on August 4, 2010, and opined that Claimant was medically stationary. Dr. Simon further diagnosed failed back syndrome and rated Claimant's permanent impairment due to his back condition at 15% of the whole person. Initially, 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 pre-existing manifest condition. Within subsequent post-hearing deposition, Dr. Simon opined that the need for the L2-L5 fusion surgery was, in part, causally related to Claimant's multilevel degenerative disc disease, a condition which predated the 2005 accident. Dr. Simon testified and the Industrial Commission subsequently found that Claimant had a 5% whole person impairment attributable to his 1994 injury and the balance (10%) attributable to the 2005 industrial accident. R., p. 29.

The Industrial Commission did find that the Claimant suffers a 15% whole person permanent impairment of his lumbar spine, 5% attributable to his 1994 injury, and the balance attributable to his 2005 industrial accident. R., p. 32.

Beginning September 15, 2010, Claimant was paid an additional $1,989.82. in permanent indemnity payment. Jt. Hg. Ex. V-5.

In other words, after the 2005 industrial accident, the Surety has paid $22,398.75 in permanent partial impairment benefits. At 2005 permanent income benefit rate, this sum equates to a 15% permanent partial whole man impairment rating.

The Industrial Commission found that Claimant has sustained a permanent disability of 100%, inclusive of his 15% whole person impairment. R., pp. 34-35.

The Industrial Commission identified the medical/vocational factors of how the pre-existing impairment from the 1994 accident "combined" with the effects of the subject 2005 accident to cause Claimant's total and permanent disability. R., pp. 35-38.

Upon *Carey v. Clearwater County Road Department*, 107 Idaho 109, 686 P.2dd 54 (1984), the remaining 85% disability of Claimant was apportioned at 56.7% to Employer/Surety with a date of medical stability of August 4, 2010.

By *Order to Clarify*, the Industrial Commission determined that Employer/Surety were entitled to credit on the disability award for permanent impairment benefits already paid on this claim. R., pp. 89-90. It is this latter Order upon which Claimant has filed his Appeal.

1. Claimant's Appeal

Claimant has brought his appeal addressing whether or not the Employer/Surety should be given a credit for the previously paid permanent impairment benefits paid.

Employer/surety acknowledge that this is an issue of statutory interpretation along with recognizing prior case law that claimants are not to make a "double recovery".

Employer/surety would object to Claimant counsel's argument/submission that he is not aware of any surety who has ever asked for a credit for PPI benefits that have been paid prior to a finding by the Commission that a given claimant is totally and permanently disabled. No such evidence was presented to the Industrial Commission. No such factual finding was made by the Industrial Commission. Employer/surety would respectfully request that such argument be stricken.

2. ISIF's Cross-Appeal

The Claimant has adequately described status of the Cross-Appeal brought by that ISIF.

The Employer/surety will likewise respond to the ISIF appeal within a reply brief as a Cross-Respondent. Until such time as the ISIF files its Appeal Brief, it is speculative to respond to the unknown.

CLAIMANT'S RESTATED ISSUE ON APPEAL

Whether upon the finding of total permanent disability of a Claimant after payment of earlier same accident permanent impairment benefit, does that Claimant receive both the statutory permanent impairment rating benefit and the statutory total permanent disability benefit?

ARGUMENT

For the purposes of this brief, it is appropriate to clearly and distinctly set out the standards of appellate review which we believe to be applicable.

The Idaho Supreme Court's jurisdiction in appeals from decisions of the Industrial Commission in workers' compensation cases is limited to a review of questions of law. *Tarbet v. J. R. Simplot Co.*, 151 Idaho 755, 264 P.3d 394 (2011) citing *McAlpin v. Wood River Med. Ctr.* 129 Idaho 1, 3-4, 921 P.2d 178, 180-81 (1996); Idaho Const. Art. V, § 9.

Within *Paoliniv. Albertsons, Inc.*, 143 Idaho 547, 149 P.3d 822 (2006), the Court reaffirmed its standard for review of statutes:

> [2-8] "The interpretation of a statute is a question of law over which we exercise free review." *McLean v. Maverick Country Stores, Inc.*, 142 Idaho 810, 813, 135 P.3d 756, 769 (2006). "This Court must construe a statute to give effect to the intent of the legislature." *Carrier v. Lake Pend Oreille School Dist. #184*, 142 Idaho 804, 807, 134 P.3d 655, 658 (2006). "It must begin with the literal words of the statute; those words must be given their plain, usual, and ordinary meaning; and the statute must be construed as a whole." *McLean v. Maverick Country Stores, Inc.*, 142 Idaho 810, 813, 135, P.3d 756, 759 (2006) (citations omitted). "Statutes that are *in pari materia* must be construed together to effect legislative intent. Statutes are in *pari materia* if they relate to the same subject." *City of Sandpoint v. Sandpoint Indep. Highway Dist.*, 139 Idaho 65, 69, 72 P.3d 905, 909 (2003) (citations omitted).

A statute is to be construed as a whole and words should be given their plain, usual and ordinary meaning. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous or redundant. When the statutory language is

unambiguous, the clearly expressed intent of the legislative body must be given effect. *Farber v. Idaho State Insurance Fund,* 147 Idaho 307, 208 P.3d 289 (2009).

However, the legal issue of this claim as brought by the Claimant needs to be put into perspective.

There was no issue raised by Claimant that the subject payments should have been characterized as temporary disability payment during a period of medical recovery. Claimant has not disputed that the subject payments were made by the Employer/Surety as payment of permanent impairment.

This Employer/Surety has not filed Cross-Appeal to assert that it should be allowed off-set of the disputed permanent impairment/permanent disability benefits paid within the previous Lump Sum Settlement Agreement back in1996.

Instead, the sum and substance of Claimant's Appeal is to advocate that the Employer/Surety is to pay the permanent impairment benefit arising out of the subject injury and then upon further medical treatment/change of condition, the Employer/Surety is to then, again, to pay the permanent impairment as part of the total permanent disability.

Within *Order to Clarify*, page 2, the Industrial Commission addressed its determination:

> 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. R., p. 90.

Idaho Code §72-425 provides:

> Permanent disability evaluation. "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 as provided in § 72-430, Idaho Code.

The statute, itself, recognizes that permanent impairment is part of permanent disability.

The Employer/Surety asserts that § 72-425 Idaho Code is clear that total disability is inclusive of permanent impairment and not supplemental to that permanent impairment.

Claimant's argument, if followed to its conclusion, would illogically allow a claimant to concurrently receive both permanent impairment benefit and total disability benefit at the same time. For example, in the situation of a exemplar claimant sustaining workplace accident injury resulting in a 60% permanent partial impairment rating, then the claimant temporarily returning to work, and undergoing change of the condition as to that same workplace injury within five years of the accident causing additional permanent activity restriction and then becoming totally and permanently disabled, Claimant's argument in the present case would allow that exemplar claimant to receive both the permanent partial impairment rating and the subsequent lifetime total permanent disability benefit.

The Employer/Surety urges further support to the statutory interpretation that the Employee's total disability benefit obligation is inclusive of the same accident paid permanent impairment can be found within § 72-406, Idaho Code.

Idaho Code § 72-406 provides:

> Deductions for preexisting injuries and infirmities. (1) In cases of permanent disability less than total, if the degree or duration of disability resulting from an industrial injury or occupational disease is increased or prolonged because of a preexisting physical impairment, the employer shall be liable only for the additional disability from the industrial injury or occupational disease.
>
> (2) 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.

Subsection (1) specifically addresses cases of permanent disability less than total. Subsection (2) contains no such modifier. Therefore by reading the statutes *in pari materia,* Subsection (2) is applicable to cases of total permanent disability.

Statutes are to be construed as a whole so as to give effect to the intent of the Legislature. It is submitted that Paragraph 2 of § 72-406, Idaho Code, specifically addresses the instant facts. Claimant has been paid $22,398.75 in permanent impairment benefit since the 2005 injury. Such permanent impairment benefit amount should be inclusive within the statutory obligation of the Employer/Surety in the apportionment of liability with the Second Injury Fund.

It is submitted that the public policy of Idaho is, avoid a claimant making a double recovery for the same injury. For instance, a similar reduction in reduction of worker's compensation benefit to avoid double compensation to the claimant occurs within the context of recovery in concurrent civil tort cases. *Schneider v. Farmers Merchant, Inc.*, 106 Idaho 241, 678 P.2d 33 (1983); *Barnett v. Eagle Helicopters, Inc.*, 123 Idaho 361, 848 P.2d 419 (1993);*Williams v. Blue Cross of Idaho*, 151 Idaho 515, 260 P.3d 1186 (2011).

A claimant who receives a permanent impairment rating for an industrial accident and then upon a change of medical condition to the same injured body part receives total permanent disability benefit without off-set of the initial permanent impairment rating is receiving a double recovery for the single injury.

At page 22 of his Opening Brief, Claimant has referred to the majority of the states law being that total and permanent disability benefits should not be reduced by prior paid PPD benefits or the PPI. He cites to *ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW* § 59.42 (c) (1997) as his authority.

The Employer/Surety would urge strong suspicion upon such an old treatise of greater than 26 years. Within current *LARSON'S*, that section number has been withdrawn and is reserved.

Instead, reference to *LARSON'S WORKERS' COMPENSATION, DESK EDITION* (2013) provides correlation to § 92.02[3]. That section within Chapter 92 EFFECT OF SUCCESSIVE OR CONCURRENT INJURIES ON MAXIMUM AWARD addresses the another but different familiar

combination of a claimant having a permanent partial award from one accident and subsequently sustaining permanent total disability from and unrelated accident.

Simply stated, current § 92.02[3] does not address the current appeal issue of Claimant seeking a determination that the permanent partial impairment sustained within the subject accident is not to be off-set against the total permanent disability award arising out of the same subject accident.

At page 22-23 of his Opening Brief, Claimant points to a Minnesota case. *Durant v. Butler Bros.*, 275 Minn. 487 (Minn. 1967) as persuasive authority.

Again, the Employer/Surety question the Claimant's reliance upon such case as having impact towards the present appeal as being misplaced.

The Minnesota Supreme Court specifically recognizes that the issue is one of statutory interpretation.

The Minnesota Supreme Court specifically recognizes that some states have specifically granted this credit. The Minnesota Supreme Court specifically identified then Idaho Code § 72-310 for the off-set credit and specifically cited to *Endicott v. Potlatch Forests*, 69 Idaho 450, 208 P.2d 803, as determining Idaho Code § 72-310 requires that the total temporary disability and permanent partial disability awarded an employee in an accident must be deducted from the subsequent award for permanent total disability.

In *Endicott v. Potlatch Forests*, supra, claimant had the single accident, but thereafter, entered

into successive disability agreement upon change of condition with the employer for a total of 400 weeks. He then sought award upon total permanent disability without off-set for the prior 400 weeks of award.

The Supreme Court rejected this contention finding that the statute was clear, plain and explicit and upheld the off-set of the prior 400 weeks of award.

The Employer/Surety submits that the present Idaho workers' compensation statutes including § 72-406(2), § 72-425, and the instant case involving the Second Injury Fund of § 72-332(1), as well as the public policy benefit of a claimant not receiving a double recovery, should be interpreted so that this Claimant is not to receive a double recovery of permanent impairment and another permanent impairment contained within the permanent total disability apportionment.

CONCLUSION

In summary, it is requested that this Appeal of the Claimant be denied and that the Court hold upon statutory and public policy authority that an employer/surety may off-set the impairment benefit paid within a subject accident against the later award of total permanent disability arising out of change of condition.

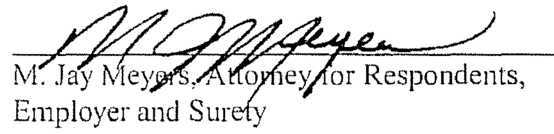
It is requested that the Industrial Commission decision be affirmed and Respondent Employer/Surety be awarded its costs.

The Employer/Surety again note that the Cross-Appellant did not file a Cross-Appellant Appeal Brief within the time stated for filing an Appellant's Brief and will address its issues when

such Cross-Appellant Appeal Brief is filed.

RESPECTFULLY SUBMITTED this 18th day of October, 2013.

MEYERS LAW OFFICE, PLLC



M. Jay Meyers, Attorney for Respondents,
Employer and Surety

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 18th day of October, 2013, I caused a true and correct copy of the foregoing EMPLOYER/SURETY - RESPONDENTS' BRIEF to be forwarded with all required charges prepaid, by U.S. Mail, to the following person(s):

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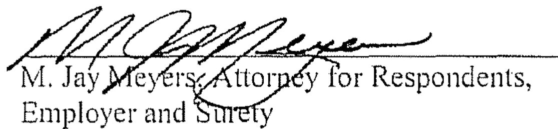

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