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# Corgatelli v. Steel West Appellant's Brief Dckt. 41012

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IN 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 Docket No. 41012

**CLAIMANT-APPELLANT-CROSS RESPONDENT'S BRIEF**

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Appeal from the Industrial Commission of the State of Idaho

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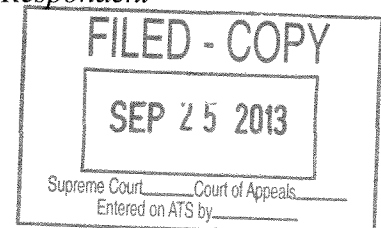
Chairman Thomas P. Baskin presiding with  
Commissioners Thomas E. Limbaugh and R.D. Maynard.

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Fred J. Lewis  
P. O. Box 1391  
Pocatello, Idaho 83204-1391  
*Attorney for Claimant-Appellant-  
Cross Respondent*

M. Jay Meyers  
P.O. Box 4747  
Pocatello, Idaho 83205-1391  
*Attorney for Defendants-Respondents-  
Cross Respondents*

Paul B. Rippel  
P.O. Box 51219  
Idaho Falls, Idaho 83405-1219  
*Attorneys for Defendant-Respondent –  
Cross appellant*



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## I. STATEMENT OF THE CASE

### A. NATURE OF THE CASE

The Industrial Commission found the Claimant, Gary R. Corgatelli (“Claimant”) to be totally and permanently disabled. The Commission also found that the Industrial Special Indemnity Fund (“ISIF”) liability had been established. Therefore, Claimant’s total and permanent disability benefits are to be paid pursuant to the *Carey* formula by ISIF and Employer, Defendants/Respondents-Cross Respondents, Steel West Inc. (“Steel West”) and its surety, Idaho State Insurance Fund (“Surety”). The Commission ordered Steel West/Surety to pay the sum of \$99,599.78 and ISIF to pay the balance of Claimant’s lifetime total and permanent disability benefits. There have been two separate appeals filed in this case.

#### 1. Claimant’s Appeal

On April 5, 2013, the Commission entered an Order to Clarify granting Steel West/Surety a **credit** for the permanent partial impairment (PPI) benefits paid to the Claimant. These PPI benefits were paid in relationship to Claimant’s 2005 accident and calculate to the sum of \$22,398.75. Claimant appeals the Commission’s Order to Clarify to this Court. Claimant submits that this is a question of law that is to be decided by this Court.

Claimant concedes that based upon the Commission’s Findings of Fact, Conclusions of Law, and Order dated July 26, 2012 (“Order”), Steel West/Surety has made an overpayment of PPI benefits to him in the sum of \$10,444.75 and they should be given a credit for this overpayment. However, Steel West/Surety should not be given a credit for the 8% in PPI payments Claimant was paid in 2006 and 2007 in the sum of \$11,946.00, against their \$99,599.78 total and permanent disability benefit obligation to the Claimant. Therefore, Claimant’s appeal to this Court concerns this \$11,946.00 in disputed PPI benefits.

Claimant believes that this is an issue of first impression before the Idaho Supreme Court. Claimant could not locate one reported case either before this Court or the Commission where the surety was given a credit for prior PPI benefits paid, to be deducted against the surety's obligation to pay total and permanent disability benefits. Moreover, Claimant's counsel 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. This is a new credit that the Surety is requesting in this case. This request of a new credit is significant because a number of claimants, who are awarded total and permanent disability benefits, have been paid PPI benefits for their last accident at some time prior to the finding of their total and permanent disability. Therefore, sureties and claimants around the state of Idaho are going to be interested in the outcome of this appeal because it will have a significant impact on many future total and permanent disability claims.

## **2. ISIF's Appeal**

The appeal brought by ISIF arises out of the Commission's Order dated July 26, 2012, holding that the Claimant had proven that he was totally and permanently disabled as of August 4, 2010. The Commission found ISIF liability had been established. ISIF appeals from this decision and asks this Court who should pay the Claimant his total and permanent disability benefits, not whether the Claimant is entitled to total and permanent disability benefits. Neither Steel West, nor its surety, Idaho State Insurance Fund, nor ISIF appealed the Commission's decision finding the Claimant to be totally and permanently disabled as a result of injuries the Claimant suffered while employed with Steel West.

ISIF argued at hearing that the Claimant became totally and permanently disabled solely as a result of his last industrial accident, which excused ISIF from any liability in this case. Steel

West/Surety argued that the Claimant's pre-existing back injury combined with his back injury from the last industrial accident and left the Claimant totally and permanently disabled.

The Commission agreed with Steel West/Surety and found that the back injury from the last industrial accident combined with the Claimants pre-existing back injury and rendered the Claimant totally and permanently disabled. Thus, ISIF's liability was established. ISIF has now appealed the Commission's Order to this Court and has asked this Court to determine who should pay the claimant his total and permanent disability benefits. Claimant will respond to ISIF's appeal in a reply brief as a Cross Respondent.

## **B. COURSE OF PROCEEDINGS BELOW**

On July 15, 2009, Claimant filed a worker's compensation Complaint against Steel West/Surety arising from a January 3, 2005 accident while working at Steel West. R., p 1, 9.<sup>1</sup> In the Complaint, Claimant claimed entitlement to workers compensation benefits, including total and permanent disability benefits. R., p. 1, 9. Steel West/Surety filed a timely Answer to the complaint. R., p. 4.

Claimant also filed a Complaint against ISIF on January 26, 2011. R., p. 8. ISIF filed a timely Answer to the Complaint. R., p. 12.

The Commission assigned the case to Referee Alan Taylor, who conducted a hearing in Pocatello on November 23, 2011. R., p. 17. Referee Taylor submitted his recommendation to the Commission. The Commission received Referee Taylor's recommendation, but chose not to adopt it. R., p. 18. Instead, on July 26, 2012, the Commission issued its own Order. R., p. 18. In its Order, the Commission found Claimant to be totally and permanently disabled with a total PPI rating of 15%, with 5% referable to Claimant's 1994 accident and 10% referable to

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<sup>1</sup> There is only one volume in the record, therefore, Claimant with dispense with the portion of Rule 35(e), under the Idaho Appellate Rules, of listing the volume number.

Claimant's 2005 accident. R., p. 41. The Commission ordered Steel West/Surety to pay Claimant 333.5 weeks of total and permanent disability benefits or \$99,599.78 under the *Carey* formula. R., p. 37, 42. Lastly, the Commission held that Steel West/Surety was not entitled to any reduction for the lump sum payment of \$27,348.75 in PPI and Permanent Partial Disability (PPD) benefits it paid Claimant after his 1994 accident. R., p. 41. The Commission stated that such a reduction would result in a "windfall" and "is contrary to the policies underlying Idaho's workers' compensation laws." R., p. 41.

Following the Commission's Order, Steel West/Surety filed a Motion for Reconsideration and Clarification. R., p. 44. Steel West/Surety's Motion was accompanied by an affidavit and supporting brief. R., p. 48, 54. Later, an Amended Brief was filed by Steel West/Surety. R., p. 65. In the Amended Brief, Steel West/Surety acknowledged that they were not entitled to any credit for previous benefits paid as a result of Claimant's 1994 accident. R., p. 66. However, Steel West/Surety did assert that they were entitled to a credit based upon the prior \$22,398.75 in PPI benefits Surety paid to Claimant as a result of the 2005 injury. R., p. 66, 68. Steel West/Surety argued that they were justified in this request based upon Idaho Code § 72-332, § 72-316 and § 72-406(2). R., p. 68.

Claimant filed an objection to the Motion for Reconsideration and Clarification and provided his own supporting affidavit and brief. R., p. 71, 75, 80.

The Commission took the issue under advisement and on April 5, 2013, issued an Order to Clarify its previous Order. R., p. 89. In its Order to Clarify, the Commission granted Steel West/Surety's Motion and gave them a \$22,398.75 credit to apply to their share of Claimant's total and permanent disability benefits. R., p. 89-90. The Commission based its decision to reduce the total and permanent disability benefits award to Claimant on Idaho Code § 72-425, which Steel West/Surety never argued in its Motion for Reconsideration and Clarification. R.,



p. 90. The Commission concluded that Claimant's total and permanent disability benefits are inclusive of his PPI benefits from the 2005 accident, and therefore, Steel West/Surety are entitled to credit for all previous PPI payments paid. R., p. 90.

Claimant filed a Notice of Appeal on May 13, 2013, appealing the Commission's Order to Clarify. R., p. 92. On the same day, ISIF also filed a Notice of Appeal, cross appealing the Commission's Order rendered on July 26, 2012. R., p. 96.

### **C. STATEMENT OF FACTS**

#### **1. Claimant Gary Corgatelli's Background**

In 1973, Claimant began a very long and enjoyable career working for Steel West as a fitter and welder. R., p. 20, (see para. 3). During his career with Steel West, he became very successful in the business. R., p. 20, (see para. 3). This led to several promotions. R., p. 20, (see para. 3). The first came in the early 1980's when Claimant was promoted to lead man on his crew. R., p. 20, (see para. 3). Later, he was promoted to shipping and receiving, and paint foreman. R., p. 20, (see para. 3). This is where things began to take an unfortunate turn for Claimant.

#### **2. Claimant's 1994 Accident**

In 1994, Claimant experienced his first serious work related injury. R., p. 20, (see para. 4). Claimant was pushing a load of steel off a delivery truck for Steel West when he injured his back. R., p. 20, (see para. 4). After the injury, Claimant met with and was examined by several different medical doctors. R., p. 5-7. On October 11, 1995, Claimant met with Dr. Fields who awarded Claimant with a 5% PPI rating attributed solely to the 1994 accident. R., p. 23, (see para. 10). Upon receiving notice of the 5% PPI rating, Steel West/Surety entered into a lump sum agreement with Claimant in the amount of \$27,500.00. R., p. 23, (see para. 11); Joint Exhibit "U" at 6.

Following his injury, Claimant attempted to return to his former position at Steel West. R., p. 23, (see para. 12). However, the lingering effects of his injury rendered him unable to perform the former job duties. R., p. 23, (see para. 12). Therefore, he accepted a lower paying position with Steel West as safety director. R., p. 23, (see para. 12).

### **3. Claimant's 2005 Accident**

In 2005, things got worse for Claimant as he experienced a second serious injury while working for Steel West. R., p. 24, (see para. 13). As Claimant was stepping down off a semi-truck at work, he slipped on a piece sheet metal covered in snow. R., p. 24, (see para. 13). As his front foot slid forward on the sheet metal, his back foot caught the bottom step of the truck, causing Claimant's legs to be split apart. R., p. 24, (see para. 13). Eventually, Claimant's legs gave way, forcing him to the ground. R., p. 24, (see para. 13). Claimant's lower back took the brunt force of the impact, as it connected with the hard sheet metal. R., p. 24, (see para. 13). Claimant again sought medical treatment for his back. R., p. 24, (see para. 13).

Claimant underwent surgery by Dr. Allen in May 2005. R., p. 26, (see para. 15). Several months later, in December of 2005, Claimant met with Dr. Himmeler. R., p. 26, (see para. 17). During the examination, Dr. Himmeler awarded him a 13% PPI rating for his 2005 back injury. Joint Exhibit "G" at 4. Dr. Himmeler later reduced the 13% PPI rating to 8% PPI rating for the 2005 back injury. Joint Exhibit "G" at 14. However, Dr. Himmeler added in an additional 5% PPI rating, related to the 2005 accident, for Claimant's sexual dysfunction and bladder dysfunction, for a total of 13% PPI rating. Joint Exhibit "G" at 14. The Surety paid Claimant this 13% in PPI benefits for a total of \$19,412.25. Joint Exhibit "V" at 5. The Surety accomplished this by making monthly PPI benefit payments to the Claimant of \$1,297.71 beginning in February of 2006 and continuing each month thereafter until March of 2007 and a final PPI benefit payment of \$1,244.31 in April of 2007. Joint Exhibit "V" at 5.

As time passed, Claimant's back injury gradually got worse. R., p. 26, (see para. 18); Joint Exhibit "D" at 48. Claimant decided something had to be done, so he met with Dr. Allen on February 18, 2009, to discuss surgical options. R., p. 28, (see para. 22). Dr. Allen recommended surgery. R., p. 28, (see para. 22); Joint Exhibit "D" at 48-49. On April 6, 2009, Claimant underwent a three level lumbar fusion surgery performed by Dr. Allen. R., p. 28, (see para. 22); Joint Exhibit "D" at 51.

After the surgery, Claimant and Steel West agreed that Claimant could no longer perform any job at Steel West because of his limitations. R., p. 30, (see para. 28). Thus, Claimant began pursuing other job opportunities. R., p. 30, (see para. 28). In all, Claimant applied for or inquired about work for over "125 businesses in his geographic area," receiving less than 10 interviews, and not one single job offer. R., p. 30, (see para. 28).

On July 15, 2009, Claimant filed a workers compensation Complaint requesting total and permanent disability benefits. R., p. 1, 9. On August 4, 2010, Claimant met with Dr. Simon, IME doctor for Steel West/Surety, who concluded that Claimant had reached maximum medical improvement and awarded Claimant with a 15% whole person impairment rating, which appeared to be attributed to the 2005 accident. R., p. 29, (see para. 26). However, Dr. Simon did not clarify whether Claimant's PPI rating should be apportioned between the 2005 and 1994 accident or the 2005 accident alone. R., p. 29, (see para. 26). This caused some confusion in that Dr. Fields had previously awarded Claimant a 5% whole person impairment rating based solely upon the 1994 back injury, and Dr. Himmler had previously awarded Claimant a 8% whole person impairment rating based solely upon the 2005 back injury. R., p. 23, (see para. 10); Joint Exhibit "G" at 14. Thus, it would appear that the 15% whole person impairment was attributable to both the 1994 and 2005 accidents.

After Dr. Simon assigned the 15% PPI rating, the Surety made an additional 2% in PPI benefit payments to the 13% it already paid. This additional 2% in PPI benefits calculated to \$2,986.50 and were paid to Claimant in September 2010 and October 2010. Joint Exhibit “V” at 5. Thus, in all, Steel West/Surety has paid Claimant \$22,398.75 in PPI benefits. R., p. 53; Joint Exhibit “V” at 5.

Claimant filed a Complaint against ISIF on January 26, 2011. R., p. 8. ISIF filed a timely Answer to the Complaint. R., p. 12.

The confusion in regard to Dr. Simons 15% PPI rating was cleared up at his deposition after he indicated that although he found Claimant to have a 15% impairment rating, 10% of it was attributable to the 2005 accident, whereas 5% of it was attributable to the 1994 accident. R., p. 32, (see para. 34).

#### **4. The Commission’s Decision**

On July 26, 2012, the Commission issued its Order, concluding that Claimant was totally and permanently disabled. R., p. 37, (see para. 48). The Commission found ISIF’s liability had been established. R., p. 41. Under the *Carey* formula Steel West/Surety were responsible to pay Claimant 333.5 weeks of total and permanent disability benefits or \$99,599.78. R., p. 42.

On August 14, 2012, Steel West/Surety filed their Motion for Reconsideration and Clarification. R., p. 44. In that motion Steel West/Surety moved the Commission for reconsideration and clarification of the Commission’s July 26, 2012 Order. R., p. 46. Steel West/Surety specifically requested that they be given a credit for the entire \$22,390.75 they paid in PPI benefits associated with the 2005 accident. R., p. 45-46. Claimant objected to this Motion. R., p.71-72.

On April 5, 2013, the Commission entered its Order to Clarify granting Steel West/Surety’s Motion and gave them a credit for the entire 15% permanent impairment that had

already been paid by Steel West/Surety, which calculated to the sum of \$22,390.75. R., p. 89-90. Claimant filed the first appeal in this case requesting that this Court reverse the Commission's Order to Clarify dated April 5, 2013. R., p. 92.

As a part of the Commission's July 26, 2012 Order, it discussed Dr. Himmeler's notation of mild bladder incontinence and partial sexual dysfunction. R., p. 26, (see para. 17). The Commission also noted that urologist Douglas Norman, M.D., examined claimant in 2006 and found no indication of neurogenic bladder. R., p. 26, (see para. 17). Dr. Himmeler had given a 5% whole person impairment rating for the bladder incontinence and partial sexual dysfunction. Joint Exhibit "G" at 14. However, the Commission did not award the 5% impairment for the bladder incontinence and partial sexual dysfunction. R., p. 41. This portion of the Order leaves the Claimant with an 8% PPI rating given to him by Dr. Himmeler for his 2005 back injury, prior to Claimant's 2009 lumbar fusion surgery. Joint Exhibit "G" at 14. Claimant was paid the 8% in PPI benefits in 2006 and 2007. Joint Exhibit "V" at 5. A 2005 PPI rating of 8% calculates to 40 weeks at the 2005 PPI rate of \$298.65 (2005 average state weekly wage of \$543.00 times 55% equals \$298.65/week) for a total sum of \$11,946.00. Based on the Commission's decision Claimant concedes that Steel West/Surety overpayment calculates as follows:

- 1. Total PPI benefits paid by Surety.....\$ 22,390.75
- 2. Less 8% whole person PPI benefits paid in 2006 and 2007.....\$-11,946.00
- 3. PPI overpayment by Steel West/Surety.....\$10,444.75

Claimant concedes that Steel West/Surety should be given a credit of \$10,444.75 for this overpayment to their obligation to pay the Claimant the sum of \$99,599.78 under the *Carey* formula for a total net payout of \$89,155.03, if this Court affirms the Commission's July 26, 2012 decision and finds ISIF liability has been established.

Finally, Steel West/Surety and ISIF do not dispute the Commission's finding that Claimant is entitled to total and permanent disability benefits. The second appeal filed by ISIF asks this Court to decide who should pay the Claimant his total and permanent disability benefits for life. None of the Defendants in this case are arguing that the Claimant should not receive total and permanent disability benefits for life.

## **II. ISSUE PRESENTED ON APPEAL**

Idaho Code §72-408 is the statutory basis for payment of total and permanent disability benefits. Idaho Code §72-408 has no provision for a credit to be given to a surety for PPI or disability benefits it paid prior to the time it became obligated to pay total and permanent disability benefits. Did the Commission err by relying on Idaho Code §72-425 and holding Steel West/Surety is entitled to a credit for PPI benefits it paid prior to Commission finding Claimant was totally and permanently disabled?

## **III. STANDARD OF REVIEW**

"When this Court reviews a decision of the Industrial Commission, it exercises free review over questions of law, but reviews question of fact only to determine whether substantial and competent evidence supports the Commission's findings." *Gooby v. Lake Shore Mgmt. Co.*, 136 Idaho 79, 82 (2001). "Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion." *Id.* Therefore, the Commission's "conclusions on the credibility and weight of the evidence will not be disturbed on appeal unless they are clearly erroneous." *Id.*

Additionally, the Idaho Supreme Court exercises "free review" over the interpretation of statutes when such interpretations are at issue. *Parkwest Homes, LLC v. Barnson*, 302 P.3d 18, 22 (2013).

#### IV. ARGUMENT

##### **A. IDAHO CODE §72-408 IS THE STATUTORY BASIS FOR PAYMENT OF TOTAL AND PERMANENT DISABILITY BENEFITS AND IT HAS NO PROVISION FOR A CREDIT TO BE GIVEN TO A SURETY FOR PPI BENEFITS IT PAID PRIOR TO THE TIME IT BECAME OBLIGATED TO PAY TOTAL AND PERMANENT DISABILITY BENEFITS TO A CLAIMANT.**

Idaho Code §72-408 is the statutory basis for payment of total and permanent disability benefits. Idaho Code §72-408 has no provision for a credit to be given to a surety for PPI or disability benefits it paid prior to the time it became obligated to pay total and permanent disability benefits. Did the Commission err by relying on Idaho Code §72-425 and holding Steel West/Surety is entitled to a credit for PPI benefits it paid prior to Commission finding Claimant was totally and permanently disabled? Yes.

##### **1. Statutory construction – Plain Language Controls**

The purpose of the Workmen’s Compensation Act in Idaho “was to provide sure and certain relief for injured workers and their dependents.” *Hogaboom v. Economy Mattress*, 107 Idaho 13, 17 (1984). To fulfill this purpose, sure and certain relief should be provided “regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as is otherwise provided in this act.” *Haldiman v. American Fine Foods*, 117 Idaho 955, 956 (1990)

When interpreting these statutory laws, the Courts “primary function” is to “give effect to the legislative intent.” *Parkwest Homes*, 302 P.3d at 22. The court should look first to the language of the statute, if the statutory language “is unambiguous, its plain language controls.” *Pioneer Irrigation Dist. v. City of Caldwell*, 153 Idaho 593, 597 (2012).

In additional to these general rules of statutory construction, when dealing with Idaho worker’s compensation laws, this Court has consistently adhered to the well-established principle of liberally construing law in favor of claimant. *Haldiman*, 117 Idaho at 956. “This liberal construction principle has been applied in several cases to determine whether an employee is entitled to a particular benefit” and “in these cases this Court has frequently construed statutes in a manner that favors the award of benefits.” *Id.*

In this case, by keeping in mind the liberal construction principle and the need to provide sure and certain relief to injured worker, Claimant should be entitled to \$99,599.78 in total and permanent disability benefits subject only to a reduction for the overpayment of \$10,444.75

## **2. Idaho Code §72-408**

The Commission has found and all Defendants now agree, Claimant is totally and permanently disabled. None of the Defendants dispute this finding by the Commission. The Defendants are now arguing over who should pay Claimant the total and permanent disability benefits the Claimant won before the Commission.

The Commission used Idaho Code §72-425 to “evaluate” Claimants disability by looking at “permanent impairment and ... pertinent nonmedical factors”. R., p. 31, (see para. 32). After evaluating the “permanent impairment and ... pertinent nonmedical factors” of this case the Commission found Claimant was in fact 100% disabled. R., p. 35, (see para. 40). Since Claimant was found to be totally and permanently disabled he is now entitled to be paid total and permanent disability benefits by the Surety and ISIF together under the *Carey* formula or by the Surety alone. However, Claimant cannot rely on Idaho Code §72-425 as a statutory basis for payment of these benefits because this code section does not provide for the payment of any workers compensation benefits. Idaho Code §72-425 only directs how to evaluate a claimant’s disability. It does not direct how much the claimant should be paid in benefits, nor does it set forth any deductions or limitations on benefits.

Claimant must rely solely on Idaho Code §72-408 for the statutory basis for the payment of his total and permanent disability benefits. This section of the Idaho Code reads as follows:

72-408. Income benefits for total and partial disability. Income benefits for total and partial disability during the period of recovery, and **thereafter in cases of total and permanent disability**, shall be paid to the disabled employee subject



to deduction on account of waiting period and subject to the maximum and minimum limits set forth in section 72-409, Idaho Code, as follows:

(1) For a period not to exceed a period of fifty-two (52) weeks, an amount equal to sixty-seven per cent (67%) of his average weekly wage and thereafter an amount equal to sixty-seven per cent (67%) of the currently applicable average weekly state wage.

(2) Partial disability. For partial disability during the period of recovery an amount equal to sixty-seven per cent (67%) of his decrease in wage-earning capacity, but in no event to exceed the income benefits payable for total disability.

Idaho Code § 72-408 (*emphasis added*)

Idaho Code § 72-408 provides for the payment of income benefits to an injured worker in two circumstances including: 1) during the period of recovery when an injured worker has suffered a total or partial disability, or 2) after the period of recovery when an injured worker has been found to be totally and permanently disabled. Idaho Code § 72-408; *Nielson v. Industrial Special Indem. Fund*, 106 Idaho 878, 883 (1984); *Phinney v. Shoshone Med. Ctr.*, 131 Idaho 529, 532-533 (1998). This second type of benefit paid under Idaho Code § 72-408 becomes a lifetime benefit, which is payable until the injured worker dies. It is unlike any other income benefit paid under the workers compensation law in Idaho.

Based upon the plain reading of Idaho Code § 72-408, it is clear to see that it is the statutory basis for the payment of total and permanent disability benefits. But, there is one thing for certain, Idaho Code § 72-408 does not contain any provision for a surety to take an offset, credit or reduction for PPI benefits against the surety's obligation to pay total and permanent disability benefits when the claimant has been found to be totally and permanently disabled. The language of this statute could not be plainer.

There is no case holding Idaho Code §72-425 or Idaho Code §72-408 allows for a credit against total and permanent disability benefits for PPI benefits paid by a surety prior to the claimant being found to be totally and permanently disabled. That is because the statutory provision does not exist.

In 2005, Claimant was injured in a work related accident while working at Steel West. R., p. 24, (see para. 13). After reaching maximum medical improvement in December of 2005, Claimant was awarded PPI benefits. Joint Exhibit G at 4; R., p. 53. These benefits were calculated and paid to Claimant under Idaho Code § 72-429. This Court has indicated that Idaho Code § 72-429, along with its companion section, § Idaho Code 72-428, deal with benefit payments for disabilities that are less than total. *Carey v. Clearwater County Rd. Dep't*, 107 Idaho 109, 116 (1984). Claimant's PPI benefits were paid under these disability benefit statutes.

Claimant's injury began to get worse and in 2009 Claimant underwent a three level lumbar fusion surgery. R., p. 28. After surgery, Claimant again reached maximum medical improvement and filed a Complaint with the Commission requesting that he be awarded total and permanent disability benefits in July 2009. R., p. 1, 9. Claimant was awarded total and permanent disability benefits by the Commission's Order on July 26, 2012, based upon the Commission's finding that Claimant was totally and permanently disabled. R., p. 41. These total and permanent disability benefits are calculated and are going to be paid out to the Claimant pursuant to Idaho Code § 72-408.

The PPI benefits paid in 2006-2007, were payable under Idaho Code § 72-429. When the Commission found Claimant 100% disabled he became entitled to total and permanent disability benefits under Idaho Code § 72-408. These two different benefits are separate and distinct benefits, paid at separate and distinct times, under separate and distinct sections of the Idaho Code.

Therefore, the Commission erred, based on the plain reading of the worker's compensation statutes, when it awarded Steel West/Surety a credit against Claimant's permanent and total disability benefits by the amount of prior paid PPI benefits. Idaho Code § 72-408. This section of the Idaho worker's compensation law does not provide for such a credit. Thus,

because the law is silent, Claimant should not be subject to any deduction when considered in light of the purpose of the Idaho worker's compensation law, to provide sure and certain relief, and in light of liberal statutory construction rule, of construing worker's compensation laws in favor of the Claimant. *Haldiman*, 117 Idaho at 956.

### **3. Statutory construction of Idaho Code §72-408**

If for some reason, the Court finds Idaho Code §72-408 unclear as to whether prior paid PPI payments can be deducted from subsequent award of total and permanent disability benefits, the Court can use the rules of statutory construction to support a finding in favor of Claimant. Under the rules of construction, if the statutory language is not plain or is ambiguous, the Court can "ascertain legislative intent" from three sources: 1) the statute's context, 2) the statutes legislative history and 3) the public policy in support of the statute. *Pioneer Irrigation Dist.*, 153 Idaho at 597.

#### **a. Statutory Context**

The statutory context of Idaho's worker's compensation law, which is the first factor in statutory construction, supports a finding in favor of Claimant. The worker's compensation law was developed in the context of and for the purpose of providing "sure and certain relief for injured workers" and their dependents, regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as is otherwise provided in this act. *Haldiman*, 117 Idaho at 956; *Hogaboom*, 107 Idaho at 17. Furthermore, because of the context in which worker's compensation was enacted and in an effort to fulfil its purposes, this Court has established a liberal policy construing the law in favor of the claimant. *Haldiman*, 117 Idaho at 956.

Idaho Code §72-408 contains no provision for a credit to be given for PPI or PPD benefits. Idaho Code §72-408 is the only statute that authorizes the payment of total and

permanent disability benefits. Moreover, Idaho Code §72-408 is the most specific statute in regard to total and permanent disability benefits. A basic tenet of statutory construction is that the more specific statute or section addressing the issue controls over the statute that is more general. *Mulder v. Liberty Northwest Insurance*, 135 Idaho 52, 57 (2000). The more general statute should not be interpreted as encompassing an area already covered by one which is more specific. *Id.* Additionally, when choosing between alternative constructions of the statute, this Court presumes that the statute was not enacted to work a hardship or to effect an oppressive result. *Id.* Therefore, this Court should construe liberally the workers compensation law in favor of the claimant. The humane purposes, which the law serves, leave no room for a narrow, technical construction. *Id.*

In this case, if this Court does find that the worker's compensation laws are silent or ambiguous as to whether total and permanent disability benefits should be reduced by prior PPI benefits, the Court should rule in favor of Claimant based upon the context in which the laws were enacted.

**b. Legislative History**

The Legislative History of Idaho Code §72-408 also favors a finding that Claimant should be entitled to his award of total and permanent disability benefits without a reduction for PPI benefits paid to him because the laws have been modified to provide such.

In 1971, the Idaho Legislature undertook the comprehensive task of re-codifying the Idaho Workmen's Compensation Laws. In the 1971 recodification, which came into effect in 1972, the Claimant submits the Idaho Legislature actions clearly indicated that total and permanent disability benefits should not be reduced by the prior paid PPD benefits or the PPI benefits. Claimant invites the Court to examine the predecessor statute to Idaho Code § 72-408, which was contained in the Idaho Code as § 72-310. This section was the total and permanent

disability benefit statute in force prior to the 1971 recodification of the law. The now repealed Idaho Code § 72-310(a) read:

“Where the injury causes **total disability** for work, the employer during such disability shall pay the injured employee weekly compensation... **subject to deductions, if any, on account of waiting period, partial disability, and limited wages** as set forth in section 72-310(b), 72-310(c) and 72-310(d).”

Idaho Code § 72-310 (1969) [repealed](emphasis added)

In other words, this former section of the Idaho Code states that total and permanent disability benefits are subject to deductions in three different scenarios: 1) on the account of waiting period, 2) partial disability, which is directly applicable in our case, and 3) limited wages. Even more explicit, Idaho Code § 72-310(c) went into greater detail for claims decided prior to 1972, in regard to the relationship of total and permanent disability benefits and prior paid PPD benefits, which are inclusive of PPI benefits. This repealed statute read in pertinent part as follows:

“total disability begins after a period of partial disability, the period of partial disability shall be deducted from such total period of 400 weeks.”

Idaho Code § 73-310(c) (1969). [Repealed]

This language clearly and explicitly stated that a partial disability had to be deducted from a subsequent period of total disability. Under the now repealed Idaho Code § 72-310 Steel West/Surety would win on the PPI credit issue appealed by Claimant. No question. In fact, this Court stated that § 72-310, “requires no construction” because “it is clear, plain and explicit.” *Endicott v. Potlatch Forest*, 69 Idaho 450, 452 (1949). In *Endicott*, the claimant was awarded PPD benefits and later was awarded total disability benefits. *Id.* The Court cited § 72-310 as its “clear, plain and explicit” reason for reducing the total disability benefits by the amount previous paid in PPD benefits. *Id.*

However, under the “comprehensive recodification” of the Idaho Workmen’s Compensation Law post 1971, § 72-310 was revised and consequently the “clear, plain and explicit” language allowing for a deduction against permanent and total disability benefits based upon prior paid PPI or PPD benefits was specifically eliminated. Idaho Code § 72-310 (1969) [Repealed]; Idaho Code § 72-408. Today, the Idaho legislature states the following in Idaho Code § 72-408 in regard to the deductions to be made to total and permanent disability benefits:

“Income benefits for total and partial disability during the period of recovery, and thereafter in cases of **total and permanent disability**, shall be paid to the disable employee **subject to deduction on account of waiting period and subject to the maximum and minimum limits set forth in section 72-409.**”

Idaho Code § 72-408 (emphasis added.)

This statute, § 72-408, states almost exactly what the pre-1971 statute under § 72-310 did in that permanent and total disability benefit payments are subject to deduction on account of waiting period and wage limits. Idaho Code § 72-310 (1969) [Repealed]; Idaho Code § 72-408. But, the current § 72-408 does not mention anything about the total and permanent disability being subject to deduction for partial disability or PPI benefits, as was the case with the pre-1971 statute under § 72-310. Idaho Code § 72-310 (1969) [Repealed]; Idaho Code § 72-408.

If the Legislature intent was to keep the pre-1971 policy of allowing total and permanent disability benefits to be reduced by prior paid partial disability benefits, which would have included the 8% in PPI benefits paid to Claimant in this case, then they would have expressly stated so in the post 1971 statutes, as they expressly did for the allowance of deductions arising from waiting periods and wage limits.

Thus, the second factor in statutory construction strongly favors Claimant’s position, that he is entitled to the PPI benefits previously paid, with no credit to Steel West/Surety.

**c. Public Policy**

The last factor in statutory construction, public policy, also favors Claimant in this case. As stated several times, the purpose of worker's compensation law is to provide sure and certain relief for the injured worker. *Haldiman*, 117 Idaho at 956; *Hogaboom*, 107 Idaho at 17. The humane purposes, which the law serves, leave no room for a narrow, technical construction. *Mulder*, 135 Idaho at 57. In this case, the Commission found Steel West/Surety to be obligated to make payments to Claimant for 333.5 weeks. R., p. 37, (see para. 48). Following that time, ISIF was ordered to take over the payments. R., p. 42. However, if the Court sustains the deduction of Claimant's total and permanent disability benefits this Court will allow Steel West/Surety to stop the payment of total and permanent disability benefits before ISIF's obligation starts. Claimant will be left for a number of months with only a partial payment from ISIF.<sup>2</sup> In effect, this will create a gap between the last payment from Steel West/Surety and the time ISIF takes over the payments. This gap hardly looks like sure and certain relief.

What is Claimant to do during the gap, go and get a job? This seems unrealistic based off Claimant's past experience looking for a job. R., p. 30. Claimant applied for or inquired about work for over 125 businesses and received less than 10 interviews, and not one single job offer. R., p. 30, L. 28. This is because Claimant is totally and permanently disable. He cannot find work because of his disability.

Moreover, the Claimant is asking this Court to decide an issue of law that will have significant impact on future totally and permanently disabled claimants. If the decision by the Commission is affirmed it will allow the sureties who have paid PPI benefits during some prior period of time to stop the payment of total and permanent disability for months or maybe even

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<sup>2</sup> The difference between 55% of the average weekly wage in 2005 and 67% of the then prevailing average weekly wage

years after the claimant has already been adjudicated to be totally and permanently disabled and is no longer working. This would be devastating to claimants that can no longer work.

There are number of total and permanent disability cases that fit with in this category. Claimants are injured in an accident, a minimally invasive surgery is completed, maximum medical improvement is achieved and an impairment rating is assigned and paid. Years later the claimant's condition deteriorates and then he becomes totally and permanently disabled and begins to receive total and permanent disability benefits. With no ability to return to work, these claimants completely rely on their total and permanent disability benefits. The PPI benefits that they received years before are long gone. They cannot have their total and permanent disability benefits stopped because of the PPI benefits they were paid years prior. The totally and permanently disabled claimants in Idaho cannot be told on the one hand they cannot work, and then on the other hand they receive no benefits. That is not sure and certain relief as promised by the worker's compensation law.

Therefore, the last factor used in statutory construction favors a finding that Claimant is entitled to the full total and permanent disability benefits awarded to him with only a reduction for the overpayment of PPI benefits it paid to him, not the PPI benefits claimant was legitimately paid pursuant to Idaho Code § 72-429.

**B. THE COMMISSION MISAPPLIED IDAHO CODE SECTION 72-425 WHEN IT RULED THAT STEEL WEST/SURETY WAS ENTITLED TO A CREDIT FOR ALL THE PPI BENEFITS IT HAD PAID TO THE CLAIMANT.**

In its Order to Clarify, the Commission provided a two page justification on which it based its decision to reduce Claimant's total and permanent disability benefits by the amount of prior paid PPI benefits. R., p. 89. The Commission's reason for the reduction stemmed from its reading of Idaho Code § 72-425, entitled Permanent Disability Evaluation. R., p. 90. It reads, an

“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 provide in § 72-430. Idaho Code §72-425.

The Commission then states that “because [Claimant’s] disability is inclusive of his accident-related impairment, [Steel West/Surety] is entitled to credit for payments made on that impairment.” R., p. 90. Continuing the Commission stated that “holding otherwise would essentially require [Steel West/Surety] to pay benefits on the same impairment rating twice.” R., p. 90. Thus, it appears that the Commission is saying that because Steel West/Surety paid PPI benefits to Claimant, arising from the 2005 accident in 2006 and 2007, they do not have to pay PPI benefits under the new permanent and total disability award. Such an argument has some surface appeal, but it is oversimplified.

Claimant does not dispute the Commission’s reading of Idaho Code § 72-425 in that an injured workers impairment is a factor in determining his permanent disability. However, § 72-425 is limited to evaluating the degree of a permanent disability. It is not used to calculate the benefits of an injured worker in terms of compensation. In fact, before any compensation can be distributed under the Worker’s Compensation Act, there must first be a determination as to whether the injured worker is totally or partial injured. Idaho Code § 72-425; see *Funes v. Aardema Dairy*, 150 Idaho 7, 8 (2010). The difference in these two, is that a permanent total disability arises when either the “claimant’s permanent impairment together with nonmedical factors totals 100% or by a showing that the claimant fits within the definition of an odd-lot worker.” *Funes*, 150 Idaho at 8. Once a disability is determined to be total or partial pursuant to Idaho code § 72-425, benefit compensation is then determined by using § 72-408, if the injury is total and permanent, or § 72-428 and § 72-429, if the injury is permanent partial.

There is no bases in the current Idaho worker’s compensation law for an offset to total and permanent disability benefits under I.C. § 72-408 for PPI benefits that have been paid by the surety at some prior period of time under I.C. §§ 72-428 and 72-429.

This conclusion that total and permanent disability benefits should not be reduced by prior paid PPD benefits or the PPI benefits is further supported by the view of the majority of the states. ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW § 59.42(c) (1997). In Larson's Workers' Compensation Law treatise ("Larson"), one of the leading sources on workers compensation law, it states that the "usual holding is that the permanent partial award need not be deducted from the subsequent permanent total award." *Id.*

To illustrate the majority view, Larson cites several cases including one from the state of Minnesota. *Id.*, at footnote 59; see *Durant v. Butler Bros.*, 275 Minn. 487 (Minn. 1967). In *Durant*, the Claimant was injured during a work related accident. *Durant*, 275 Minn. at 488. The Claimant filed a claim and received a lump sum payment in PPD benefits. *Id.* Several years later, Claimants injury grew worse and he filed a claim for total and permanent disability benefits arising from the same accident that he had received the prior PPD benefits. *Id.* The Minnesota Industrial Commission found claimant to be total and permanently disable and awarded him total and permanent disability benefits associated with the claimant's injury. *Id.* at 488-489. However, the Minnesota Industrial Commission reduced the amount of total and permanent disability benefits by the amount of PPD benefits previously paid for the injury. *Id.* The decision was appealed to the Minnesota Supreme Court and it framed the issue as follows:

Where compensation has been paid for a condition of permanent partial disability and that condition later changes to permanent total disability, should any or all of the amount paid pursuant to a stipulated award for permanent partial disability be credited on the later award for permanent total disability?

*Id.* 489.

In answering the above question, the Minnesota Supreme Court held that an employer is **not** allowed to deduct prior paid PPD benefits from its current obligation to pay total and permanent disability benefits. *Id.* at 494. It reasoned that "the effect" in allowing a reduction in the amount of "compensation payable for the permanent total disability by the full amount

employee received for permanent partial disability is to say that he was not entitled to compensation for the period in which he was permanently partially disabled.” *Id.*

However, the Court in *Durant* did place some limitation on its holding by stating that when permanent and total disability and PPD benefit payments overlap, the employer is entitled to a credit in the amount of PPD benefits paid. *Id.*

In this case, Claimant’s facts are essentially identical to those in *Durant*. Just like the Claimant in *Durant*, Claimant experienced a work related accident and received PPI benefits from Steel West/Surety, which is similar to the PPD benefits in *Durant*. Over the course of the next few years Claimant’s injury became worse and Claimant ended up filing a claim for total and permanent disability benefits, just like the claimant in *Durant*. Thus, under the majority opinion among the states, Claimant is entitled to keep the prior paid PPI benefits, in addition to his permanent and total disability benefits.

#### **IV. CONCLUSION**

The plain reading of the Idaho worker’s compensation laws do not provide for a reduction of permanent and total disability benefits based on prior paid PPI benefits that are calculated under PPD benefit statute. This supports a finding that Claimant should be entitlement to the full amount of permanent and total disability benefits without any reduction. The application of this Court’s well established principle of construing worker’s compensation laws in favor of the claimant only strengthens that conclusion.

However, if the court finds that there is some ambiguity, the Court can ascertain that the intent of the legislature was to not allow any deduction of permanent and total disability benefits by prior paid PPD benefits, or PPI benefits included therein. The law was enacted to provide sure and certain relief and was explicitly changed to prohibit such a deduction in 1971. Furthermore,

the public policy behind disallowing such a deduction lies solely in favor of Claimant because it prevents gaps in his benefits.

For these reasons, Claimant asked the court to find that he is entitled to the full \$99,599.78 in permanent and total disability benefits, subject only to a deduction for the overpayment of \$10,444.75 and without any deduction for the prior paid PPI benefits and the sum of \$11,946.00.

Claimant will respond to ISIF's appeal as the Cross Respondent in a subsequent brief.

DATED this 24 day of September, 2013.

RACINE OLSON NYE BUDGE &  
BAILEY, CHARTERED

By: 

FRED J LEWIS  
Attorney for Appellants

**CERTIFICATE OF SERVICE**

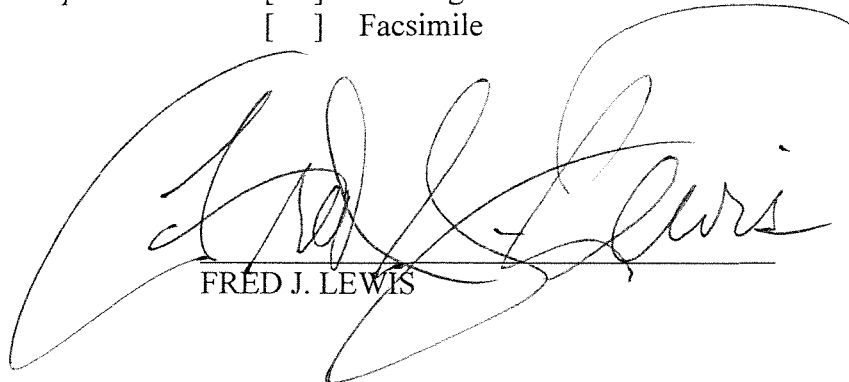
I HEREBY CERTIFY that on the 24 day of September, 2013, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

M. Jay Meyers  
P.O. Box 4747  
Pocatello, Idaho 83205-1391  
*Attorney for Defendants-Respondents-  
Cross Respondents*

☒ U. S. Mail  
Postage Prepaid  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Facsimile

Paul B. Rippel  
P.O. Box 51219  
Idaho Falls, Idaho 83405-1219  
*Attorneys for Defendant-Respondent –  
Cross appellant*

☒ U. S. Mail  
Postage Prepaid  
☐ Hand Delivery  
☐ Overnight Mail  
☐ Facsimile

  
FRED J. LEWIS