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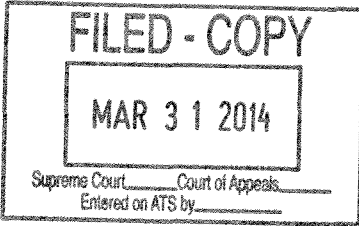
IN THE SUPREME COURT FOR THE STATE OF IDAHO

TRUDY DEON, Claimant/Appellant, vs. H & J INC., d/b/a BEST WESTERN COEUR D'ALENE INN & CONFERENCE CENTER, Employer, and LIBERTY NORTHWEST INSURANCE CORP., Surety, Defendants/Respondents, and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant/Respondent.	)	Supreme Court No. 41593-2013 **RESPONSIVE BRIEF OF DEFENDANT/RESPONDENTS H & J, INC., d/b/a BEST WESTERN COEUR D'ALENE INN & CONFERENCE CENTER and LIBERTY NORTHWEST INSURANCE CORP.**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Supreme Court____Court of Appeals____
Entered on ATS by________

RESPONSIVE BRIEF OF DEFENDANT/RESPONDENTS
H & J, INC., d/b/a BEST WESTERN COEUR D'ALENE INN & CONFERENCE CENTER
and
LIBERTY NORTHWEST INSURANCE CORP.

APPEAL FROM THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO
THOMAS BASKIN, CHAIRMAN

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COPY

TABLE OF CONTENTS

Table Of Authorities. 3

Statement Of The Case:

I. NATURE OF THE CASE 4

II. COURSE OF PROCEEDINGS BELOW 6

III. STATEMENT OF FACTS 9

IV. ISSUES PRESENTED ON APPEAL 19

A. Whether the Industrial Commission properly found that the elements of collateral estoppel were met

B. Whether the Industrial Commission properly raised the affirmative defense of collateral estoppel *sua sponte*

C. Whether Claimant's due process rights were violated

D. Whether the Industrial Commission properly denied Claimant's request to modify the ISIF settlement agreement pursuant to I.C. 72- 719(3)

E. Whether the settlement agreement is void as a matter of law

F. Whether attorney fees should be awarded on appeal

Argument :

I. RELEVANT LAW 19

II. STANDARD OF REVIEW. 22

III. THE COMMISSION'S ORDER ON RECONSIDERATION SHOULD BE AFFIRMED IN ALL RESPECTS 23

IV. DEFENDANTS SHOULD BE AWARDED COSTS ON APPEAL 29

V. APPELLANT IS NOT ENTITLED TO ATTORNEY FEES ON APPEAL . . 29

Conclusion 29

TABLE OF AUTHORITIES

CASE	PAGE CITED
Dumaw v. J. L. Norton Logging 118 Idaho 150, 795 P.2d 312 (1990)	24
Harmon v. Lute's Const. Co., Inc. 112 Idaho 291, 732 P.2d 260 (1986)	21
Jackman v. State Industrial Special Indemnity Fund 129 Idaho 689, 931 P.2d 1207 (1997)	25
Magic Valley Radiology, PA v. Kolouch 123 Idaho 434, 849 P.2d 107 (1993)	21
Stoddard v. Haggadone Corp., 147 Idaho 186, 207 P.3d 162 (2009)	21
The Highlands, Inc. v. Hosac 130 Idaho 67, 69, 936 P.2d 1309, 1311 (1977)	23
Ticor Title Co., v. Stanion 144 Idaho 119, 123, 157 P.3d 613, 617 (2007)	21
Vawter v. United Parcel Service, Inc. --- P.3d --- (2014) 2014 WL 497437, Idaho (2014)	22, 23, 27, 29
Wernecke v. St. Marie's Joint School District No. 401 147 Idaho 277, 207 P.3d 1008 (2009)	28

STATUTES AND OTHER AUTHORITIES	PAGE CITED
Idaho Code Section 72-332	19
Idaho Code Section 72-404	20
Idaho Code Section 72-719	20, 27
Idaho Code Section 72-804	29
Idaho Appellate Rule 40	29

STATEMENT OF THE CASE

I. Nature of the Case

Claimant/Appellant, Trudy Deon ("Claimant"), is represented by Stephen Nemec of Coeur d'Alene, Idaho. Respondents/Defendants, H & J, Inc., d/b/a Best Western Coeur d'Alene Inn & Conference Center ("Defendant/Employer"), and Liberty Northwest Insurance Corporation ("Defendant/Surety"), are represented by Joseph M. Wager of Meridian, Idaho.

This matter was heard on October 16, 2012, before Industrial Commission Referee Alan Reed Taylor ("Referee"). Prior to hearing, Claimant entered into a settlement with Co-Defendant Idaho Industrial Special Indemnity Fund ("ISIF"), represented by Thomas W. Callery of Lewiston, Idaho, wherein Claimant and ISIF stipulated to a Carey apportionment of 60/40, with ISIF accepting 60% responsibility for Claimant's total and permanent disability for purposes of the settlement. *A.R., p. 39-49.*

On May 3, 2013, the Commission issued its Findings of Fact, Conclusions of Law and Order ("the Decision") in this matter. The Decision, as originally drafted and proposed by Referee Taylor was not adopted in its entirety by the Commission, due to the Referee's treatment of the vocational opinions offered by Nancy Collins, Mary Barros-Bailey and Dan Brownell. The Commission revised the proposed opinion to give different treatment to how Claimant's pre-existing permanent physical impairment of 13% of the whole person affected her permanent disability. However, the Commission adopted Referee Taylor's ultimate conclusion that Claimant is totally and permanently disabled as a result of the subject accident alone, and that Defendant/Employer therefore bears full responsibility for Claimant's total and permanent disability. On that same date, the

Commission issued its Notice of Reconsideration ("the Notice"), noting that neither Referee Taylor nor Employer/Surety had prior independent knowledge of the terms and conditions of Claimant's settlement with ISIF. However, because the Commission was required by this Court's recent decision in *Wernecke v. St. Marie's Joint School District No. 401*, 147 Idaho 277, 207 P.3d 1008 (2009), to review and approve Claimant's settlement with ISIF, the Commission itself ***was*** aware of the terms and conditions of the settlement agreement, specifically, the agreement between Claimant and ISIF that 60% of the responsibility for Claimant's total and permanent disability was to be borne by ISIF. The Notice specified that the conclusions reached in connection with Claimant's claim against Employer/Surety implicated the need to consider the impact of the settlement with ISIF on the award made against Employer/Surety. The Commission invited the parties to submit additional briefing on the issue of whether Claimant's settlement with ISIF created some collateral estoppel effect against Claimant in connection with her prosecution of her claim against Employer/Surety. A.R., p. 112-*126*.

Both parties filed opening briefs and reply briefs addressing the issue of the collateral estoppel effect of the lump sum settlement agreement between Claimant and ISIF approved by the Commission and filed November 8, 2012. Additionally, Claimant filed a Motion to Modify ISIF Settlement Agreement Pursuant to I. C. 72-719(3), which was fully briefed by all three parties, and ultimately denied by the Commission. *A.R., p. 127-161.*

The Commission issued its Conclusions and Order on Reconsideration, (hereinafter "Order on Reconsideration"), dated November 4, 2013, stating as follows:

> In accordance with this decision on reconsideration, the Commission enters these revised conclusions of law and Order:

1. Claimant has proven that she suffers whole person impairment of 17% of the whole person referable to her pre-existing conditions, and a 4% whole person impairment referable to her 2008 industrial accident.

2. Claimant has proven that she suffers permanent disability of 85% inclusive of impairment, and has further proven that she is an odd-lot worker, totally and permanently disabled under the *Lethrud* test.

3. Claimant is estopped from asserting that 100% of Claimant's total and permanent disability should be born [sic] by Employer/Surety, and is bound by the prior lump sum settlement in which she stipulated and agreed that the ISIF bears some responsibility for her total and permanent disability on account of pre-existing cervical spine and lower extremity impairments.

4. The lump sum settlement agreement does not collaterally estop Claimant from adjudicating, in this proceeding, how Claimant's total and permanent disability should be apportioned between the ISIF and Employer.

5. Employer's responsibility for Claimant's total and permanent disability is calculated as follows under *Car*ey, Supra:

   4/17x83=19.92+4=23.92

   Employer is responsible for the payment of disability equaling 23.92%, with credit for impairment paid to date. The liability of the ISIF was previously compromised and commuted by the aforementioned November 8, 2012 lump settlement agreement.

6. Pursuant to I.C. 72-718, this decision is final and conclusive as to all matters adjudicated.

A.R., p. 166-185. This appeal followed. *A.R. p. 186-190.*

II. Course of Proceedings Below

Claimant filed Worker's Compensation Complaints on January 18 and March 29, 2011[1], asserting entitlement to medical benefits, temporary partial disability benefits, permanent partial impairment benefits and total permanent disability benefits for injuries

[1] These two complaints were consolidated by Order of the Industrial Commission on July 1, 2011. A.R., p. 24-25.

sustained on October 4 , 2008 and February 9, 2007. *A.R., p. 1-9.* Defendants filed Answers on January 28 and April 12, 2011, admitting that the condition for which benefits were claimed was caused partly by an accident arising out of and in the course of Claimant's employment. Disputed matters included: 1) Whether Claimant's current condition was causally related to the industrial accident or was a pre-existing/subsequent condition ; 2) Whether Claimant was entitled to additional medical benefits; 3) Whether Claimant was entitled to additional TTD/TPD benefits; 4) Whether Claimant had an additional PPI and/or PPD arising out of the accident; and 5) Whether Claimant was totally and permanently disabled. *A.R., p. 10-13.*

Claimant filed a separate complaint against ISIF on June 9, 2011. *A.R., p. 14-20.* ISIF filed its Answer on June 17, 2011, raising the following affirmative defenses: 1) Inability to accurately either admit or deny portions of the Complaint due to limited medical record availability; 2) Claimant was not totally and permanently disabled; 3) Claimant did not suffer from a known manifest, pre-existing, permanent physical impairment within the meaning of I.C. 72-332(2); 4) Any permanent physical impairment suffered by Claimant was not a hindrance or obstacle to Claimant's employment or re-employment; 4) If Claimant was totally disabled it was not due to the aggravation and acceleration of a pre-existing condition nor due to the combined effects of pre and post injury conditions; 5) Claimant was capable of retraining for employment suitable to Claimant's alleged limitations but either failed to pursue suitable employment or to cooperate in retraining for such employment. *A.R., p. 21-23.*

On or about October 2, 2012, Claimant reached a tentative settlement with ISIF at mediation. Claimant's claim against Employer/Surety went to hearing as scheduled on

October 16, 2012. As of the date of hearing, the proposed lump sum settlement between Claimant and ISIF had not been executed by the parties. That settlement was eventually executed and submitted to the Commission for review and approval. The Commission approved the lump sum agreement between Claimant and ISIF on or about November 8, 2012. *A.R., p. 167.*

Referee Alan Taylor conducted a hearing October 16, 2012, in Coeur d'Alene, Idaho, on the following issues[2]:

A. The extent of Claimant's permanent partial impairment.

B. The extent of Claimant's permanent disability, including whether Claimant is permanently and totally disabled pursuant to the odd-lot doctrine or otherwise.

C. Whether apportionment for a pre-existing or subsequent condition pursuant to I.C. 72-406 is appropriate.

D. Apportionment under the *Carey* formula.

E. Claimant's entitlement to additional medical benefits.

A.R., p. 82. Evidence considered included the Industrial Commission legal file, Claimant's Exhibits 1-25 admitted at hearing, Defendants' Exhibits 26-28 admitted at hearing, and the testimony of Claimant, Daniel Brownell and Mary Barros-Bailey, taken at the hearing. *A.R. p. 82-83.*

As previously stated, on May 3, 2013, the Commission issued its Findings of Fact, Conclusions of Law and Order ("the Decision") in this matter. The Decision, as originally drafted and proposed by Referee Taylor was not adopted in its entirety by the Commission. However, the Commission adopted Referee Taylor's ultimate conclusion that

[2] As noted above, Claimant and ISIF reached a settlement prior to hearing. *A.R., p. 39-49.*

Claimant is totally and permanently disabled as a result of the subject accident alone, and that Defendant/Employer therefore bears full responsibility for Claimant's total and permanent disability. *A.R., p. 110.*

III. Statement of Facts

A. Claimant's industrial accident and subsequent medical treatment

Claimant, who was 57 years old at the time of hearing, had worked as a maintenance technician for her time-of-injury employer since 2003. *Exh. 28, p. 6; Tr. p. 27, lines 19-21, p. 28, lines 6-7.* Claimant was injured at work on October 4, 2008, while attempting to open a clogged drain using a tool known as an "electric snake." Claimant testified that the tool caught her glove and began to wrap around her hand. Claimant yelled for help, and was assisted by a co-worker who interrupted the power by unplugging the cord from the wall outlet. The co-worker cut away Claimant's glove and disengaged the tool from Claimant's right hand/wrist. *Tr. p. 30, lines 21-25, p. 31, lines 1-19.* Claimant was transported to Kootenai Medical Center where she was treated and released. *Tr. p. 31, lines 17-22; Exh. 21, p. 278-279.* Claimant subsequently treated with Dr. Michael Ludwig, M.D., on four occasions from October 6 through November 6, 2008. *Tr. p. 32, lines 1-9; see generally Exh. 21, p. 281-295.* Dr. Ludwig recommended referral to Dr. Patrick Mullen, MD, for hand consultation. Claimant was evaluated by Dr. Mullen on November 13, 2008. Due to Claimant's continued complaints of right wrist pain, Dr. Mullen requested an MR arthrogram that was performed on December 4, 2008. The arthrogram results showed no evidence of abnormality in Claimant's right wrist. *Exh. 13, p. 152-153.* Claimant presented to Dr. Mullen for further follow up on December 10, 2008, January 5, 2009, and February 2,

2009, with continued pain complaints. Dr. Mullen continued to recommend light duty and hand therapy. When Claimant had not improved much by February 2, 2009, Dr. Mullen requested Claimant's referral to an orthopedic specialist for a second opinion. *Exh. 17, p. 204.*

Claimant underwent a second opinion evaluation by hand surgeon, Dr. Anthony Sestero on March 19, 2009. Based upon a physical examination as well as a review of all diagnostic studies, Dr. Sestero found no structural abnormality, inflammatory abnormality, tumor, or evidence of traumatic injury. *Exh. 16, p. 196.* Dr. Sestero opined that the prolonged splint use for immobilization combined with prolonged protection, was causing stiffness, which in turn, caused Claimant's secondary pain and discomfort. He recommended that Claimant discontinue splint usage, work aggressively with therapy to relieve the stiffness, try to return to all normal activities as much as possible, and offered a positive prognosis of Claimant's likely return to her previous level of function and employment. *Exh. 16, p. 195-196.*

Claimant thereafter returned to Dr. Mullen on March 26, 2009, reporting that Dr. Sestero could not find anything specifically wrong with her wrist. *Exh. 17, p. 207.* Dr. Mullen noted Claimant complained of continued pain in the small digit, generalized pain in the wrist, as well as intermittent numbness in her ring and small fingers, most notably at night, and also observed that Claimant was now wearing a combination of two splints, the first being a Neoprene hand splint, along with a second thermoplastic splint across the wrist. Physical examination revealed no hyperemia or abnormal hair growth. Claimant's fingers were equally cool on both sides. Claimant was , "able to make a remarkably tight composite fist…I unfortunately am unable to find anything anatomically

that I am able to correct with anything other than hand therapy. She may benefit from chronic pain management. She may benefit from cognitive behavioral therapy...I think she should have an IME..." *Exh. 17, p. 207.* Dr. Mullen re-prescribed hand therapy, but noted that he would not schedule any further follow up appointments for Claimant. *Id.*

Thereafter, Claimant was scheduled for an IME with orthopedic surgeon, Dr. Stewart Kerr, MD. *Exh. 18, p. 213-223.* Dr. Kerr's IME report, dated April 17, 2009, included recommendations for an additional four-to-six weeks of occupational therapy in combination with daily use of an anti-inflammatory medication for eight weeks. Dr. Kerr opined that while engaging in the additional eight weeks of medication therapy and four-to-six weeks of occupational therapy, Claimant was capable of gainful employment on a reasonably consistent basis and could engage in repetitive grasping with the right upper extremity up to four hours per day. Otherwise, no additional temporary work restrictions were recommended. *Exh. 18, p. 220).*

Claimant returned to Dr. Mullen on May 11, 2009, for follow up after her IME with Dr. Kerr. Claimant reported her pain symptoms were the same. Dr. Mullen again noted no obvious swelling to the right hand or wrist, no cellulitis and no abnormal hair growth. Concurrence with Dr. Kerr's report was noted, and Claimant was provided with a work release as well as prescriptions for Meloxicam and additional hand therapy. Dr. Mullen indicated Claimant should follow up in six weeks, stating, "If she is still continuing to have a lot of pain she will probably require another opinion on treatment or perhaps referral to chronic pain therapy. *Exh. 17, p. 207, p. 209.*

Upon Claimant's return to Dr. Mullen for follow up on June 28, 2009, she reported being discharged from hand therapy, and no improvement in her pain in her

hand or her ring finger. She stated she was working three days a week, four hours at a time, and by the end of the day her hand was very painful. Improvement was reported in her forearm and wrist, with symptoms now primarily located in the ring finger and into her hand. Physical examination showed no swelling, ability to range the ring finger with no triggering and passively extend the ring finger at the PIP joint to nearly zero degrees. No implications for surgical intervention were identified. Dr. Mullen prescribed Trazadone at a very low dosage, discontinued Meloxicam and substituted ibuprofen due to Claimant's complaints of migraine headaches, continued the same work restrictions, and scheduled follow up in one month. *Exh. 17, p. 208*. At follow up on July 30, 2009, Claimant reported no change in pain and stiffness, although she reported a noticeable improvement in mood since starting the daily Trazadone. At that point, Dr. Mullen essentially released Claimant from his care with no further treatment recommendations, noting Claimant was scheduled to see Dr. Spencer Greendyke the following day. *Exh. 17, p. 212*.

On July 31, 2009, Claimant was evaluated by Dr. Greendyke, who performed a physical examination, noting no swelling, ecchymosis, deformity, tenderness, crepitus, effusion, masses, or defects in Claimant's hand. Her range of motion, strength testing and sensations were normal and Tinel's sign was negative. Dr. Greendyke's impression was failure of conservative management of Claimant's industrially related right wrist/hand injury, with the addition of a differential diagnosis of CRPS I. He noted his intention to "change everything." Motrin was discontinued, Celebrex and Elavil were added, and occupational therapy with "Rolane" was ordered. Claimant was released to light duty with instructions to "avoid repetitive use of right hand." If there was no

improvement at the two week follow up and EMG/NCS would be ordered. *Exh. 15, p. 173-176.*

Chart notes documenting Claimant's August 12, 2009 follow up with Dr. Greendyke, included Claimant's continued subjective complaints of right hand pain and numbness, as well as her report that she stopped taking Celebrex because she felt it gave her heartburn. Dr. Greendyke increased the Elavil to 50mg/night, requested an EMG/NCS, continued light duty restrictions of lifting up to three pounds and avoiding repetitive bending of the wrist. *Exh. 15, p. 177-180.*

Dr. J. Craig Stevens performed an EMG/NCS on August 19, 2009. The results of the testing revealed mild ulnar neuropathy at Claimant's right wrist, likely caused by a single event injury, rather than a continuing compressive lesion. Thus, Dr. Stevens opined that without the identification of a correctable lesion, surgical intervention would be inappropriate. *Exh. 14, p. 160-164.*

After follow up on August 26, 2009, Dr. Greendyke released Claimant to light duty work with one restriction, increasing her permissible lifting weight from three pounds to ten pounds. Occupational therapy and the use of a TENS unit were noted to be causing an improvement in Claimant's condition. On September 30, 2009, Dr. Greendyke increased Claimant's permissible lifting to 20 pounds, and on October 28, 2009, determined Claimant was at maximum medical improvement, and recommended an IME for impairment rating. *Exh. 15, p. 181-190.*

B. Independent Medical Evaluation by Dr. J. Craig Stevens, MD

The Surety scheduled an IME with Dr. J. Craig Stevens, Certified Independent Medical Examiner, who evaluated Claimant on November 18, 2009. *See generally Exh.*

14, p. 155-170. Dr. Stevens conducted a review of pertinent medical records in Claimant's presence to allow her an opportunity to comment, a personal interview with Claimant, and a physical examination of Claimant's injury. Based upon the information thus obtained, Dr. Stevens issued a final written report containing his findings, conclusions, permanent partial impairment rating, and recommendations for work restrictions.

Dr. Stevens diagnosed Claimant's work related injury as a "torque compression strain of the right wrist with pronation torque applied as well as compressive forces causing ligamentous injuries to the collateral ligaments of the 4th and to a lesser extent the 5th digits, specifically at the MP joints. No tear sufficient to indicate surgical necessity was ever present, through that early timeframe, per evaluations by both Dr. Mullen and Dr. Sestero. Later EMG/NCS testing identified an isolated ulnar nerve injury at the wrist involving primarily the dorsal cutaneous branch, causing a very discrete pattern of sensory loss, most likely caused by a single event injury rather than a continuing compressive lesion, thus without indications for surgical repair. *Exh. 14, p. 164.* A year after Claimant's injury, during which she received a very prolonged course of treatment including extensive physical therapy, Claimant exhibited no deficit of strength, range of motion or other parameter to indicate the necessity of continued physical therapy. Claimant's medications consisted simply of over the counter preparations. Accordingly, Dr. Stevens found no indications for further interventions in an attempt to render further improvement, as further improvement would be quite unlikely. Thus, Claimant was deemed to be at maximum medical improvement. *Exh. 14, p. 164.*

Using the *AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition,* Dr. Stevens first noted that use of the range of motion method of rating would not be appropriate as Claimant had no range of motion deficits. Therefore, Dr. Stevens based Claimant's rating on the collateral ligament injuries and her sensory alteration within the ulnar distribution, specifically finding that the 5th digit injury had healed, and would not be rated. Claimant's ultimate two percent upper extremity impairment of the 4th digit was then determined by considering: 1) "residual pain and/or functional loss with normal motion; 2) Claimant's subjective self-rating of her functional capabilities; 3) her entirely normal objective physical examination; 4) existence of ulnar entrapment at the wrist based on EMG; and 5) mild sensory deficit. Dr. Stevens released Claimant to full duty work with no restrictions, based on objective parameters. *Exh. 14, p. 164-166.*

C. Independent Medical Evaluation by Dr. Fred McNulty, MD

Claimant retained Dr. Fred McNulty, M.D., to perform an independent medical evaluation nearly four years after her date of injury. Dr. McNulty issued a final written report containing a review of Claimant's medical records, his findings related to a physical examination of Claimant performed on September 13, 2012, and his analysis of Claimant's degree of physical impairment with suggested permanent work restrictions.

Ultimately, Dr. McNulty opined that, as a result of her industrial injury on October 4, 2008, Claimant sustained "chronic right wrist, ring, and little finger sprains as well as injury to the ulnar sensory nerve at the wrist." Claimant was deemed MMI as to that injury and Dr. McNulty provided a permanent partial impairment rating of one percent for the pinkie finger, one percent for the ring finger, and two percent for a moderate sensory deficit of the ulnar nerve below the forearm, that, when combined, result in a four

percent whole person impairment rating attributed to the October 4, 2008, injury. *Exh. 11, p. 142.*

Dr. McNulty further opined that his examination of Claimant was consistent with the findings noted in the September 4, 2012 supplemental report by Hand Therapy & Healing Center of Coeur d'Alene. He agreed that Claimant was incapable of returning to her previous employment as a maintenance worker due to her decreased right hand function, stating that Claimant was best-suited to sedentary work that did not involve repetitive lifting and grabbing with her right hand. *Id.*

D. Functional Capacity Evaluation and Supplemental Report

At the request of Claimant' legal counsel, Claimant was evaluated approximately three years post-injury at Hand Therapy & Healing Center of Coeur d'Alene. A report of Claimant's evaluation performed on September 16, 2011, was summarized as follows:

> "If she were to return to work she would need to have primarily left-handed work with a weight load on the right of less than 5 pounds lifting, up to 20 pounds with both hands, minimum repetition and self-paced."

Exh. 12, p. 145-147. Ms. Taft wrote a letter, dated September 4, 2012, stating that she was asked to review Claimant's case and the evaluation performed one year earlier. Claimant was not seen again by Ms. Taft for this review. Ms. Taft simply restated her previous conclusions, then noted, "Ms. Deon's skills are not consistent with return to her previous job or a cashiering position which would require sustained repetitive movement and lifting. *Exh. 12, p. 144.*

E. Disability evaluation by Dr. Mary Barros-Bailey, PhD

Dr. Mary Barros-Bailey, Ph.D., was retained by Defendants to perform a disability

evaluation of Claimant. Dr. Barros-Bailey submitted her initial disability report on October 31, 2011, as well as a supplemental report dated July 31, 2012. *See generally Exh. 8, p. 66-83*. Dr. Barros-Bailey appeared at hearing to testify as an expert witness on behalf of the Defendants. *See generally Tr. p. 122-158.* After reviewing Claimant's medical and employment records, Claimant was personally interviewed by Dr. Barros-Bailey on September 9, 2011. Claimant was noted to have a high school education as well as college skill-specific training in drafting and HVAC. Claimant has a diverse work history that includes past employment as a design drafter, job coach, rehabilitation technician, dishwasher, cook, janitor, furniture refinisher, emergency dispatcher, ambulance attendant, and seasonal forestry laborer. *Exh. 8, p. 82.* Dr. Barros-Bailey described the transferrable skills Claimant had as a result of her diverse work experience. Exh. 8, p. 78-82

Two opinions exist regarding Claimant's permanent functional abilities. The first, provided by Dr. Stevens on November 18, 2009, fully released Claimant to work without restriction. Using Dr. Stevens' opinion, Dr. Barros-Bailey found Claimant would have no PPD in excess of impairment. *Tr. p. 158, lines10-19*; *Exh. 8, p. 83*. The second opinion is the functional capacity evaluation performed three years after Claimant's injury. Therapist, Virginia Taft, estimated that Claimant should lift no more than five pounds with her right hand, and up to twenty pounds using both hands, with minimum repetition, and possible accommodations for visual deficits. Based upon Ms. Taft's set of restrictions, Dr. Barros-Bailey estimated that Claimant would have a 45 percent disability inclusive of impairment, without apportionment. *Tr. p. 134, lines1-25, p. 13, lines1-13, p. 157 lines 11-25; Exh. 8, p. 83.*

Dr. Barros-Bailey was subsequently asked to review the May 28, 2012, report issued by Mr. Dan Brownell. She then issued a supplemental report dated July 31, 2012, containing a discussion of Mr. Brownell's report.[3]

F. Disability evaluation by Dr. Nancy Collins, PhD

Defendant Idaho Industrial Special Indemnity Fund retained Dr. Nancy Collins, Ph.D., to perform a disability assessment prior to settling out of the current case. *See generally, Exh. 7, p. 51-65.* In performing the disability evaluation, Dr. Collins, like Dr. Barros-Bailey, used the same professional standards and methods accepted by professionals in the field of vocational rehabilitation and vocational consulting practices. *Ex. 7, p. 51; Exh.8, p. 66.* Dr. Collins provided two different PPD scenarios, the first based on the medical opinion of Dr. Stevens, and the second based on the opinions of Dr. Dickey, Dr. Greendyke, and the Hand Function Assessment. Dr. Collins found that when using Dr. Steven's report, wherein Claimant had no permanent restrictions based on objective findings, Claimant had no disability in excess of impairment. If Claimant's disability was calculated using the restrictions that limit Claimant to some light and sedentary jobs that do not require repetitive use of her right hand, Claimant would experience a 90 percent loss of access to her job market and a 12 percent wage loss. After considering Claimant's age, Dr. Collins determined Claimant's permanent partial disability under the listed restrictions to be 56%.

G. Disability evaluation by Dan Brownell

[3] Dr. Barros-Bailey noted that Mr. Brownell did not indicate what functional assumptions, of the two contained in the record, he considered in arriving at his estimate of 85 percent disability, inclusive of impairment. She went on to explain that not only is it outside the scope of vocational rehabilitation practitioners to choose one set of restrictions over another, but it is part of the ethical standards that underlie the profession for those who are certified to practice by the Commission on Rehabilitation Counselor Certification and it is the de facto standard of care in rehabilitation counseling even for those who are not certified. Tr. *p.130, lines1-14; Exh. 8, p. 66.*

Claimant retained Dan Brownell to perform a disability evaluation on her behalf. *Exh. 6, p. 48-50.* Mr. Brownell submitted his initial report on May 28, 2012, and also appeared at hearing to testify on Claimant's behalf. *Exh, 6, p 48; Tr. p. 72-121.* Mr. Brownell's written report found Claimant 85 percent disabled. *Exh. 6. p. 50.*

IV. Issues on Appeal

A. Whether the Industrial Commission properly found that the elements of collateral estoppel were met.

B. Whether the Industrial Commission properly raised the affirmative defense of collateral estoppel *sua sponte*.

C. Whether Claimant's due process rights were violated.

D. Whether the Industrial Commission properly declined Claimant's request to modify the ISIF settlement agreement pursuant to I.C. 72-719(3).

E. Whether the ISIF settlement agreement is void as a matter of law.

F. Whether attorney fees should be awarded on appeal.

<u>ARGUMENT</u>

I. RELEVANT LAW

A. I. C. Section 72-332 ISIF liability

I.C. Section 72-332 states in relevant part:

> (1) If an employee who has a permanent physical impairment from any cause or origin, incurs a subsequent disability by an injury or occupational disease 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 or occupational disease or by reason of the aggravation and acceleration of the pre-existing impairment suffers total and permanent disability, the employer and surety shall be liable for compensation benefits only for the disability caused by the injury or occupational disease, including scheduled and unscheduled permanent disabilities, and *the injured employee shall be compensated for the*

remainder of his income benefits out of the industrial special indemnity account.

I.C. Section 72-332. *(Emphasis added).*

B. I. C. Section 72-404 Lump sum payments

Idaho Code Section 72-404 states:

72-404. Lump sum payments. Whenever the commission determines that it is for the best interest of all parties, the liability of the employer for compensation may, on application to the commission by any party interested, be discharged in whole or in part by the payment of one or more lump sums to be determined, with the approval of the commission.

I. C. Section 72-404.

C. I. C. Section 72-719 Modification of awards and agreements

Idaho Code Section 72-719 states:

72-719. Modification of awards and agreements—Grounds—Time within which made.

(1) On application made by a party in interest filed with the commission at any time within five (5) years of the date of the accident causing the injury or date of first manifestation of an occupational disease, on the ground of a change in conditions, the commission may, but not oftener than once in six (6) months, review any order, agreement or award upon any of the following grounds:

(a) Change in the nature or extent of the employee's injury or disablement; or

(b) Fraud.

(2) The commission on such review may make an award ending, diminishing or increasing the compensation previously agreed upon or awarded, subject to the maximum and minimum provided in this law, and shall make its findings of fact, rulings of law and order or award, file the same in the office of the commission, and immediately send a copy thereof to the parties.

(3) The commission, on its own motion at any time within five (5) years of the date of the accident causing the injury or date of first manifestation of an occupational disease, may review a case in order to correct a manifest injustice.

(4) **This section shall not apply to a commutation of payments under section 72-404.**.

I. C. Section 72-404. *(Emphasis added).*

D. An approved LSA is final and is not modifiable absent proof of fraud

The Idaho Supreme Court has recognized that an approved LSA is final and may not be modified absent proof of fraud:

> However, once a lump sum compensation agreement is approved by the commission, that agreement becomes an award and is final and may not be reopened or set aside absent allegations and proof of fraud. I.C. Sec. 72-718; *Fountain v. T.Y. & Jim Hom*, 92 Idaho 928, 453 P.2d 577 (1969); *Vogt v. Western General Dairies*, 110 Idaho 782, 718 P.2d 1220 (1986). Since, in the present case the compensation award was made by means of a lump sum agreement, the commission correctly held that Harmon's allegations of manifest injustice were insufficient, even if proven, to permit the commission to set aside the agreement. Thus, we find claimant's arguments on appeal that the commission erred in so holding to be without merit.

Harmon v. Lute's Const. Co., Inc., 112 Idaho 291, 732 P.2d 260 (1986).

E. Estoppel

1. Collateral estoppel

The doctrine of collateral estoppel, or issue preclusion, protects litigants from having to re-litigate an identical issue with the same party or its privy in a subsequent action. *Ticor Title Co., v. Stanion*, 144 Idaho 119, 123, 157 P.3d 613, 617, (2007). Five factors are required for issue preclusion to bar the re-litigation of an issue determined in a prior proceeding: (1) the party against whom the earlier decision was asserted had a full and fair opportunity to litigate the issue decided in the earlier case; (2) the issue decided in the prior litigation was identical to the issue presented in the present action; (3) the issue sought to be precluded was actually decided in the prior litigation; (4) there was a final judgment on the merits in the prior litigation; and (5) the party against whom the issue is asserted was a party or in privity with a party to the litigation. See *Magic Valley Radiology, PA v. Kolouch,* 123 Idaho 434, 849 P.2d 107 (1993); *Stoddard v.*

Haggadone Corp., 147 Idaho 186, 207 P.3d 162 (2009). Whether collateral estoppel bars the re-litigation of issues adjudicated in prior litigation between the same parties is a matter of law upon which the Court exercises free review.

2. Quasi-estoppel

The doctrine of quasi-estoppel "prevents a party from asserting a right, to the detriment of another party, which is inconsistent with a position previously taken." *Vawter v. United Parcel Service, Inc.*, --- P.3d --- (2014) 2014 WL 497437, Idaho (2014) (citing *Atwood v. Smith*, 143 Idaho 110, 114, 138 P.3d 310, 314 (2006)). Quasi-estoppel stands for the proposition that " 'one cannot blow both hot and cold.' " *Id.*, (quoting *KTVB, Inc. v. Boise City*, 94 Idaho 279, 281, 486 P.2d 992, 994 (1971).

> This doctrine applies when: (1) the offending party took a different position than his or her original position, and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in. *C & G, Inc.*, 139 Idaho at 145, 75 P.3d at 199. Estoppel theories generally present mixed questions of law and fact. *The Highlands, Inc., v. Hosac,* 130 Idaho 67, 69, 936 P.2d 1309, 1311 (1997). Because mixed questions of law and fact are primarily questions of law, this Court exercises free review. *Id.*

Id., (quoting *Allen v. Reynolds*, 145 Idaho 807, 812, 186 P.3d 663, 668 (2008)).

II. STANDARD OF REVIEW

When the Supreme Court reviews a decision from the Industrial Commission, it exercises free review over questions of law but reviews questions of fact only to determine whether substantial and competent evidence supports the Commission's finding. *Vawter v. United Parcel Service, Inc.*, ---P.3d---, 2014 WL 497437, Idaho (2014) (citing *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Substantial and competent

evidence is "relevant evidence which a reasonable mind might accept to support a conclusion." *Id.*, (citing *Boise Orthopedic Clinic v. Idaho State Ins. Fund,* 128 Idaho 161, 164, 191 P.2d 754, 757 (1996). The Commission's conclusions on the credibility and weight of evidence will not be disturbed unless the conclusions are clearly erroneous. *Id.*, (citing *Zapata v. J.R. Simplot Co.*, 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999). Estoppel theories generally present mixed questions of law and fact. *The Highlands, Inc. v. Hosac,* 130 Idaho 67, 69, 936 P.2d 1309, 1311 (1977) (citing *Independent Gas & Oil Company v. T.B. Smith Co.*, 51 Idaho 710, 724-25, 10 P.2d 317, 322 (1932). Because mixed questions of law and fact are primarily questions of law, this Court exercises free review. *Id., (citing Doolittle v. Meridian Joint Sch. Dist.,* 128 Idaho 805, 811, 919 P.2d 334, 340 (1996).

III. THE COMMISSION'S NOVEMBER 4, 2013, ORDER ON RECONSIDERATION SHOULD BE AFFIRMED IN ALL RESPECTS

A. As a party to an approved LSA apportioning some portion of liability for Claimant's total and permanent disability to ISIF, Claimant is estopped from now arguing that Employer/Surety is liable for 100% of her total and permanent disability

Claimant's reliance on this Court's decision in *Vawter v. United Parcel Service, Inc.,* --- P.3d --- (2014) 2014 WL 497437, Idaho (2014) to support her contention that the Commission improperly found that the elements of collateral estoppel were met in the case at bar, is misplaced. *Claimant's Opening Brief on Appeal, p. 14. Vawter* held that the Commission's decision to apply collateral estoppel was in error because *Vawter* involved multiple hearings but ***one cause of action***. Collateral estoppel "precludes re-litigation of the same issue in a ***separate cause of action***. *Vawter v. United Parcel Service, Inc.,* --- P.3d --- (2014) 2014 WL 497437, Idaho (2014) (citing *Rodriguez v.*

Dep't of Correction, 136 Idaho 90, 92, 29 P.3d 401, 403 (2001) (Emphasis added)). Specifically, *Vawter* involves the same set of operative facts related to the claimant's employment with UPS over a period of more than 25 years, including a 1990 low back injury and a 2009 herniated disk, both of which were industrial injuries incurred while employed by UPS. Indeed, it was the employer, UPS, who filed the complaint against ISIF to establish ISIF's liability for a portion of the claimant's benefits. Therefore, the Court determined that these were not separate factual situations, but that all the hearings and orders addressed only one cause of action.

In the current case, although ISIF would have participated in the hearing had it not reached a settlement with Claimant, her claim against ISIF was the subject of a separate complaint, which was consolidated with Claimant's complaints against Employer/Surety for the purposes of hearing only. The Commission properly found that Claimant was barred from re-litigating the issue of whether ISIF liability had been established by the doctrine of collateral estoppel. First, Claimant had a full and fair opportunity to litigate this issue in her prior case against ISIF. Before ISIF could be found liable in that case, Claimant bore the burden of proving that she was totally and permanently disabled, and that all elements of ISIF liability were met. *Dumaw v. J. L. Norton Logging*, 118 Idaho 150, 795 P.2d 312 (1990) (identifying four requirements a claimant must meet to establish ISIF liability under Idaho Code Section 72-332, including: (1) whether there was indeed 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). Claimant could not prevail against ISIF unless she met her burden of proof under *Dumaw*.

On the question of whether Claimant is barred from re-litigating the issue of whether ISIF liability has been established, all elements required to apply the doctrine of collateral estoppel exist: (1) Claimant's separate complaint against ISIF afforded Claimant a full and fair opportunity to litigate these issues; (2) the issue decided in Claimant's previous case against ISIF is identical to the issue before the Commission in Claimant's claim against Employer/Surety, (i.e., whether Claimant is totally and permanently disabled, and if so, whether apportionment under the *Carey* formula is appropriate); (3) *Carey* apportionment and ISIF liability was argued by the parties and addressed by the Commission; (4) a lump sum settlement approved by the Commission under I. C. Section 72-404 constitutes a final decision of the Commission and is therefore a final judgment on the merits, *Jackman v. State Industrial Special Indemnity Fund*, 129 Idaho 689, 931 P.2d 1207 (1997) (citing *Davidson v. H.H. Keim Company*, 110 Idaho 758, 718 P.2d 1196 (1986)); and (5) the party against whom collateral estoppel is asserted, (Claimant), was a party to the previous action in which she alleged ISIF bore ***some portion*** of the responsibility for her total and permanent disability. Claimant is also a party to the action against Employer/Surety and in that case argues that 100% of the liability for her total and permanent disability should be born by Employer. Based on the foregoing, it is perfectly clear that the Commission properly found that the doctrine of collateral estoppel prevents Claimant from re-litigating the issue of whether ISIF bears responsibility for ***some portion*** of her total and permanent disability. Further, the Commission properly determined that: (1) Claimant is estopped

from now asserting that Employer/Surety is entirely responsible for her total and permanent disability; and (2) Claimant is bound by the Commission's order approving the lump sum settlement, which established that ***some portion*** of Claimant's total and permanent disability must be borne by ISIF.

B. The Commission did not violate Claimant's due process rights by inviting the parties to submit briefs on the issue of collateral estoppel

Claimant argues that the Commission violated Claimant's due process rights by providing late notice of the issue of collateral estoppel. Claimant contends that Employer/Surety failed to raise the affirmative defense of collateral estoppel, and in fact, specifically waived it by failing to add it as an issue for the October 16, 2012, hearing. Thus, Claimant claims that she was prejudiced by this late notice and was unable to prepare her prosecution of this claim to properly argue that she should not be estopped from asserting a position at hearing that was inconsistent with the position she took in the agreement with ISIF, (i.e., at hearing and in her Opening Brief, Claimant argued she was permanently and totally disabled solely from the October 4, 2008 industrial accident, therefore Carey apportionment (a noticed issue for hearing) was, as stated by Claimant, "not deemed relevant," yet Claimant's agreement with ISIF specifically provides, "... the Fund and the Claimant stipulate and agree that Claimant is totally and permanently disabled upon the combined effects of the Claimant's pre-existing cervical spine injury and left lower extremity injury, combining with the injury to her right hand and wrist.

While the Commission is not bound by the Idaho Rules of Civil Procedure, it does have its own rules of procedure. Under these rules, the Commission is required to

give parties notice of the issues to be decided but does not need to state each individual issue. *Vawter v. United Parcel Service, Inc.*, --- P.3d --- (2014) 2014 WL 497437, Idaho (2014), (citing *Gomez v. Dura Mark, Inc.*, 152 Idaho 597, 601, 272 P.3d 569, 575 (2012)). The issues of apportionment and Carey apportionment were noticed for hearing. Indeed, Claimant argued both of the issues at hearing and in her subsequent briefing below. Claimant's inconsistent positions are inherent in those arguments and they constitute sufficient notice of the issue of estoppel. Id. Because of her position taken in the ISIF agreement, Claimant has received a $70,000.00 award. Now Claimant takes the opposite position to again receive an even larger monetary award. If successful, Claimant's current position would give Claimant a windfall at Employer/Surety's expense. Thus, under the doctrine of quasi-estoppel Claimant may not assert that her total and permanent disability stems solely from the October 4, 2008, industrial accident.

C. The Commission properly denied Claimant's motion to modify the LSA

Claimant argues the Commission improperly denied Claimant's motion to modify the LSA in order to correct a manifest injustice under I. C. Section 72-719 (3). *Claimant's Opening Brief, p. 22.* Unfortunately for Claimant, the statute she cites in support of this argument also, by its explicit terms, specifically prohibits its application to a commutation of payments under I.C. 72-404 (authorizing lump sum payments and discharge of liability pursuant thereto). I.C. Section 72-719(4) provides:

> **(4) <u>This section shall not apply to a commutation of payments under section 72-404.</u>.**

I. C. Section 72-719(4) (*Emphasis added).*

D. The LSA satisfies the requirements of this Court's ruling in *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 207 P.3d 1008 (2009)

ISIF's liability may only be established when the Industrial Commission finds that the requirements of I.C. § 72-332 have been satisfied. That requires findings by the Commission of four elements: (1) a pre-existing impairment; (2) that the impairment was "manifest"; (3) that the alleged impairment was a "subjective hindrance"; and (4) that the alleged impairment combines in causing total disability. *Wernecke* provides that the requisite findings may be made by the Commission upon a hearing on the merits, or, as in the present case, upon a stipulation of the parties considered and approved by the Commission. See *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 207 P.3d 1008 (2009).

The LSA sets forth the following with regard to Claimant's pre-existing impairment:

> ". . . Claimant suffered from a cervical spine injury and a left lower extremity injury prior to the industrial accident that occurred on October 4, 2008. . . "

and notes a 6% whole person impairment award for the cervical spine injury based upon an independent medical examination, and a 7% whole person impairment award for the left lower extremity injury.[4] *LSA, p. 2.* The LSA continues:

> "The Fund and the Claimant stipulate and agree that Claimant is totally and permanently disabled based upon the combined effects of the Claimant's pre-existing cervical spine injury and left lower extremity injury, combining with the injury to her right hand and wrist . . . based upon the medical records, the Claimant and the Fund stipulate that a 60/40 Carey Formula apportionment with the Fund being responsible for 60% of the Claimant's total and permanent disability is appropriate in this case. This Carey Formula apportionment is based upon the impairment for Claimant's cervical spine injury and left lower extremity, and the significant

[4] It is also noted that other medical providers, including Dr. Sears, indicated Claimant could return to work with no restrictions and had no ratable impairment for her cervical condition.

> impairment to Claimant's right hand and wrist as a result of the October 4, 2008, accident. It further takes into account the conflicting evidence concerning Claimant's cervical impairment and her ability to return to medium level work as an HVAC technician after her cervical injury and lower extremity injury. . .

LSA, p. 3-4. The Commission's consideration and approval of the stipulations of the parties set forth in the LSA and above render it a valid final judgment.

IV. CLAIMANT/APPELLANT IS NOT ENTITLED TO ATTORNEY FEES ON APPEAL UNDER I. C. §72-804

Regardless of the outcome of the issues on appeal, Claimant/Appellant is not entitled to an award of costs and/or attorney fees. Claimant/Appellant is the party who filed this appeal, and it is she who is contesting the Commission's decision in favor of Employer/Surety. It is absurd to imply, as Claimant/Appellant seems to in her Opening Brief, that Respondents had no basis upon which to reply to Claimant's appeal. Respondents clearly have reasonable grounds to ask the Court to affirm the Industrial Commission's ruling. I.C. 72-804 fees are only payable when the Commission, or any Court hearing a workers compensation proceeding, determines that the employer or surety contested the claim for compensation "without reasonable grounds."

V. COSTS ON APPEAL

Pursuant to I.A.R. 40(a), Employer/Surety requests an award of costs on appeal in the event they are found to be the prevailing party before this Court.

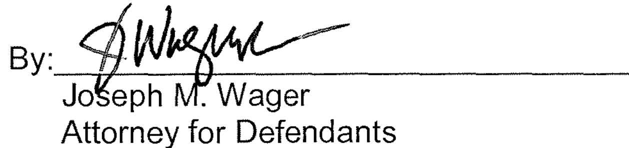
CONCLUSION

As previously set forth, Defendants respectfully pray this Court apply the standard of review announced in *Vawter v. United Parcel Service, Inc.,* --- P.3d --- (2014) 2014 WL 497437, Idaho (2014) and affirm the Commission's November 4, 2013 Order on

Reconsideration in all respects.. Further, Defendants request this Court award costs on appeal to Defendants/Respondents, pursuant to I. A. R. 40.

Respectfully submitted this 28th day of March, 2014.

LAW OFFICES OF KENT W. DAY



By: ______________________
Joseph M. Wager
Attorney for Defendants

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March, 2014, I caused a copy of the foregoing **RESPONSIVE BRIEF OF DEFENDANT/RESPONDENTS** to be served by first class mail, postage prepaid, upon the following:

Stephen Nemec James Vernon & Weeks 1626 Lincoln Way Coeur d'Alene, ID 83814	Thomas Callery Jones Bower & Callery PO Box 854 Lewiston, ID 83501

____
Joseph M. Wager