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Deon v. H&J Respondent's Brief 2 Dckt. 41593

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IN THE SUPREME COURT OF THE STATE OF IDAHO

TRUDY DEON,)
) Supreme Court Docket No.: 41593
 Claimant-Appellant,)
) Case No.: I. C. 2007-005950
 vs.) I. C. 2008-032836
)
 H&J, INC. d/b/a, BEST WESTERN COEUR)
 D'ALENE INN & CONFERENCE CENTER,)
 Employer, and LIBERTY NORTHWEST)
 INSURANCE CO., Surety)
)
 Defendant-Respondents, and)
)
 STATE OF IDAHO INDUSTRIAL SPECIAL)
 INDEMNITY FUND,)
)
 Defendant-Respondent.)
 _____)

RESPONDENT ISIF'S BRIEF

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

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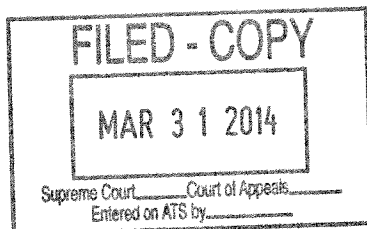


TABLE OF CONTENTS

I. STATEMENT OF THE CASE1

II. STATEMENT OF FACTS AND COURSE OF PROCEEDING2

III. ISSUES PRESENTED ON APPEAL6

IV. ARGUMENT.....6

 1. IDAHO CODE § 72-719 DOES NOT ALLOW FOR A LUMP SUM
 AGREEMENT TO BE MODIFIED BASED ON MANIFEST INJUSTICE6

 2. A MANIFEST INJUSTICE DID NOT OCCUR AND DEON SHOULD
 NOT BE ALLOWED TO MODIFY THE LUMP SUM AGREEMENT8

 3. DEON SHOULD NOT BE ALLOWED TO MODIFY THE
 AGREEMENT AND REAP THE FRUITS OF THE SETTLEMENT11

 4. THE ISIF SETTLEMENT IS NOT VOID12

 5. ATTORNEYS FEES ARE NOT APPROPRIATE13

V. CONCLUSION14

TABLE OF CASES AND AUTHORITIES

CASES

Carey v. Clearwater Road Dept., 107 Idaho 109 (1984)1
Emery v. J.R. Simplot Co., 141 Idaho 407 (2005)12
Harmon v. Lute’s Const. Co.,Inc., 112 Idaho 291 (1986)7, 14
Stevens-McAtee v. Potlatch Corp., 145 Idaho 325 (2008)13
Sines v. Appel, 103 Idaho 9, 13, 644 P.2d 331, 335 (1982).....9
Wernecke v. St. Maries Joint School Dist. No. 401, 147 Idaho 277 (2009)4, 5, 9, 11, 12, 13

STATUTES

Idaho Code § 72-332.....2, 5, 12
Idaho Code § 72-4047, 8
Idaho Code § 72-718.....5
Idaho Code § 72-7196, 7, 14
Idaho Code § 72-719(3)6
Idaho Code § 72-80413

I. STATEMENT OF THE CASE

Trudy Deon (herein after referred to as “Deon”) appeals from the Industrial Commission Order on Reconsideration dated November 4, 2013 modifying previous Finding of Facts, Conclusions of Law and Order entered by the Commission after hearing. Deon also appeals from the order denying her motion for modification of the Lump Sum Agreement she entered with the Industrial Special Indemnity Fund (hereinafter referred to as “ISIF”) prior to hearing.

The Industrial Commission had initially entered Findings of Fact, Conclusions of Law and Order finding that Deon had proven that she was totally and permanently disabled solely as a result of her 2008 industrial accident and assessing 100% responsibility on her employer, H&J, Inc. (R. p. 110). The Commission subsequently modified that result giving collateral estoppel effect to a Lump Sum Agreement between Deon and the ISIF. The Lump Sum Agreement had stipulated that Deon was totally disabled and apportioned Deon’s disability 60% to the ISIF and 40% to H&J, Inc.

Pursuant to the Order on Reconsideration, the Industrial Commission found that H&J, Inc. was responsible for 23.92% of disability (R. p. 182) and the ISIF the remaining 76.08% based on the Carey formula. *Carey v. Clearwater Road Dept.*, 107 Idaho 109 (1984). The Commission ruled that Deon was precluded from asserting that 100% of her total and permanent disability was the responsibility of H&J, Inc. based on the Lump Sum Agreement. (R. p. 183). The Commission however, did not bar litigation over the issue of how the Carey apportionment should be allocated between H&J, Inc. and the ISIF (R. p. 182). As a result, instead of H&J, Inc.

being responsible for 40% of disability benefits, the Commission found H&J, Inc. responsible for 23.92% of Deon's disability.

The ISIF'S brief will be limited to the issues directly related to the Lump Sum Agreement between Deon and the ISIF.

II. STATEMENT OF FACTS AND COURSE OF PROCEEDING

In January 2011, Deon filed a Complaint with the Idaho Industrial Commission alleging she was entitled to indemnity and medical benefits and specifically noted that one of the issues involved was whether Deon was totally and permanently disabled. (R. p. 1). Six months later, in June of 2011, Deon filed a separate Complaint against the ISIF alleging liability pursuant to Idaho Code § 72-332. (R. p. 14). Deon's Complaint against the ISIF included the following allegations concerning her pre-existing physical impairments:

Claimant was attacked by dogs on February 16, 2006 suffering a variety of injuries to both lower extremities; fibromyalgia; arthritis; head injury as a child. See also attached documentation.

Claimant had a pre-existing "permanent physical impairment" that was manifest prior to the current injuries, that constituted a "subjective" hindrance or obstacle to obtaining employment or re-employment, that a work related injury occurred, and by reason of the "combined effects" of both the pre-existing permanent partial impairments and the subsequent back injury that also resulted in permanent impairment, or by reason of the work-related aggravations and acceleration of the pre-existing permanent partial impairments, Claimant now suffers total and permanent disability.

Worker's Compensation Complaint, p. 1 (R. p. 14).

The Industrial Commission scheduled the case for hearing on October 16, 2012. (R. p. 26). Both the ISIF and H&J, Inc. continued as Defendants in the case. Shortly before hearing,

as a result of a joint mediation between all parties requested by Deon and conducted by the Idaho Industrial Commission, the ISIF reached a settlement with Deon. (R. p. 50; Hearing Tr. p. 7). H&J, Inc. and Deon did not settle at mediation and the case against H&J, Inc. proceeded to hearing in front of the referee on October 16, 2012. (R. p. 50). The ISIF did not participate in the hearing based on its settlement with Deon. It was acknowledged at the time of the hearing, that a settlement had been reached between Deon and the ISIF and that the sole issue remaining for hearing was the liability of H&J, Inc. to Deon. (Hearing Tr. pp. 6-7).

At the mediation, Deon settled her claim against the ISIF for a \$70,000 cash lump sum. The settlement was submitted for approval in the form of a Stipulation and Agreement of Lump Sum Discharge and Order of Approval and Discharge (hereinafter referred to as “Lump Sum Agreement”). (R. p. 39). Deon released the ISIF from all past and future liability in exchange for a \$70,000 cash payment. The Lump Sum Agreement was executed by Deon and her attorney on October 19, 2012, and approved by the Idaho Industrial Commission on November 8, 2012. (R. p. 48).

The Lump Sum Agreement included the following language:

WHEREAS, 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.

Lump Sum Agreement, p. 3 (R. p. 41).

The Lump Sum Agreement went on to state:

WHEREAS, 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 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 the 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.

Lump Sum Agreement, p. 4 (R. p. 42).

Deon stipulated to a Carey formula apportionment between herself and the ISIF with 60% of Deon's total and permanent disability being the responsibility of the ISIF. (R. p. 42). The Lump Sum Agreement also recognized that Deon had a 7% whole person impairment secondary to a dog attack in 2006 which resulted in lower extremity injuries and a 6% whole person impairment based upon a prior Lump Sum Agreement for industrial accidents to her cervical spine which occurred in 1988 and 1990. (R. p. 40). The Lump Sum Agreement at issue also noted that other medical providers indicated that Deon had no ratable impairment, nor any restrictions for her 1988 and 1990 cervical condition. (R. p. 40).

There was also conflicting evidence concerning the proper impairment for Deon's right upper extremity injury from the October 2008 industrial accident. (R. p. 41). Dr. McNulty provided a 4% whole person impairment related to Deon's right hand pain and dysfunction while Dr. J. Craig Stevens provided Deon with a 1% whole person impairment.¹ (R. p. 41).

The Lump Sum Agreement in this case contains the requisite elements to invoke ISIF liability pursuant to *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277.

¹ The Lump Sum Agreement omitted referencing a 2% whole person impairment for the ulnar sensory nerve injury by Dr. McNulty. (R. p. 60.)

The four critical elements of ISIF liability under Idaho Code § 72-332 were contained within the Lump Sum Agreement:

(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 v. St. Maries Joint School Dist. No. 401, 147 Idaho at 285.

The Lump Sum Agreement signed by Deon acknowledged that she had a life expectancy of 27 years (R. p. 45) and presumably for Social Security offset purposes, prorated her net benefits on a monthly basis:

9. The parties acknowledge and agree that the \$70,000.00 lump sum to be paid to Claimant under the terms of this agreement constitutes compensation for total and permanent disability that will affect Claimant the rest of her life. Claimant’s remaining life expectancy is 27 years or 324 months according to the 2007 Social Security Actuarial Life Table.

Therefore, even though paid in a lump sum, the Claimant’s net benefits after deduction of attorney fees in the amount of \$17,500.00 and costs in the amount of \$2,762.61 shall be considered to be \$153.51 a month for 324 months beginning December 1, 2012.

Lump Sum Agreement, p. 7 (R. p. 45).

Finally, the Lump Sum Agreement included the following paragraph where the parties waived their right to appeal or to reopen the proceeding and further waived their right to reconsideration pursuant to Idaho Code § 72-718:

12. All parties waive the right of appeal or to re-open these proceedings as a part of the consideration of and for this Agreement. The parties hereby specifically and expressly agree, as a part of the consideration herein, that all

parties waive the right to reconsideration of an award otherwise provided under the Workers' Compensation Laws of Idaho, §72-718, Idaho Code.

Lump Sum Agreement, p. 8 (R. p. 46).

III. ISSUES PRESENTED ON APPEAL

1. Did the Industrial Commission err in refusing to modify the ISIF settlement agreement pursuant to Idaho Code § 72-719(3)?
2. Is the ISIF settlement void as a matter of law?
3. Should attorneys fees be awarded on appeal?

IV. ARGUMENT

1. IDAHO CODE § 72-719 DOES NOT ALLOW FOR A LUMP SUM AGREEMENT TO BE MODIFIED BASED ON MANIFEST INJUSTICE.

Deon requested modification of the Lump Sum Agreement with the ISIF based upon Idaho Code § 72-719 which allows the Commission, within five (5) years of the date of the accident, to review a case in order to correct a manifest injustice. Idaho Code § 72-719 states:

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[, Idaho Code].

Emphasis added.

Idaho Code § 72-404 authorizes lump sum payments and discharge of liability pursuant thereto and states:

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.

Idaho Code § 72-404.

Idaho Code § 72-719 by its explicit terms cannot be used as a basis to modify a Lump Sum Agreement.

The Idaho Supreme Court has recognized that an approved Lump Sum Agreement 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 Geneal 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 Harmons' 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 (1986).

None of the cases cited by Deon in her Appellant's Opening Brief involved lump sum agreements resolved pursuant to Idaho Code § 72-404:

Page v. McCain Foods, Inc., 145 Idaho 302, 179 P.3d 265 (2008); *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995); *Matthews v. Department of Corrections*, 121 Idaho 680, 827 P.2d 693 (1992); *Sines v. Appel*, 103 Idaho 9, 644 P.2d 331 (1982); and *Banzhaf v. Carnation Co.*, 104 Idaho 700, 662 P.2d 1144 (1983).

Appellant's Opening Brief, p. 23.

2. A MANIFEST INJUSTICE DID NOT OCCUR AND DEON SHOULD NOT BE ALLOWED TO MODIFY THE LUMP SUM AGREEMENT.

After the initial complaint against H&J, Inc. was filed, Deon added a claim against the ISIF contending that a prior cervical spine injury and a left lower extremity injury combined with her 2008 right hand and wrist injury rendering her totally and permanently disabled. (R. P. 14). By filing her complaint against the ISIF, Deon alleged she was totally and permanently disabled based on a combination of pre-existing impairments and her 2008 accident.

Deon requested a mediation which was conducted by Industrial Commission Mediator, Dennis Burks. At the mediation Deon and the ISIF agreed to enter into a Lump Sum Settlement for \$70,000.00. (R. P. 39). Deon did not settle with H&J, Inc. and ultimately that claim went to Hearing. (Tr. p. 6). Prior to any decision on the claim against H&J, Inc., the Lump Sum Agreement was signed by all parties and approved by the Idaho Industrial Commission. The Lump Sum Agreement was filed with the Commission on November 8, 2012 and Deon received the \$70,000.00 cash settlement shortly thereafter. (R. p. 39).

The Lump Sum Agreement included specific language required by *Wernecke v. St. Maries Joint School District*, 147 Idaho 277. The Lump Sum Agreement noted that Deon had prior physical impairments, including a 7% whole person impairment for her lower extremity injury and a 6% whole person impairment for her cervical injury.

Further, the Lump Sum Agreement stated that Deon was totally and permanently disabled based upon the combined effect of Deon's pre-existing cervical spine injury and her left lower leg injury combined with her 2008 right hand and wrist injury. The Agreement also expressly stipulated a 60/40 Carey apportionment between the ISIF and H&J. Inc.

The Industrial Commission ultimately found after Hearing that Deon was totally and permanently disabled solely as a result of the last accident involving the employer which directly contradicts the Lump Sum Agreement.

Deon now argues that the Lump Sum Agreement should not have collateral estoppel effect so as to reduce Deon's right to the total disability benefits from H&J, Inc. based on the Industrial Commission's authority to correct a manifest injustice.

"Manifest" has been defined to mean: capable of being easily understood or recognized at once by the mind; not obscure; obvious... "Injustice" has been defined to mean: absence of justice; violation of right or of the rights of another; iniquity, unfairness; an unjust act or deed; wrong.

Sines v. Appel, 103 Idaho 9, 13 (1982).

In the Lump Sum Agreement, Deon agreed to accept a cash settlement in exchange for giving up her right to a monthly annuity and the Agreement was specifically drafted to reflect that desire:

WHEREAS, the parties acknowledge and agree that the \$70,000.00 lump sum to be paid to Claimant under the terms of this agreement constitutes compensation on a claim of total and permanently disability that will affect Claimant for the rest of her life.

WHEREAS, the Claimant has financial needs that currently exist that would be satisfied by a lump sum payment as opposed to statutory monthly payments.

Lump Sum Agreement, p. 4 (R. p. 42).

The decision to accept a cash payment was made by Deon in consultation with her legal counsel.

WHEREAS, the decision to accept a lump sum, as opposed to a monthly annuity, has been made after consulting by Claimant with her legal counsel, including consideration of the Claimant's need for immediate cash and that monthly annuity payments cease upon death without survivor benefits.

Lump Sum Agreement, p. 5 (R. p. 43).

Finally, Deon was well aware that she had a remaining statistical average life expectancy of approximately 27 years.

9. The parties acknowledge and agree that the \$70,000.00 lump sum to be paid to Claimant under the terms of this agreement constitutes compensation for total and permanent disability that will affect Claimant the rest of her life. Claimant's remaining life expectancy is 27 years or 324 months according to the 2007 Social Security Actuarial Life Table.

Lump Sum Agreement, p. 7 (R. p. 45).

It is clear that under the facts of this case Deon has not suffered a manifest injustice. Quite the contrary, she obtained a cash settlement knowing full well that she was compromising her right to a monthly annuity if she was found totally disabled in exchange for the certainty and benefit of receiving immediate cash. The Agreement was also structured to avoid a potential

reduction or the complete offset of Deon's Social Security benefits. The Agreement provided for a pro-ration of the net lump sum cash benefit of \$49,757.29 for 324 months at \$153.51 per month in order to avoid Deon's loss of Social Security Disability benefits. (R. p. 45).

Without knowing the specific Social Security offset involved, Deon's actual life span (as opposed to a statistical average life expectancy) it is impossible to determine what additional amount, if any, Deon would receive if the Lump Sum Agreement were modified.

3. DEON SHOULD NOT BE ALLOWED TO MODIFY THE AGREEMENT AND REAP THE FRUITS OF THE SETTLEMENT

Nowhere in Deon's brief nor in her motion to modify the ISIF settlement agreement has Deon taken the position that the Agreement should be modified so as to require Deon to return the \$70,000 settlement funds received pursuant to the Agreement. Deon should not be allowed a double recovery. As the Court acknowledged in *Wernecke*, if on remand she were determined to be ineligible for ISIF benefits, she will be required to repay the Lump Sum Settlement funds to the ISIF. *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277 (2009). There the court stated as follows:

Wernecke does not expect a double recovery, she simply aims to bring her current claim against ISIF and, if she succeeds in showing the Commission that she is permanently and totally disabled, then ISIF's liability for total and permanent disability can be properly apportioned and ISIF will be credited for the \$6,500.00 it already paid. *See, e.g., Southern v. Dept of Labor & Indus.*, 236 P.2d 548, 551 (Wash. 1951) ("If the claimant is classified as totally permanently disabled, the nine hundred dollars already paid to him must be considered as an advance on the award to which he is entitled by virtue of this classification."). Therefore, should Wernecke be determined on remand to be totally and permanently disabled, ISIF will be credited the \$6,500.00 already paid.¹¹

...

¹¹ On the other hand, should Wernecke be determined ineligible for ISIF benefits, she will be required to repay the \$6,500.

Wernecke v. St. Maries Joint School Dist. No. 401, 147 Idaho 277 at 287.

Under any resolution of this case Deon is not entitled to receive both total disability benefits from H&J, Inc. and retain the \$70,000 lump sum settlement funds from the ISIF.

4. THE ISIF SETTLEMENT IS NOT VOID.

Deon asserts that pursuant to *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277 (2009), the ISIF Lump Sum Agreement is void because the Commission's Order in essence constitutes a waiver of total and permanent disability benefits. In *Wernecke* the Supreme Court recognized that parties may compromise claims arising from past injuries but recognized they generally may not compromise claims arising from future injuries. *Emery v. J.R. Simplot Co.*, 141 Idaho 407 (2005). In *Wernecke* the lump sum agreement contained no finding as to the requirements of ISIF liability under Idaho Code § 72-332. In fact, in the *Wernecke* agreement the ISIF disputed whether an injury occurred, whether the claimant was totally and permanently disabled, whether there was pre-existing impairments, and whether the impairments were manifest.

In the Deon Lump Sum Agreement at issue, the parties specifically acknowledge the pre-existing cervical and lower extremity impairments suffered by Deon and clearly recognized that those impairments were manifest and in fact were a hindrance to her employment. Moreover, the Agreement specifically acknowledged that she was totally and permanently disabled based upon

the combined effects of the pre-existing cervical and lower extremity injuries combining with her 2008 injury to her right hand. (R. p. 41).

Moreover, Deon's case does not involve her waiving a right to a future benefit as in the *Werneke* case. In fact, Deon has not suffered a future industrial injury. Idaho Code § 72-318(2) prohibits agreements where an employee waives his or her rights to compensation for future injuries, however, Deon is not waiving her right to compensation for any future injuries in the present litigation. Parties may clearly compromise claims arising from past injuries. Idaho Code § 72-318(2) concerning waiver of right to future compensation and the *Werneke* case are both inapplicable to Deon because a future claim has not been compromised.

5. ATTORNEYS FEES ARE NOT APPROPRIATE.

Attorneys fees are not granted to a Claimant as a matter of right under worker's compensation law, but may only be affirmatively awarded under the circumstances set forth in Idaho Code § 72-804. *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325 (2008). Idaho Code § 72-804 provides in pertinent part:

If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground...the employer shall pay reasonable attorney fees in addition to the compensation provided by this law.

The Idaho Supreme Court has repeatedly held that Idaho Code § 72-804 allows an award of attorneys fees on appeal only where the employer or its surety unreasonably brought or contested a claim. By its very language, Idaho Code § 72-804 does not apply to the ISIF since it is neither an employer nor a surety. Moreover, the ISIF has not unreasonably contested Deon's

claim. In fact, the ISIF voluntarily entered into a settlement agreement on a lump sum basis with Deon at her request. There is no basis for an award of attorney fees against the ISIF.

V. CONCLUSION

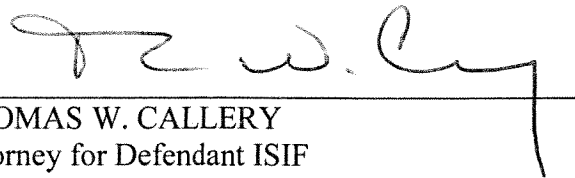
Idaho Code § 72-719 cannot be used as a basis to modify or amend a lump sum agreement approved by the Idaho Industrial Commission as the section specifically excludes lump sum agreements from the reach of Idaho Code § 72-719. The Idaho Supreme Court has held on more than one occasion that a lump sum agreement approved by the Commission is a final award that may not be reopened or set aside absent allegation and proof of fraud. In *Harmon supra* the Idaho Supreme Court specifically recognized that manifest injustice cannot be used as a basis to set aside a lump sum agreement.

Even if the Court were to address the issue of manifest injustice, under the facts of this case there simply is none. Deon filed a Complaint against the ISIF alleging that pre-existing impairments combined with her last injury of record to render her totally disabled. It was Deon herself who chose to add the ISIF as a defendant in the case and Deon herself who determined, in consultation with her attorney, to accept a cash settlement and waive her right to a monthly annuity. The Lump Sum Agreement is neither unfair nor inequitable nor unjust in any way to Deon.

The Order of the Commission denying the Motion for Modification of ISIF Settlement is correct and should be affirmed.

DATED this 28 day of March, 2014.

JONES, BROWER & CALLERY, P.L.L.C.



THOMAS W. CALLERY
Attorney for Defendant ISIF

CERTIFICATE OF SERVICE

I hereby certify that on the 28 day of March, 2014, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

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James, Vernon & Weeks, P.A.
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Coeur d'Alene, ID 83814

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- Overnight Mail
- Facsimile transmission to:
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THOMAS W. CALLERY