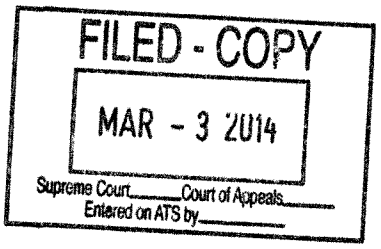
3-3-2014

Deon v. H&J Appellant's Brief Dckt. 41593

IN THE SUPREME COURT OF 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 CORPORATION, Surety, Defendants-Respondents, and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant-Respondent.	Docket No. 41593 I.C. No. 2007-005950 and 2008-032836 APPELLANT'S OPENING BRIEF



APPEAL FROM THE INDUSTRIAL COMMISSION
OF THE STATE OF IDAHO

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I. STATEMENT OF THE CASE

A. Nature of the Case

This case involves a claim for total and permanent disability benefits stemming from an industrial accident on October 4, 2008. The accident occurred when Trudy Deon's ("claimant") right hand became encircled and crushed in an electric auger while clearing a clogged drain in the kitchen of the Coeur d'Alene Inn & Conference Center ("employer"). Tr., p. 12. At all relevant times, the employer was insured by Liberty Northwest Insurance Corporation ("surety") for industrial injuries. R. pp. 10-13.

Following a formal hearing on October 16, 2012, the Industrial Commission ("Commission") concluded on May 3, 2013 that the claimant was entitled to total and permanent disability benefits payable by the surety. R. p. 110. Simultaneously, the Commission also issued a notice of reconsideration *sua sponte* on May 3, 2013, raising issue of an the affirmative defense of collateral estoppel on behalf of the employer/surety. R. pp. 112-114.

On November 4, 2013, the Commission entered an order on reconsideration determining that the Claimant was not entitled to total and permanent disability benefits payable by the surety and was instead entitled to an award of $38,612.64 (i.e. 23.92% PPD minus a $2,039.40 PPI payment). R. pp. 183-184. The Commission reached this result by relying on a settlement with the Industrial Special Indemnity Fund ("ISIF") during the pendency of this case as a means to utilize the affirmative defense of collateral estoppel against the claimant. *Id.*

B. Course of the Proceedings

On October 4, 2008, the claimant suffered crush type injuries to her right hand in an industrial accident. R. p. 1. On January 18, 2011, the claimant filed a Complaint relating to the October 2008 accident alleging entitlement to additional medical/indemnity benefits. *Id.* On

January 28, 2011, the employer/surety filed an Answer to the October 2008 accident stating that the claimant was not entitled to any additional medical/indemnity benefits. R. pp. 10-11. Shortly thereafter, the employer/surety alleged in discovery responses that claimant's impairment and/or disability could relate to a prior industrial accident on February 9, 2007. R. p. 5.

Claimant then filed a Complaint relating to the February 9, 2007, accident on March 29, 2011. R. p. 5. The employer/surety filed an Answer on April 12, 2011, claiming that the claimant was not entitled to any additional medical/indemnity benefits with respect to the February 9, 2007 accident. R. pp. 12-13.

On June 9, 2011, Claimant then filed a Complaint against the ISIF for total and permanent disability benefits. R. pp.14-16. The ISIF filed an Answer on June 17, 2011, stating that the claimant was not entitled to any additional indemnity benefits from the ISIF as a result of the October 4, 2008 accident. R. pp. 21-23.

On July 1, 2011, the Commission ordered all the matters referenced above consolidated into a single proceeding. R. pp. 24-25. On January 12, 2012, the Commission set the case for hearing on October 16, 2012. R. p. 26. On October 2, 2012, the claimant filed her pre-hearing notice of witnesses, exhibits, and post-hearing depositions. R. pp. 29-31. On October 5, 2012, the employer/surety filed a joint supplemental notice of witnesses, exhibits, and post-hearing depositions. R. pp. 33-35. On October 9, 2012, the ISIF filed an exchange of exhibits and disclosure. R. pp. 36-38.

On October 5, 2012, a joint mediation involving all of the parties was conducted telephonically by Commission mediator Dennis Burks. At the mediation, the ISIF successfully reached a settlement with the claimant but the employer/surety did not. The case then proceeded to hearing against the employer/surety with Commission Referee Alan Taylor on October 16, 2012.

R. p. 50. Post-hearing briefs were filed and the matter was taken under advisement by the Commission on December 24, 2012. R. p. 50.

Referee Taylor determined in a decision dated April 8, 2013, that the claimant's "right upper extremity alone renders her totally and permanently disabled." R. p. 77. The Referee relevantly concluded as a matter of law that the claimant had proven that she was totally and permanently disabled under the *Lethrud* test, that apportionment pursuant to I.C. §72-406 was moot, and apportionment pursuant to *Carey v. Clearwater County Road Department*, 107 Idaho 109, 686 P.2d 54 (1984) was not appropriate. R. pp. 78-79.

On May 3, 2013, the Commission declined to adopt Referee's Taylor recommendations in their entirety "due to the Referee's treatment of the vocational opinions offered by Nancy Collins, Mary Barros-Bailey and Dan Brownell." R. p. 112. However, the Commission agreed with Referee Taylor that the claimant had proven that she was totally and permanently disabled under the *Lethrud* test, apportionment pursuant to I.C. §72-406 was moot, and apportionment pursuant to *Carey v. Clearwater County Road Department*, 107 Idaho 109, 686 P.2d 54 (1984) was not appropriate on May 3, 2013. R. p. 110.

Sua sponte, the Commission issued a notice of reconsideration of the May 3, 2013, conclusions of law, raising the affirmative defense of collateral estoppel on behalf of the employer/surety based on the settlement with the ISIF as formally approved by the Commission on November 8, 2012. R. pp. 112-126. The Commission ordered a revised simultaneous briefing on May 30, 2013, regarding the affirmative defense of collateral estoppel with opening briefs due on June 28, 2013, and reply briefs due on July 19, 2013. On June 27, 2013, the employer/surety filed an opening brief regarding the impact of the ISIF settlement on the May 3, 2013 decision. Ex. Add. Doc. 4. On June 28, 2013, the claimant filed an opening brief. Ex. Add. Doc. 5. On July 18, 2013,

the employer/surety filed a reply brief. Ex. Add. Doc. 6. On July 19, 2013, the claimant filed a reply brief. Ex. Add. Doc. 7.

Before the Commission had ruled on the notice of reconsideration, the Claimant filed a motion for modification of the ISIF settlement agreement on July 26, 2013 to clarify that the settlement agreement was not intended to have any collateral estoppel effect benefiting the employer/surety , together with a supporting affidavit. R. 127-141. The supporting affidavit contained an analysis by economist Dr. Torelli documenting the windfall of hundreds of thousands of dollars that the employer/surety would receive if the ISIF settlement agreement was used to bar payment of the claim for total and permanent disability benefits assessed against the surety. R. 136-141. The employer/surety and ISIF filed responsive briefing opposing any attempt to modify the settlement agreement on August 8, 2013, and August 9, 2013. R. 142-156. The claimant filed a reply brief on August 14, 2013. R. 157-160. On September 27, 2013, the Commission issued an order denying any modification to the ISIF settlement agreement based on its interpretation of I.C. §72-719(4). R. pp. 161-165.

On November 4, 2013, the Commission entered an order on reconsideration applying the affirmative defense of collateral estoppel to reduce the award to the claimant from one of total and permanent disability payable by the surety to an award of $38,612.64 (i.e. 23.92% PPD minus a $2,039.40 PPI payment) payable by the surety. R. pp. 183-184. The Commission's order on reconsideration was based on its interpretation of *Jackman v. State Industrial Special Indemnity Fund*, 129 Idaho 689, 931 P.2d 1207 (1997). R. pp. 175-179.

A notice of appeal was filed on November 14, 2013 and a first amended notice of appeal was filed on November 22, 2013. R. pp. 186-198.

C. Concise Statement of Facts

Trudy Deon was employed as a maintenance worker by the Coeur d'Alene Inn from June 11, 2003, until November 15, 2009. Ex. 28, p. 14. Her duties were summarized in the job site evaluation ("JSE") performed by Beth Griggs of the Industrial Commission Rehabilitation Division ("ICRD") as follows:

> Repairs and maintains rooms and facilities at motel and convention center. Uses hand and power tools to change lighting fixtures, unclog and repair plumbing, and repair damages to rooms. Changes HVAC filters and belts. Performs pool and spa maintenance. Performs snow removal and outdoor landscaping. Ex. 1, p. 4; *See* also Ex. 28, pp. 22-29.

On October 4, 2008, the claimant was in the kitchen of the employer working to unplug a drain that was clogged and flooding the kitchen area. Tr., p. 30, L. 21-23. In the process of cleaning out the drain, the claimant's right hand became entangled in an electric auger that encircled, twisted, and crushed her right hand. A co-worker eventually heard her cries for help and unplugged the device from the wall as a safety switch had been removed from the auger that would have allowed the claimant to shut off the device. Tr., p. 31, L. 1-14. Magnetic resonance imaging ("MRI") on November 3, 2008 interpreted the injuries to the right hand as follows:

> Impression:
> 1. Disruption of the A2 pulley system of the fourth digit with palmar bowing of the flexor tendon and edema surrounding the flexor tendon in this location compatible with focal tenosynovitis.
> 2. Partial disruption or strain of the A2 pulley system of the fifth digit with palmar bowing of the flexor tendon and mild tenosynovitis.
> 3. Nondisplaced fracture involving the distal aspect of the proximal phalanx of the fifth digit. Ex. 13, p. 148.

The MRI report was amended on November 13, 2008 to read as follows:

> Impression:
> 1. Ligamentous tear and bowing of the flexor tendon in the fourth and fifth digits. This occurs just proximal to the interphalangeal joint. This is in the region of the proximal volar plate/check rain ligament and C2 Pulley. The fifth digit tear is partial. The fourth digit tear

is partial versus complete, with a partial tear favored as the tendon does not bowstring across the PIP joint.
2. Increased signal adjacent to the radial and ulnar collateral ligaments of the fourth and fifth PIP joints. No gross disruption, probable sprain.
3. Osseous contusion of the distal aspect of the fifth proximal phalanx. No definitive fracture, although a nondisplaced fracture cannot be excluded. Followup radiography may be helpful.
4. Findings discussed with Dr. Mullen. Ex. 13, p. 151.

The claimant consulted with a wide variety of specialists and underwent multiple physical therapy sessions with a wide variety of providers without substantial improvement over the next year before being discharged from physical therapy on October 28, 2009. Ex. 20, p. 260. In the interim, EMG/NCV studies on the right upper extremity were interpreted as abnormal by Dr. Stevens, who concluded on August 19, 2009 that:

> Her symptoms and examination do suggest an ulnar sensory nerve injury at the wrist involving both the deep and superficial branches causing hypesthesia within the classic ulnar pattern and also the dorsum of the hand within the dorsal ulnar cutaneous distribution. I strongly suspect that this is a compressive injury and likely a single event injury. It is unclear if there is actually any correctable lesion other than hoping that the sensation will gradually return with time. It would not be unreasonable to do an exploration but my suspicion is that there is no "correctable lesion" of the ulnar nerve. Ex. 14, p. 156.

Dr. Stevens subsequently saw the claimant in the context of a medical examination at the request of the surety and assessed 2% upper extremity impairment. Ex. 14, p. 166. Dr. Stevens stated that while no restrictions were assessed based on objective matter, he would not be addressing the claimant subjective work tolerance and provided a full release on November 18, 2009. Ex. 14, p. 167. The claimant was laid off by her supervisor, Jeff Mills, on behalf of the employer in November 2009. Mr. Mills testified at his deposition as follows:

A: I believe I laid her off in about the 1st of November 2009.
Q: Okay. And why was that?
A: She was not capable of performing her duties. Ex. 9, p. 98, L. 21-24.

The claimant searched for work without success for approximately six months but was unsure of what work she would be able to perform as documented in the ICRD file. Ex. 1, pg.

23. On May 13, 2010, the Social Security Administration declared the claimant disabled and administrative judge Gene Duncan commented:

> The State agency medical consultants' physical assessments are given little weight because other medical opinions are more consistent with the record as a whole and evidence received at the hearing level shows that the claimant is more limited than determined by the State agency consultants. Greater weight has been given to the credible records of treating sources that have had an on-going relationship with the claimant. The undersigned finds the residual functional capacity (RFC) indicated above is supported by the totality of the objective medical findings and other evidence in the record. Ex. 4, p. 38.

Judge Duncan concluded that:

> Even if the claimant had the residual functional capacity for the full range of sedentary work considering the claimant's age, education, and work experience, a finding of "disabled" would be directed by Medical-Vocational Rule 201.14. Ex. 4, p. 39.

The claimant filed a complaint for total and permanent disability benefits against the employer/surety on January 18, 2011 and against the ISIF on June 9, 2011. R. p. 1 and 14. On September 16, 2011, the claimant was seen for a functional capacity evaluation ("FCE") at her own expense because the surety refused to pay for the evaluation despite recommendations from multiple treating physicians within the chain of referral for such a procedure. See Ex. 15, pp. 189-190, Ex. 17, p. 207, R. 109. The FCE report concluded that the claimant would need to secure a job with "primarily left handed work with a weight load on the right of less than 5# lifting, up to 20# with both hands, minimum repletion, and self paced" if she was to return to the labor force. Ex. 12, p. 147. Vocational expert Dan Brownell concluded that with the claimant's learning disability, work history, and hand injury, she had incurred a loss of access to 90% of the labor market and would require a sympathetic employer to access the remaining positions. R. p. 99.

On May 3, 2013, the Commission issued a decision determining that the claimant was an odd lot worker and totally and permanently disabled as a result of the last industrial accident under the *Lethrud* test, rendering apportionment pursuant to *Carey v. Clearwater County Road Department*, 107 Idaho 109, 118, 686 P.2d 54, 63 (1984) inappropriate. R. p. 108. On May 3,

2013, the Commission raised the affirmative defense of collateral estoppel *sua sponte* on behalf of the employer/surety in a notice of reconsideration and subsequently issued an order on November 4, 2013, determining that claimant was not entitled to total and permanent disability benefits. R. 183-184.

II. ISSUES ON APPEAL

1. Did the Commission err in finding the elements of the collateral estoppel were met?
2. Did the Commission err in raising the affirmative defense of collateral estoppel *sua sponte* on behalf of the employer/surety?
3. Did the Commission violate the Claimant's right to due process?
4. Did the Commission err in refusing to modify the ISIF settlement agreement pursuant to I.C. §72-719(3)?
5. Is the ISIF settlement void as a matter of law?
6. Should attorney fees be awarded on appeal?

III. STANDARD OF REVIEW

In *Vawter v. United Parcel Service, Inc.*, --- P.3d ----, 2014 WL 497437, Idaho (2014), this court reviewed the standard of review for an appeal from the Industrial Commission of the State of Idaho and stated:

> When this 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 findings. *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." *Boise Orthopedic Clinic v. Idaho State Ins. Fund*, 128 Idaho 161, 164, 911 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. *Zapata v. J.R. Simplot Co.*, 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999).

Whether collateral estoppel bars the relitigation of issues adjudicated in prior litigation is a question of law upon which the court exercises free review. *Rodriguez v. Dep't of Correction*, 136 Idaho 90, 92, 29 P.3d, 401, 403 (2001).

IV. ARGUMENT

A. Introduction

This appeal asks this court to assess whether the Commission should continue to use the affirmative defense of collateral estoppel to deny compensation to claimants instead of analyzing a claim on the merits. *See Vawter v. United Parcel Service, Inc.*, --- P.3d ----, 2014 WL 497437, Idaho (2014). It is noteworthy from the commencement of this action until raised by the Commission, the employer/surety failed to raise the affirmative defense of collateral estoppel. R. pp. 112-115. The employer/surety specifically waived the affirmative defense of collateral estoppel by failing to add it as an issue for hearing on October 16, 2012 as set forth in the hearing transcript below:

REF. TAYLOR:	Thank you, and welcome. The defendants, employer and surety, are represented by attorney Roger Brown. I note for the record that the State of Idaho Industrial Special Indemnity Fund is not represented today. I understand, in communication received late last week, that the ISIF has settled with claimant prior to today, and I would just like Mr. Nemec to confirm that.
MR. NEMEC:	That is correct. I have not received any of those documents, but we have reached a settlement on the issues. Tr. pp. 6-7.
. . .	
REF. TAYLOR:	Okay, based on counsels' comments, it appears that we can delete issues one (b) and six, one (b) pertaining to TTDs and six pertaining to the liability of ISIF pursuant to 72-332. **Any further comments or issues**, counsel? (emphasis added).
MR. NEMEC:	I don't believe so.
MR. BROWN:	No, your Honor.

Tr. p. 10, L. 7-14.

Whether the ISIF settlement agreement could have any collateral estoppel effect was ripe for adjudication on October 16, 2012. The employer/surety was aware of the settlement with ISIF prior to the hearing as noted in the hearing transcript above and the employer/surety was also present at the mediation of the matter on October 5, 2012. Perhaps more importantly, the employer/surety had approximately 1.5 months following the formal approval of the settlement to raise or argue this affirmative defense in their post-hearing brief and failed to do so.

To argue that the affirmative defense of collateral estoppel was not ripe for consideration as the Commission suggested in the Notice of Reconsideration is akin to arguing that apportionment defenses under I.C. §72-406 are not appropriate for review until the Commission has first held a primary hearing on the issue of PPI, and then a secondary hearing on apportionment as it relates to PPD. Were that the law, the policy of providing "sure and certain" relief to injured workers would devolve into a Byzantine system of hearings that would further lengthen the time from injury to relief.

While the Notice of Reconsideration states the employer/surety may not have had "independent knowledge of the terms and conditions of Claimant's settlement with the ISIF," that statement should have had no bearing on the Commission's May 3, 2013 decision. *See* R. p. 113. Specifically, the Claimant was under no duty to provide the ISIF settlement agreement to the employer/surety according to the Idaho Rules of Civil Procedure or the Judicial Rules of Practice and Procedure. More importantly, the employer/surety was aware of the ISIF settlement and a copy was available from from the Commission, Claimant, or the ISIF had they asked for one.

From a policy perspective, the doctrine of collateral estoppel has no place in the world of worker's compensation law because settlement agreements at the Commission are not examined on the merits, but rather a "best interests" standard. While the court may reverse the Commission's earlier decision determining that the claimant is not entitled to total and permanent disability benefits on a variety of grounds, it should be recognized that *Tagg v. State of Idaho, ISIF,* 123 Idaho 95, 844 P.2d 1345 (1993) (which held that a third party beneficiary not named in a settlement agreement was not entitled to utilize the settlement agreement as *res judicata)* remains good law.

The confusion surrounding collateral estoppel in industrial cases stems from the attempt to liken district courts out of which the doctrine arises with the Industrial Commission. By way of comparison, district courts typically never hear collateral estoppel arguments with respect to settlement agreements because the consent of the district court is not required for the parties to settle a case as it is with the Commission. If the current case was litigated in district court instead of the Commission, the employer/surety would be unable to obtain any offset for the ISIF settlement as a matter of law. *See Horner v. Sani-Top, Inc.*, 141 P.3d 1099, 143 Idaho 230 (2006).

Finally even assuming that the affirmative defense of collateral estoppel could be used in an industrial case, certain elements of the five elements test do not exist in the current case. In order to utilize the doctrine of collateral estoppel in this case, the Commission modified the test as they recently did in *Vawter.* Specifically, the Commission concluded that issues resolved via settlement satisfied the "actually decided in litigation" element of the test. The Commission also held and that a single case with multiple interlocutory orders actually contained multiple "final judgments on the merits" to satisfy the "final judgment on merits" element of the test.

In cobbling together a new collateral estoppel doctrine specific to industrial claims the Commission has created increased litigation, a chilling effect on settlement, protracted proceedings, strained judicial resources, and drastic and far reaching consequences for settlements that can reaching decades into the future for all parties. The result is directly contrary to the purpose of the act which is to provide for "sure and certain relief" to injured employees. I.C. §72-201.

It is important to recall that utilization of collateral estoppel as an affirmative defense to avoid reaching a decision on the merits of a case appears to be a recent application of the doctrine to industrial claims following *Jackman v. State Industrial Special Indemnity Fund,* 129 Idaho 689, 931 P.2d 1207 (1997). If it chooses, this court should clarify that *Tagg* remains good law and instruct the Commission to evaluate each claim on the merits, and to refrain from applying collateral estoppel as a bar to compensation to injured claimants.

1. The Commission improperly found the elements of collateral estoppel were met.

A. Liability of the Employer/Surety was not actually decided in the ISIF settlement.

The doctrine of collateral estoppel exists to prevent the relitigation of an issue previously determined in a separate cause of action when:

> (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. *Stoddard v. Hagadone Corporation*, 147 Idaho 186, 191, 207 P.3d 162, 167 (2009) (emphasis added).

Thus the collateral estoppel doctrine prevents the relitigation of issues **actually litigated** and decided in a **prior** case. *Robertson Supply Inc. v. Nicholls* 131 Idaho 99,102, 952 P.2d 914, 917 (1998) citing *Anderson v. City of Pocatello*, 112 Idaho 176, 183, 731 P.2d 171, 178 (1986) (emphasis added). Collateral estoppel is inapplicable in cases like this one where the litigation, albeit including several different hearings, is nevertheless all part of the same case. *See Sanije Berisha*, Claimant, IC 2002-003038, 2012 WL 2118142 (Idaho Ind. Com. May 30, 2012).

Robertson suggests that the most critical element of the five part test in collateral estoppel is that the issue must have actually been litigated and decided on the merits in the prior suit. *See Id.* at 103.

> There are many reasons why a party may choose not to raise an issue, or to contest an assertion in a particular action. The action may involve so small an amount that litigation of the issue may cost more than the value of the lawsuit. Or the form may be an inconvenient one in which to produce the necessary evidence or in which to litigate at all. The interests of conserving judicial resources, of maintaining consistency, and of avoiding oppression or harassment of the adverse party are less compelling when the issue on which preclusion is sought has not actually been litigated before. **And if preclusive effect were given to issues not litigated, the result might be to discourage compromise, to decrease the likelihood that the issues in an action would be narrowed by stipulation, and thus to intensify litigation**. Restatement (Second) of Judgments§ 27 comment e (1982). *Id.* (emphasis added).

As further explained in *Anderson v City of Pocatello*, 112 Idaho 176, 182, 731 P.2d 171,177 (1986):

> The theory of the use of judgments is not a matter to be lightly dogmatized about; yet it seems clear that the operation of recognizing it, when produced from another court, in support of a plaintiff or in defense of a defendant, is upon analysis not at all an employment of evidence. It is rather the **lending of the court's executive aid, on certain terms, to a claimant or a defendant, without investigation of the merits of fact**. 4 Wigmore, *Evidence* § 1346 (Chadbourn rev.1972) (emphasis added); *accord,* Note, *Judgments as Evidence,* 46 Iowa L.Rev. 400 (1961); J. Weinstein and M. Berger, 4 *Weinstein's Evidence* para. 803(22) [01] (1984).

In *Vawter v. United Parcel Service, Inc.*, --- P.3d ----, 2014 WL 497437, Idaho (2014), the Commission considered an interlocutory order regarding benefits owed to the claimant as synonymous with an "actual decision in prior litigation" under the third element of the collateral estoppel test. The Commission refused to award the claimant the full amount of medical benefits owed based on a prior interlocutory order which awarded the claimant a smaller amount. In reversing the Commission's decision, this court held collateral estoppel did not apply to cases involving multiple hearings with a single cause of action beause the "prior litigation" element of the collateral estoppel test was not met. *Id.* at 10.

In *Tagg v. State of Idaho, ISIF,* 123 Idaho 95, 844 P.2d 1345 (1993), the ISIF sought to use a settlement agreement between the claimant and employer/surety to preclude a subsequent claim against the ISIF. This court noted that Industrial Commission decisions are final and conclusive only at to the matters actually considered and adjudicated by the Commission. *Id.* at 98. This court held that there was no compelling reason to depart from this principle. The court also held that the settlement agreement between claimant and employer/surety did not act to preclude a subsequent and previously unadjudicated claim against ISIF for compensation attributable to a pre-existing condition. *Id.* In issuing its decision in this case, the Commission failed to consider the *Tagg* holding and analysis.

In *Rajspic v Nationwide Mutual Ins. Co.*, 104 Idaho 662, 665, 662 P.2d 534, 537 (1983), this court chose not to apply collateral estoppel to a stipulation from a prior case to a pending case because the Court was, ***"[H]esitant to hold in such circumstances that an issue resolved by stipulation has been litigated or determined for purposes of collateral estoppel."*** The Commission failed to recognize this directive in applying collateral estoppel in this case.

The Supreme Court of the United States commented on whether collateral estoppel should apply to stipulated or consent judgments in *Arizona v California*, 530 U.S. 392,414, 120 S.Ct. 2304, 2319 (2000) as follows:

> But settlements ordinarily occasion no *issue preclusion*, (sometimes called collateral estoppel), unless it is clear, as it is not here, that the parties intend their agreement to have such an effect. "In most circumstances, it is recognized that consent agreements ordinarily are intended to preclude further litigation on the claim presented but are not intended to preclude further litigation on any of the issues presented. **Thus consent judgments ordinarily support claim preclusion but not issue preclusion**." 18 Charles Alan Wright, Arther R. Miller, & Edward H. Cooper, Federal Practice and Procedure §4443, pp. 384-385 (1981). This differentiation is grounded in basic res judicata doctrine. It is the general rule that issue preclusion attaches only "[w]hen an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment." Restatement (Second) of Judgments §27, p. 250 (1982). "**In the case of a judgment entered by confession, consent, or default, none of the issues is actually litigated**. Therefore, the rule of this Section [describing issue preclusion's domain] does not apply to any issue in a subsequent action." *Id.*, comment *e* at 257 (emphasis added).

Thus, to be given preclusive effect, the issue must have been "actually litigated, squarely addressed and specifically decided." *Spectrum Health Continuing Care Group v. Anna Marie Bowling Irrevocable Trust*, 410 F.3d 304, 312 (2005). "An issue is not actually litigated if, for example, there has been a default, a confession of liability, a failure to place a matter in issue by proper pleading or **even because of a stipulation** (Restatement [Second] of Judgments §27 comments d, e, at 255-257 (emphasis added); see also, *Gilberg v. Barbieri*, 53 N.Y.2d 285, 441 N.Y.S.2d 49, 423 N.E.2d 807, supra). *Kaufman v. Eli Lilly and Company*, 65 N.Y.2d 449, 482 N.E.2d 63, 492 N.Y.S.2d 584, (1985). Where an issue is uncontested, such as an underlying point in a settlement agreement, the issue was not actually litigated in the prior proceeding and therefore is not precluded from a subsequent one. *Spectrum Health Continuing Care Group v. Anna Marie Bowling Irrevocable Trust*, 410 F.3d 304, 312 (2005).

Applying these principles to a worker's compensation claim in which the claimant sought to challenge the Board's failure to give preclusive effect to an earlier lump sum settlement, a New Hampshire court noted, "[c]ollateral estoppel may be invoked to preclude reconsideration of an issue only when the issue has been actually litigated. Where ...the final judgment ...was based on a stipulation of settlement, the issue asserted for preclusion was not actually litigated." *M.A. Crowley Trucking v. Moyers*, 140 N.H. 190, 195, 665 A.2d 1077, 1080 (1995) (citations omitted). Thus, collateral estoppel does not apply to any issues conceded in the lump sum settlement. *Appeal of Hooker*, 142 N.H. 40,46, 694 A.2d 984, 988 (1997) (emphasis added).

In the pending appeal as in the recent *Vawter* decision, it was improper for the Commission to apply collateral estoppel where was a single cause of action and all of the settlements/orders were part of the same case. *See Vawter v. United Parcel Service, Inc.*, --- P.3d ---, 2014 WL 497437, Idaho (2014). Even if there were multiple cases, this court should clarify that a settlement in an industrial case is not synonymous with deciding a case on the merits. In this case, the claimant never actually litigated the ultimate issue of employer/surety liability and ISIF liability until it was determined on May 3, 2013, that the employer/surety was 100% liable. The fact that the Commission found the employer/surety 100% liable in this case is *ipso facto* proof that the Commission did not previously litigate/decide this issue in the ISIF settlement. ISIF liability was arrived at through stipulation in the settlement agreement in between the claimant and ISIF. Thus just as the court did in *Rajspic,* this court should decline to hold that an issue resolved by stipulation has been litigated or determined for purposes of collateral estoppel.

B.) The ISIF settlement is not a final judgment on the merits

The doctrine of collateral estoppel exists to prevent the relitigation of an issue previously determined in a separate cause of action when:

> (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. *Stoddard v. Hagadone Corporation*, 147 Idaho 186, 191, 207 P.3d 162, 167 (2009).

This five-part test originated in district court cases and is believed to have been successfully applied to a worker's compensation case post-*Tagg* in *Jackman v. State of Idaho, Industrial Special Indemnity Fund*, 129 Idaho 689, 951 P.2d 1207 (1997). In *Jackman*, the court held that a settlement with the employer/surety precluded a claim brought against the ISIF on the basis of collateral estoppel. Prior to *Jackman*, it is not believed that a settlement with the employer/surety had been used to preclude a claim against the ISIF using the affirmative defense of collateral estoppel. *See, Tagg v State of Idaho, ISIF,* 123 Idaho 95, 844 P.2d 1345 (1993).

The application of collateral estoppel in an industrial case is troubling as Idaho Rule of Civil Procedure 54(a) defines a final judgment as one which has been entered on all claims of relief, except costs and fees, asserted by or against all parties in the action. This court has previously held that Commission decisions which reserve jurisdiction for any reason, such as the determination of additional damages, are not final decisions/judgments of the Commission for purposes of appeal. *See Jensen v. The Pillsbury Company*, 121 Idaho 127, 823 P.2d 161 (1992). Thus, there is a clear distinction between an **interlocutory decision** and a **final judgment on the merits** in a Commission case.

In *Vawter v. United Parcel Service, Inc.*, --- P.3d ----, 2014 WL 497437, Idaho (2014), the Commission attempted to equate an interlocutory order awarding medical benefits with a final judgment on the merits despite the fact that additional hearings were being held and no final, appealable order had been entered. In reversing the Commission's legal conclusion that collateral estoppel could apply, this court held:

> The Commission's 2010 order awarding medical benefits was not a final order, but rather, an interlocutory order that was subject to modification until such time as a final appealable order was entered. Thus, the Commission's decision to apply collateral estoppel was in error. For that reason, Vawter is entitled to recover all of his medical expenses, as initially provided by the Commission in its 12-5-12 Order. *Id.* at 10.

Another clear illustration of the failure to obtain a final judgment with respect to collateral estoppel is seen in *Richardson v. Navistar Int'l Transp. Corp.*, 170 F.3d 1264, (10th Cir. 1999). In that case, the plaintiffs settled with the original defendants in an action following trial where a jury verdict allocated 100% of the fault between the original defendants and the plaintiff, but before entry of a final judgment. The plaintiffs then filed a second lawsuit against a different group of defendants not named in the first suit who raised the affirmative defense of collateral estoppel. The Utah Supreme Court held that even though liability had previously been determined in the prior case, because a final judgment had never been entered, the jury verdict did not bind any party or the court.

With respect to the approval of a settlement agreement, it is apparent that the decision to approve or disapprove of the compensation is the final "decision" or interlocutory award of the Commission and it is not a decision on the merits. *See Davidson v. H.H. Kiem Company*, 110 Idaho 758, 760, 778 P.2d 1196, 1198 (1986). In a typical case, the procedure for approval of a lump sum settlement agreement (LSSA) is as follows:

> When an LSSA is presented to the Commission, it may approve or deny the settlement based on the "best interests of all parties." I.C. §72-404; J.R.P. XVIII(B). The

> Commission's Rule XVIII(C) gives a short list of all the documentation an LSSA submission is expected to contain. If the LSSA is approved, that ends the matter. If it is denied, the Commission may request additional information, or the Commission or either party may "schedule a hearing limited to the issue of whether the lump sum settlement ... is for the best interests of all parties." J.R.P. XVIII(D). The Commission's internal rules state that "[t]here is no appeal from the Commission's decision" regarding approval or denial of an LSSA. Id. **If the Commission denies the settlement agreement at the hearing, a claimant may leave the LSSA behind and request a final hearing on the merits.** (emphasis added). *Owsley v. Idaho Industrial Commission*, 141 Idaho 129, 106 P.3d 455 (2005).

Applying the rationale from *Jackman* to the current industrial case as the Commission did is flawed as the settlement agreement with the ISIF did not end the litigation in this case as it did in *Jackman* and was thus not a final judgment on the merits. In *Jackman,* the Claimant had settled with the employer/surety four years before he ever brought his claim against the ISIF in a separate case—a different set of facts from those currently before the court where the settlement with the ISIF was merely an interlocutory order prior to the final judgment on the merits on May 3, 2013. *Vawter's* holding has clarified that interlocutory orders cannot be used for purposes of collateral estoppel. To the extent that *Jackman* is now in conflict with *Vawter* and *Tagg*, it should be overruled.

2. The Commission erred in raising the affirmative defense of collateral estoppel *sua sponte* on behalf of the employer/surety.

This court has held on numerous occasions that affirmative defenses such as collateral estoppel must be plead prior to the trial of a matter or they are waived. *Patterson v. State, Dept. of Health & Welfare*, 151 Idaho 310, 256 P.3d 718 (2011); *Bluestone v. Mathewson*, 103, Idaho 453, 456, 649 P.2d 1209,1212 (1982); *See also* I.R.C.P. 8(c). Failure to raise an affirmative defense ordinarily results in a waiver of the defense. *Hartwell Corp. v. Smith*, 107 Idaho 134, 686 P.2d 79 (Ct. App.1984). In the industrial case *Baldner v. Bennett's, Inc*, 103 Idaho 458, 649 P.2d 1214 (1982), this court held the burden to raise the issue of apportionment with respect to

disability benefits rested with the defense and the failure to raise apportionment at hearing rendered any review by the Supreme Court inappropriate. In the industrial case *Paull v. Preston Theatres Corporation*, 63 Idaho 594, 124 P.2d 562, (1942), the defendants attempted to raise an affirmative defense after a hearing on the merits. In refusing such relief this court cited with approval *Utah Delaware Mining Co. v Industrial Commission*, 76 Utah 187, 289 P. 94 (1930), which commented on the duty to raise affirmative defenses with greater clarity, holding:

> The general rule is that a party can rely on the statute of limitations only where he pleads it and ordinarily is required to interpose the plea at his first opportunity. Generally, new trials or rehearings are **not granted** to give a **defeated party** an opportunity to interpose the statute of limitations where he theretofore and before an adjudication on merits had full opportunity to interpose it. *Id.* at 567 (emphasis added).

Recently, the Commission stated that, "It is the obligation of the parties to indicate what the disputed issues are for hearing. *See Phinney v. Shoshone Medical Center*, 131 Idaho 529, 532, 960 P.2d 1258, 1261 (1998). The Commission cannot decide issues that are not before it." *Sherri Troutwine, Claimant*, IC 2006,012796, 2009 WL 5850565 (Idaho Ind. Com. November 27, 2009).

In this case, the Answer filed by the employer/surety on January 28, 2011 failed to list collateral estoppel as an affirmative defense. R. pp. 10-11. Despite having knowledge that the claimant had settled with the ISIF at mediation and had invoked ISIF liability in a total and permanent disability claim, the employer/surety failed to raise this defense at the hearing of this matter or at anytime thereafter. Indeed, the employer/surety has yet to properly amend their Answer in this matter. The employer/surety failed to raise collateral estoppel in post-hearing briefing. As the employer/surety's post-hearing brief was not due until December 17, 2012, employer/surety clearly had ample opportunity to argue whether the ISIF settlement could have had collateral estoppel effect. Because the Claimant consistently argued for total and permanent

disability and invoked ISIF liability long before defendant's brief was due, a definitive issue involving concrete facts with respect to an apportionment defense could have easily been adjudicated by Referee Taylor who took this claim under advisement on December 24, 2012, prior to the formal adjudication on the merits on May 3, 2013.

When the defendants failed to raise the affirmative defense of collateral estoppel or even address the *Carey* formula issue in their briefing, just as in *Baldner* and *Paull,* the claimant in this case was entitled to rely upon the finality of the adjudication on May 3, 2013. Given that the employer/surety viewed this claim as one involving less than total disability according to their arguments and briefing throughout this litigation, it appears that the employer/surety made a tactical decision to avoid raising the collateral estoppel defense. Raising such a defense would have suggested that the employer/surety contemplated liability for a total and permanent disability claim, a proposition that defendants chose to vigorously contest over several years of litigation. To raise collateral estoppel as a defense would have placed the employer/surety at a heightened risk for an award of the claimant's attorney fees for the failure to pay any disability benefits following the payment of the PPI award in 2009 to present day.

Finally, it is not the Commission's function to serve as trial strategist for any litigant. In this case, the Commission acted in direct contravention of *Troutwine* in which the Commission concluded it "cannot decide issues that are not before it." *Sherri Troutwine, Claimant*, IC 2006,012796, 2009 WL 5850565 (Idaho Ind. Com. November 27, 2009). In raising the affirmative defense of collateral estoppel that the employer/surety waived at hearing after approving the ISIF settlement, the Commission created the perfect procedural booby trap. *See* Tr. p. 10 L. 7-14. The Commission's advocacy for the employer/surety has essentially changed an award of lifetime disability benefits into a claim worth exactly $108,612.64. R. pp. 183-184.

3. The Commission violated the Claimant's right to due process.

This Court has held that administrative tribunals are unable to raise issues without first serving an affected party with "fair notice" and a "full opportunity" to meet such issues. *Gomez v. Dura Mark, Inc.*, 152 Idaho 597, 601, 272 P.3d 569, 573 (2012). Pursuant to the codification of that rule in I.C.§72-713, the Commission is required to give the parties at least ten (10) days notice of the issues to be decided at hearing unless the parties stipulate otherwise[1]. This procedure allows the parties' to easily modify the issues to provide a meaningful hearing of the relevant issues on the merits.

In this particular case, employer/surety did not request that the affirmative defense of collateral estoppel be included in the notice of hearing, at the hearing, or anytime after the hearing until prompted to do so at the urging of the Commission following the entry of a favorable decision for the claimant. As such, the claimant was prejudiced by this late notice. Had proper notice been provided, the claimant would have conducted the prosecution of this claim in a different manner. If the employer/surety had stated at hearing that collateral estoppel would be argued based on the settlement with the ISIF, the claimant could have simply refused to endorse the settlement and avoided this procedural morass. By interjecting the affirmative defense into these proceedings following an adjudication by the Commission, the Commission has prejudiced the claimant's rights.

4. The Commission erred in refusing to modify the ISIF settlement agreement.

Idaho Code provides for the modification of a settlement agreement approved by the Industrial Commission by means of I.C. §72-719(3). *See Sines v. Appel*, 103 Idaho, 9, 12, 644 P. 2d 331, 334 (1982). Specifically, I.C. §72-719(3) states as follows:

The commission, on its own motion at any time within five (5) years of the date of

[1] A stipulation or mutual agreement to modify the issues on the day of hearing is common at the Commission

accident causing the injury or date of first manifestation of an occupational disease, may review a case in order to correct a manifest injustice. *Id.*

"**Manifest**" has been defined to mean: capable of being easily understood or recognized at once by the mind; not obscure; obvious. Webster's Third New International Dictionary, 1967. *Sines v. Appel*, 103 Idaho, 9, 13, 644 P. 2d 331, 335 (1982). "**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. Webster's Third New International Dictionary, 1967. *Id.*

In the context of workers' compensation, an example of a manifestly unjust decision would be one that deprives a claimant of benefits that she is obviously entitled to receive. The court has held that the Commission may review any order to correct a manifest injustice, even when a purported manifest injustice is brought to the Commission's attention by either party or a third party. *Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2008). Specifically, the court has previously held that settlement agreements may be modified to correct a manifest injustice in *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).

In this case, the employer/surety will owe the Claimant approximately **$77,629.28** in total permanent disability benefits for the period of time from November 18, 2009 thru January 1, 2015[2]. R. 138-141. If the court determines that the Commission was correct in determining that the ISIF settlement agreement had a collateral estoppel impact limiting the amount that the employer/surety owes, the end result will be a windfall profit of over **$500,000.00** to the employer/surety on a claim where the Commission initially found the employer/surety liable for

[2] It is estimated that the court may issue a decision in early 2015

lifetime disability benefits. R. 138-141.

The employer/surety has not provided any consideration to the claimant for the windfall they seek to obtain and the claimant never intended to provide the surety with a release of liability when she signed the ISIF settlement agreement. Should the court accept the untimely affirmative defense raised by the employer/surety following an adjudication on the merits on May 3, 2013, the claimant will be left to spend the rest of her life subsisting on a net income of **$820.40/month** in Social Security benefits. Ex. 2, p. 26. This is precisely the type of situation I.C. §72-719(3) was created to remedy. As such, it is respectfully requested that the court direct the Commission to add language to the ISIF settlement agreement clarifying that the settlement agreement was not intended to have a collateral estoppel effect benefitting the employer/surety if collateral estoppel is even deemed to be an applicable defense.

5. **The ISIF settlement is void as a matter of law.**

I.C. §72-318(2) states that, "No agreement by an employee to waive his rights to compensation under this act shall be valid." I.C. §72-318(2) must be interpreted to prohibit all agreements that waive an employee's rights to compensation under the Act. *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 283, 207 P.3d 1008, 1014 (2009). In this case, the Commission's order on reconsideration has construed the ISIF settlement agreement as a waiver of her right to total and permanent disability benefits paid by the employer/surety as determined in the May 3, 2013 order. R. p. 110. Additionally, the May 3, 2013, order determined that the ISIF had no liability in the current matter when the claim was examined on the merits. R. p. 110. As was stated in *Wernecke*, if the ISIF settlement agreement is void, there can be no basis for imposing collateral estoppel because there is no valid final judgment. *Id.* at 289.

6. Attorney fees should be awarded on appeal

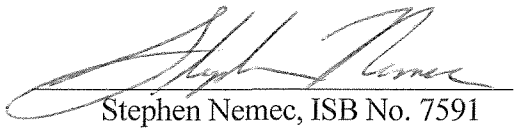
Attorney fees are awarded on appeal in an industrial case if the court determines that the employer or his surety contested a claim for compensation made by an injured employee without reasonable grounds pursuant to I.C. §72-804. In this particular case, the employer/surety has raised the same tired arguments regarding collateral estoppel as a means to avoid compensating the claimant as this court recently found wanting in *Vawter v. United Parcel Service, Inc.*, --- P.3d ----, 2014 WL 497437, Idaho (2014). In reviewing *Vawter*, the undersigned is unable to appreciate any discernible difference in the arguments put forward by the employer/surety in that case and the arguments put forward by the employer/surety in this case. As such, the arguments now being advanced by the surety have previously been determined to be without merit.

V. CONCLUSION

It is the policy of worker's compensation statutes to encourage "sure and certain relief for injured workers." I.C. §72-201. It should not be the policy of the Industrial Commission to use settlement agreements to avoid deciding a claim on its merits. To the extent that *Jackman* conflicts with this policy, *Jackman* should be overruled as it conflicts with the courts well reasoned holdings in *Tagg* and *Vawter*.

Based on the argument presented herein, the Commission's prior determination that collateral estoppel is applicable should be reversed and the case remanded back to the Commission so that the May 3, 2013 order assessing total and permanent disability benefits against the surety is reinstated.

RESPECTFULLY SUBMITTTED this 28th day of February, 2014.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 28th day of February, 2014 two true and correct copies of the foregoing document were served upon each of the following individuals by the method indicated below:

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