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Vol. 1 of 1

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

GARY DAVIS,

Appellant/Cross Respondent,

v.

HAMMACK MANAGEMENT, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety,

Respondents/Cross Respondents,

and

STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND,

Respondent/Cross Appellant.

SUPREME COURT NO. 43863

AGENCY'S RECORD

LAW CLERK

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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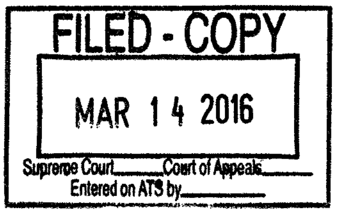

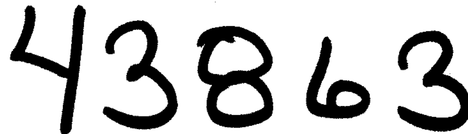

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

GARY DAVIS, Appellant/Cross Respondent, v. HAMMACK MANAGEMENT, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Respondents/Cross Respondents, and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Respondent/Cross Appellant.	**SUPREME COURT NO. 43863** **AGENCY'S RECORD**

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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EXHIBITS LIST

REPORTER'S TRANSCRIPTS:

There was no hearing, so no reporter's transcript was taken.

EXHIBITS:

Claimant filed exhibits 1-5 with Claimant's Memorandum in Support of Petition for Declaratory Ruling. Those exhibits are contained in the Agency's Record with the memorandum.

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ATTORNEYS FOR DEFENDANT STATE OF IDAHO,
INDUSTRIAL SPECIAL INDEMNITY FUND

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BEFORE THE INDUSTRIAL COMMISSION

STATE OF IDAHO

******

GARY DAVIS, Claimant, vs. HAMMACK MANAGEMENT, INC., Employer, and STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	I.C. No. 2005-501080 STIPULATION FOR ENTRY OF AWARD AGAINST DEFENDANTS FILED JUN 26 2014 Industrial Commission

COME NOW Claimant, Gary Davis ("Claimant"), Hammack Management, Inc. ("Employer") and the State Insurance Fund ("Surety") and the State of Idaho, Industrial Special Indemnity Fund, ("ISIF"), by and through their respective attorneys, and hereby Stipulate to the Entry of Award against Employer, Surety and the ISIF, hereafter collectively referred to as "Defendants" in this case. This Stipulation is made upon the following grounds and for the following reasons:

1. On or about November 9, 2004, Claimant was employed by Employer and earning approximately $400.00 per week as a maintenance man. On that date Claimant was injured as a result of an accident occurring in the course and scope of his employment with Employer (the "industrial injury").

2. Employer, at the time of the industrial injury, was insured for its worker's compensation liability by Surety under the laws of the State of Idaho.

3. At the time of the industrial injury, Claimant was Thirty-Seven (37) years old and married.

4. Claimant has heretofore invoked the jurisdiction of the Industrial Commission ("Commission") by duly serving Employer with his Complaint. Employer and Surety later joined the ISIF. Defendants have duly filed and served their Answers and Affirmative Defenses.

5. As a result of the industrial injury, Claimant suffered an injury to his low back aggravating a pre-existing back condition and causing severe and permanent injuries as more fully appears from the matters and papers on file with the Commission.

6. Claimant contends and Defendants agree that Claimant suffered from and has been disabled by certain injuries, diseases, and/or infirmities which pre-existed the industrial

injury. ISIF stipulates and agrees that 1) Claimant suffered from permanent pre-existing physical impairments relating to his cervical and lumbar spine, including impairments resulting from four (4) lumbar surgeries prior to the industrial injury; 2) that his permanent pre-existing physical impairments were manifest; 3) that his permanent pre-existing physical impairments were hindrances and obstacles to employment; 4) that the industrial injury aggravated, accelerated, and otherwise combined with his permanent pre-existing conditions; and 5) that Claimant is totally and permanently disabled as a result of his permanent pre-existing conditions and his industrial injury and relevant non-medical factors.

7. Following the industrial injury, Claimant was examined and treated by numerous physicians, both treating physicians and independent medical evaluators. Among the more significant aspects of his medical course since the industrial injury are the following:

a. **3/1/05**: 1) Bilateral revision laminectomy at L4-5, 2) Foraminotomy at L4-5 and L5-S1, 3) Revision diskectomy at L4-5 and L5-S1 bilaterally, 4) L4-5 and L5-S1 posterior lumbar interbody fusion, PCR interbody spacer, iliac crest autograft, 5) L4-5 and L5-S1 posterolateral fusion with iliac crest autograft, 6) Segmental pedicle screw instrumentation at L4-5 and L5-S1, 7) Harvesting right iliac crest bone graft, 8) Use of operating microscope, 9) Repair of durotomy. Performed by Dr. Jorgenson.

b. **10/27/05**: 1) Bilateral L2-3, L3-4 laminectomy, 2) Exploration of the lumbar spine. Performed by Dr. Jorgenson. Post-op complications: Infection to left hip.

c. **8/23/07**: 1) Removal of hardware, L4 to S1, 2) Facet arthrodesis of L4-5 and L5-S1, 3) Re-do lumbar laminectomies, bilateral medial facetectomies and foraminotomies, L2-3, L3-4, and L4-5, 4) Posterior lumbar interbody fusion L3-4, 5) Posterolateral intersegmental fixation L2, L3, L4, L5 and S1, 6) Posterolateral intersegmental fusion L2, L3 and L4, 7) Harvest of left-sided iliac crest bone graft. Performed by Dr. Hajjar.

d. **9/16/08**: 1) Removal of hardware, L4 to S1, 2) Assessment of arthrodesis at L2-3, L3-4, L4-5, and L5-S1, 3) Lumbar laminectomy with bilateral medial facetectomies and fibraminotomies, including diskectomy at L1-2

L3- for bilateral spinal canal and neural decompression, 4) Re-do left sided 4 and L4-5 hemilaminotomy and medial facetectomies for spinal canal and neural decompression, 5) Posterolateral intersegmental fixation T10-12, L1-L5, and S1, 6) Posterolateral intersegmental fusion of T10-T12, L1 and L3. Performed by Dr. Hajjar.

e. **5/18/10**: 1) Removal of hardware including S1 screws, 2) Assessment of arthrodesis at L5-S1, 3) Re-do L5-S1 bilateral decompression and laminotomy, 4) Posterolateral intersegmental fixation, L5-S1, 5) Posterolateral intersegmental fusion, L5-S1, 6) Harvest of right-sided iliac crest bone graft. Performed by Dr. Hajjar.

f. **12/6/10**: 1) Anterior cervical microdiskectomy at C4-5, C5-6 and C6-7 for bilateral spinal canal and neural decompression, 2) Anterior cervical interbody fusions C4-5, C5-6, and C6-7, 3) Anterior cervical plating, C4-5, 6 and 7, 4) Harvest of sternal bone graft. Performed by Dr. Hajjar.

g. **2/14/13**: C3 through 7 anterior cervical decompression and stabilization and T7 through sacral fusion and instrumentation. Performed by Dr. Hajjar.

8. Claimant's permanent partial impairments resulting from the industrial injury have been rated by numerous physicians, both treating physicians and through the IME process. The ratings for the industrial injury range from a high of 100% whole person impairment (Drs. Fredrickson and Hajjar—both treating physicians) to a low of 22% whole person impairment (IME of Drs. Wilson and Frizzell). The parties stipulate and agree that October 1, 2013 shall be designated as the date of medical stability and the date on which Claimant became totally and permanently disabled ("MMI date").

9. Following the industrial injury, and as a result thereof, Claimant was temporarily disabled and has been paid all benefits due for such temporary disability through the MMI date and has been paid all compensable medical benefits through the date hereof.

10. Defendants hereby stipulate that Claimant had 32% aggregate whole person permanent partial impairment before the industrial injury and that Claimant suffered an

additional 27% whole person permanent partial impairment due to the industrial injury. As Defendants stipulate that Claimant is totally and permanently disabled, they agree to apportion the nonmedical factors and the additional remaining permanent disability according to law. Therefore, Employer accepts responsibility for paying 250 weeks of total and permanent disability income benefits, commencing as of Claimant's MMI date, October 1, 2013.

11. Starting October 1, 2013 and continuing for 250 weeks thereafter, unless Claimant dies prior to the expiration of such 250-week period, Surety shall be responsible to pay Claimant total and permanent disability income benefits in the amount of 55% of the average weekly state wage for 2004, the year of the industrial injury, namely, $293.70 per week, subject to the credit described in paragraph 12, below. Beginning on October 1, 2013, Claimant is entitled to be paid total and permanent disability benefits at 45% of the then prevailing average weekly state wage pursuant to Idaho Code Sections 72-408 and 72-409. Therefore, the total and permanent disability benefit rate for claimant for 2013 is $303.30 per week, and for 2014 is $307.80 per week. The difference between Surety's obligation of $293.70 per week and Claimant's benefit rate of 45% of the prevailing average state weekly wage shall be paid by the ISIF. Therefore, for the period of October 1, 2013 through December 31, 2013, the ISIF will pay to Claimant the sum of $9.60 per week. For the calendar year 2014, ISIF shall be obligated to pay to Claimant the differential amount of $14.10 per week. At the expiration of said 250 week period, subject to the credit discussed in paragraph 12, below, the ISIF will pay Claimant his full statutory income benefits, said amount being 45% of the then prevailing average state weekly wage, until Claimant's death.

12. Surety has accepted aggregate permanent physical impairment ratings amounting to 27% whole person impairment for the industrial injury and paid the benefits associated with such ratings. In addition, Surety has paid Claimant benefits corresponding to 5% whole person as an advance against permanent disability. These benefits, combined, amount to a total of 160 weeks. The amount paid by Surety to Claimant for the 160 weeks based on the combined total of the 27% whole person PPI and 5% advance against permanent disability, amounts to $46,992. Notwithstanding any other provision herein, Surety is entitled to a credit of 160 weeks, or $46,992, against its obligation to pay 250 weeks of total and permanent disability benefits to Claimant beginning October 1, 2013, leaving a total of 90 weeks of benefits to be paid by Surety.

13. The Claimant retained Claimant's counsel to represent him in this worker's compensation claim on or about 12/29/04. A Complaint was filed with the Industrial Commission on or about 4/27/06. The parties stipulate and agree that the efforts of Claimant's counsel have operated primarily and substantially to secure all of the worker's compensation benefits that the Claimant has received in this worker's compensation claim since the date when Claimant's counsel was retained on 12/29/04. Pursuant to IDAPA 17.02.08.033.01(e), Claimant's counsel shall be allowed to assert a charging lien of 25% against the Claimant's worker's compensation benefits that are being paid pursuant to the terms of this stipulation. However, after a period of 10 years from the date when the Claimant achieved MMI on 10/1/13 (I.e., on 10.1.23), the Claimant's attorney's charging lien shall be reduced from 25% down to 15% in accordance with IDAPA 17.02.08.033.01(e)(iii).

14. All parties stipulate and agree that the Commission shall, on and by approval hereof, be deemed to have fully adjudicated said accident as against Defendants, resultant

injuries industrial in nature and origin, and all pre-existing disability, as provided by the Worker's Compensation Laws of the State of Idaho.

15. The above outlined payments, agreed to be paid by Defendants, are in consideration for and in payment of any and all claims Claimant has, and may now or hereafter make against Defendants and any of them for benefits under the Worker's Compensation Laws of the State of Idaho, save and except for compensable medical benefits and medical services related to the industrial accident. Approval of this Stipulation to Entry of Award by the Commission shall fully and finally discharge Defendants from liability for any and all claims Claimant has, and may now or hereafter have, including but not limited to every claim of whatever nature or kind for total and permanent disability compensation and all other claims Claimant could now or hereafter make for benefits under the Worker's Compensation Laws of the State of Idaho, save and except for compensable medical benefits and medical services. This is the case whether or not the full extent of Claimant's damages, disability, loss, expenses or claims is now known or foreseen, and regardless of whether Claimant shall ever again injure himself in another or future accident, or otherwise, or suffer any disease which would arguably cause the Defendants, or any of them, to be liable for additional claims or benefits under the laws of the State of Idaho. This Stipulation shall, upon approval and entry of award by the Industrial Commission, discharge the Defendants, and each of them, from liability for this and any other and all claims forever, regardless of whether such claims arise from the accident which is the subject of this action or any accidents, injuries, diseases, impairments, disabilities or infirmities existing prior to such accident or hereafter arising.

16. Upon Order of the Commission approving this Stipulation, and excepting only payment of said sums by Defendants as aforesaid, Defendants and each of them shall be, and by these presents are fully, finally and forever discharged and released of and from any and all additional liability to Claimant on account of the above alleged accident, save and except for Surety's responsibility for compensable medical benefits and medical services related to the industrial accident, pursuant to law.

17. Surety stipulates that it will continue to provide medical benefits and services to Claimant for his industrial injuries, infirmities and conditions causally related to his industrial injury.

18. The terms of this Stipulation shall be binding upon all of the undersigned parties, their heirs, representatives, successors and assigns.

19. All parties stipulate that the Commission shall, on and by approval hereof, be deemed to adjudicate said alleged accident, resultant injury and disability industrial in nature and origin, and all pre-existing disability, as provided by the Worker's Compensation Laws of the State of Idaho.

20. The parties represent and advise the Commission that the benefits provided for and to be paid hereunder are the full measure of benefits Claimant would be entitled to receive if this matter proceeded to hearing and Defendants were found to be liable for future medical care causally related to the industrial injury, for permanent partial impairment benefits and for total and permanent disability income benefits pursuant to law.

DATED this 6th day of June, 2014.

CLAIMANT:

GARY DAVIS

STATE OF IDAHO)
:ss.
County of Ada)

On this 6th day of June, 2014, before me a Notary Public in and for said State, personally appeared GARY DAVIS, known to me to be the person whose name is subscribed in the above and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year in the certificate first above written.

MEGAN NIECE NOTARY PUBLIC STATE OF IDAHO

Megan Niece
Notary Public for Idaho
My Comm. Expires: February 5, 2019

Rick D. Kallas
Attorney for Claimant

STATE INSURANCE FUND

By: , Assistant Manager/Claims
Authorized Representative of Employer and Surety

As to form only:

Jon M. Bauman
Attorney for Employer/Surety

INDUSTRIAL SPECIAL INDEMNITY FUND

By: James F. Kile
Manager, ISIF

Kenneth L. Mallea, Attorney for ISIF

ORDER OF APPROVAL AND DISCHARGE

The foregoing Stipulation for Entry of Award Against Defendants ("Stipulation") having duly and regularly come before this Commission, and it appearing that the interests of justice and the best interests of the parties are and will be served by approving said Stipulation and granting the Order of Discharge as prayed for:

NOW, THEREFORE, said foregoing Stipulation for Entry of Award Against Defendants shall be, and the same hereby is **APPROVED**, and the Complaint in this matter is dismissed with prejudice.

DATED this 26 day of JUNE, 2014.

INDUSTRIAL COMMISSION

By ______________________
Chairman

____
Member

____
Member

ATTEST:

____
Assistant Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the 20 day of JUNE, 2014, a true and correct copy of **STIPULATION FOR ENTRY OF AWARD AGAINST DEFENDANTS AND ORDER OF APPROVAL** was served by United States Mail upon each of the following:

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4842-2787-2282, v. 1

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY DAVIS, Claimant, vs. HAMMACK MANAGEMENT, INC., Employer, and IDAHO STATE INSURNACE FUND, Surety, and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	I.C. No. 2005 - 501080 CLAIMANT'S PETITION FOR DECLARATORY RULING WHICH INTERPRETS AND CLARIFIES THE STIPULATION FOR ENTRY OF AWARD AGAINST DEFENDANTS AND ORDER OF APPROVAL AND DISCHARGE ENTERED BY THE INDUSTRIAL COMMISSION ON 6.26.14

COMES NOW Claimant, Gary Davis, and pursuant to J.R.P. 15, hereby requests that the Industrial Commission enter a Declaratory Ruling which interprets the rights, duties and obligations of the parties pursuant to the Stipulation For Entry of Award Against Defendants and the Order of Approval and Discharge entered by the Industrial Commission on 6.26.14.

(A) Issues in Dispute.

The following issues are in dispute and require a Declaratory Ruling:

1. Whether the $39,649.50 invalid PPI credit granted to Employer for the 27% whole person PPI award previously paid to Claimant before the parties stipulated that Claimant was totally and permanently disabled is void pursuant to Idaho Code §72-711 and the Idaho Supreme Court's holding in *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014) because it deprives the Claimant of the full measure of his statutory total and permanent disability (TPD) benefits and does not "conform to the provisions of this law"?

2. Whether the $39,649.50 invalid credit taken by Employer for the 27% whole person PPI award previously paid to Claimant before the parties stipulated that Claimant was totally and permanently disabled is void pursuant to Idaho Code §72-318(1) and the Idaho Supreme Court's holding in *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014) because it unfairly relieves Employer in whole or in part from its liability to pay the Claimant the full measure of his statutory TPD benefits pursuant to the Idaho Workers' Compensation Act?

3. Whether the $39,649.50 invalid credit taken by Employer for the 27% whole person PPI award previously paid to Claimant before the parties stipulated that Claimant was totally

and permanently disabled is void pursuant to Idaho Code §72-318(2) and the Idaho Supreme Court's holding in *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014) because it unfairly requires the Claimant to waive his right to receive the full measure of his statutory TPD benefits under the Idaho Workers' Compensation Act?

4. Whether the Industrial Special Indemnity Fund must begin paying the Claimant his full statutory TPD benefits based on 45% of the currently applicable average weekly state 90 weeks after the stipulated date of MMI on 10.1.13 pursuant to the unambiguous terms of the Stipulation which made ISIF liability "subject to the credit discussed in paragraph 12"?

5. Whether the Stipulation is ambiguous when defining the date when the Industrial Special Indemnity Fund's obligation to pay full statutory TPD benefits would begin and whether that ambiguity should be construed against the ISIF and in favor of the Claimant since the ISIF drafted the language of the Stipulation?

6. Whether Claimant is entitled to an award of attorney's fees from Employer and ISIF pursuant to Idaho Code §72-804 because Employer and ISIF have both contested the Claimant's claim for the full measure of his TPD benefits that he is entitled to receive pursuant to the Act and the Stipulation without reasonable grounds?

(B) <u>An Actual Controversy Exists With Both Defendants</u>

1. The Claimant wrote to Employer on 1.15.15 and asked Employer to either reimburse the Claimant for the $39,649.50 invalid PPI credit that it took against the Claimant's TPD benefits or stipulate to amend the 6.26.14 Stipulation in order to eliminate the credit.

Employer denied both requests on 1.20.15. Therefore, an actual controversy exists with Employer over the validity of its taking the illegal credit for PPI benefits previously paid.

2. The Claimant wrote to ISIF on 2.2.15 and asked ISIF to confirm in writing that it would begin paying Claimant his full statutory TPD benefits based on 45% of the currently applicable AWSW beginning 90 weeks after the stipulated date of MMI on 10.1.13 in accordance with the express language of the Stipulation. The ISIF responded to the Claimant's 2.2.15 letter on 2.5.15 and denied the Claimant's requests. Therefore, an actual controversy exists with ISIF over the date when its obligation to pay the Claimant his full statutory total and permanent disability benefits begins.

(C) The Claimant's Interest in Receiving Full Statutory TPD Benefits is at Stake

The Claimant has an interest in collecting his full statutory TPD benefits based on the statutory rate of 45% of the currently applicable average weekly state wage from the stipulated date of MMI on 10.1.13 until the date he dies based on the stated purpose of the Stipulation and the provisions of the Act.

If Employer stops paying its 55% share of the Claimant's TPD disability benefits after 90 weeks based on its invalid PPI credit and the ISIF refuses to begin paying the Claimant his full statutory benefits until after 250 weeks from the stipulated date of MMI on 10.1.13, the Claimant will go 160 weeks or more than 3 years without collecting his full statutory TPD benefits in direct violation of the stated purpose of the stipulation and the substantive provisions of Idaho's workers' compensation Act.

This Petition For Declaratory Ruling is based on the express terms of the Stipulation and Order entered on 6.26.14, the facts and legal authorities cited in the Claimant's Memorandum In

Support of Petition For Declaratory Ruling (including Exhibits No. 1-5), the sworn statements of Claimant in his Affidavit In Support of Petition For Declaratory Ruling (Ex. 5) and the provisions of the Idaho Workers' Compensation Act. A copy of the 6.26.14 Stipulation and Order and Approval of Discharge is attached to this Petiition.

Respectfully submitted this 26th day of February 2015.

ELLSWORTH, KALLAS & DEFRANCO, PLLC

By:________________________
RICK D. KALLAS
Attorney for Claimant

Certificate of Service

I HEREBY CERTIFY that on the 26th day of February 2015, I caused to be served a true and correct copy of Claimant's Petition For Declaratory Ruling by the method indicated below upon the following persons:

Kenneth L. Mallea Mallea Law Offices 78 SW 5th Ave., Ste. 1 P.O. Box 857 Meridian, Idaho 83680	[X] U.S. Mail, Postage Prepaid [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile @ 208.888.2789
Jon M. Bauman Elam & Burke 251 E. Front Street, Ste. 300 P.O. Box 1539 Boise, ID 83701	[X] U.S. Mail, Postage Prepaid [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile @ 208.384.5844

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ISB No. 2397

ATTORNEYS FOR DEFENDANT STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND

BEFORE THE INDUSTRIAL COMMISSION

STATE OF IDAHO

* * * * * *

GARY DAVIS, Claimant, vs. HAMMACK MANAGEMENT, INC., Employer, and STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	I.C. No. 2005-501080 STIPULATION FOR ENTRY OF AWARD AGAINST DEFENDANTS FILED JUN 26 2014 Industrial Commission

COPY

COME NOW Claimant, Gary Davis ("Claimant"), Hammack Management, Inc. ("Employer") and the State Insurance Fund ("Surety") and the State of Idaho, Industrial Special Indemnity Fund, ("ISIF"), by and through their respective attorneys, and hereby Stipulate to the Entry of Award against Employer, Surety and the ISIF, hereafter collectively referred to as "Defendants" in this case. This Stipulation is made upon the following grounds and for the following reasons:

1. On or about November 9, 2004, Claimant was employed by Employer and earning approximately $400.00 per week as a maintenance man. On that date Claimant was injured as a result of an accident occurring in the course and scope of his employment with Employer (the "industrial injury").

2. Employer, at the time of the industrial injury, was insured for its worker's compensation liability by Surety under the laws of the State of Idaho.

3. At the time of the industrial injury, Claimant was Thirty-Seven (37) years old and married.

4. Claimant has heretofore invoked the jurisdiction of the Industrial Commission ("Commission") by duly serving Employer with his Complaint. Employer and Surety later joined the ISIF. Defendants have duly filed and served their Answers and Affirmative Defenses.

5. As a result of the industrial injury, Claimant suffered an injury to his low back aggravating a pre-existing back condition and causing severe and permanent injuries as more fully appears from the matters and papers on file with the Commission.

6. Claimant contends and Defendants agree that Claimant suffered from and has been disabled by certain injuries, diseases, and/or infirmities which pre-existed the industrial

injury. ISIF stipulates and agrees that 1) Claimant suffered from permanent pre-existing physical impairments relating to his cervical and lumbar spine, including impairments resulting from four (4) lumbar surgeries prior to the industrial injury; 2) that his permanent pre-existing physical impairments were manifest; 3) that his permanent pre-existing physical impairments were hindrances and obstacles to employment; 4) that the industrial injury aggravated, accelerated, and otherwise combined with his permanent pre-existing conditions; and 5) that Claimant is totally and permanently disabled as a result of his permanent pre-existing conditions and his industrial injury and relevant non-medical factors.

7. Following the industrial injury, Claimant was examined and treated by numerous physicians, both treating physicians and independent medical evaluators. Among the more significant aspects of his medical course since the industrial injury are the following:

a. **3/1/05**: 1) Bilateral revision laminectomy at L4-5, 2) Foraminotomy at L4-5 and L5-S1, 3) Revision diskectomy at L4-5 and L5-S1 bilaterally, 4) L4-5 and L5-S1 posterior lumbar interbody fusion, PCR interbody spacer, iliac crest autograft, 5) L4-5 and L5-S1 posterolateral fusion with iliac crest autograft, 6) Segmental pedicle screw instrumentation at L4-5 and L5-S1, 7) Harvesting right iliac crest bone graft, 8) Use of operating microscope, 9) Repair of durotomy. Performed by Dr. Jorgenson.

b. **10/27/05**: 1) Bilateral L2-3, L3-4 laminectomy, 2) Exploration of the lumbar spine. Performed by Dr. Jorgenson. Post-op complications: Infection to left hip.

c. **8/23/07**: 1) Removal of hardware, L4 to S1, 2) Facet arthrodesis of L4-5 and L5-S1, 3) Re-do lumbar laminectomies, bilateral medial facetectomies and foraminotomies, L2-3, L3-4, and L4-5, 4) Posterior lumbar interbody fusion L3-4, 5) Posterolateral intersegmental fixation L2, L3, L4, L5 and S1, 6) Posterolateral intersegmental fusion L2, L3 and L4, 7) Harvest of left-sided iliac crest bone graft. Performed by Dr. Hajjar.

d. **9/16/08**: 1) Removal of hardware, L4 to S1, 2) Assessment of arthrodesis at L2-3, L3-4, L4-5, and L5-S1, 3) Lumbar laminectomy with bilateral medial facetectomies and fibraminotomies, including diskectomy at L1-2

L3- for bilateral spinal canal and neural decompression, 4) Re-do left sided 4 and L4-5 hemilaminotomy and medial facetectomies for spinal canal and neural decompression, 5) Posterolateral intersegmental fixation T10-12, L1-L5, and S1, 6) Posterolateral intersegmental fusion of T10-T12, L1 and L3. Performed by Dr. Hajjar.

e. **5/18/10**: 1) Removal of hardware including S1 screws, 2) Assessment of arthrodesis at L5-S1, 3) Re-do L5-S1 bilateral decompression and laminotomy, 4) Posterolateral intersegmental fixation, L5-S1, 5) Posterolateral intersegmental fusion, L5-S1, 6) Harvest of right-sided iliac crest bone graft. Performed by Dr. Hajjar.

f. **12/6/10**: 1) Anterior cervical microdiskectomy at C4-5, C5-6 and C6-7 for bilateral spinal canal and neural decompression, 2) Anterior cervical interbody fusions C4-5, C5-6, and C6-7, 3) Anterior cervical plating, C4-5, 6 and 7, 4) Harvest of sternal bone graft. Performed by Dr. Hajjar.

g. **2/14/13**: C3 through 7 anterior cervical decompression and stabilization and T7 through sacral fusion and instrumentation. Performed by Dr. Hajjar.

8. Claimant's permanent partial impairments resulting from the industrial injury have been rated by numerous physicians, both treating physicians and through the IME process. The ratings for the industrial injury range from a high of 100% whole person impairment (Drs. Fredrickson and Hajjar—both treating physicians) to a low of 22% whole person impairment (IME of Drs. Wilson and Frizzell). The parties stipulate and agree that October 1, 2013 shall be designated as the date of medical stability and the date on which Claimant became totally and permanently disabled ("MMI date").

9. Following the industrial injury, and as a result thereof, Claimant was temporarily disabled and has been paid all benefits due for such temporary disability through the MMI date and has been paid all compensable medical benefits through the date hereof.

10. Defendants hereby stipulate that Claimant had 32% aggregate whole person permanent partial impairment before the industrial injury and that Claimant suffered an

additional 27% whole person permanent partial impairment due to the industrial injury. As Defendants stipulate that Claimant is totally and permanently disabled, they agree to apportion the nonmedical factors and the additional remaining permanent disability according to law. Therefore, Employer accepts responsibility for paying 250 weeks of total and permanent disability income benefits, commencing as of Claimant's MMI date, October 1, 2013.

11. Starting October 1, 2013 and continuing for 250 weeks thereafter, unless Claimant dies prior to the expiration of such 250-week period, Surety shall be responsible to pay Claimant total and permanent disability income benefits in the amount of 55% of the average weekly state wage for 2004, the year of the industrial injury, namely, $293.70 per week, subject to the credit described in paragraph 12, below. Beginning on October 1, 2013, Claimant is entitled to be paid total and permanent disability benefits at 45% of the then prevailing average weekly state wage pursuant to Idaho Code Sections 72-408 and 72-409. Therefore, the total and permanent disability benefit rate for claimant for 2013 is $303.30 per week, and for 2014 is $307.80 per week. The difference between Surety's obligation of $293.70 per week and Claimant's benefit rate of 45% of the prevailing average state weekly wage shall be paid by the ISIF. Therefore, for the period of October 1, 2013 through December 31, 2013, the ISIF will pay to Claimant the sum of $9.60 per week. For the calendar year 2014, ISIF shall be obligated to pay to Claimant the differential amount of $14.10 per week. At the expiration of said 250 week period, subject to the credit discussed in paragraph 12, below, the ISIF will pay Claimant his full statutory income benefits, said amount being 45% of the then prevailing average state weekly wage, until Claimant's death.

12. Surety has accepted aggregate permanent physical impairment ratings amounting to 27% whole person impairment for the industrial injury and paid the benefits associated with such ratings. In addition, Surety has paid Claimant benefits corresponding to 5% whole person as an advance against permanent disability. These benefits, combined, amount to a total of 160 weeks. The amount paid by Surety to Claimant for the 160 weeks based on the combined total of the 27% whole person PPI and 5% advance against permanent disability, amounts to $46,992. Notwithstanding any other provision herein, Surety is entitled to a credit of 160 weeks, or $46,992, against its obligation to pay 250 weeks of total and permanent disability benefits to Claimant beginning October 1, 2013, leaving a total of 90 weeks of benefits to be paid by Surety.

13. The Claimant retained Claimant's counsel to represent him in this worker's compensation claim on or about 12/29/04. A Complaint was filed with the Industrial Commission on or about 4/27/06. The parties stipulate and agree that the efforts of Claimant's counsel have operated primarily and substantially to secure all of the worker's compensation benefits that the Claimant has received in this worker's compensation claim since the date when Claimant's counsel was retained on 12/29/04. Pursuant to IDAPA 17.02.08.033.01(e), Claimant's counsel shall be allowed to assert a charging lien of 25% against the Claimant's worker's compensation benefits that are being paid pursuant to the terms of this stipulation. However, after a period of 10 years from the date when the Claimant achieved MMI on 10/1/13 (I.e., on 10.1.23), the Claimant's attorney's charging lien shall be reduced from 25% down to 15% in accordance with IDAPA 17.02.08.033.01(e)(iii).

14. All parties stipulate and agree that the Commission shall, on and by approval hereof, be deemed to have fully adjudicated said accident as against Defendants, resultant

injuries industrial in nature and origin, and all pre-existing disability, as provided by the Worker's Compensation Laws of the State of Idaho.

15. The above outlined payments, agreed to be paid by Defendants, are in consideration for and in payment of any and all claims Claimant has, and may now or hereafter make against Defendants and any of them for benefits under the Worker's Compensation Laws of the State of Idaho, save and except for compensable medical benefits and medical services related to the industrial accident. Approval of this Stipulation to Entry of Award by the Commission shall fully and finally discharge Defendants from liability for any and all claims Claimant has, and may now or hereafter have, including but not limited to every claim of whatever nature or kind for total and permanent disability compensation and all other claims Claimant could now or hereafter make for benefits under the Worker's Compensation Laws of the State of Idaho, save and except for compensable medical benefits and medical services. This is the case whether or not the full extent of Claimant's damages, disability, loss, expenses or claims is now known or foreseen, and regardless of whether Claimant shall ever again injure himself in another or future accident, or otherwise, or suffer any disease which would arguably cause the Defendants, or any of them, to be liable for additional claims or benefits under the laws of the State of Idaho. This Stipulation shall, upon approval and entry of award by the Industrial Commission, discharge the Defendants, and each of them, from liability for this and any other and all claims forever, regardless of whether such claims arise from the accident which is the subject of this action or any accidents, injuries, diseases, impairments, disabilities or infirmities existing prior to such accident or hereafter arising.

16. Upon Order of the Commission approving this Stipulation, and excepting only payment of said sums by Defendants as aforesaid, Defendants and each of them shall be, and by these presents are fully, finally and forever discharged and released of and from any and all additional liability to Claimant on account of the above alleged accident, save and except for Surety's responsibility for compensable medical benefits and medical services related to the industrial accident, pursuant to law.

17. Surety stipulates that it will continue to provide medical benefits and services to Claimant for his industrial injuries, infirmities and conditions causally related to his industrial injury.

18. The terms of this Stipulation shall be binding upon all of the undersigned parties, their heirs, representatives, successors and assigns.

19. All parties stipulate that the Commission shall, on and by approval hereof, be deemed to adjudicate said alleged accident, resultant injury and disability industrial in nature and origin, and all pre-existing disability, as provided by the Worker's Compensation Laws of the State of Idaho.

20. The parties represent and advise the Commission that the benefits provided for and to be paid hereunder are the full measure of benefits Claimant would be entitled to receive if this matter proceeded to hearing and Defendants were found to be liable for future medical care causally related to the industrial injury, for permanent partial impairment benefits and for total and permanent disability income benefits pursuant to law.

DATED this 6th day of June, 2014.

CLAIMANT:

GARY DAVIS

STATE OF IDAHO)
:ss.
County of Ada)

On this 6th day of June, 2014, before me a Notary Public in and for said State, personally appeared GARY DAVIS, known to me to be the person whose name is subscribed in the above and acknowledged to me that he executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and seal the day and year in the certificate first above written.

MEGAN NIECE NOTARY PUBLIC STATE OF IDAHO

Megan Niece
Notary Public for Idaho
My Comm. Expires: February 5, 2019

Rick D. Kallas
Attorney for Claimant

STATE INSURANCE FUND

By: , Assistant Manager/Claims
Authorized Representative of Employer and Surety

As to form only:

Jon M. Bauman
Attorney for Employer/Surety

INDUSTRIAL SPECIAL INDEMNITY FUND

By: James F. Kile
Manager, ISIF

Kenneth L. Mallea, Attorney for ISIF

ORDER OF APPROVAL AND DISCHARGE

The foregoing Stipulation for Entry of Award Against Defendants ("Stipulation") having duly and regularly come before this Commission, and it appearing that the interests of justice and the best interests of the parties are and will be served by approving said Stipulation and granting the Order of Discharge as prayed for:

NOW, THEREFORE, said foregoing Stipulation for Entry of Award Against Defendants shall be, and the same hereby is **APPROVED,** and the Complaint in this matter is dismissed with prejudice.

DATED this 26 day of JUNE, 2014.

INDUSTRIAL COMMISSION

By ______________________
Chairman

____
Member

____
Member

ATTEST:

____
Assistant Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

<u>CERTIFICATE OF SERVICE</u>

I hereby certify that on the 20 day of JUNE, 2014, a true and correct copy of **STIPULATION FOR ENTRY OF AWARD AGAINST DEFENDANTS AND ORDER OF APPROVAL** was served by United States Mail upon each of the following:

Rick D. Kallas
1031 East Park Boulevard
Boise, ID 83712
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*Attorney for Employer/*Surety

Kenneth L. Mallea
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Attorney for Defendant ISIF

Verlene Wise/James F. Kile
Industrial Special Indemnity Fund
P O Box 83720
Boise, ID 83720-7901
Defendant ISIF

____

4842-2787-2282, v. 1

Rick D. Kallas
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Attorney for Claimant

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INDUSTRIAL COMMISSION

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY DAVIS, Claimant, vs. HAMMACK MANAGEMENT, INC., Employer, and IDAHO STATE INSURNACE FUND, Surety, and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	I.C. No. 2005 - 501080 CLAIMANT'S AFFIDAVIT IN SUPPORT OF PETITION FOR DECLARATORY RULING

Gary Davis, the Claimant, being first duly sworn on oath, states as follows:

1. I am the Claimant in this case and make this affidavit based on my own personal knowledge.

2. Before I signed the Stipulation For Entry of Award Against the Defendants in my case on June 6, 2014, I sat down in my attorney's office and read the Stipulation. At that time, it was my understanding that the State Insurance Fund had agreed to pay its share of my total and permanent disability benefits for 250 weeks after the date when the parties stipulated that I reached maximum medical improvement on October 1, 2013. However, based on the language of paragraphs 11 and 12 of the Stipulation, I understood that the State Insurance Fund was taking a credit against its obligation to pay 250 weeks worth of TPD benefits based on the 27% PPI award that it had paid to me and the 5% disability above impairment award it had paid to me before the parties stipulated that I was totally and permanently disabled by my industrial injury.

3. After the State Insurance Fund took the credits described in paragraph 12 of the Stipulation, I knew that it would stop paying me its share of my TPD benefits 90 weeks after October 1, 2013. However, I was not concerned about losing those payments from the State Insurance Fund because it was my understanding that the Industrial Special Indemnity Fund would begin paying my full statutory total and permanent disability benefits based on 45% of the current Average Weekly State Wage when the State Insurance Fund stopped making its payments. It did not matter to me who paid my benefits as long as I continued to receive the full measure of my benefits based on 45% of the current Average Weekly State Wage.

4. My understanding that the Industrial Special Indemnity Fund would begin paying my full statutory total and permanent disability benefits based on 45% of the current Average Weekly State Wage after 90 weeks was based on the plain language of paragraph 11 which said that the State Insurance Fund's obligation to pay me was "subject to the credit" in paragraph 12 and the Industrial Special Indemnity Fund's obligation was also "subject to the credit" in paragraph 12. In my mind, that meant that when the State Insurance Fund's obligation stopped after 90 weeks, the Industrial Special Indemnity Fund's obligation to pay full benefits would start.

5. If I would have known that the Industrial Special Indemnity Fund would take the position that it did not have to start paying me my full statutory total and permanent disability benefits until after 250 weeks, I never would have signed the Stipulation since it would require me to waive my right to receive the full measure of my statutory total and permanent disability benefits for more than 3 years from week 90 to week 250.

6. I cannot live and pay my bills based on the small differential payment that I will receive from the Industrial Special Indemnity Fund based on the difference between 45% of the current Average Weekly State Wage and 55% of the Average Weekly State Wage for the year that I was injured back in 2004.

7. Based on 45% of the Average Weekly State Wage in 2015, that differential payment is only $16.35 per week or $65.40 per month. After paying my attorney 25%, I will only receive $49.05 per month.

8. I cannot live and pay my bills on $49.05 per month. Therefore, I am asking the Industrial Commission to not allow the State Insurance Fund to take the invalid credit for the 27%

whole person PPI award that it previously paid to me. I understand that the State Insurance Fund is legally entitled to take a credit for the 5% disability above impairment benefits that it paid to me on a voluntary basis and I do not have any objection to that credit.

9. If the Industrial Commission is going to allow the State Insurance Fund to take the 27% PPI credit, then I would ask the Industrial Commission to require the Industrial Special Indemnity Fund to begin paying full statutory benefits based on 45% of the current Average Weekly State Wage when the State Insurance Fund payments stop after 90 weeks from October 1, 2013.

10. If the State Insurance Fund is allowed to stop making payments after 90 weeks from 10.1.13 but the Industrial Special Indemnity Fund does not have to start paying my full statutory benefits until 250 weeks after 10.1.13, I will not be able to survive on the small differential payment from the ISIF for more than 3 years.

Further your Affiant Sayeth Naught.

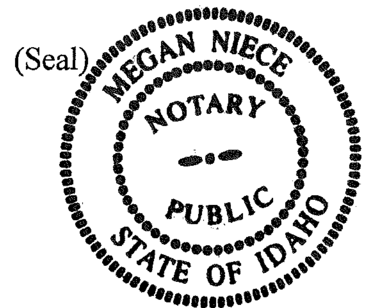
Dated this 25th day of February, 2015.

Gary Davis

SUBSCRIBED AND SWORN TO before me this 25th day of February, 2015

County of Ada)
: s.s.
State of Idaho)

(Seal)



Megan Niece
Notary Public For Idaho
Residing at Boise, Idaho
My Commission Expires: February 5, 2019

Certificate of Service

I HEREBY CERTIFY that on the 26th day of February 2015, I caused to be served a true and correct copy of Claimant's Affidavit In Support of Petition For Declaratory Ruling by the method indicated below upon the following persons:

Kenneth L. Mallea Mallea Law Offices 78 SW 5th Ave., Ste. 1 P.O. Box 857 Meridian, Idaho 83680	[X] U.S. Mail, Postage Prepaid [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile @ 208.888.2789
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Attorney for Claimant

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STRIAL COMMISSION

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY DAVIS, Claimant, vs. HAMMACK MANAGEMENT, INC., Employer, and IDAHO STATE INSURNACE FUND, Surety, and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	I.C. No. 2005 - 501080 CLAIMANT'S MEMORANDUM IN SUPPORT OF PETITION FOR DECLARATORY RULING

(A) BACKGROUND FACTS

The Claimant and the Defendants entered into a Stipulation For Entry of Award Against Defendants that the Industrial Commission entered as an Order of Approval and Discharge on 6.26.14. The stated purpose of the Stipulation was to provide the Claimant with "the full measure of benefits Claimant would be entitled to receive if this matter proceeded to hearing and Defendants were found to be liable for future medical care causally related to the industrial injury, for permanent partial impairment benefits and for total and permanent disability income benefits pursuant to law" (See ¶20 on page 8 of the Stipulation).

Based on application of the formula announced in *Carey v. Clearwater County Road Department*, 107 Idaho 109, 686 P.2d 54 (1984), Employer agreed to pay Claimant 250 weeks of benefits at 55% of the average weekly state wage for the year that Claimant was injured in 2004 starting on 10.1.13 (See ¶ 10 of the Stipulation). However, Employer's obligation to pay Claimant 250 weeks of benefits was "subject to the credit described in paragraph 12, below" which shortened Employer's liability for total and permanent disability (TPD) benefits from 250 weeks down to 90 weeks (See ¶11 of the Stipulation).

Paragraph 12 gave Employer 2 credits: (1) an invalid credit of 135 weeks for the 27% whole person PPI award that Employer paid to Claimant prior to the date when the parties stipulated that the Claimant was totally and permanently disabled (i.e., 27% X 500 weeks = 135 weeks X 55% of 2004 AWSW of $293.70 = $39,649.50); and (2) a valid credit of 25 weeks based on the 5% disability in excess of impairment benefits that Employer paid to Claimant on a voluntary basis pursuant to an 11.6.12 Stipulation

Regarding Advance of Benefits (i.e., 5% X 500 weeks = 25 weeks X 2004 AWSW of $293.70 = $7,342.50) [1]. The total combined credit claimed by Employer in paragraph 12 is $39,649.50 + $7,342.50 = $46,992.00.

A mere 60 days after the Industrial Commission entered its Order of Approval and Discharge in this case on 6.26.14, the Idaho Supreme Court entered its decision in *Corgatelli v. Steel West, Inc.,* 157 Idaho 287, 335 P.3d 1150 (2014) on 8.25.14. The *Corgatelli* Court held that there is no statutory basis under the Idaho Workers' Compensation Act to give Employer credit for PPI benefits paid prior to a determination that the Claimant is totally and permanently disabled.

Based on the holding in *Corgatelli* and the provisions of the Idaho Workers' Compensation Act, the Claimant wrote to Employer on 1.22.15 and asked Employer to either reimburse him for the invalid credit that it took against his TPD benefits for the PPI benefits previously paid or stipulate to amend the 6.26.14 Stipulation to eliminate the invalid credit (See Ex. 1). Employer responded on 1.20.15 and rejected both requests (See Ex. 2).

After Employer made it clear that it would stop paying Claimant' its share of his TPD benefits at the expiration of 90 weeks after the stipulated date of MMI on 10.1.13, the Claimant wrote to ISIF on 2.2.15 and asked the ISIF to confirm in writing that it would begin paying the Claimant his full statutory TPD benefits at 45% of the currently applicable AWSW after the expiration of 90 weeks from the stipulated date of MMI on 10.1.13 (See Ex. 3).

[1] The Claimant concedes that Employer is entitled to claim the 25-week credit of $7,342.50 for the disability in excess of impairment payments that Employer made on a voluntary basis pursuant to the 11.6.12 Stipulation.

Even though the ISIF's obligation to pay Claimant the full measure of his statutory TPD benefits was "subject to the credit discussed in paragraph 12, below" which shortened the ISIF payment obligation from 250 weeks to 90 weeks (See ¶11 of the Stipulation), the ISIF responded to the Claimant's 2.2.15 request on 2.5.15 and refused to confirm that it would begin paying the Claimant his full statutory TPD benefit of 45% of the currently applicable AWSW at the expiration of 90 weeks after the stipulated date of MMI on 10.1.13 (See Ex. 4).

Based on the Employer's unconscionable position that is entitled to claim a invalid credit in violation of the Claimant's substantive rights under the Idaho Workers' Compensation Act and the ISIF's unconscionable position that its obligation to pay Claimant the full measure of his statutory TPD benefits is not "subject to" the credit even though the Stipulation clearly indicates otherwise, the Claimant has been placed in the unjustified position of being deprived of the full measure of his statutory TPD benefits for more than 3 years or 160 weeks from week 90 to week 250.

The Claimant cannot afford to purchase the basic necessities of life for more than 3 years between week 90 and week 250 based on the small differential payment that he will receive from the ISIF based on the difference between 55% of the AWSW in 2004 of $293.70 and 45% of the currently applicable AWSW (See Ex. 5). In 2015, the small differential payment made by ISIF is $16.35 per week calculated as follows: 45% of 2015 AWSW = $310.05 – 55% of 2004 AWSW of $293.70 = $16.35 per week X 4 = $65.40 per month. After paying a 25% attorney's fee, the Claimant will only receive $49.05 per month. The Claimant cannot survive on $49.05 per month (See Ex. 5).

(B) ARGUMENT

1. THE INDUSTRIAL COMMISION SHOULD DECLARE THE INVALID PPI CREDIT CLAIMED BY EMPLOYER VOID UNDER THE ACT

The Stipulation approved by the Commission on 6.26.14 gives Employer a credit for the 27% whole person PPI award that Employer paid to Claimant prior to the date when the parties stipulated that the Claimant was totally and permanently disabled. However, in *Cogatelli*, the Court held that there was no statutory basis for the Commission to give Employer a credit for PPI benefits previously paid in a total and permanent disability case:

> Examining worker's compensation law as a whole, *Roe v. Albertson's Inc.*, 141 Idaho 524, 528, 112 P.3d 812, 816 (2005), this Court finds that there is no statutory basis for the Commission to award Steel West a credit for permanent physical impairment benefits previously paid to Corgatelli. ...
>
> Thus, the current version of Idaho Code section 72-408, which provides for the employee such as Corgatelli to receive total and permanent disability benefits, includes no deduction or credit for previously paid permanent impairment benefits in its award of disability benefits. ...
>
> No other statute in Idaho's worker's compensation law permits the employer to receive credit for permanent physical impairment benefits paid before the award of total and permanent disability benefits. As a purely statutory scheme, the Court cannot judicially construct a credit for employers into worker's compensation law. *Corgatelli*, 335 P.3d 1155.

Even before the *Corgatelli* decision was published on 8.25.14, there was no statutory basis for the Commission to award Employer a $39,649.50 PPI credit against its obligation to pay the Claimant the full measure of his statutory TPD benefits. Therefore, the Commission acted beyond the authority or jurisdiction granted to it by statute when it awarded Employer the invalid PPI credit in direct violation of Idaho Code §72-711 and Idaho Code §72-318. Neither the Commission nor the Supreme Court is authorized to judicially construct a credit that does not exist under the provisions of the Act.

The Stipulation For Entry of Award Against Defendants approved the Commission on 6.26.14 was basically a Compensation Agreement which is authorized by Idaho Code §72-711 – Compensation agreements. However, that statute expressly provides that the Commission does not have authority to approve an agreement which does not conform to the provisions of the worker's compensation act:

> 72-711. Compensation agreements. If the employer and the afflicted employee reach an agreement in regard to compensation under this law, a memorandum of the agreement shall be filed with the commission, and, if approved by it, thereupon the memorandum shall for all purposes be an award by the commission and be enforceable under the provisions of section 72-735, unless modified as provided in section 72-719. An agreement shall be approved by the commission only when the terms conform to the provisions of this law.

Even before the Supreme Court entered its holding in *Cortagelli* on 8.25.14, the PPI credit approved by the Commission in this case on 6.26.14 was invalid because it did not "conform to the provisions of this law". Therefore, the Commission did not have the authority or jurisdiction to approve those provisions of the Stipulation which granted Employer the invalid credit.

The Commission should rectify the injustice created by giving Employer the invalid credit by entering a declaratory ruling that the PPI credit claimed by Employer is void and require Employer to pay 55% of the average weekly state wage of 2004 or $293.70 for a period of 225 weeks beginning on the stipulated date of MMI on 10.1.13 (i.e., 250 weeks – 25 week credit for the PPD in excess of PPI benefits that Employer paid on a voluntary basis pursuant to the 11.6.12 Stipulation = 225 weeks of TPD liability for Employer).

If the Commission does not declare the credit void and allows Employer to claim the invalid credit, it will be relieving Employer of its obligation to pay Claimant the full

measure of his TPD benefits and it will be requiring the Claimant to waive his right to receive the full measure of his TPD benefits in direct violation of Idaho Code §72-318 - Invalid Agreements – Penalty which provides in pertinent part:

> (1) No agreement…or any contract, rule regulation or device whatever designed to relieve the employer in whole or in part from any liability created by this law, shall be valid.
>
> (2) No agreement by an employee to waive his rights to compensation under this act shall be valid.

Since there was no statutory basis to support the Commission giving Employer a $39,649.50 invalid credit for PPI benefits previously paid, the credit described in paragraphs 11-12 of the stipulation must be declared void because it "relieves the employer in whole or part from any liability created by this law" (See I.C. §72-318(1)) and it requires the "employee to waive his rights to compensation under this act" (See §72-318(2)).

When reviewing the Idaho Workers' Compensation Act, the Commission should give the Act a liberal reading in favor of providing the injured worker with the full measure of the compensation that the Act promises to him:

When interpreting the Act, we must liberally construe its provisions in favor of the employee in order to serve the humane purpose for which it was promulgated. *Reese v. V-1 Oil Co.,* 141 Idaho 630, 633, 115 P.3d 721, 724 (2005); *Davaz v. Priest River Glass Co.,* 125 Idaho 333, 337, 870 P.2d 1292, 1296 (1994). The Act is designed to provide sure and certain relief for injured workers and their families and dependents. *Davaz,* 125 Idaho at 337, 870 P.2d at 1296; I.C. § 72-201. The primary objective of an award of permanent disability benefits is to compensate the claimant for his or her loss of earning capacity. *Davaz,* 125 Idaho at 337, 870 P.2d at 1296. The purposes served by the Act leave no room for narrow technical constructions. *Reese,* 141 Idaho at 633, 115 P.3d at 724. *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 282, 207 P.3d 1008, 1113 (2009).

The *Wernecke* Court emphasized the important public policy of making sure that the injured worker receives the full measure of the benefits that he is entitled to receive under the Act:

> Claimants and ISIF do not have absolute freedom to contract because the duties of the parties arise under the Act. As one worker's compensation expert states in his treatise:
>
> it must be stressed that the objective of the legislation is not to see how much money can be transferred to workers as a class; it is to ensure that those with truly compensable claims get full compensation. If there is doubt about the compensability of the claim, the solution is not to send the claimant away half-compensated, but to let the Compensation Board decide the issue. That is the Board's job.
>
> 8 ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW § 132.04[2] (2008) *Id.* 147 Idaho 285, 207 P.3d 1016.

Because there was no statutory basis for the Commission approve the invalid PPI credit and allowing the credit to remain in effect would relieve Employer of its obligation to pay full compensation under the Act and would require the Claimant to waive the full measure of the TPD benefits that he is entitled to under the Act and the Stipulation, the Commission should declare the PPI credit provisions in paragraph 11 and 12 void under Idaho Code §72-318 and order Employer to pay the Claimant 55% of the AWSW for 2004 for 225 weeks after the stipulated date of MMI on 10.1.13.

(2) THE UNAMBIGUOUS PHRASE "SUBJECT TO THE CREDIT" SHOULD BE GIVEN ITS PLAIN AND ORDINARY MEANING TO DEFINE THE DATE WHEN EMPLOYER'S PAYMENT OBLIGATION ENDS AND THE DATE WHEN THE ISIF'S OBLIGATION TO PAY FULL STATUTORY BENEFITS BEGINS

If the Commission does not declare the invalid PPI credit given to Employer in paragraphs 11 and 12 of the Stipulation void and require the Employer to pay the full measure of its share of the Claimant's TPD benefits for 225 weeks after the stipulated

date of MMI on 10.1.13, the Commission should give the plain and ordinary meaning to the phrase "subject to the credit discussed in paragraph 12" and enter a declaratory ruling which requires the ISIF to begin paying the Claimant his full statutory TPD benefits based on 45% of the currently applicable AWSW 90 weeks after the date of MMI on 10.1.13 because the ISIF expressly stated in the Stipulation that its obligation to pay full statutory TPD benefits was "subject to the credit discussed in paragraph 12".

The ISIF's obligation to pay the Claimant full statutory TPD benefits based on 45% of the then currently applicable AWSW is set forth in paragraph 11 of the Stipulation:

> At the expiration of said 250 week period, *subject to the credit discussed in paragraph 12*, below, the ISIF will pay Claimant his full statutory income benefits, said amount being 45% of the then prevailing average state weekly wage, until Claimant's death (italics supplied).

The phrase "subject to the credit discussed in paragraph 12" means that the ISIF's obligation to begin making full statutory TPD benefits would begin after 90 weeks because the ISIF expressly stated that its obligation to pay full statutory TPD benefits at 45% of the AWSW was "subject to" or "controlled by" or "governed by" the credit granted to Employer in paragraph 12.

There is no Idaho Supreme Court decision directly on point which defines the meaning of the phrase "subject to". However, that common phrase is used throughout the Idaho Workers' Compensation Act as being synonymous with "controlled by" or "governed by". For example, in Idaho Code §72-303, the qualifications of a Surety are "subject to" or "controlled by" or "governed by" regulations that have been promulgated by the Director of the Department of Insurance. In Idaho Code §72-603, the Employers duty to keep and maintain accurate employee records is "subject to" or "controlled by" or

"governed by" the provisions of the Act. In Idaho Code §72-719(2), the Commission's authority to modify a prior award is "subject to" or "controlled by" or "governed by" the maximum and minimum amounts authorized by the Act.

The common phrase "subject to" is defined by Blacks Law Dictionary as follows:

> Liable, subordinate, subservient, inferior, obedient to; governed or affected by; provided that; provided; answerable for. Homan v. Employers Reinsurance Corp., 345 Mo, 650, 136 W.W. 2d 289, 302. Black's Law Dictionary, 5th Edition, West Publishing Co., 1979.

This interpretation of the phrase "subject to", which treats it as synonymous with the phrases "controlled by" or "governed by", is consistent with the interpretation given to the phrase "subject to" by other courts:

> The phrase "subject to" is not synonymous with "according to" or "consistent with"; it means conditioned upon, limited by, or subordinate to. (*Coffey v. Superior Court* (1905) 147 Cal. 525, 535 [82 P. 75]; *National Auto. & Casualty Ins. Co. v. Frankel* (1988) 203 Cal.App.3d 830, 835 [250 Cal.Rptr. 236]; *Shay v. Roth* (1923) 64 Cal.App. 314, 318 [221 P. 967]; *Colonial Savings & L. Assn. v. Redwood Empire Title Co.* (1965) 236 Cal.App.2d 186, 191-192 [46 Cal.Rptr. 16]; *State v. Willburn* (1967) 49 Hawaii 651 [426 P.2d 626, 630].) Thus, if the Legislature had made the entry of a judgment "subject to" a statutory provision, *the effect of that judgment would be controlled and limed by* the statute. *Swan Magnetics, Inc. v. Superior Court,* 56 Cal.App.45h, 1504, 1510 [66 Cal.Rptr.2d 541] (1997) (italics supplied).

The ISIF's obligation to pay the Claimant his full statutory TPD benefits based on 45% of the current ASWS was "subject to" or "controlled by" or "governed by" or "obedient to" or "subordinate to" the credit in paragraph 12 which clearly means that its obligation to begin paying full statutory TPD benefits begins after 90 weeks – not after 250 weeks as it unreasonably argues now.

When the Claimant signed the Stipulation on 6.6.14, he reasonably interpreted the phrase "subject to the credit discussed in paragraph 12" to mean that the ISIF's liability

for paying full statutory TPD benefits based on 45% of the currently applicable AWSW would begin after 90 weeks because that is when Employer's 250 week obligation ended after it had been "subject to" or "controlled by" or "governed by" the same credit described in paragraph 12 (See Ex. 5). The phrase "subject to the credit" should be construed to mean the same thing when applied to both the Employer and the ISIF. Any other interpretation is strained and extremely damaging to the Claimant.

The Claimant never would have signed the Stipulation if the ISIF's obligation to pay him full statutory TPD benefits was not "subject to the credit" because that would have left him without the full measure of his statutory TPD benefits for more than 3 years from week 90 when Employer stopped paying its share of his TPD benefits until week 250 when ISIF would begin paying his full statutory TPD benefits.

The ISIF's position that the phrase "subject to the credit" means absolutely nothing when it describes the ISIF's obligation to begin paying full statutory TPD benefits is unconscionable because it would essentially bankrupt the Claimant by depriving him of the full measure of his statutory TPD benefits and limiting him to a small differential payment based on the difference between 55% of the AWSW in 2004 and the currently applicable 45% of the AWSW.

The bottom line is that the ISIF drafted the Stipulation and specifically stated that its obligation to pay full statutory benefits was "subject to the credit discussed in paragraph 12" ; i.e., it had to begin paying full statutory TPD benefits at 90 weeks instead of 250 weeks because its obligation was "subject to" or "controlled by" or "governed by" the credit just like the Employer's obligation to pay TPD benefits was "subject to" or "controlled by" or "governed by" the credit.

The Commission should give the phrase "subject to the credit discussed in paragraph 12" its plain and ordinary meaning and enter a declaratory ruling which requires the ISIF to begin paying its full statutory TPD benefit at 45% of the currently applicable AWSW 90 weeks after the stipulated date of MMI on 10.1.13.

(3) ANY AMBIGUITY OVER THE DATE WHEN THE ISIF MUST BEGIN PAYING THE CLAIMANT HIS FULL STATUTORY TOTAL AND PERMANENT DISABILITY BENEFITS MUST BE CONSTRUED AGAINST THE ISIF BECAUSE IT DRAFTED THE STIPULATION

The Claimant contends that the phrase "subject to the credit discussed in paragraph 12" is not ambiguous because it is only susceptible of one reasonable interpretation and means the same thing when applied to both the Employer and the ISIF. However, If the Commission decides that the phrase "subject to the credit discussed in paragraph 12" is ambiguous because it is susceptible of 2 or more different interpretations, the Commission should construe that ambiguity against the ISIF and in favor of the Claimant because the ISIF drafted the Stipulation:

> The rules of construction of contracts and written documents in general apply to the interpretation of court orders. *Evans v. City of American Falls, Idaho,* 52 Idaho 7, 18, 11 P.2d 363 (1932); *In re Callnan's Estate,* 70 Cal.2d 150, 74 Cal.Rptr. 250, 449 P.2d 186 (1969); *Fidelity Union Trust Co. v. Byrne,* 76 N.J.Super. 256, 184 A.2d 163 (1962). Interpretation of an ambiguous document presents a question of fact. *Cf. Roberts v. Hollandsworth,* 582 F.2d 496, 499 (9th Cir.1978) (contract case); *Pollard Oil Co. v. Christensen,* 103 Idaho 110, 115, 645 P.2d 344, 349 (1982) (contract case). On the other hand, interpretation of an unambiguous document presents a question of law. *Cf. Suchan v. Suchan,* 106 Idaho 654, 660, 682 P.2d 607, 613 (1984) (contract case); *Beal v. Mars Larsen Ranch Corp., Inc.,* 99 Idaho 662, 668, 586 P.2d 1378, 1384 (1978).
>
> Determination of whether a document is ambiguous is itself a question of law. *Cf. Pocatello Industrial Park, Co. v. Steel West, Inc.,* 101 Idaho 783, 789, 621 P.2d 399, 405 (1980) (contract case). *Suchan v. Suchan*, 113 Idaho 102, 106, 741 P.2d 1289, 1293 (1986)...

> Moreover, the magistrate interpreted the order consistently with the general rule that written documents, if ambiguous, should be construed against the drafter. *Cf. Morgan v. Firestone Tire & Rubber Co.,* 68 Idaho 506, 519, 201 P.2d 976 (1948) (contract case). *Id.* 113 Idaho 108, 741 P.2d 1295.

The ISIF will ask the Commission to completely overlook the phrase "subject to the credit discussed in paragraph 12" and treat that phrase as a nullity so that the ISIF can avoid paying the Claimant his full statutory TPD benefits until 250 weeks after the stipulated date of MMI on 10.1.13. The ISIF's interpretation is not only inconsistent with the plain language of the stipulation, it is unconscionable because it would deprive the Claimant of his full TPD benefits for more than 3 years from week 90 to week 250.

The Claimant cannot live on the small differential payment that he would receive from the ISIF based on the difference between Employer's obligation based on 55% of the 2004 AWSW and the currently applicable 45% of the AWSW. In 2015, that differential payment is only $16.35 per week X 4 = $65.40 per month. After paying attorney's fees, the Claimant would collect 75% of that amount or $49.05 per month. As indicated in his affidavit, the Claimant cannot live on that amount and needs to collect the full measure of his TPD benefits based on 45% of the currently applicable AWSW from 10.1.13 until the day he dies (See Ex. 5).

The Commission should construe the the Stipulation as a whole based on its stated purpose and give effect to the true meaning of the parties when the Stipulation was drafted; i.e., that the Claimant would receive the full measure of his statutory TPD benefits as "if this matter proceeded to hearing and Defendants were found to be liable for ...total and permanent disability income benefits pursuant to law" (See ¶20, p. 8 of the Stipulation).

4. THE CLAIMANT IS ENTITLED TO AN AWARD OF ATTORNEY'S FEES AGAINST BOTH DEFENDANTS PURSUANT TO IDAHO CODE §72-804

Even before the Idaho Supreme Court entered its decision in *Corgatelli* and held that there is no statutory basis under the Act to support granting the Employer an invalid credit against its obligation to pay the full measure TPD benefits for PPI benefits previously paid, the statutory provisions of Idaho's Workers' Compensation Act did not allow for a PPI credit against TPD benefits. The Commission has never had the jurisdiction or the authority to judicially construct a credit that did not exist and then grant that invalid credit to an Employer. Therefore, it is obvious that the credit claimed by Employer in this case is void under Idaho Code §72-318 and Idaho Code §72-711.

The Claimant wrote to Employer and asked them to acknowledge that their PPI credit was invalid and do the right thing by either reimbursing the Claimant for the invalid credit that it took in violation of the Act or stipulate to amend the Stipulation to eliminate the credit. Employer rejected both requests with a terse 2-line response thereby placing the Claimant in the unreasonable position where he had no alternative but to file this Petition For Declaratory Relief (See Ex. 2).

The Employer should be held liable for paying the Claimant's attorney's fees based on 30% of the invalid credit or $39,649.50 or $11,894.85 because it has contested the Claimant's claim for the full measure of his TPD benefits without reasonable grounds by claiming a PPI credit that is obviously invalid under the Act.

The ISIF drafted the Stipulation which expressly made the ISIF's obligation to pay Claimant the full measure of his statutory TPD benefits "subject to" the credit described in paragraph 12. The phrase "subject to the credit" is not ambiguous and should mean the same thing when applied to the ISIF that it means when applied to the

Employer; i.e., Employer's obligation to pay TPD benefits was shortened from 250 weeks to 90 weeks and the start date for the ISIF's obligation to pay full statutory benefits based on 45% of the current AWSW was likewise shortened from 250 weeks to 90 weeks. No other interpretation would make any sense because it would require the Claimant to go without the full measure of his TPD benefits for more than 3 years from week 90 to week 250.

Even if the Commission construes the phrase "subject to" to be ambiguous and to mean something other than "controlled by" or "governed by" the credit, according to basic rules of contract construction, the ambiguous phrase must be interpreted against the ISIF since it drafted the ambiguous language in the Stipulation.

After the Claimant's attempts to get Employer to do the right thing failed, the Claimant wrote to the ISIF and asked it to confirm in writing that it would begin paying Claimant his full statutory TPD benefits based on 45% of the current AWSW after 90 weeks from the date of MMI on 10.1.13. Following Employer's lead, the ISIF also rejected the Claimant's reasonable requests and refused to provide any explanation for its position with a terse 4 line-letter (See Ex. 4) thereby forcing him to file this Petition For Declaratory Ruling.

The position taken by the ISIF over the date when it must begin paying the Claimant his full TPD benefits is unconscionable because it is not supported by any reasonable interpretation of the plain language of the Stipulation and would deprive the Claimant of the full statutory measure of his TPD benefits for more that 3 years. If the Commission does not enter an award of attorney's fees against Employer based on 30% of the invalid credit that it is claiming, then it should require the ISIF to pay the

Claimant's fees because it has contested the Claimant's right to receive the full measure of his statutory TPD benefits without reasonable grounds.

(C) Conclusion

The stated purpose of the Stipulation drafted by the ISIF was to provide the Claimant with "the full measure of benefits Claimant would be entitled to receive if this matter proceeded to hearing and Defendants were found to be liable for... total and permanent disability income benefits pursuant to law" (*See* ¶20 on page 8 of the Stipulation).

If the Industrial Commission does not declare the invalid credit granted to Employer for PPI benefits previously paid void or declare that the ISIF must begin paying its full statutory measure of the Claimant's TPD benefits based on 45% of the currently applicable AWSW 90 weeks after the Claimant reached MMI on 10.1.13, the Employer will be relieved of its obligation to pay the Claimant the full measure of his TPD benefits and the Claimant will be forced to waive his right to receive the full measure of his TPD benefits in direct violation of the Act and the express terms of the Stipulation.

For all of the above reasons, the Claimant respectfully requests a Declaratory Ruling from the Commission which declares the PPI credit claimed by Employer void or requires the ISIF to begin paying the full measure of the Claimant's TPD benefits based on 45% of the currently applicable AWSW 90 weeks after the 10.1.13 date of MMI and requires both Defendants to pay the Claimant's attorney's fees.

Respectfully submitted this 26th day of February 2015.

ELLSWORTH, KALLAS & DEFRANCO, PLLC

By: ______________________
RICK D. KALLAS
Attorney for Claimant

Certificate of Service

I HEREBY CERTIFY that on the 26th day of February 2015, I caused to be served a true and correct copy of Claimant's Memorandum In Support of Petition For Declaratory Ruling by the method indicated below upon the following persons:

Kenneth L. Mallea Mallea Law Offices 78 SW 5th Ave., Ste. 1 P.O. Box 857 Meridian, Idaho 83680	[X] U.S. Mail, Postage Prepaid [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile @ 208.888.2789
Jon M. Bauman Elam & Burke 251 E. Front Street, Ste. 300 P.O. Box 1539 Boise, ID 83701	[X] U.S. Mail, Postage Prepaid [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile @ 208.384.5844

____
Rick D. Kallas

Exhibit 1

ELLSWORTH, KALLAS & DEFRANCO, P.L.L.C.

Joseph L. Ellsworth
Rick D. Kallas *
John C. DeFranco

ATTORNEYS AT LAW
1031 E. Park Blvd.
Boise, Idaho 83712

Phone: (208) 336-1843
Fax: (208) 345-8945

- Licensed in Idaho and Oregon

January 15, 2015

Via Facsimile
(208) 384-5844

Jon M. Bauman, Esq.
Elam & Burke, PA
251 E. Front St., Ste. 300
P.O. Box 1539
Boise, Idaho 83701-1539

Re: (1) Request For Lump Sum Payment of Void 27% PPI Credit Claimed By Employer / Surety
(2) Alternative Request For Stipulation To Amend 6.24.14 Stipulation To Eliminate Void Credit

Davis v. Hammack Management, Inc. & SIF
I.C. No. 05-501080

Dear Mr. Bauman:

The stated purpose of the Stipulation For Entry of Award Against Defendants filed with the Industrial Commission on 6.24.14 was to provide the Claimant with "the full measure of benefits Claimant would be entitled to receive if this matter proceeded to hearing and Defendants were found to be liable for future medical care causally related to the industrial injury, for permanent partial impairment benefits and for total and permanent disability income benefits pursuant to law" (*See* ¶20 on page 8 of the Stipulation). However, the language set forth in paragraphs 11 and 12 of the Stipulation wrongfully gave Employer / Surety an undeserved credit toward its obligation to pay 250 weeks worth of TPD benefits based on the 27% PPI rating that Employer / Surety had paid to Claimant before the parties stipulated that the Claimant was totally and permanently disabled.

Just 62 days after the Stipulation was entered in this case, the Idaho Supreme Court held that there is no statutory basis in the Idaho workers' compensation act to give Employer / Surety a credit for PPI benefits paid to the Claimant before he is deemed totally and permanently disabled (*See Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150, 157 (2014). Because Employer / Surety were not entitled to claim the 27% whole person PPI credit set forth in paragraphs 11 and 12 of the Stipulation under *Corgatelli* and because the PPI credit described in paragraphs 11 and 12 would require the Claimant to waive his rights to receive full compensation for his total and permanent disability under the Idaho workers' compensation act, the PPI credit is not valid and enforceable under Idaho law (*See* Idaho Code §72-318(2) and the Idaho Supreme Court's holding in *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 207 P.3d 1008 (2009)).

The 27% PPI credit claimed by Employer / Surety is worth $39,649.50, calculated as follows: i.e., 27% X 500 weeks = 135 weeks X 2004 PPI rate of $293.70 = $39,649.50). In order to avoid having to amend the Stipulation entered by the Industrial Commission on 6.24.14, the Claimant respectfully requests that Employer / Surety pay him a lump sum payment of $39,649.50 to fully compensate him for his total and permanent disability benefits. In the alternative, if

Employer / Surety will not pay the Claimant his full total and permanent disability benefits in a lump sum as requested, the Claimant requests that Employer / Surety prepare a stipulation to amend the 6.24.14 stipulation to eliminate the unearned and void credit for the payment of the 27% whole person PPI benefits previously paid.

Please contact me at your convenience if you have any questions about the requests made in this letter. Thank you for your cooperation.

Very truly yours,

Rick D. Kallas

CC: Client
ISIF attorney Kenneth L. Mallea via facsimile @ 208.888.2789

Exhibit 2

ELAM & BURKE
ATTORNEYS AT LAW

JON M. BAUMAN

251 East Front Street, Suite 300
Post Office Box 1539
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Fax 208 384-5844
E-mail jmb@elamburke.com

January 20, 2015

VIA FACSIMILE
345-8945

Rick D. Kallas
ELLSWORTH, KALLAS & DEFRANCO, PLLC
1031 East Park Boulevard
Boise, Idaho 83712

Re:	Claim No.:	200500871
	Claimant:	Gary Davis
	Date of Injury:	11/09/04
	Employer:	Hammack Management, Inc.
	E&B File No.:	179-0174

Dear Mr. Kallas:

I am in receipt of your letter of January 15, 2015. I have conferred with the Surety about the demand set forth in that letter. Your demand is respectfully denied.

Very truly yours,

ELAM & BURKE
A Professional Association

Jon M. Bauman

JMB:sd
cc: Vicki Baer
Diane Evans

4817-5976-2465, v. 1

Exhibit 3

ELLSWORTH, KALLAS & DEFRANCO, P.L.L.C.

Joseph L. Ellsworth
Rick D. Kallas *
John C. DeFranco

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- Licensed in Idaho and Oregon

February 2, 2015

Kenneth L. Mallea
MALLEA LAW OFFICES
78 SW 5th Avenue
P. O. Box 857
Meridian, Idaho 83680-0857

Re: Request For Confirmation That ISIF Will Pay Full Statutory TPD Benefits After 90 Weeks

Davis v. Hammack Management, Inc. and State Insurance Fund and State of Idaho Industrial Special Indemnity Fund
I.C. No. 2005-501080

Dear Mr. Mallea:

When the parties entered into the Stipulation For Entry of Award Against Defendants and the Industrial Commission entered its Order pursuant thereto on 6.24.14, all of the parties and the Commission were operating on the premise that the purpose of the Stipulation was to provide the Claimant with "the full measure of benefits Claimant would be entitled to receive if this matter proceeded to hearing and Defendants were found to be liable for future medical care causally related to the industrial injury, for permanent partial impairment benefits and for total and permanent disability income benefits pursuant to law" (*See* ¶20 on page 8 of the Stipulation).

The total and permanent disability benefits that the Claimant is entitled to receive pursuant to the Stipulation were defined in paragraph 11:

> Beginning on October 1, 2013, Claimant is entitled to be paid total and permanent disability benefits at 45% of the then prevailing average weekly state wage pursuant to Idaho Code Sections 72-408 and 72-409.

Employer and ISIF divided responsibility for the Claimant's total and permanent disability benefits based on the formula announced by the Idaho Supreme Court in *Carey v. Clearwater County Road Dep't,* 107 Idaho 109, 686 P.2d 54 (1984). Paragraph 11 required Employer to pay 250 weeks worth of benefits beginning on the stipulated date of MMI of 10.1.13 "subject to the credit described in paragraph 12, below."

The phrase "subject to the credit in paragraph 12" was interpreted by all of the parties to mean that the Employer's 250 weeks of liability would be shortened to 90 weeks of liability based on Employer claiming a credit for 160 weeks of PPI / PPD benefits that Employer previously paid to Claimant prior to the date when the parties stipulated that the Claimant was totally and permanently disabled.

The language of paragraph 11 also made it clear that after the Employer satisfied its obligation to pay 250 weeks of benefits which was shortened to 90 weeks after being "subject to the credit in paragraph 12", the ISIF would begin paying Claimant his full statutory benefits based on 45% of the currently applicable AWSW:

> At the expiration of said 250 week period, ***subject to the credit discussed in paragraph 12***, below, the ISIF will pay Claimant his full statutory income benefits, said amount being 45% of the then prevailing average state weekly wage, until Claimant's death (emphasis supplied).

The phrase "subject to the credit in paragraph 12" means the same thing when applied to the ISIF as it meant when it was applied to Employer; i.e., that ISIF's obligation to begin paying the Claimant his full statutory total and permanent disability benefits at 45% of the AWSW would begin at 90 weeks instead of 250 weeks because the ISIF's obligation to pay full statutory benefits is "subject to the credit in paragraph 12" just like Employer's obligation was subject to the credit in paragraph 12.

On 1.15.15, I wrote to the attorney for Employer, Jon Bauman, and advised him that 135 weeks of the credit Employer claimed in paragraph 12 for PPI benefits previously paid was invalid based on the Idaho Supreme Court's holding in *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150, 157 (2014) (Note: I faxed you a copy of my 1.15.15 letter to Mr. Bauman). Since Employer was not entitled to claim the invalid credit described in paragraph 12 of the stipulation, paragraph 12 must be considered void because it deprives the Claimant of the full measure of total and permanent disability benefits that he would be entitled to under the worker's compensation act and violates the express purpose of the Stipulation.

To the extent that paragraph 12 requires the Claimant to waive his right to receive full total and permanent disability benefits in violation of the worker's compensation act and the stated purpose of the stipulation, the agreement is void pursuant to Idaho Code §72-318(2) and the Idaho Supreme Court's holding in *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 207 P.3d 1008 (2009). I asked Employer to either pay the Claimant a lump sum for taking the invalid credit or stipulate to amend paragraph 12 of the 6.24.14 Stipulation to eliminate the invalid credit. Employer responded on 1.20.15 and rejected both options (*See* copy of Mr. Bauman's 1.20.15 enclosed herewith).

Given Employer's position that it is entitled to claim an invalid credit, if the ISIF takes the position that it does not have to begin paying the Claimant his full measure of statutory total and permanent disability benefits until 250 weeks after the stipulated date of MMI on 10.1.13, the Claimant will have no alternative but to file a Petition For Declaratory Relief with the Industrial Commission because the unreasonable positions taken by Employer and ISIF will leave the Claimant without any total and permanent disability benefits for approximately 3 years from week 90 to week 250 (unless ISIF continues to pay a small differential payment from week 90 to week 250).

Please confirm that ISIF will begin paying the Claimant his full statutory total and permanent disability benefits based on 45% of the currently applicable AWSW beginning 90 weeks after 10.1.13 based on the explicit language of paragraph 11 which makes the ISIF's liability to pay full statutory benefits "subject to the credit in paragraph 12". If the ISIF will not begin paying the Claimant his full statutory total and permanent disability benefits 90 weeks after 10.1.13, please explain why the ISIF is refusing to pay the Claimant the full measure of his total and permanent disability benefits in violation of the worker's compensation act and the express language of the stipulation.

Thank you for your cooperation in this matter.

Very truly yours,

Rick D. Kallas

Attorney at Law

Enclosure
CC: Gary Davis
Jon Bauman via facsimile @ 208.384.5844

Exhibit 4

MALLEA LAW OFFICES

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February 5, 2015

Rick D. Kallas
1031 East Park Boulevard
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Re: *Davis v. Hammack Management, Inc., State Insurance Fund, ISIF*
I.C. Case No. 2005-501080

Dear Mr. Kallas:

I am in receipt of your letter dated February 2, 2015.

I have conferred with my client about your requested "confirmation" and, failing that, your request for an explanation.

Your requests/demands are respectfully denied.

Very truly yours,

Kenneth L. Mallea

KLM/dm
cc: James F. Kile
Jon Bauman

Exhibit 5

Rick D. Kallas
Idaho State Bar No. 3872
Ellsworth, Kallas & DeFranco, P.L.L.C.
1031 E. Park Blvd.
Boise, Idaho 83712
Telephone: (208) 336-1843
Facsimile: (208) 345-8945
E-mail: rdk@greyhawklaw.com

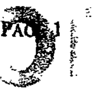
Attorney for Claimant

'5 FEB 26 A 8:37

RECEIVED
INDUSTRIAL COMMISSION

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY DAVIS, Claimant, vs. HAMMACK MANAGEMENT, INC., Employer, and IDAHO STATE INSURNACE FUND, Surety, and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	I.C. No. 2005 - 501080 CLAIMANT'S AFFIDAVIT IN SUPPORT OF PETITION FOR DECLARATORY RULING



Gary Davis, the Claimant, being first duly sworn on oath, states as follows:

1. I am the Claimant in this case and make this affidavit based on my own personal knowledge.

2. Before I signed the Stipulation For Entry of Award Against the Defendants in my case on June 6, 2014, I sat down in my attorney's office and read the Stipulation. At that time, it was my understanding that the State Insurance Fund had agreed to pay its share of my total and permanent disability benefits for 250 weeks after the date when the parties stipulated that I reached maximum medical improvement on October 1, 2013. However, based on the language of paragraphs 11 and 12 of the Stipulation, I understood that the State Insurance Fund was taking a credit against its obligation to pay 250 weeks worth of TPD benefits based on the 27% PPI award that it had paid to me and the 5% disability above impairment award it had paid to me before the parties stipulated that I was totally and permanently disabled by my industrial injury.

3. After the State Insurance Fund took the credits described in paragraph 12 of the Stipulation, I knew that it would stop paying me its share of my TPD benefits 90 weeks after October 1, 2013. However, I was not concerned about losing those payments from the State Insurance Fund because it was my understanding that the Industrial Special Indemnity Fund would begin paying my full statutory total and permanent disability benefits based on 45% of the current Average Weekly State Wage when the State Insurance Fund stopped making its payments. It did not matter to me who paid my benefits as long as I continued to receive the full measure of my benefits based on 45% of the current Average Weekly State Wage.

4. My understanding that the Industrial Special Indemnity Fund would begin paying my full statutory total and permanent disability benefits based on 45% of the current Average Weekly State Wage after 90 weeks was based on the plain language of paragraph 11 which said that the State Insurance Fund's obligation to pay me was "subject to the credit" in paragraph 12 and the Industrial Special Indemnity Fund's obligation was also "subject to the credit" in paragraph 12. In my mind, that meant that when the State Insurance Fund's obligation stopped after 90 weeks, the Industrial Special Indemnity Fund's obligation to pay full benefits would start.

5. If I would have known that the Industrial Special Indemnity Fund would take the position that it did not have to start paying me my full statutory total and permanent disability benefits until after 250 weeks, I never would have signed the Stipulation since it would require me to waive my right to receive the full measure of my statutory total and permanent disability benefits for more than 3 years from week 90 to week 250.

6. I cannot live and pay my bills based on the small differential payment that I will receive from the Industrial Special Indemnity Fund based on the difference between 45% of the current Average Weekly State Wage and 55% of the Average Weekly State Wage for the year that I was injured back in 2004.

7. Based on 45% of the Average Weekly State Wage in 2015, that differential payment is only $16.35 per week or $65.40 per month. After paying my attorney 25%, I will only receive $49.05 per month.

8. I cannot live and pay my bills on $49.05 per month. Therefore, I am asking the Industrial Commission to not allow the State Insurance Fund to take the invalid credit for the 27%

whole person PPI award that it previously paid to me. I understand that the State Insurance Fund is legally entitled to take a credit for the 5% disability above impairment benefits that it paid to me on a voluntary basis and I do not have any objection to that credit.

9. If the Industrial Commission is going to allow the State Insurance Fund to take the 27% PPI credit, then I would ask the Industrial Commission to require the Industrial Special Indemnity Fund to begin paying full statutory benefits based on 45% of the current Average Weekly State Wage when the State Insurance Fund payments stop after 90 weeks from October 1, 2013.

10. If the State Insurance Fund is allowed to stop making payments after 90 weeks from 10.1.13 but the Industrial Special Indemnity Fund does not have to start paying my full statutory benefits until 250 weeks after 10.1.13, I will not be able to survive on the small differential payment from the ISIF for more than 3 years.

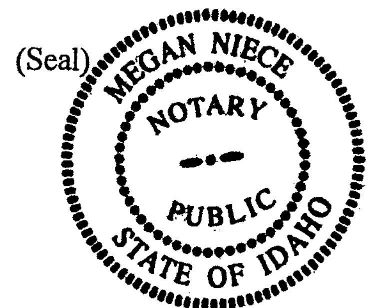
Further your Affiant Sayeth Naught.

Dated this 25th day of February, 2015.

Gary Davis

SUBSCRIBED AND SWORN TO before me this 25th day of February, 2015

County of Ada)
: s.s.
State of Idaho)

(Seal) 

Megan Niece
Notary Public For Idaho
Residing at Boise, Idaho
My Commission Expires: February 5, 2019

Certificate of Service

I HEREBY CERTIFY that on the 26th day of February 2015, I caused to be served a true and correct copy of Claimant's Affidavit In Support of Petition For Declaratory Ruling by the method indicated below upon the following persons:

Kenneth L. Mallea Mallea Law Offices 78 SW 5th Ave., Ste. 1 P.O. Box 857 Meridian, Idaho 83680	[X] U.S. Mail, Postage Prepaid [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile @ 208.888.2789
Jon M. Bauman Elam & Burke 251 E. Front Street, Ste. 300 P.O. Box 1539 Boise, ID 83701	[X] U.S. Mail, Postage Prepaid [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile @ 208.384.5844

Rick D. Kallas

Jon M. Bauman
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Bauman - ISB #2989

Attorney for Defendants, Employer and Surety

2015 MAR 11 P 4: 33
RECEIVED
INDUSTRIAL COMMISSION

BEFORE THE INDUSTRIAL COMMISSION

FOR THE STATE OF IDAHO

GARY DAVIS,

Claimant,

vs.

HAMMACK MANAGEMENT, INC.

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,

Defendants.

I.C. No. 2005-501080 [sic]

EMPLOYER AND SURETY'S OBJECTION AND RESPONSE TO CLAIMANT'S PETITION FOR DECLARATORY RULING WHICH INTERPRETS AND CLARIFIES THE STIPULATION FOR ENTRY OF AWARD AGAINST DEFENDANTS AND ORDER OF APPROVAL AND DISCHARGE ENTERED BY THE INDUSTRIAL COMMISSION ON 6.26.14

Defendants Employer and Surety (SIF) respond and object to Claimant's Petition for Declaratory Ruling Which Interprets and Clarifies the Stipulation for Entry of Award Against Defendants and Order of Approval and Discharge Entered by the Industrial Commission on 6.26.14 ("Petition") as follows.

Claimant's Petition is in effect an attempt to modify an order or award of the Industrial Commission ("Commission"), namely, the Order of Approval and Discharge whereby the matter identified in the caption of the Petition was dismissed with prejudice on June 26, 2014. That matter having been dismissed with prejudice, it is final, concluded and forever discharged, by the express terms of the Stipulation for Entry of Award Against Defendants ("Stipulation") that the Commission approved and pursuant to which the Commission dismissed the Complaint in that matter with prejudice.

Pursuant to Idaho Code Section 72-718, "a decision of the commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated by the commission upon filing the decision in the office of the commission" unless a party sought reconsideration under Idaho Code Section 72-718 or "appeared pursuant to" Idaho Code Section 72-724. No party has sought reconsideration of or filed a notice of intent to appeal from the Order of Approval and Discharge entered by the Commission on June 26, 2014.

Idaho Code Section 72-719 provides a limited basis upon which a party may seek to modify an award or agreement, but only for limited grounds, and within a limited time. Specifically, the application for modification must be made "within five (5) years of the date of the accident causing the injury or date of first manifestation of an occupational disease." Idaho Code Section 72-719(1). Claimant's Petition has been filed too late to comply with that

deadline. Moreover, Section 72-719 only permits modification of awards and agreements for "(a) Change in the nature or extent of the employee's injury or disablement; or (b) Fraud." Claimant's Petition fails to allege either of these circumstances. Therefore, the case identified in the caption of the Petition is final and concluded. Claimant cannot reopen that matter. Nevertheless, he has improperly filed a pleading as if the former matter were not concluded and fully discharged. Claimant should have filed a new pleading with a new docket number (I.C. No.) and served the respective parties. Claimant failed to do any of these things. He has improperly used the caption of a claim that was dismissed with prejudice and then served former counsel for the respective Defendants in that claim, rather than the parties themselves. Rule 4(B)(1), J.R.P., requires service on "all other parties." *See* also Rule 15(D), J.R.P. Undersigned counsel was not authorized to act as the agent for Employer and Surety in the former proceeding once that proceeding was dismissed with prejudice and the Order of Approval and Discharge had been served on his respective clients. Thus, there has been a failure of service of the Petition.

There is no occasion for the Commission to issue a ruling on the Petition because the matter in which the Petition was filed was dismissed with prejudice as of June 26, 2014 and Claimant failed, within the time allowed, to seek reconsideration of, appeal from, or assert grounds for modifying the order dismissing that matter with prejudice. Thus, there is no "actual controversy" for the Commission to resolve as required by Rule 15(F)(4)(b), J.R.P. The controversy that existed among the parties has been fully and finally resolved by the Commission's order approving the Stipulation and dismissing the matter with prejudice.

Claimant's effort to invent a controversy is improper. Claimant seeks to give retroactive application to a decision that the Idaho Supreme Court issued on August 25, 2014, almost two months after the Commission dismissed the former proceedings with prejudice: *Corgatelli v. Steel West, Inc.* Claimant cites no authority for the proposition that a dismissal with prejudice resulting from approval of a Stipulation may be overturned whenever the Idaho Supreme Court, or any other tribunal, may issue a decision that, had it been in effect prior to the final disposition of a case, might arguably have affected some of the rights of one or more of the parties to the former proceeding. The notion Claimant urges is unsupported by law and has the potential to work vast mischief, as it would completely undermine the finality of any decision or award, even where no party had ever sought reconsideration of, appealed from, or asserted appropriate grounds for modifying the decision or award within the time permitted by law.

Claimant implicitly suggests that the Commission has not relinquished jurisdiction of this matter. But as the Commission has previously held, "This argument stands the notion of finality of an award on its head. A Commission decision is a final disposition of matters adjudicated. Idaho Code Section 72-718." Further, "[w]hen the Commission deems it necessary to retain jurisdiction after an award it expressly so states. This express action is necessary to hold open an otherwise finally decided matter." *Frank v. The Bunker Hill Company*, I.C. 80-341382, 2003 WL 23064623 (Dec. 12, 2003). (This holding was affirmed in *Frank v. The Bunker Hill Company*, 142 Idaho 126, 130-131, 124 P.3d 1002, 1006-1007 (2005), citing *Fowler v. City of Rexburg*, 116 Idaho 1, 2-3, 773 P.2d 269, 270-271.) Here, there is no claim that the Commission explicitly retained jurisdiction of this matter, and even if such a claim were made, there is no evidence to support such a claim. Jurisdiction cannot be conferred merely by filing

an improper pleading under an old and inoperative case number. Thus, the Commission should dismiss or deny Claimant's Petition pursuant to Rule 15(F)(4)(a), J.R.P.

As the Commission held in *Fodge v. Glen Fodge dba Fodge Logging*, I.C. No. 90-720094, 1998 WL 354229 (May 29 1998), "without finality all other aspects of the procedural process would be rendered moot." The Commission added there that Idaho Code Section 72-719 allows reopening of a case based upon fraud, "but only within five years after the accident causing the injury or occupation[al] disease. Such a time restriction emphasizes the obligation of the parties to diligently prosecute the case to hearing and of the Commission to timely issue its decisions." The Commission went on to add "Applications for modification of an award due to fraud must be made within five years of the accident causing the injury. The motion to reopen was not filed until November of 1997, nearly two years past the statute of limitations. To allow the Defendant's [sic] to reopen in this instance would open the flood gates to relitigation of any case for an allegation of fraud. That is not the intent of Idaho Code, Section 72-718. Defendant's motion is barred by the five-year statute of limitations under Idaho Code, Section 72-719."

If Claimant's view were allowed to prevail, no decision of the Commission dismissing a case with prejudice would ever be final. A party could lie in wait and return to the Commission at any time, even years after the matter was resolved, in hopes that some newly- developed provision of law might – if retroactively applied – provide some new or additional relief beyond that to which the party had already and long since agreed. Countless instances might be imagined where a party who settled a claim learned, months or years later, of a change in the law. Meanwhile, in reliance on the Commission's order approving an award and dismissing the

Complaint with prejudice, the other parties doubtless, and reasonably, changed their position. Witnesses may have died or moved away. Medical records may have been purged. There are compelling reasons the statutes provide for finality of decisions and awards.

In this case, Claimant was represented by legal counsel. He voluntarily entered into the Stipulation as appears from his acknowledged signature and that of his attorney. Moreover, the Stipulation was not a one-sided, take-it-or-leave-it contract. Claimant's attorney requested the inclusion of particular language in the Stipulation concerning attorney fees and his wishes were accommodated in that regard. "Even at common law, a party who has signed an agreement is bound by it, in the absence of fraud, duress or undue influence." *See, e.g., Lawrence v. Hutchinson*, 146 Idaho 892, 898, 204 P.3d 532, 538 (Ct. App. 2009) ("An agreement entered into in good faith in order to settle adverse claims is binding upon the parties, and absent a showing of fraud, duress or undue influence, is enforceable either at law or in equity."); *St. Alphonsus Regional Medical Center v. Krueger*, 124 Idaho 501, 507, 861 P.2d 71, 77 (Ct. App. 1992) ("The agreement to compromise and settle is binding in the absence of fraud, duress or undue influence.").

Claimant asserts none of these grounds. Indeed, having dismissed the Complaint with prejudice, the Commission no longer has jurisdiction over the former proceeding. Thus, pursuant to Rule 15(f)(4)(a)&(b), the Commission should decline to entertain the Petition or enter a declaratory ruling. For the foregoing reasons, Claimant's Petition should be denied.

Respectfully submitted this 11 day of March, 2015.

ELAM & BURKE, P.A.

By: [signature]
Jon M. Bauman, Of the Firm
Attorneys for Defendants, Employer and Surety

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 11 day of March, 2015, I caused a true and correct copy of the above and foregoing instrument to be served upon the following in the manner indicated below:

Rick D. Kallas ELLSWORTH, KALLAS & DEFRANCO, PLLC 1031 East Park Boulevard Boise, Idaho 83712	X ____ ____ ____	U.S. Mail Hand Delivery Federal Express Facsimile Transmission
Kenneth L. Mallea MALLEA LAW OFFICES 78 SW 5th Avenue, Suite 1 P.O. Box 857 Meridian, Idaho 83680	X ____ ____ ____	U.S. Mail Hand Delivery Federal Express Facsimile Transmission

[signature]
Jon M. Bauman

4835-1263-8754, v. 1

Kenneth L. Mallea
MALLEA LAW OFFICES
78 SW 5th Avenue, Suite 1
P.O. Box 857
Meridian, ID 83680
Telephone: (208) 888-2790
Fax: (208) 888-2789
Idaho State Bar No. 2397

Attorney for Defendant State of Idaho
Industrial Special Indemnity Fund

BEFORE THE INDUSTRIAL COMMISSION

STATE OF IDAHO

* * * * * * * *

GARY DAVIS, Claimant, vs. HAMMACK MANAGEMENT, INC., Employer, and STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	I.C. No. 2005-501080 **LIMITED APPEARANCE TO CHALLENGE SUBJECT MATTER JURISDICTION AND SERVICE OF PROCESS** 2015 MAR 12 A 10 36 RECEIVED INDUSTRIAL COMMISSION

COMES NOW the State of Idaho, Industrial Special Indemnity Fund ("ISIF"), by and through the undersigned counsel, and hereby makes a limited appearance before the Industrial Commission in response to Claimant's Petition for Declaratory Ruling Which

Interprets and Clarifies the Stipulation for Entry of Award against Defendants and Order of Approval and Discharge entered by the Industrial Commission on June 26, 2014 ("Petition"). JRP 15 addresses declaratory rulings before the Idaho Industrial Commission. JRP 15E provides that: "Within fourteen days after service of a Petition, any party served may file a written response thereto..." This Response is made by the ISIF for the limited purpose of seeking dismissal of the Petition on grounds that the Commission lacks subject matter jurisdiction over the Petition, and that the service of the Petition violates the Rules of Practice and Procedure which in turn results in a failure of personal jurisdiction over the ISIF with respect to the Petition. Although the Commission's Rules of Practice and Procedure do not specifically address a limited appearance for the purpose of contesting subject matter and personal jurisdiction, undersigned counsel believes that the Commission may look to IRCP 12(b) by way of analogy and by way of guidance in reviewing the ISIF limited appearance Response.

More specifically, and again by way of analogy, the ISIF's limited appearance in this proceeding would be analogous to motions filed under IRCP 12(b) (1) and (5). Although the Rules of Civil Procedure do not apply to Industrial Commission proceedings except in the context of pre-hearing discovery, the concepts of jurisdiction over the subject matter of the claim and over the purported Defendant are basic concepts of administrative law and of Industrial Commission practice. Again, by analogy, we can look to the analysis under IRCP 12(b) for guidance.

A. The Industrial Commission Lacks Subject Matter Jurisdiction Over the Petition.

The Petition purports to be a continuation of Industrial Commission Case No 2005-501080. That case was fully and finally concluded by the Industrial Commission's Order

of Approval and Discharge entered June 26, 2014. The Order of Approval and Discharge specifically stated that "the complaint is dismissed with prejudice." No reconsideration under Idaho Code §72-718 was sought by Claimant. No appeal to the Idaho Supreme Court pursuant to Idaho Code §72-724 was taken. The Order of Approval and Discharge fully and finally concluded all matters with respect to Case No. 2005-501080.

The case having been fully and finally concluded, and the complaint against this Defendant being dismissed with prejudice pursuant to the Industrial Commission's Order, there is no continuing subject matter jurisdiction regarding Case No. 2005-501080. There is no continuing jurisdiction of this Commission over that dismissed case. The Claimant, by simply attaching a case number to a pleading, may not revive, reinstate or continue a proceeding which had been dismissed with prejudice and by final order.

The concept of subject matter jurisdiction speaks to the power of the tribunal to entertain the case and to adjudicate the claim or controversy. *Baird-Sallaz v. Sallaz*, September 19, 2014 Idaho Supreme Court Op. No. 101. Subject matter jurisdiction cannot be conferred by a self-serving and legally wrong pleading.

There is no doubt that the Commission has general jurisdiction to entertain a Petition for Declaratory Ruling as set forth in JRP 15A. However, the Commission does not have jurisdiction to entertain a Petition for Declaratory Ruling under a case which has been conclusively and finally dismissed with prejudice. A Petition for Declaratory Ruling is necessarily a new case, resting on its own merits (or lack thereof) and is not based upon the pleadings, record, testimony, discovery, claim and defenses asserted by the parties in the prior and dismissed case 2005-501080.

In proceeding in this limited appearance, the ISIF is not intending to frustrate the liberal provisions of Idaho Code §72-708 or to unduly constrict the application of JRP 15.

But the instant Petition is necessarily a new proceeding which is governed by JRP 15 and which is separate and apart from the normal process of a complaint, service thereof on the ISIF, and the filing of an answer and other affirmative defenses by the ISIF. There is simply no way for this Claimant to leg into the entirety of the record in Case No. 2005-501080 or for this Claimant to confer subject matter jurisdiction upon the Commission in a fully and finally adjudicated proceeding. In the event of appeal of any final ruling on any appropriate and proper petition to come before the Commission by this Claimant, the record on appeal certainly should not include the entirety of the Clerk's record in Case No. 2005-501080. This is an entirely new, separate, and distinct claim and the ISIF does not consent to the validity of the Petition as a continuation of Case No. 2005-501080 and submits that the Industrial Commission lacks subject matter jurisdiction of the Petition.

B. The Petition Has Not Been Properly Served Upon the ISIF.

As noted, the ISIF is making a limited and special appearance to contest jurisdiction of the Industrial Commission over the Petition. Valid service of process is a condition precedent to the tribunal's jurisdiction over the "person" of the Defendant. JRP 4 addresses service of a Workers Compensation Complaint. JRP 4(B)(1) mandates that the party filing a Complaint shall serve "all other parties." Subsection (B)(2) mandates that the pleading shall be served upon the last known address of the respective party. The ISIF has no agent as may be present regarding an Employer or Surety. Undersigned counsel is not the agent of the ISIF for purposes of service of process. JRP 15 likewise addresses service of a Petition for Declaratory Ruling. JRP 15(D) requires the Petitioner to serve a copy of the Petition "on all other persons to the actual controversy at the time the Petition is filed with the Commission." JRP 15(B) provides that "person" shall be construed to include "governmental agency or department," which the ISIF undoubtedly is.

As noted in the Petition, the pleading was purportedly "served" by mailing a copy to undersigned counsel. Yet undersigned counsel is not the agent for the ISIF and is not authorized to accept service of process of any complaint or any Petition for Declaratory Ruling.

Service of process is the due process procedure which vests a tribunal with jurisdiction over a person or a party. *McGloon v. Gwinn*, 140 Idaho 727, 100 P.3d 621 (2004). Service of process is not a technical or trivial concept in law or in proceedings before the Idaho Industrial Commission. The Commission's own rules address service of process and mandate that a petition or pleading must be served directly upon a party. Valid service of process in accordance with the Commission rules is a condition precedent to the Commission's jurisdiction over a party, and in this case, over the ISIF.

C. Conclusion.

As in District Court cases, the failure of the ISIF to raise at this preliminary juncture, the lack of subject matter jurisdiction and personal jurisdiction, could be said to constitute a waiver. The ISIF therefore respectfully comes forward at this early part of the proceeding to lodge its objections to the continuation of this proceeding. The disposition of the pending Petition under JRP 15(F)(4) should be dismissal for the failure of subject matter jurisdiction and personal jurisdiction over the ISIF. The pending Petition should be dismissed.

DATED this 11th day of March, 2015.

MALLEA LAW OFFICES

[signature]
Kenneth L. Mallea
Attorney for Defendant ISIF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 11th day of March, 2015, a true and correct copy of the within and foregoing document was served upon:

Rick D. Kallas
1031 East Park Boulevard
Boise, ID 83712
Attorney for Claimant

Jon M. Bauman
P.O. Box 1539
Boise, ID 83701
Attorney for Employer/Surety

__X__ by U.S. mail
_____ by facsimile

Rick D. Kallas
Idaho State Bar No. 3872
Ellsworth, Kallas & DeFranco, P.L.L.C.
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Attorney for Claimant

2015 MAR 17 P 3:40
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INDUSTRIAL COMMISSION

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY DAVIS, Claimant, vs. HAMMACK MANAGEMENT, INC., Employer, and IDAHO STATE INSURNACE FUND, Surety, and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	I.C. No. 2005 - 501080 CLAIMANT'S REPLY IN SUPPORT OF CLAIMANT'S PETITION FOR DECLARATORY RULING

(A) INTRODUCTION

The Claimant is filing a consolidated Reply Memorandum In Support of his Petition For Declaratory Ruling that addresses the 3.11.15 written response from the Industrial Special Indemnity Fund (ISIF) and the 3.11.15 written response from Employer / Idaho State Insurance Fund (Employer).

(B) REBUTTAL OF THE ISIF'S ARGUMENTS

1. THE JUDICAL RULES OF PRACTICE AND PROCEDURE DO NOT AUTHORIZE THE FILING OF A LIMITED APPEARANCE

Idaho Code §72-508 authorizes the Industrial Commission to promulgate reasonable rules and regulations to accomplish the purposes of the Act. Pursuant to Idaho Code §72-508, the Industrial Commission promulgated the Judicial Rules of Practice and Procedure (JRP). According to Idaho Code §72-508, those rules "shall be binding in the administration of this law". JRP 15 – Declaratory Rulings – sets forth a very specific procedure that must be followed when any interested person asks the Industrial Commission "for rulings on the construction, validity, or applicability of any workers' compensation statute, rule, or order" JRP 15(A).

After the Petitioner served his Petition For Declaratory Ruling on the Employer and the ISIF, "any party served may file a written response thereto, stating with specificity the facts and the law on which the responding party relies". JRP 15(E) (underline supplied). The language of JRP 15(E) is clear and unambiguous. JRP 15(E) only allows the party served with a Petition For Declaratory Ruling to file one written response. The ISIF made the voluntary tactical decision to

limit its one written response to the filing of a "limited appearance" which is not even authorized by the JRP.

The ISIF has admitted in its written response that "the Commission's Rules of Practice and Procedure do not specifically address a limited appearance for the purpose of contesting subject matter and personal jurisdiction" (*See* p. 2, Ll. 9-13). The ISIF has also admitted that "the Rules of Civil Procedure do not apply to Industrial Commission proceedings except in the context of pre-hearing discovery" (*See* p. 2, Ll. 16-17).

After making those binding admissions, the ISIF then asked the Industrial Commission to judicially construct a new limited appearance rule and insert it into the Judicial Rules of Practice and Procedure "by way of analogy" to the Idaho Rules of Civil Procedure. Without following the proper rule making procedure for creating a new rule and adding it to the Judicial Rules of Practice and Procedure, the Industrial Commission does not have the authority to judicially construct a new limited appearance rule by analogy to the Idaho Rules of Civil Procedure.

With the exception of the limited discovery tools authorized by JRP 7(C), the Idaho Supreme Court has held on multiple occasions that the Idaho Rules of Civil Procedure do not apply to proceedings before the Industrial Commission:

> The Idaho Rules of Civil Procedure govern in the district courts and the magistrate's division of the district courts. I.R.C.P. 1(a). The Industrial Commission is not a division of the district court. *See* I.C. § 72-501(1) (statutory creation of the Industrial Commission as an executive department of the state government). Furthermore, the Commission has the authority to "promulgate and adopt reasonable rules and regulations involving judicial matters" and to the extent the regulations are consistent with law, they are binding. I.C. § 72-508. *Page v. McCain Foods, Inc.*, 145 Idaho 302, 311, 179 P.3d 265, 274 (2008).
>
> The Commission is not bound by the Idaho Rules of Civil Procedure, but it does have its own rules of procedure. *Vawter v. United Parcel Serv., Inc.*, 155 Idaho 903, 318 P.3d 893, 901 (2014).

Since the Judicial Rules of Practice and Procedure do not authorize a limited appearance and the Idaho Rules of Civil Procedure do not apply to Industrial Commission proceedings, the Industrial Commission should not consider the subject matter and personal jurisdiction arguments advanced by the ISIF in its unauthorized limited appearance. However, in the event that the Industrial Commission elects to consider the arguments made by the ISIF in its limited appearance, the Commission should reject each of the ISIF's arguments because they lack merit.

2. THE INDUSTRIAL COMMISSION HAS SUBJECT MATTER JURISDICTION TO DECIDE THE LEGAL ISSUES RAISED BY THE CLAIMANT'S PETITION FOR DECLARATORY RULING

The ISIF argues that the Industrial Commission does not have subject matter jurisdiction to clarify the parties' rights, duties and obligations under the Idaho Code §72-711 Compensation Agreement [1] because the Industrial Commission entered an Order of Approval and Discharge pursuant thereto on 6.26.14. The Idaho Supreme Court's holding in *Williams v. Blue Cross of Idaho,* 151 Idaho 51, 260 P.3d 1186 (2011) soundly refutes the ISIF's lack of subject matter jurisdiction argument.

In *Williams*, the Claimant entered into a final lump sum settlement agreement with the State Insurance Fund which was finalized and approved by the Industrial Commission. After the settlement agreement was finalized and approved by the Commission, the Claimant filed a Petition For Declaratory Ruling asking the Commission for a Declaratory Ruling that clarified the legal rights of all interested persons to the settlement proceeds (including the rights of a non-party subrogee).

[1] In this case, the Compensation Agreement at issue was entitled by the Defendants as a Stipulation For Entry of Award Against Defendants and Order of Approval and Discharge.

Before the Commission clarified the legal rights of the interested persons, it asked the parties to submit briefs on the question of whether the Industrial Commission had subject matter jurisdiction to decide the issues raised by the Petition. Both parties argued that the Industrial Commission lacked subject matter jurisdiction to clarify the parties' legal rights pursuant to the finalized and approved lump sum agreement. The Commission disagreed with the parties and ruled that it had proper subject matter jurisdiction to clarify the parties' legal rights.

Although neither party challenged the Commission's exercise of subject matter jurisdiction on appeal, the Idaho Supreme Court raised the issue of subject matter jurisdiction *sua sponte* and held that the Industrial Commission had jurisdiction to determine all interested persons' legal rights in the lump sum agreement that had already been finalized and approved by the Commission just like the Compensation Agreement in this case:

> We conclude that the Commission had jurisdiction to consider whether Blue Cross is a subrogee, rather than a creditor, under I.C. § 72-802, and that the Commission also had jurisdiction to determine the extent of Blue Cross' entitlement to the settlement proceeds. According to I.C. § 72-707, " [a]ll questions arising under [the workers' compensation laws of this state], if not settled by agreement or stipulation of the interested parties with the approval of the commission, except as otherwise herein provided, shall be determined by the commission." I.C. § 72-707. Generally, the Commission's jurisdiction is limited to adjudicating " certain complaints filed by a workers' compensation claimant against an employer or an employer's surety." Owsley v. Idaho Indust. Comm'n, 141 Idaho 129, 134, 106 P.3d 455, 460 (2005) (emphasis omitted). However, the Commission may properly exercise jurisdiction in cases, like this one, where the Commission is asked to clarify a claimant's rights under a lump sum settlement agreement. Pursuant to I.C. § 72-404, the Commission has the responsibility to approve lump sum settlement agreements and in doing so, must determine that the settlement is in the best interest of the parties. It necessarily follows that the Commission has jurisdiction to clarify a claimant's rights under a lump sum settlement agreement that is presented for Commission approval. Id. 151 Idaho 54-55, 260 P.3d 1189-1190. ....
>
> Although the case at hand concerns the subrogation of a third-party insurer rather than the SIF, both instances require clarification of a worker's rights arising under

workers' compensation law. According to the statutory mandates in I.C. §§ 72-707, -803, and -404 mentioned above, the Commission is the proper tribunal to clarify such rights, particularly in the case of a lump sum settlement where a claim for medical services is at issue. Williams, by filing this declaratory judgment action, was essentially asking the Commission to clarify his rights to the proceeds of the lump sum settlement agreement that he entered into with the SIF, particularly in light of Blue Cross' claim for a portion of the settlement proceeds that it argued were for amounts it paid for medical services provided to Williams. In order to determine Williams' rights under the settlement agreement, the Commission necessarily had to determine whether Blue Cross was a subrogee. In determining that Blue Cross was a subrogee, the Commission implicitly determined that Williams was not entitled to all of the lump sum proceeds because Blue Cross had paid Williams' disputed medical bills and, therefore, Blue Cross, as a subrogee, assumed Williams' legal right to attempt to collect payment for such expenses. Consequently, the Commission had jurisdiction to consider whether Blue Cross is a subrogee because Blue Cross' status as subrogee directly affects Williams' entitlement under the lump sum settlement agreement.

Further, although the Commission found that it lacked jurisdiction to decide the extent of Blue Cross's subrogation entitlement, such a determination was also within its authority and was, in fact, necessary to determine whether the lump sum settlement was in the parties' best interest. As mentioned above, the Commission must approve all lump sum settlement agreements, and in doing so, it is the Commission's responsibility to ensure that the settlement is in the best interest of the parties. I.C. § 72-404. This is a responsibility that the Commission must scrupulously honor. See Wernecke v. St. Maries Joint Sch. Dist. # 401, 147 Idaho 277, 286, 207 P.3d 1008, 1017 (2009). If an injured worker's insurance company has provided compensation for medical expenses for which the worker is now seeking to obtain workers' compensation benefits, it is in the best interest of the parties to ensure that the insurance company's subrogation claim is resolved contemporaneously with the proposed settlement. This would help ensure that the parties will not be subjected to further litigation after the settlement agreement is finalized. Coupled with the jurisdiction grants in I.C. §§ 72-707 and -803, section 72-404 requires the Commission to do so.

It is also worth noting that before approving the lump sum settlement agreement in this case, the Commission could and should have requested that the parties stipulate as to how the lump sum settlement proceeds were to be allocated, including what portion was to be allocated to Blue Cross for payment of the disputed medical bills. Therefore, pursuant to its authority, the Commission could have attempted to get the parties to stipulate as to how the settlement proceeds were to be allocated and, failing such agreement, determined the entitlement of each. *Williams, supra,* 151 Idaho 155-156, 260 P.3d 1190-1191 (emphasis supplied).

The rationale for the holding in the *Williams* applies to this case. Just like the Commission was asked to review the final lump sum agreement in *Williams* pursuant to Idaho Code §72-404, the Commission in this case was asked to review and approve the Compensation Agreement pursuant to Idaho Code §72-711. *Williams* makes it abundantly clear that the Industrial Commission has subject matter jurisdiction to clarify the parties' legal rights under the Compensation Agreement and the workers' compensation Act as requested by the Claimant in his Petition For Declaratory Ruling. The Commission should reject the ISIF's lack of subject matter jurisdiction argument because it lacks merit.

3. THE INDUSTRIAL COMMISSION HAS PERSONAL JURISDICTION OVER THE INDUSTRIAL SPECIAL INDEMNITY FUND

The ISIF argues that the Industrial Commission lacks personal jurisdiction over the ISIF because the Claimant served his Petition For Declaratory Ruling on the Defense attorney for ISIF who first appeared as the ISIF's attorney of record on 9.11.11 when he signed the ISIF's Answer to the Complaint that Employer filed against the ISIF. From the date of his initial appearance on 9.11.11 to the date when the Industrial Commission entered its 6.26.14 Order of Approval and Discharge which approved the parties' stipulated Compensation Agreement, the same Defense attorney has appeared as the attorney of record for the ISIF throughout these proceedings.

If the ISIF's attorney wished to withdraw as the attorney of record for the ISIF in these proceedings, he had to comply with the mandatory withdrawal procedures set forth in JRP 14.

> **B. Leave to Withdraw.** Except as provided above, or by stipulation between an attorney and his or her client, no attorney may withdraw as an attorney of record without first obtaining approval by the Commission. A request to withdraw shall be made by filing a motion, supported by affidavit, with the Commission and served on all parties to the action, including the client. The Commission may

grant leave to withdraw as counsel of record on a showing of a factual basis to establish good cause and on such conditions as will prevent any delay in determination and disposition of the pending action. JRP 14(B).

Since Defense counsel for ISIF never filed a Motion For Leave to Withdraw and never obtained an Order from the Industrial Commission authorizing him to withdraw, he is still the attorney of record for the ISIF and was the appropriate agent to receive service of the Claimant's Petition For Declaratory Ruling on behalf of the ISIF. Since the Claimant properly served the ISIF's attorney of record, the Industrial Commission has proper personal jurisdiction over the ISIF in these proceedings.

The ISIF argues that the Claimant's Petition For Declaratory Ruling should be treated as an entirely separate and distinct cause of action. However, that argument lacks merit. The Claimant has but one cause of action against Employer and the ISIF arising out of his 11.9.04 industrial accident. Just because the Claimant's one cause of action may have resulted in multiple hearings, multiple orders or multiple declaratory rulings, that does not change the singular nature of the one cause of action which exists between the Claimant, the Employer and the ISIF.

> The Commission's decision was in error because collateral estoppel does not apply to this case, which involved multiple hearings but one cause of action. Collateral estoppel " precludes relitigation of the same issue in a separate cause of action." *Id.* A cause of action is a " group of operative facts giving rise to one or more bases for suing; a factual situation that entitles one person to obtain a remedy in court from another person...." Black's Law Dictionary 251 (9th ed. 2009).
>
> Here, all of the orders deal with the same operative facts related to Vawter's employment with UPS, so the orders do not deal with separate factual situations. Therefore, all the hearings and orders address only one cause of action. *See Sanije Berisha, Claimant,* IC 2002-003038, 2012 WL 2118142 (Idaho Ind.Com. May 30, 2012) (" 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."). *Vawter, supra*, 318 P3d. 903-904.

Since the Claimant's Petition For Declaratory Ruling is part of the same cause of action against the Defendants which arose from the Claimant's 11.9.04 industrial accident, it was proper for the Claimant to serve the ISIF through its Defense attorney of record who has never obtained an Order from the Commission authorizing him to withdraw as the ISIF's attorney of record. The ISIF was properly served by mailing the Petition to its attorney of record and the Industrial Commission has proper personal jurisdiction over the ISIF.

4. THE ISIF DOES NOT HAVE THE RIGHT TO FILE A SECOND WRITTEN RESPONSE

JRP 15(E) limited the ISIF to filing one written response in opposition to the Claimant's 2.26.15 Petition For Declaratory Ruling. By making the tactical decision to limit the scope of its one written response to a limited appearance which attacked the Commission's exercise of subject matter jurisdiction and personal jurisdiction, the ISIF has exhausted its rights under JRP 15(E) and cannot file a second written response challenging the merits of the Claimant's Petition:

> Waiver is a voluntary, intentional relinquishment of a known right or advantage." *Brand S Corp. v. King,* 102 Idaho 731, 734, 639 P.2d 429, 432 (1981). " It is a voluntary act and implies election by a party to dispense with something of value or to forego some right or advantage which he might at his option have demanded and insisted upon." *Crouch v. Bischoff,* 78 Idaho 364, 368, 304 P.2d 646, 649 (1956). Stoddard v. Hagadone Corp, 147 Idaho 186, 191, 207 P.3d 162, 167 (2009).

The ISIF made the voluntary tactical decision to forego its right to address the substantive merits of the Claimant's Petition and chose instead to place all of its eggs in one basket and focus exclusively on the subject matter jurisdiction and personal jurisdiction issues. By making that voluntary election, the ISIF has exhausted its legal rights under JRP 15(E) and cannot file a second written response to challenge the Claimant's Petition For Declaratory Ruling.

(C) REBUTTAL OF EMPLOYER'S ARGUMENTS

1. THE CLAIMANT SEEKS A DECLARATORY RULING THAT THE PPI CREDIT GRANTED TO EMPLOYER IN THE COMMISSION'S 6.26.14 ORDER IS VOID

Employer has mischaracterized the Claimant's Petition For Declaratory Ruling as an untimely Motion To Modify a final Order pursuant to Idaho Code §72-719. The Claimant is not seeking an Order which modifies the Commission's 6.26.14 Order pursuant to Idaho Code §72-719. The Claimant is asking the Commission for a Declaratory Ruling that the PPI credit it gave to Employer in its 6.26.14 Order is void pursuant to Idaho Code §72-408, Idaho Code §72-711 and Idaho Code §72-318 because there was no statutory basis which authorized the Commission to give Employer a PPI credit against its obligation to pay the Claimant the full measure of his statutory total and permanent disability (TPD) benefits.

Employer fails to appreciate the difference between a void order which has no legal effect from the moment it is created and a valid order which can later be modified pursuant to Idaho Code §72-719. The 6.26.14 Order is void *ab initio* since the Commission did not have the statutory authority to judicially construct a PPI credit against the Claimant's TPD benefits. Therefore, the invalid credit that was granted to Employer exceeds the jurisdiction of the Commission and must be declared void.

2. THE COMMISSION HAS PROPER SUBJECT MATTER AND PERSONAL JURISDICTION OVER EMPLOYER

Employer makes the same lack of subject matter jurisdiction and personal jurisdiction arguments that were made by the ISIF and rebutted in sections (B) (2) and (3) above. The Petition For Declaratory Ruling is not a separate cause of action which requires a new caption and a new case number. This is a single cause of action that arises out of the same industrial

accident on 11.9.04 and involves the same operative facts and the same parties.

As explained by the Supreme Court in *Williams*, the Commission obviously has subject matter jurisdiction to resolve all disputed issues that arise under the Idaho Workers' Compensation Act pursuant to Idaho Code §72-707. The Commission also has subject matter jurisdiction to clarify the Claimant's rights under a Compensation Agreement that was approved pursuant to Idaho Code §72-711.

The Defense attorney for Employer has been the attorney of record in this case for approximately 9 years since he filed Employer's Answer to the Complaint on 5.22.06. If the Defense attorney wished to withdraw as attorney of record for Employer, then he had a duty to comply with the mandatory leave to withdraw requirements of JRP 14(B) and file a Motion For Leave to Withdraw with the Industrial Commission and obtain an Order authorizing him to withdraw. Since Defense counsel failed to file a Motion To Withdraw, he remained Employer's attorney of record. Therefore, it was perfectly appropriate for Claimant to serve Employer through its attorney of record with his 2.26.15 Petition For Declaratory Ruling. Both Employer and the ISIF have been properly served in this Declaratory Ruling proceeding and the Industrial Commission has both subject matter and personal jurisdiction over both Defendants.

3. THE CLAIMANT HAS AN ACTUAL CONTROVERSY WITH BOTH EMPLOYER AND THE ISIF

Employer argues that there is no actual controversy between Claimant and Employer because any controversy that previously existed was fully and finally resolved by the 6.26.14 Order approving the Compensation Agreement. Again, Employer fails to appreciate the distinction between a void Order which is void *ab initio* and a valid Order which becomes final and cannot be modified except under the limited circumstances described in Idaho Code §72-

719. A void Order has no legal meaning or effect and cannot be considered a valid final Order that resolves all of the controversies between the parties.

The Claimant carefully framed the actual controversy which exists with Employer over the void PPI credit and the actual controversy which exists with the ISIF over the date when its obligation to pay full statutory TPD benefits begins in his Petition For Declaratory Ruling and his Memorandum in Support of Petition For Declaratory Ruling.

Employer is taking an invalid PPI credit against its obligation to pay full TPD benefits in direct violation of Idaho Code §72-408, Idaho Code §72-318 and Idaho Code §72-711. That actual controversy will deprive the Claimant of 55% of the 2004 AWSW from week 90 to week 225 and will cost the Claimant $39,649.50 in TPD benefits.

The ISIF is taking the position that it does not have to begin paying the Claimant his full statutory TPD benefits at 45% of the currently applicable AWSW until week 250 even though the Stipulation clearly states that the ISIF's obligation is "subject to" the invalid PPI credit being claimed by Employer. That actual controversy will deprive Claimant of his full statutory TPD benefits for more than 3 years from week 90 to week 250.

Based on the record before the Commission, there can be no dispute that an actual controversy exists between the Claimant and the Defendants which could cost the Claimant more than 3 years of TPD benefits.

5. THE COMMISISON DID NOT HAVE A VALID STATUTORY BASIS TO GRANT EMPLOYER AN INVALID PPI CREDIT EVEN BEFORE CORGATELLI WAS DECIDED

Employer argues that the Claimant seeks to give retroactive application to the holding in *Corgatelli v. Steel West*, 157 Idaho 287, 335 P.3d 1150 (2014) which was decided on 8.25.14, approximately 60 days after the Commission approved the invalid PPI credit in this case on

6.26.14.

Both the Idaho State Insurance Fund and the Industrial Special Indemnity Fund were named Defendants in the *Corgatelli* case. That means that when the Defendants in this case signed the Stipulation in June of 2014, they had already filed their written briefs and made their oral arguments to the Idaho Supreme Court in *Corgatelli.* Both Defendants were intimately familiar with the legal arguments being made in *Corgatelli* and knew that the Idaho Supreme Court could issue an opinion any moment that would prevent the State Insurance Fund from taking the invalid PPI credit against the Claimant's TPD benefits.

Although both Defendants had insider knowledge of the arguments being made in *Corgatelli*, Employer and the ISIF chose to remain silent in this case. Neither Defendant notified Claimant that the $39,649.50 PPI credit being taken by Employer might be declared invalid by the Idaho Supreme Court at any moment. Instead, they signed the Stipulation in June of 2014 hoping that the 20-day time frame for filing a Motion For Reconsideration and the 42-day time frame for filing an appeal to the Idaho Supreme Court would expire and they could hide behind an "alleged" final Order and argue that an invalid credit became valid because it was merged into a final Order.

Even if Employer is correct and the holding in *Corgatelli* cannot be applied retroactively to the 6.26.14 Order, that does not address the fundamental statutory arguments made by the Claimant pursuant to Idaho Code §72-408, Idaho Code §72-318 and Idaho Code §72-711; i.e., that the PPI credit granted to Employer must be declared void under Idaho Code §72-318 and Idaho Code §72-711 because there were no statutory provisions in the worker's compensation Act which authorized the Commission to grant Employer a PPI credit against its obligation to

pay the full measure of TPD benefits.

Since the Commission acted beyond the jurisdiction granted to it by statute when it granted Employer the invalid PPI credit, the PPI credit provisions of the Compensation Agreement and Order of Approval and Discharge must be declared void and set aside pursuant to Idaho Code §72-318 and Idaho Code §72-711. Idaho Code §72-408, Idaho Code §72-318 and Idaho Code §72-711 were all in effect when the Industrial Commission entered its Order of Approval and Discharge on 6.26.14.

Employer argues that an invalid agreement can be made valid by simply calling it a final Order. Employer's logic is flawed. Under Idaho Code §72-711, the PPI credit provisions of the 6.26.14 Compensation Agreement and Order never became a valid final Order because the Commission only had jurisdiction to approve the final agreement of the parties "when the terms conform to the provisions of this law" and the PPI credit granted to Employer obviously did not conform to the provisions of Idaho Code §72-408.

The PPI credit provisions of the Compensation Agreement in this case clearly did not conform to the provisions of the law because they relieved the Employer of its obligation to pay full TPD benefits in direct violation of Idaho Code §72-408 and Idaho Cod §72-318(1) and they required the Claimant to waive his rights to receive full TPD compensation under the Act in direct violation of Idaho Code§72-408 and Idaho Code §72-318(2).

The Supreme Court has made it very clear that any agreement which requires the Employee to waive his right to receive full compensation under the Act must be declared void:

> Section 72-318(2) sets out the State's policy that agreements purporting to waive an employee's rights to compensation under the Act are void. *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 286, 207 P.3d 1008, 1117 (2009).

Conclusion

JRP 15(E) gave the ISIF the right to file one written response in opposition to the Claimant's Petition For Declaratory Ruling. The ISIF did not address the substantive merits of any of the Claimant's statutory arguments or contract construction arguments in its written response. Likewise, the ISIF did not object to the Claimants' request for an award of attorney's fees pursuant to Idaho Code §72-804. Instead, the ISIF chose to limit its response to a limited appearance challenge to subject matter and personal jurisdiction. The Judicial Rules of Practice and Procedure do not authorize a limited appearance.

Since the ISIF did not oppose any of the Claimant's requests for declaratory relief or the Claimant's request for attorney's fees, the Claimant requests a Declaratory Ruling which requires the ISIF to begin paying Claimant his full statutory TPD benefits based on 45% of the current AWSW 90 weeks after the MMI date of 10.1.13.; i.e., on or about 5.23.15. The Claimant also requests an award of attorney's fees pursuant to Idaho Code §72-804 because the ISIF has contested the Claimant's right to receive his full statutory TPD benefits without reasonable grounds.

The Employer did not respond to the Claimant's Idaho Code §72-318 and Idaho Code §72-711 arguments in its written response. The Employer's silence must mean that the Employer realizes that that the Industrial Commission has no choice but to declare the PPI credit provisions of the Compensation Agreement and Order of Approval and Discharge void because they relieve the Employer of its obligation to pay full statutory TPD benefits in violation of Idaho Code § 72-408 and Idaho Code §72-318(1) and require the Claimant to waive his right to

receive the full measure of his statutory TPD benefits in direct violation of Idaho Code §72-408 and Idaho Code §72-318(2).

Since the terms of the invalid PPI credit granted to Employer did not conform to the provisions of the Act, the Commission did not have authority to approve the PPI credit and it must be declared void and set aside pursuant to Idaho Code §72-711 and Idaho Code §72-318.

Like the ISIF, the Employer did not even address the Claimant's request for attorney's fees pursuant to Idaho Code §72-804. Implicit in the Employer's silence is the recognition that it has contested the Claimant's right to receive the full measure of his statutory TPD benefits under Idaho Code §72-408 without reasonable grounds. The Commission should declare that portion of the Compensation Agreement which awards an invalid PPI credit to Employer void and award attorneys' fees to the Claimant because Employer has contested his right to receive the full measure of his TPD benefits without reasonable grounds.

Time is of the essence in this matter because the Employer will stop paying the Claimant 55% of the 2004 AWSW 90 weeks after the stipulated date of MMI on 10.1.13; i.e., on or about 5.23.15. The Claimant respectfully requests that the Commission issue the requested Declaratory Rulings in this case as soon as possible.

Respectfully submitted this 17th day of March 2015.

ELLSWORTH, KALLAS & DEFRANCO, PLLC

By:____________________________
RICK D. KALLAS
Attorney for Claimant

Certificate of Service

I HEREBY CERTIFY that on the 17th day of March 2015, I caused to be served a true and correct copy of Claimant's Rely Memorandum In Support of Petition For Declaratory Ruling by the method indicated below upon the following persons:

Kenneth L. Mallea Mallea Law Offices 78 SW 5th Ave., Ste. 1 P.O. Box 857 Meridian, Idaho 83680	[X] U.S. Mail, Postage Prepaid [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile @ 208.888.2789
Jon M. Bauman Elam & Burke 251 E. Front Street, Ste. 300 P.O. Box 1539 Boise, ID 83701	[X] U.S. Mail, Postage Prepaid [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile @ 208.384.5844

Rick D. Kallas

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY DAVIS,

Claimant,
Petitioner herein,

v.

HAMMACK MANAGEMENT INC.,

Employer,

and

STATE INSURANCE FUND,

Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,

Respondents herein.

IC 15-000107
(2005-501080)

ORDER ON PETITION FOR DECLARATORY RULING

FILED
OCT - 6 2015
INDUSTRIAL COMMISSION

On February 26, 2015, Petitioner filed his Petition for declaratory ruling with supporting memorandum. Petitioner requests a ruling on the impact of *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014) on the parties' lump sum settlement agreement (LSSA), approved by order of the Commission dated June 26, 2014. Petitioner argues that *Corgatelli, supra*, renders the PPI credit in the LSSA invalid, and without Commission intervention, the present LSSA improperly denies Petitioner the full measure of his statutory total permanent disability benefits, unfairly relieves Employer/Surety (Employer) and the Industrial Special Indemnity Fund (ISIF) of their respective obligations to pay Petitioner total permanent disability benefits, unfairly requires Petitioner to waive his full statutory total permanent disability benefits, and adversely affects the timing of ISIF's total permanent disability payments. Petitioner also wishes the Commission to evaluate the LSSA for ambiguity, and to order the payment of attorney's fees by Employer and ISIF because they have contested Petitioner's

request for the "full measure" of his TPD benefits.

On March 11, 2015, Employer filed an objection to Petitioner's request. Employer argues that Petitioner's proposed issues are not proper for a declaratory ruling, because Petitioner's petition is an attempt to retroactively apply *Corgatelli*, *supra*, to the June 26, 2014 LSSA, which was dismissed with prejudice. Employer argues that the reconsideration and appeal time has passed, thus the LSSA is final and no actual controversy exists. Employer also challenges Petitioner's service of the petition for declaratory ruling.

On March 12, 2015, ISIF filed a limited appearance to challenge the subject matter jurisdiction and service of process.

On March 17, 2015, Petitioner filed a reply brief. Petitioner objects to the ISIF's arguments, and contends that the Commission has jurisdiction to consider his petition for declaratory ruling.

Petitioner Properly Served Respondents

ISIF and Employer argue that Petitioner improperly served them because their respective legal counsel no longer represented them after the negotiated LSSA. However, neither counsel for the ISIF nor Employer complied with Commission rules treating the withdrawal as counsel of record under J.R.P. 14. The Commission finds that Petitioner properly served his request for declaratory ruling.

The Impact of *Corgatelli* on the Previously Approved LSSA

Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law (JRP) 15(c) (May 8, 2013) describes by whom, and for what, a petition for declaratory ruling may be filed:

J.R.P. 15(c). Contents of Petition.

Whenever any person has an actual controversy over the construction, validity or

applicability of a statute, rule, or order, that person may file a written petition with the Commission, subject to the following requirements:

> 1. The petitioner must expressly seek a declaratory ruling and must identify the statute, rule, or order on which a ruling is requested and state the issue or issues to be decided;
>
> 2. The petitioner must allege that an actual controversy exists over the construction, validity or applicability of the statute, rule, or order and must state with specificity the nature of the controversy;
>
> 3. The petitioner must have an interest which is directly affected by the statute, rule, or order in which a ruling is requested and must plainly state that interest in the petition; and
>
> 4. The petition shall be accompanied by a memorandum setting forth all relevant facts and law in support thereof.

The Commission may decline to make a ruling where it lacks jurisdiction over the issue presented or where there is other good cause why a ruling should not be made. J.R.P.15(f).

Here, it is clear that Petitioner qualifies as a "person" as defined in the rule. Petitioner alleges the existence of an "actual controversy" over the validity of an Order of the Commission, i.e., the LSSA approved by order of the Commission dated June 26, 2014. Petitioner contends that in view of *Corgatelli, supra*, the "credit" given in the LSSA for the payment of a prior impairment rating is illegal. Employer and the ISIF assert that the LSSA is legal, binding, and not subject to further review by the Commission. Assuming that the Commission has continuing jurisdiction over the LSSA, an "actual controversy" between Petitioner and the other parties to the LSSA appears to exist since Petitioner may net a larger recovery depending on how the controversy is resolved.

The LSSA at issue in this matter was approved by the Commission on June 26, 2014 pursuant to the provisions of Idaho Code § 72-404, which provides:

> 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.

LSSAs are agreements of both compromise and commutation. The LSSA approved by the Commission contains both of these elements. The LSSA reflects that Petitioner suffered the subject work accident on November 9, 2004. This accident caused injury to Petitioner's lumbar spine. Petitioner suffered from a number of pre-existing conditions involving his lumbar and cervical spine. In fact, prior to November 9, 2004, Petitioner had undergone four lumbar spine surgeries. Following the November 9, 2004 accident, Petitioner underwent five additional lumbar spine surgeries and two cervical spine surgeries. The parties agree that the subject accident caused further injury to Petitioner's lumbar spine and that Petitioner is totally and permanently disabled, with a date of medical stability of October 1, 2013.

The parties also stipulated and agreed that all elements of ISIF liability are satisfied, and that responsibility for Petitioner's total and permanent disability should be apportioned between Employer and the ISIF. The manner in which that disability should be apportioned between Employer and the ISIF is the principle dispute resolved by the LSSA.

The LSSA reflects that there was disagreement between the parties over the extent and degree of Petitioner's accident-produced impairment, two physicians proposing that this impairment equaled 100%, while two other physicians proposed that Petitioner's accident-produced impairment equaled 22%. For the purposes of the LSSA, the parties stipulated that Petitioner's pre-existing permanent physical impairment equaled 32% of the whole person, while his accident-produced impairment equaled 27% of the whole person. The parties agreed that Petitioner's total and permanent disability would be shared by the Employer and the ISIF using these agreed upon PPI ratings to apportion Petitioner's remaining disability "according to

law," i.e., per *Carey v. Clearwater Cnty Road Dept.* 107 Idaho 109, 686 P.2d 54 (1984). Therefore, with these assumptions in place, the parties agreed that Employer would accept responsibility for the payment of 250 weeks of permanent partial disability benefits commencing October 1, 2013. During this 250 week period, the ISIF agreed to pay Petitioner additional benefits to bring Petitioner's weekly benefit up to the amount he is entitled to as a totally and permanently disabled employee. Thereafter, the ISIF would be solely responsible for the payment of total and permanent disability benefits until Petitioner's death.

Paragraph 12 of the LSSA reflects that prior to the execution of that document, Employer paid the entire 27% PPI rating ($39,649.50) which the parties agreed was owed by Employer. In addition, Employer had paid Petitioner an amount equal to 5% of the whole person as an advance against permanent disability. These benefits totaled 32% or 160 weeks of PPD, $46,992.00 at the appropriate rate. The LSSA reflects that Employer is entitled to apply these payments as a credit against its obligation to pay 250 weeks of benefits from October 1, 2013 forward.

It is Petitioner's central contention that per *Corgatelli*, the credit allowed by the LSSA for the previously paid 27% PPI rating ($39,649.50) is illegal, and that Employer must pay the full 250 weeks contemplated by the calculation set forth in *Carey v. Clearwater Cnty Road Dep't*, 107 Idaho 109, 686 P.2d 54 (1984).

It is worth reviewing *Carey*, *supra*, in connection with Petitioner's assertions about the application of *Corgatelli*, *supra*, to this matter.

In *Carey*, the claimant was found to have permanent physical impairment of 10% relating to a pre-existing condition and 40% relating to the work accident, for a total of 50%. Carey was found to be totally and permanently disabled under the odd lot doctrine, and the question before the Court was how to apportion the 50% disability from nonmedical factors (100% minus 50%

PPI = 50% disability from nonmedical factors) between the employer and the ISIF. Noting that the Commission had applied different rules to apportion liability between employer and ISIF in several cases then before the Court, the Court announced a rule of general application to address how disability from nonmedical factors should be apportioned where the ISIF shares responsibility with employer for claimant's total and permanent disability. The Court stated:

> We believe that the appropriate solution to the problem of apportioning the nonmedical disability factors, in an odd-lot case where the fund is involved, <u>is to prorate the nonmedical portion of disability between the employer and the fund, in proportion to their respective percentages of responsibility for the physical impairment. Thus, in the instant case, Mr. Carey's preexisting impairment was 10% of the whole man, and his physical impairment from the accident is an additional 40%, resulting in a 50% impairment. Claimant is 100% disabled, by virtue of the odd-lot doctrine, so an additional 50% nonmedical factors, over and above the 50% physical impairment, need to be allocated between the employer/surety and the fund. The fund is therefore responsible for 10/50, or 4/5 (80%) [sic], of the nonmedical portion of disability, and the employer is liable for 40/50, or 4/5 (80%), of the nonmedical factors.</u>
>
> (Emphasis supplied.)

Thus, in addition to the responsibility that employer and ISIF each bear for PPI, they also bear responsibility for disability from nonmedical factors in the same proportion that they share responsibility for PPI. Therefore, in *Carey*, employer was responsible for 40/50 of the claimant's disability from nonmedical factors, or 40% over and above the PPI for which it was responsible (40/50 x 50% = 40%). Employer's total responsibility under *Carey* was 80% (40% disability for nonmedical factors + 40% PPI). This rating was payable at 55% of the average state weekly wage for the year of injury. The claimant was entitled to recover from the ISIF the difference between the permanent partial disability compensation paid by the employer and the total and permanent disability benefits to which he was found to be entitled as an odd lot worker.

The facts of *Carey* bear a certain similarity to those before the Commission in the instant matter. Here, the parties stipulated that Petitioner's pre-existing PPI was 32%, while his accident

produced impairment was 27%. These impairments total 59% of the whole person, leaving 41% disability over and above impairment to apportion between the Employer and the ISIF in the same proportion that each entity bears responsibility for Petitioner's total PPI of 59%. Employer's responsibility for disability over and above Petitioner's PPI is calculated as follows: 27/59 x 41 = 18.76%. Therefore, the total responsibility of Employer for the payment of disability, inclusive of impairment, is 45.76% (27% PPI + 18.76% disability from nonmedical factors). 45.76% disability equates to 228.80 weeks of disability paid at 55% of the average state weekly wage for the year of injury.[1] The responsibility of Employer to pay these benefits commences, per the LSSA, on October 1, 2013. Petitioner is entitled to recover from the ISIF the difference between the permanent partial disability compensation paid by Employer and the total and permanent disability benefits to which Petitioner is entitled by virtue of his total and permanent disability.

Of course, prior to the LSSA, Employer discharged its obligation to pay the 27% PPI rating, possibly concluding that it had no defense to the payment of the same once Petitioner had been pronounced stable and ratable. Petitioner contends that the fact that this payment was made is in no wise relevant to the obligation of Employer to make this payment again as part of its responsibility under *Carey*, notwithstanding, as developed above, that a careful reading of *Carey* actually seems to endorse the notion that Employer should not have to pay the same impairment twice. Petitioner relies on the recent case of *Corgatelli* in support of his position.

In *Corgatelli*, the Commission found claimant to be totally and permanent disabled, and determined that liability should be shared by employer and the ISIF. Corgatelli was found to

[1] Although the Carey calculation actually yields Employer responsibility for the payment of 228.80 weeks of benefits, the parties agreed, for whatever reason, that the *Carey* calculation yields Employer responsibility for the payment of 250 weeks of benefits. (See paragraph 10 of the LSS.)

have impairment totaling 15% of the whole person, with 5% attributable to a pre-existing condition and 10% attributable to the subject accident. This left 85% disability from nonmedical factors to be apportioned between the ISIF and the employer. Applying the *Carey* formula, the Commission found that employer's liability for disability from nonmedical factors was 56.7% (10/15 x 85). To this, the Commission added employer's responsibility for PPI, and found that the total responsibility of employer was 66.7% (56.7 + 10). 66.7% disability equates to 333.5 weeks of benefits commencing as of the date of Corgatelli's medical stability.

Employer filed a motion for reconsideration, seeking a ruling from the Commission that in discharging its obligation to pay disability benefits in the amount of 66.7% of the whole person, it was allowed to take a credit for the 10% PPI rating already paid to Corgatelli. The Commission reasoned that to deny employer's request would be to essentially require employer to pay the PPI award twice. Therefore, employer's motion was granted. Employer was obligated to pay the 66.7% disability award but received a credit in the amount of the PPI award already paid.

On appeal to the Supreme Court, the Court first addressed the Commission's decision to credit employer's finite responsibility to pay a 66.7% disability award with the PPI payments it had previously made. The Court stated that PPI and PPD are different creatures entirely, and that there is no statutory authority that authorizes the Commission to apply the payment of PPI benefits as a credit against an employer's obligation to pay total and permanent disability benefits.

As applied to the facts of the instant matter, application of this rule means that against their obligation to pay disability of 45.76% (which consists of PPI of 27% and disability from nonmedical factors of 18.76%) Employer will not be allowed a credit for the 27% PPI previously

paid. While we agree that the holding of *Corgatelli* appears to endorse double payment of PPI, and therefore a double recovery to Petitioner, we are constrained by what seems to be the unambiguous rule of that case. Therefore, were this case before us following a hearing which adduced facts like those recited in the approved LSSA, we would likely be required to conclude that Employer is not entitled to a credit for the previously-paid PPI, and must pay the full 45.76% disability rating, notwithstanding that that rating is a composite of the previously paid PPI and disability from nonmedical factors owed under *Carey*.

Of course, this case did not go to hearing, but was resolved by the Commission's approval of a LSSA proposed and executed by the parties. In cases involving the ISIF, the Commission is cognizant of its heightened responsibility to be satisfied that such proposed agreements meet the standards imposed by *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 207 P.3d 1008 (2009). As respects settlements with the ISIF, the Court unambiguously concluded that the Industrial Commission does not even have jurisdiction to consider such a LSSA without first being satisfied that all elements of ISIF liability are met. Only then does the Commission have jurisdiction to consider whether the proposed LSSA is in the best interests of the parties under Idaho Code § 72-404. Essentially, the Commission must ascertain why it makes sense for a claimant to accept a lump sum payment from the ISIF when, absent settlement, a claimant would receive total and permanent disability payments for life.

Here, the parties do not dispute that Petitioner is totally and permanently disabled, and the LSSA so reflects. Moreover, the LSSA reflects that the statutory elements of ISIF liability are satisfied. In his petition, Petitioner does not challenge that part of the LSSA which finds Petitioner to be totally and permanently disabled, and the elements of ISIF liability satisfied. Rather, the focus is on the credit taken, and whether this is in conflict with *Corgatelli*.

It is axiomatic that an order approving a LSSA is a "decision" of the Commission pursuant to Idaho Code § 72-718. (*Morris v. Hap Taylor & Sons, Inc.*, 154 Idaho 633, 637, 301 P.3d 639, 643 (2013), *citing Davidson v. H.H. Keim Co.*, 110 Idaho 758, 760, 718 P.2d 1196, 1198 (1986)). In addition to approving the LSSA, the June 26, 2014 Order of the Commission dismissed Petitioner's complaint with prejudice. Under Idaho Code § 72-718, Petitioner had 20 days after June 26, 2014 within which to file with the Commission his motion for reconsideration of the Commission's approval of the LSSA. This, he failed to do, and no appeal of the order approving the LSSA was taken to the Idaho Supreme Court. Therefore, this "decision" of the Commission is final.

Idaho Code § 72-719 specifies that within five years following the date of injury, an injured worker may petition the Commission for a modification of an award to address a change of condition, fraud, or to correct a "manifest injustice". Significantly, the provisions of Idaho Code § 72-719 do not apply to a LSSA approved by the Commission pursuant to Idaho Code § 72-404. See Idaho Code 72-719(4). Therefore, neither does Idaho Code § 72-719 afford Petitioner a path forward on attacking the approved LSSA.

Idaho Code § 72-318, discussed at some length in *Wernecke, supra*, provides:

> (1) No agreement by an employee to pay any portion of the premiums paid by his employer for workmen's compensation, or to contribute to the cost or other security maintained for or carried for the purpose of securing the payment of workmen's compensation, or to contribute to a benefit fund or department maintained by the employer, or any contract, rule, regulation or device whatever designed to relieve the employer in whole or in part from any liability created by this law, shall be valid. Any employer who makes a deduction for such purpose from the remuneration of any employee entitled to the benefits of this act shall be guilty of a misdemeanor.
>
> (2) No agreement by an employee to waive his rights to compensation under this act shall be valid.

The *Wernecke* Court recognized that generally speaking, the provisions of Idaho Code § 72-318

prohibit the agreement by an employee to give up his right to pursue workers' compensation benefits for claims that have not yet arisen. Much of the discussion of this statute in *Wernecke* centered around a narrow exception to this general rule which allows the ISIF to enter into LSSAs under the terms of which the injured worker waives his right to future compensation. However, citing to *Emery v. J.R. Simplot Co.*, 141 Idaho 407, 111 P.3d 92 (2005), the *Wernecke* Court made it clear that LSSAs which resolve claims for a past injury are not void under Idaho Code § 72-318.

Therefore, Idaho Code § 72-318 does not authorize Petitioner's attack on the LSSA. First, vis-à-vis the LSSA with the ISIF, this LSSA is one of the narrow variety of LSSAs which can legally resolve claims for future injuries. Second, vis-à-vis the Employer, this LSSA is one which resolves a past injury, a type of LSSA altogether appropriate under Idaho Code § 72-318. Accordingly, the doctrines of quasi-estoppel and res judicata, which were found inapplicable in *Wernecke* because the prior LSSA was void under Idaho Code § 72-318, do have application here. We conclude that neither *Wernecke* nor the provisions of Idaho Code § 72-318 provide any basis to attack the approved LSSA.

Of course, it was but a scant few days following the Commission's approval of the subject LSSA that the Court issued its opinion in *Corgatelli, supra*, and it must be acknowledged that had the parties been pre-aware of the holding in that case, the LSSA would look different than the one approved by the Commission. It may have provided for additional payments, it may have provided for the same payments but couched in different language, or the parties might never have reached any agreement.

Suffice it to say, however, that we can think of no mechanism by which the approved LSSA may be attacked at this remove. The Industrial Commission lacks subject matter

jurisdiction to entertain revision of the LSSA approved by final decision of the Commission. Even if such a request could be entertained, we conclude that there is yet no way to retroactively apply the rule of *Corgatelli* to past LSSAs and past decisions of the Commission. The Commission would do little else but revisit many thousands of long-resolved claims were that the case.

ISIF's Obligation to Pay Benefits

Petitioner's second principle contention is that if Employer is entitled to a "credit" for past PPI paid, the LSSA approved by the Industrial Commission is ambiguous in defining the date on which the ISIF becomes solely responsible for paying Petitioner's entitlement to statutory benefits for total and permanent disability. Petitioner asks the Commission to resolve the ambiguity by construing the LSSA to require that the ISIF's exclusive responsibility to pay statutory benefits shall commence at the expiration of 90 weeks subsequent to October 1, 2013, as opposed to the expiration of 250 weeks subsequent to that date.

We find that the LSSA is not ambiguous, and that the responsibility of the ISIF to assume exclusive responsibility for the payment of statutory benefits for total and permanent disability does not begin until after the expiration of 250 weeks subsequent to October 1, 2013.

As reflected in paragraph 11 of the LSSA, the parties agreed on a scheme by which responsibility for the payment of statutory total and permanent disability benefits would be apportioned between the employer and the ISIF. Per the LSSA, the Employer and the ISIF share responsibility for the payment of statutory benefits for 250 weeks subsequent to October 1, 2013, with the ISIF assuming sole responsibility for the payment of benefits at the end of that 250 week period. However, paragraph 11 also specifies that Employer's obligation to pay benefits during the 250 week period subsequent to October 1, 2013 is subject to the "credit"

for the previous payment of a 27% PPI rating and a 5% advance on disability, equating to 160 weeks of benefits. The argument is that the application of this credit results in the acceleration of the date on which the ISIF becomes solely responsible for the payment of benefits. Application of the credit means that the ISIF assumes sole responsibility for the payment of statutory benefits at the expiration of 90 weeks subsequent to October 1, 2013 (250 weeks minus 160 weeks).

We do not believe the LSSA contemplates the outcome suggested by Petitioner. Paragraph 11 of the LSSA clearly contemplates that despite whatever credit may be taken by the Employer, ISIF's responsibility to pay 100% of Petitioner's statutory benefits does not commence until the expiration of 250 weeks subsequent to October 1, 2013.

Petitioner argues that to do other than as he suggests will leave him with a benefit gap between October 1, 2013, and the expiration of the 250 week period referenced in the LSSA. Therefore, the argument goes, unless ISIF's responsibility to pay 100% of Petitioner's statutory benefit is pushed back to 90 weeks following October 1, 2013, the application of the credit will leave Petitioner without full payment of his statutory entitlement for a period of approximately 160 weeks. However, this argument fails to recognize that Petitioner has been paid for this 160 week period, and presumably received that payment during the 160 week period, i.e., subsequent to the October 1, 2013 date of medical stability. We find no basis to support the assertion that Petitioner will somehow be shortchanged where ISIF's sole responsibility for the payment of Petitioner's total and permanent disability benefits does not begin until the expiration of the 250 week period following October 1, 2013.

Attorney Fees

Petitioner requests Idaho Code § 72-804 attorney's fees against Employer and ISIF

for their refusal to declare the PPI credit void, and ISIF's refusal to pay TPD benefits 90 weeks after the October 1, 2013 date of MMI. Petitioner has failed to persuade the Commission that attorney's fees are appropriate.

ORDER

For these reasons, we decline to accept Petitioner's invitation to revisit the provisions of the LSSA approved by the Industrial Commission on June 26, 2014.

DATED this 6th day of October, 2015.

INDUSTRIAL COMMISSION

R. D. Maynard, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Assistant Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of October, 2015, a true and correct copy of the **ORDER ON PETITION FOR DECLARATORY RULING** was served by regular United States Mail upon each of the following:

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INDUSTRIAL COMMISSION

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY DAVIS, Petitioner / Claimant, vs. HAMMACK MANAGEMENT, INC., Employer, and IDAHO STATE INSURNACE FUND, Surety, and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Respondents / Defendants.	I.C. No. 2005 - 501080 PETITIONER'S MOTION FOR RECONSIDERATION OF THE INDUSTRIAL COMMISSION'S OCTOBER 6, 2015 ORDER ON PETITION FOR DECLARATORY RULING

COMES NOW the Petitioner / Claimant, Gary Davis, and pursuant to Idaho Code §72-718 and J.R.P. 3(G), hereby moves the Industrial Commission for an Order which reconsiders the Industrial Commission's October 6, 2015 Order On Petition For Declaratory Ruling on the grounds and for the reasons that:

1. The industrial commission exceeded its limited jurisdiction and entered an invalid order when it granted employer / surety an unauthorized credit for the payment of PPI benefits in direct violation of Idaho Code §72-408 and Idaho Code §72-409;
2. The Industrial Commission did not fulfill its obligation to set aside its invalid June 26, 2014 Order pursuant to Idaho Code §72-318(1), Idaho Code §72-318(2) and Idaho Code §72-711; and,
3. The phrase "subject to the credit" is ambiguous because it leads to completely different outcomes when inconsistently applied to each defendant and deprives the claimant of the full measure of his total and permanent disability benefits.

This Motion For Reconsideration is based on the provisions of the Idaho Workers' Compensation Act, the JRP and the points and authorities set forth in the Petitioner's Brief in Support of Motion For Reconsideration.

Respectfully submitted this 23rd day of October 2015.

ELLSWORTH, KALLAS & DEFRANCO, PLLC

By: ______________________
RICK D. KALLAS
Attorney for Claimant

Certificate of Service

I HEREBY CERTIFY that on the 23rd day of October 2015, I caused to be served a true and correct copy of Petitioner's Motion For Reconsideration of the Industrial Commission's Order On Petition For Declaratory Ruling by the method indicated below upon the following persons:

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY DAVIS, Petitioner / Claimant, vs. HAMMACK MANAGEMENT, INC., Employer, and IDAHO STATE INSURNACE FUND, Surety, and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Respondents / Defendants.	I.C. No. 2005 - 501080 PETITIONER'S BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION OF THE INDUSTRIAL COMMISSION'S OCTOBER 6, 2015 ORDER ON PETITION FOR DECLARATORY RULING

(1) THE INDUSTRIAL COMMISSION EXCEEDED ITS LIMITED JURISDICTION AND ENTERED AN INVALID ORDER WHEN IT GRANTED EMPLOYER / SURETY AN UNAUTHORIZED CREDIT FOR THE PAYMENT OF PPI BENEFITS IN DIRECT VIOLATION OF IDAHO CODE §72-408 AND IDAHO CODE §72-409

The Industrial Commission only has limited jurisdiction as defined by the provisions of the Idaho Workers' Compensation Act:

> The Commission has no jurisdiction other than that which the legislature has specifically granted to it. The Commission therefore exercises limited jurisdiction, with nothing being presumed in favor of its jurisdiction. *See Idaho Power Co. v. Idaho Pub. Util. Comm'n,* 102 Idaho 744, 750, 639 P.2d 442, 448 (1981) (jurisdiction of Public Utilities Commission limited). *Curr v. Curr*, 124 Idaho 686, 690, 864 P. 132, 136 (1993).

When the Industrial Commission entered its 6.26.14 Order approving the parties' Compensation Agreement, there was absolutely no provision in the entire worker's compensation act which gave the Industrial Commission jurisdiction to give Employer / Surety a credit for PPI benefits previously paid toward its obligation to pay the Claimant the full measure of his total and permanent disability benefits required by Idaho Code §72-408 and Idaho Code §72-409:

> Examining worker's compensation law as a whole, *Roe v. Albertson's Inc.*, 141 Idaho 524, 528, 112 P.3d 812, 816 (2005), this Court finds that there is no statutory basis for the Commission to award Steel West a credit for permanent physical impairment benefits previously paid to *Corgatelli.* ...
>
> Thus, the current version of Idaho Code section 72-408, which provides for the employee such as Corgatelli to receive total and permanent disability benefits, includes no deduction or credit for previously paid permanent impairment benefits in its award of disability benefits. ...
>
> No other statute in Idaho's worker's compensation law permits the employer to receive credit for permanent physical impairment benefits paid before the award of total and permanent disability benefits. As a purely statutory scheme, the Court cannot judicially construct a credit for employers into worker's compensation law. *Corgatelli v. Steel West, Inc.,* 157 Idaho 287, 335 P.3d 1150, 1155 (2014).

The Defendants in the *Corgatelli* case were the Idaho State Insurance Fund and the Industrial Special Indemnity Fund. The Idaho Supreme Court published its *Corgatelli* decision on 8.25.14 – just 60 days after the Industrial Commission entered its 6.26.14 Order approving the Compensation Agreement in this case. What is interesting about this time line is that when the State Insurance Fund and the Industrial Special Indemnity Fund signed the Stipulation For Entry of Award Against the Defendants (Compensation Agreement) in this case, they knew that Claimant in *Corgatelli* had already appealed the Industrial Commission's grant of a PPI credit to the Employer in *Corgatelli* to the Idaho Supreme Court and that an adverse decision from the Supreme Court could be entered at any moment.

Even though the State Insurance Fund and the ISIF both knew that the PPI credit issue was on appeal to the Idaho Supreme Court in *Corgatelli* while the stipulation in this case was being drafted by the Defendants, neither Defendant felt the need to disclose that fact to the Claimant in this case before he executed the stipulation. Of course, if the Claimant had known that both Defendants were parties to a case on appeal to the Idaho Supreme Court which addressed the PPI credit issue, the Claimant never would have agreed to the credit language set forth in paragraph 12 of the stipulation in this case.

Even if the Idaho Supreme Court had never published the *Corgatelli* decision, the Industrial Commission cannot escape the fact that on the date it approved the Compensation Agreement in this case on 6.26.14, there was absolutely no provision in the entire Idaho Workers' Compensation Act which gave the Industrial Commission the jurisdiction to grant Employer / Surety a credit for PPI benefits previously paid and then subtract that credit from the Employer's obligation to pay the Claimant the full measure of his total and permanent disability

benefits required by Idaho Code §72-408 and Idaho Code §72-409.

Based on nothing but a pure statutory analysis and without even considering the Court's holding in *Corgatelli*, the Compensation Agreement approved by the Commission on 6.26.14 must be treated as an invalid agreement under Idaho Code §72-318(1) because it "relieve[s] the employer in whole or in part" of the Employer's liability to pay the Claimant the full measure of his total and permanent disability benefits as required by Idaho Code §72-408 and Idaho Code §72-409. The Commission cannot judicially construct or approve a credit for Employer that the statute does not provide. The Compensation Agreement is also invalid under Idaho Code §72-318(2) because it requires the Claimant to waive his rights to receive the full measure of his total and permanent disability benefits under Idaho Code §72-408 and Idaho Code §72-409.

When the Commission ruled on the Petitioner's Petition For Declaratory Ruling, the Commission dismissed Petitioner's Idaho Code §72-318 arguments by giving an extremely narrow and overly technical interpretation to the Supreme Court's holding in *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 207 P.3d 1008 (2009). According to the Industrial Commission's interpretation of *Wernecke*, Idaho Code §72-318 can only be applied in those limited situations where the Claimant has entered into an agreement that purports to waive claims for future injuries. The *Wernecke* Court expressly rejected this type of overly narrow and hyper-technical interpretation of the Act:

> When interpreting the Act, we must liberally construe its provisions in favor of the employee in order to serve the humane purpose for which it was promulgated. *Reese v. V-1 Oil Co.,* 141 Idaho 630, 633, 115 P.3d 721, 724 (2005); *Davaz v. Priest River Glass Co.,* 125 Idaho 333, 337, 870 P.2d 1292, 1296 (1994). The Act is designed to provide sure and certain relief for injured workers and their families and dependents. *Davaz,* 125 Idaho at 337, 870 P.2d at 1296; I.C. § 72-201. The primary objective of an award of permanent disability benefits is to compensate

> the claimant for his or her loss of earning capacity. *Davaz,* 125 Idaho at 337, 870 P.2d at 1296. The purposes served by the Act leave no room for narrow technical constructions. *Reese,* 141 Idaho at 633, 115 P.3d at 724. *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 282, 207 P.3d 1008, 1113 (2009).

The Supreme Court has not given *Wernecke* the overly narrow interpretation applied by the Industrial Commission and limited the application of Idaho Code §72-318 only to agreements which waive future claims. On the contrary, the Supreme Court has recently held that Idaho Code §72-318 can be used to declare any agreement void if that agreement violates *any provision* of the workers' compensation Act:

> This Court has set aside a lump sum agreement on grounds of illegality but in that case the agreement was *violative of the provisions of a workers' compensation statute. See Wernecke,* 147 Idaho at 286, 207 P.3d at 1017 (the Commission " erred by approving an agreement" that purported to waive an employee's right to compensation for future injuries because the Commission failed to make findings required by I.C. § 72-332). However, Morris *does not contend that the LSSA violates the provisions of any statute* and has not shown that it is afflicted *by any other illegality. Morris v. Hap Taylor & Sons, Inc.,* 154 Idaho 633, 301 P. 3d 639, 643 (2013) (italics supplied).

If the Claimant in *Morris* had alleged that the LSSA had violated any provisions of the Idaho workers' compensation Act or was illegal for some other reason, the Court would have properly applied Idaho Code §72-318 and set aside the illegal agreement. The Claimant in this case has specifically alleged that certain provisions of the Compensation Agreement violate the Act because they give Employer / Surety an illegal credit for the payment of PPI benefits that reduces their obligation to pay Claimant the full measure of his total and permanent disability benefits as required by Idaho Code §72-408, Idaho Code §72-409 and the formula announced by the Supreme Court in *Carey v. Clearwater County Road Department,* 107 Idaho 109, 686 P.2d 54 (1984).

The plain language of Idaho Code §72-318 states that any agreement which relieves an Employer of its obligation to pay the full measure of benefits due or forces the Claimant to waive his right to receive the full measure of benefits is invalid. The Industrial Commission should grant the Claimant's Motion For Reconsideration based on the plain language of Idaho Code §72-408 and Idaho Code §72-409 which do not give the Commission the jurisdiction to grant the Employer any credit for PPI benefits previously paid.

The Industrial Commission stated in its 10.6.15 Order On Petition For Declaratory Ruling that it did not have subject matter jurisdiction to consider revising the illegal provisions in the Compensation Agreement that were approved by the Commission in its 6.26.14 Order (*See* pp. 11-12 of 10.6.15 Order). However, the Industrial Commission and the Idaho Supreme Court always have subject matter jurisdiction to set aside an illegal or invalid agreement:

> The parties did not argue the illegality of the agreement until this appeal. The illegality of a contract, however, can be raised at any stage in litigation. The Court has the duty to raise the issue of illegality *sua sponte*. *Morrison v. Young,* 136 Idaho 316, 318, 32 P.3d 1116, 1118 (2001); *Quiring v. Quiring,* 130 Idaho 560, 566, 944 P.2d 695, 701 (1997). Whether a contract is illegal is a question of law for the court to determine from all the facts and circumstances of each case. *Morrison,* 136 Idaho at 318, 32 P.3d at 1118; *Quiring,* 130 Idaho at 566, 944 P.2d at 701 (citing *Stearns v. Williams,* 72 Idaho 276, 283, 240 P.2d 833, 840 (1952)). An illegal contract is one that rests on illegal consideration consisting of any act or forbearance which is contrary to law or public policy. *Quiring,* 130 Idaho at 566, 944 P.2d at 701 (citations omitted). The general rule is that a contract prohibited by law is illegal and unenforceable. *Id.; Williams v. Cont'l Life & Acc. Co.,* 100 Idaho 71, 73, 593 P.2d 708, 710 (1979); *Whitney v. Cont'l Life and Acc. Co.,* 89 Idaho 96, 105, 403 P.2d 573, 579 (1965). A contract "which is made for the purpose of furthering any matter or thing prohibited by statute ... is void." *Kunz v. Lobo Lodge, Inc.,* 133 Idaho 608, 611, 990 P.2d 1219, 1222 (Ct.App.1999) (quoting *Porter v. Canyon County Farmers' Mut. Fire Ins. Co.,* 45 Idaho 522, 525, 263 P. 632, 633 (1928)). This rule applies on the ground of public policy to every contract which is founded on a transaction prohibited by statute. *Id.* (citing *Porter,* 45 Idaho at 525, 263 P. 632, 633 (1928) (citations omitted)). *Trees v. Kersey,* 138 Idaho 3, 6, 56 P.3d 765, 768 (2002).

The Industrial Commission should grant the Claimant's Motion For Reconsideration because the Industrial Commission exceeded its limited jurisdiction when it gave Employer / Surety an illegal credit for the payment of PPI benefits when Idaho Code §72-408 and Idaho Code §72-409 did not authorize such a credit on the date when the Industrial Commission approved the Compensation Agreement on 6.26.14.

(2) THE INDUSTRIAL COMMISSION EXCEEDED THE LIMITED JURISDICTION GRANTED TO IT UNDER IDAHO CODE §72-711 WHEN IT APPROVED A STIPULATON / AGREEMENT THAT VIOLATED IDAHO CODE §72-408 AND IDAHO CODE §72-409

When the parties to a worker's compensation claim enter into an agreement to resolve the Defendants' liability for the payment of total and permanent disability benefits, there are 2 legal mechanisms that may be used: (1) A compensation agreement which defines the Defendants' obligations to make periodic payments to the Claimant pursuant to Idaho Code §72-408 and Idaho Code §72-409 which is subject to the approval of the Commission pursuant to Idaho Code §72-711; or (2) a lump sum settlement agreement which commutes the periodic payments that would otherwise be due under I.C. §72-408 and I.C. §72-409 into a lump sum and which is approved by the Industrial Commission pursuant to Idaho Code §72-404:

> Once a determination is made regarding the degree of a claimant's permanent disability, compensation for that disability may be awarded either through periodic payments, I.C. §§ 72-408, -409, or through a single lump sum payment, I.C. § 72-404. The particular method of compensation is left largely to the discretion of the parties, subject to the approval of the Industrial Commission, I.C. §§ 72-404, 72-711. *Harmon v. Lute's Const. Co., Inc.,* 112 Idaho 291, 293, 732 P.2d 260, 262 (1986).

In his Petition For Declaratory Ruling, the Claimant alleged that the stipulation / agreement for periodic payments at issue in this case was a Compensation Agreement that must

be set aside under Idaho Code §72-711 because its provisions did not conform to the provisions of Idaho Code §72-408 and Idaho Code §72-409:

> 72-711. COMPENSATION AGREEMENTS. If the employer and the afflicted employee reach an agreement in regard to compensation under this law, a memorandum of the agreement shall be filed with the commission, and, if approved by it, thereupon the memorandum shall for all purposes be an award by the commission and be enforceable under the provisions of section 72-735, unless modified as provided in section 72-719. An agreement *shall be approved* by the commission *only when* the terms conform to the provisions of this law (italics supplied).

Rather than address the Claimant's Idaho Code §72-711 Compensation Agreement arguments in its 10.6.15 Order On Petition For Declaratory Ruling, the Industrial Commission mischaracterized the periodic payment agreement entered into by the parties as a Lump Sum Settlement Agreement (LSSA) and ignored the requirement of Idaho Code §72-711 that all agreements involving periodic payments must "conform to the provisions of this law".

> The LSSA at issue in this matter was approved by the Commission on June 26, 2014 pursuant to the provisions of Idaho Code § 72-404, which provides: ...
>
> LSSAs arc agreements of both compromise and commutation. The LSSA approved by The Commission contains both of these elements. (*See* pp. 3-4 of 10.6.15 Order On Petition For Declaratory Ruling).

A careful reading of the "Stipulation For Entry of Award Against Defendants" that was approved by the Commission in its 6.26.14 Order confirms that the agreement did not require Employer / Surety or the ISIF to pay the Claimant a lump sum. On the contrary, the agreement required the Defendants to make periodic monthly payments of total and permanent disability benefits to the Claimant at the statutory rate of 45% of the AWSW beginning on 10.1.13 pursuant to Idaho Code §72-408 and Idaho Code §72-409 and the *Carey* formula. There is absolutely no textual basis in the body of the stipulation / agreement to support the

Commission's mischaracterization of the agreement as a LSSA that would be subject to approval under Idaho Code §72-404.

The express purpose of the agreement was to provide the Claimant with the *full measure* all benefits that he would be entitled to under the Act including, but not limited to, "*total and permanent disability income benefits pursuant to law*":

> The parties represent and advise the Commission that the benefits provided for and to be paid hereunder are *the full measure of benefits* Claimant would be entitled to receive if this matter proceeded to hearing and Defendants were found to be liable for future medical care causally related to the industrial injury, for permanent partial impairment benefits and *for total and permanent disability income benefits pursuant to law*. (*See* ¶20 of the stipulation approved by the Commission in its 6.26.14 Order) (italics supplied).

The provisions of the Act which obligate Employer / Surety and the ISIF to provide the Claimant with the full measure of his total and permanent disability benefits are Idaho Code §72-408 and Idaho Code §72-409. At the time when the Industrial Commission entered its 6.26.14 Order approving the compensation agreement of the parties, those code provision did not give the Industrial Commission jurisdiction to grant Employer / Surety an illegal credit for PPI benefits previously paid by Employer / Surety. Therefore, the Industrial Commission acted beyond the scope of its limited jurisdiction when it approved the illegal credit and the Commission must set aside those provisions of the agreement which "do not conform to the provisions of this law":

> An agreement *shall be approved* by the commission *only when* the terms *conform to the provisions of this law*. *See* Idaho Code §72-711 (italics supplied).

Since the stipulation / agreement did not conform to the provisions of Idaho Code §72-408 and Idaho Code §72-409, the Commission did not have jurisdiction to approve the illegal

PPI credit that was granted to Employer / Surety and should enter an Order On Reconsideration which declares the illegal PPI credit void and unenforceable.

(3) THE PHRASE SUBJECT TO THE CREDIT IS AMBIGUOUS BECAUSE IT LEADS TO COMPLETELY DIFFERENT OUTCOMES WHEN APPLIED TO EACH DEFENDANT AND DEPRIVES THE CLAIMANT OF THE FULL MEASURE OF HIS TOTAL AND PERMANENT DISABILITY BENEFITS

The stated purpose of the Compensation Agreement approved by the Commission on 6.26.14 was to provide the Claimant with the full measure of his statutory total and permanent disability benefits beginning on 10.1.13 and continuing each month thereafter for the rest of his life based on the statutory rate of 45% of the AWSW:

> Beginning on October 1, 2013, Claimant is entitled to be paid total and permanent disability benefits at 45% of the then prevailing average weekly state wage pursuant to Idaho Code Sections 72-408 and 72-409 (*See* ¶11 of stipulation).
>
> The parties represent and advise the Commission that the benefits provided for and to be paid hereunder are *the full measure of benefits* Claimant would be entitled to receive if this matter proceeded to hearing and Defendants were found to be liable for future medical care causally related to the industrial injury, for permanent partial impairment benefits and *for total and permanent disability income benefits pursuant to law*. (*See* ¶20 of the stipulation approved by the Commission in its 6.26.14 Order) (italics supplied).

The fundamental payment obligations of the agreement are not ambiguous. Beginning on 10.1.13, the Claimant is entitled to receive the full measure of his statutory total and permanent disability benefits each month for the rest of his life at 45% of the AWSW pursuant to Idaho Code §72-408 and Idaho Code §72-409.

The ambiguity which is at the crux of this matter is only created when the Defendants and the Commission inconsistently apply the phrase "subject to the credit described in paragraph 12, below" to Defendant Employer and to Defendant ISIF's obligation to pay total and permanent disability benefits.

According to the Defendants and the Commission, when the phrase "subject to the credit" set forth in paragraph 11 is applied to the Employer, it means that the Employer's obligation to pay the Claimant total and permanent disability benefits terminates 90 weeks after 10.1.13. However, when the identical phrase in paragraph 11 is applied to the ISIF, it means that the ISIF's obligation to begin paying the Claimant the full measure of his total and permanent disability benefits does not begin until 250 weeks after 10.1.13. These inconsistent outcomes could not be achieved if the subject phrase were not ambiguous; i.e., the identical phrase means 2 different things when applied to 2 different Defendants.

When the inconsistent application of the same exact phrase leads to 2 completely different outcomes when applied to different Defendants and those different outcomes deprive the Claimant of the full measure of his total and permanent disability benefits for a period of 160 weeks from week 90 to week 250, then it should be obvious that the phrase is ambiguous. The question of whether a compensation agreement is ambiguous is a question of law.

> The 1976 compensation agreement, however, is a *Woodvine* type "and/or" agreement which, in the *Woodvine* case, we held could be construed to be ambiguous. *Woodvine v. Triangle Dairy, Inc.,* 106 Idaho 716, 682 P.2d 1263 (1984). While "[d]etermination of whether a document is ambiguous is itself a question of law," *DeLancey v. DeLancey,* 110 Idaho 63, 65, 714 P.2d 32, 34 (1986), "[i]nterpretation of an ambiguous document presents a question of fact." Id. Accord *Woodvine*. Thus, the interpretation of the 1976 compensation agreement was a question of fact which, if raised, should have been decided by the Commission. Since it is arguable that the ambiguity issue was reserved as a result of the stipulation of the parties, we remand the matter to the Commission to resolve the ambiguity question involved in the 1976 agreement. *Fowler v. City of Rexburg,* 116 Idaho 1, 6, 773 P.2d 269, 274 (1988).

The Industrial Commission has resolved this question of law by concluding that the phrase "subject to the credit" is not ambiguous:

> We find that the LSSA is not ambiguous, and that the responsibility of the ISIF to assume exclusive responsibility for the payment of statutory benefits for total and permanent disability does not begin until after the expiration of 250 weeks subsequent to October 1, 2013 (*See* p. 12 of 10.6.15 Order on Petition For Declaratory Ruling).

The Industrial Commission's conclusion that the document is not ambiguous does not make any sense. If the document was not ambiguous, then application of the phrase "subject to the credit" would not lead to 2 completely different outcomes when applied to each Defendant and deprive the Claimant of 160 weeks of total and permanent disability benefits from week 90 to week 250.

The Commission found also found that the interpretation of the Compensation Agreement suggested by Petitioner was not supported by the language of the document:

> We do not believe the LSSA contemplates the outcome suggested by Petitioner. Paragraph 11 of the LSSA clearly contemplates that despite whatever credit may be taken by the Employer, ISIF's responsibility to pay 100% of Petitioner's statutory benefits does not commence until the expiration of 250 weeks subsequent to October 1, 2013 (*See* p. 13 of 10.6.15 Order On Petition For Declaratory Ruling).

The outcome suggested by the Petitioner is that the Compensation Agreement requires the Defendants to pay Claimant his statutory total and permanent disability benefits at the statutory rate of 45% of the AWSW beginning on 10.1.13 and continuing each month thereafter for the balance of Petitioner's life just like the document states:

> Beginning on October 1, 2013, Claimant *is entitled to be paid total and permanent disability benefits* at 45% of the then prevailing average weekly state wage pursuant to Idaho Code Sections 72-408 and 72-409 (*See* ¶11 of stipulation) (italics supplied).
>
> The parties represent and advise the Commission that the benefits provided for and to be paid hereunder are *the full measure of benefits* Claimant would be entitled to receive if this matter proceeded to hearing and Defendants were found to be liable for future medical care causally related to the industrial injury, for

> permanent partial impairment benefits and *for total and permanent disability income benefits pursuant to law*. (*See* ¶20 of the stipulation approved by the Commission in its 6.26.14 Order) (italics supplied).

Since the outcome suggested by Petitioner is expressly stated as the fundamental purpose of the agreement, it is difficult to fathom how the Commission can reach the conclusion that the document does not contemplate the outcome advanced by Petitioner. The Commission's interpretation of the Compensation Agreement is not only unreasonable because it completely overlooks the stated purpose of he agreement, it is also unreasonable because the Commission fails to apply the phrase "subject to the credit" to the ISIF's payment obligation. This is a clear misinterpretation of the agreement. The plain language of paragraph 11 clearly states that the ISIF's obligation to pay statutory total and permanent disability benefits is *subject to the credit*:

> At the expiration of said 250 week period, *subject to the credit discussed in paragraph 12, below*, the ISIF will pay Claimant his full statutory income benefits, said amount being 45% of the then prevailing average state weekly wage, until Claimant's death (See ¶11 of agreement) (italics supplied).

When the phrase "subject to the credit" is used to qualify or explain the ISIF's payment obligation, it can only mean that the phrase accelerates the commencement of the ISIF's payment obligation from week 250 down to week 90. Otherwise, the phrase is meaningless and mere surplusage. As a basic matter of contract construction, the phrase "subject to the credit" should be applied to both Defendants consistently and the Commission should enter an Order On Reconsideration which clearly states that the ISIF has an obligation to pay total and permanent disability benefits to the Claimant at the statutory rate of 45% of the AWSW beginning 90 weeks after 10.1.13 because its payment obligation was "subject to the credit" discussed in paragraph 12.

CONCLUSION

As a general concept, the Claimant understands why the finality principle embodied in Idaho Code §72-718 is important to the orderly administration of justice. However, the finality principle embodied in Idaho Code §72-718 and the doctrine of res judicata can only be applied to valid final judgments. When the Industrial Commission acts beyond its limited jurisdiction and approves an invalid agreement that grants an illegal credit that is not authorized by Idaho Code §72-408 or Idaho Code §72-409, then we are not dealing with a valid final judgment and the principle of finality must yield to the Commission's obligation to set aside an invalid agreement pursuant to Idaho Code §72-318 and Idaho Code §72-711:

> A reading of the findings and conclusions indicates the Commission was erroneously under the impression that the doctrine of res judicata precludes any consideration of the applicability of I.C. § 72-719(3) in the absence of either fraud or change of condition. Res judicata prevents only the relitigation of matters finally decided in an earlier decision of the Commission. Here the statute clearly over-rides that concept of finality, permitting the Commission to reopen its earlier decision if it finds it necessary to do so to correct a manifest injustice. *Banzhaf v. Carnation Co.*, 104 Idaho 700, 703, 662 P.2d 1144, 1177 (1983).

Idaho Code §72-318 specifically states that any agreement which relieves the Employer of its obligation to pay full compensation or requires the Claimant to waive his right to full compensation is invalid. Idaho Code §72-711 clearly states that the Industrial Commission can only approve compensation agreements which conform to the provisions of the Act. These concepts, which require the Industrial Commission to declare invalid agreements that violate the Act void, must override the concept of finality.

Even if the Commission disregards its obligation to set aside those provisions of an invalid agreement which grant an illegal credit not authorized by any provision of the workers'

compensation Act, the Commission should consistently apply the ambiguous phrase "subject to the credit" to both Defendants and require the ISIF to begin paying Claimant the full measure of his total and permanent disability benefits at 45% of the AWSW 90 weeks after 10.1.13 pursuant to Idaho Code §72-408 and Idaho Code §72-409 and paragraphs 11 and 12 of the parties' Compensation Agreement.

Respectfully submitted this 23rd day of October, 2015.

ELLSWORTH, KALLAS & DEFRANCO, PLLC

By: ______________________
RICK D. KALLAS
Attorney for Petitioner / Claimant

Certificate of Service

I HEREBY CERTIFY that on the 23rd day of October 2015, I caused to be served a true and correct copy of Petitioner's Brief in Support of Motion For Reconsideration of Order On Petition For Declaratory Ruling by the method indicated below upon the following persons:

Kenneth L. Mallea Mallea Law Offices 78 SW 5th Ave., Ste. 1 P.O. Box 857 Meridian, Idaho 83680	[X] U.S. Mail, Postage Prepaid [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile @ 208.888.2789
Jon M. Bauman Elam & Burke 251 E. Front Street, Ste. 300 P.O. Box 1539 Boise, ID 83701	[X] U.S. Mail, Postage Prepaid [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile @ 208.384.5844

____
Rick D. Kallas

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Attorney for Defendant State of Idaho
Industrial Special Indemnity Fund

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BEFORE THE INDUSTRIAL COMMISSION

STATE OF IDAHO

* * * * * * * *

GARY DAVIS, Claimant, vs. HAMMACK MANAGEMENT, INC., Employer, and STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	I.C. 15-000107 (2005-501080) **ISIF RESPONSE TO PETITIONER'S MOTION FOR RECONSIDERATION OF THE INDUSTRIAL COMMISSION'S OCTOBER 6, 2015 ORDER ON PETITION FOR DECLARATORY RULING**

COMES NOW, the State of Idaho, Industrial Special Indemnity Fund ("ISIF") by and through undersigned counsel of record and hereby responds to Petitioner's Motion for Reconsideration and Brief in Support thereof.

Initially, it must be noted that the Brief in Support of Motion for Reconsideration offers nothing new by way of analysis or authority in support of Claimant's position. The Motion for Reconsideration and Brief in Support simply rehash the arguments presented in the Petition for Declaratory Ruling, all of which were fully addressed by the Industrial Commission in its Order denying the Petition.

Claimant continues to rehash the "credit" argument with respect to the ISIF liability. As the Stipulation for Entry of Award Against Defendants unambiguously provides, and as the Commission held in its Order on Petition for Declaration Ruling, the ISIF liability to Claimant included the differential between the Claimant's statutory disability benefit rate of 45% and the prevailing average weekly state wage for year of injury owed by the Employer and Surety pursuant to Idaho Code §72-408 and §72-409. This is a very rare occurrence in ISIF liability cases. Because the date of Claimant's MMI was 9 years from the date of his industrial injury, the increase in the benefit rate payable even to a 45% rate Claimant was in excess of the 2004 55% of the average weekly state wage rate. Accordingly, and beginning with the MMI date of October 1, 2013, the ISIF was liable for, and acknowledged in the Stipulation, that it would pay to Claimant the differential rate throughout the 250 weeks of the agreed upon obligation to the Employer and Surety. The "credit" therefore recognized that the 160 week credit to the Surety for impairment paid did not eliminate the ISIF liability for the differential during the 250 weeks of total and permanent disability benefits which were the liability of the Surety.

The Commission correctly held in its Order that the ISIF liability for the full measure of Claimant's statutory benefits would not and did not accrue until the expiration

of the entire 250 weeks apportioned to the Employer and Surety. The Claimant's arguments to the contrary are devoid of cogent analysis or supporting authority.

The Motion for Reconsideration should be denied on the grounds and for the reasons set forth in the Commission's Order on Petition for Declaratory Ruling filed October 6, 2015.

DATED this 2nd day of November, 2015.

MALLEA LAW OFFICES

Kenneth L. Mallea
Attorney for ISIF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2nd day of November, 2015, a true and correct copy of the foregoing document was served via U.S. Mail to the following:

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Attorney for Claimant

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Attorney for Defendants, Employer and Surety

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BEFORE THE INDUSTRIAL COMMISSION

FOR THE STATE OF IDAHO

GARY DAVIS, Claimant, vs. HAMMACK MANAGEMENT, INC. Employer, and IDAHO STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	I.C. No. 05-501080 EMPLOYER AND SURETY'S RESPONSE TO PETITIONER'S MOTION FOR RECONSIDERATION OF THE INDUSTRIAL COMMISSION'S OCTOBER 6, 2015 ORDER ON PETITION FOR DECLARATORY RULING

Defendants Employer and Surety, by and through Elam & Burke, P.A., their attorneys of record, hereby respond as follows to Petitioner's Motion for Reconsideration of the Industrial Commission's October 6, 2015 Order on Petition for Declaratory Ruling dated October 23, 2015 ("Motion for Reconsideration").

The Motion for Reconsideration is not well taken. Pursuant to Rule 3, J.R.P., a motion "shall ... set forth the relief or order sought." The Motion for Reconsideration merely asks the Industrial Commission to reconsider its ruling of October 6, 2015 on the Petition for Declaratory Ruling. The motion fails to set forth the relief or order sought.

The Motion for Reconsideration fails to raise any new arguments not already raised previously. The Industrial Commission has held on numerous occasions that it is not inclined to re-weigh evidence and arguments during reconsideration simply because the case was not resolved in a party's favor. *Oakes v. Coeur d'Alene School District No. 271*, 2015 IIC 0034 (08/07/2015); *Federko v. Sun Valley Co.*, 2011 IIC 0034 (06/03/2011).

The Motion for Reconsideration, like Claimant's Petition for Declaratory Ruling and supporting briefs, asks the Industrial Commission to reopen a case that was dismissed with prejudice before the Idaho Supreme Court issued its decision in *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014). Petitioner did not seek reconsideration or appeal from the Industrial Commission's decision approving the Stipulation for Entry of Award Against Defendants. In its Order on Petition for Declaratory Ruling, the Industrial Commission set forth cogent reasons why Petitioner's request should be denied. Petitioner offers no new legal or

factual matter that would call into question the Industrial Commission's ruling or the basis for that ruling.

Petitioner also argues that the Industrial Commission should retroactively apply the decision in *Corgatelli* to invalidate the Stipulation for Entry of Award Against Defendants. As the Industrial Commission pointed out, however, "We conclude that there is yet no way to retroactively apply the rule of *Corgatelli* to past LSSAs and past decisions of the Commission. The Commission would do little else but revisit many thousands of long-resolved claims were that the case." Order on Petition for Declaratory Ruling, p. 12. Petitioner does not assert any basis for reconsidering these assertions because none exists.

Nevertheless, Petitioner has resorted to circular argument by suggesting that somehow, the *Corgatelli* decision, if applied retroactively, would preclude the Industrial Commission from approving the Stipulation for Entry of Award Against Defendants. There is no limit to the number of possibilities one can imagine if one were allowed to travel backward in time. Not content with this flawed reasoning, however, Petitioner also appears to suggest, once again, that somehow the Employer and Surety and the Industrial Special Indemnity Fund had advance knowledge of how the Idaho Supreme Court would rule in *Corgatelli*. The suggestion is unreasonable, based as it is on nothing but conjecture. In fact, the undersigned had no idea what issues the Idaho Supreme Court would ultimately address in *Corgatelli*, and no idea how those issues would be resolved. The Industrial Commission noted that "it must be acknowledged that had the parties been pre-aware of the holding in that case [*Corgatelli*], the LSSA would look

different than the one approved by the Commission." Order on Petition for Declaratory Ruling, p. 11.

Defendants Employer and Surety concur in the ISIF Response to Petitioner's Motion for Reconsideration of the Industrial Commission's October 6, 2015 Order on Petition for Declaratory Ruling. Petitioner's Motion for Reconsideration should be denied.

Respectfully submitted this 4 day of November, 2015.

ELAM & BURKE, P.A.

By: ______________________
Jon M. Bauman, Of the Firm
Attorneys for Defendants, Employer and Surety

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4 day of November, 2015, I caused a true and correct copy of the above and foregoing instrument to be served upon the following in the manner indicated below:

Rick D. Kallas ELLSWORTH, KALLAS & DEFRANCO, PLLC 1031 East Park Boulevard Boise, Idaho 83712	X U.S. Mail ___ Hand Delivery ___ Federal Express ___ Facsimile Transmission
Kenneth L. Mallea MALLEA LAW OFFICES 78 SW 5th Avenue, Suite 1 P.O. Box 857 Meridian, Idaho 83680	X U.S. Mail ___ Hand Delivery ___ Federal Express ___ Facsimile Transmission

____
Jon M. Bauman

4849-3669-5850, v. 1

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY DAVIS,

Claimant,
Petitioner herein,

v.

HAMMACK MANAGEMENT INC.,

Employer,

and

STATE INSURANCE FUND,

Surety,

and

STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,

Respondents herein.

IC 15-000107
(2005-501080)

ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION

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INDUSTRIAL COMMISSION

On October 6, 2015, the Commission entered its Order on Petition for Declaratory Ruling. On October 23, 2015, Petitioner filed his timely motion for reconsideration, with supporting memoranda. Defendants Employer/Surety and ISIF filed timely responses. For the reasons set forth in more detail below, the Commission declines to reconsider its October 6, 2015 Order.

In its October 6, 2015 Decision, the Commission observed that while the provisions of Idaho Code § 72-719 do afford limited opportunities to re-visit an award of the Commission, that section was not relevant to resolution of the instant matter since the provisions of Idaho Code § 72-719 do not apply where there has been a settlement pursuant to the provisions of Idaho Code § 72-404. (*See* Idaho Code § 72-719(4)). Idaho Code § 72-404 provides:

> 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.

Such agreements, commonly referred to as lump sum settlement agreements, contemplate the compromise of a claim by the payment of "one or more lump sums". Here, the agreement at issue does not contemplate the payment of one or more lump sums in compromise of Defendants' liability. Rather, the agreement contemplates the payment of all benefits to which Claimant would be entitled as though adjudged permanently and totally disabled by the Commission. The issue resolved by the agreement was not whether Claimant is totally and permanently disabled, and not whether the ISIF bears some responsibility for the payment of total and permanent disability benefits. Rather, the issue resolved by the agreement was how that responsibility should be apportioned between the Employer and the ISIF. The agreement is silent as to whether it is submitted to the Industrial Commission pursuant to the provisions of Idaho Code § 72-404 or Idaho Code § 72-711. Likewise, the Commission's order approving the settlement is silent as to whether it is approved pursuant to Idaho Code § 72-404, Idaho Code § 72-711, or some other authority. Petitioner argues that since the agreement does not call for the payment of a lump sum or sums, the agreement is more appropriately characterized as a "compensation agreement" under Idaho Code § 72-711. Assuming, without deciding, that Petitioner is correct in this characterization, the Commission concludes that this would not change the outcome in this matter.

First, even though Idaho Code § 72-711 compensation agreements may be re-visited pursuant to the provisions of Idaho Code § 72-719(c) (*Sines v. Appel*, 103 Idaho 9, 644 P.2d 311 (1982); *Banzhaf v. Carnation Co.*, 104 Idaho 700, 662 P.2d 1144 (1983)), the fact remains that the limited review afforded by the provisions of Idaho Code § 72-719 is only available within five years following the date of the accident giving rise to the claim. The stipulation of the

parties reflects that the subject accident occurred on November 9, 2004. Therefore, per Idaho Code § 72-719, the time within which to challenge an award of the Commission for change of condition, fraud, or to correct a manifest injustice, has long passed. Idaho Code § 72-719 cannot disturb the finality of the Commission's June 26, 2014 Order approving the settlement agreement, even if that agreement is characterized as a "compensation agreement" under Idaho Code § 72-711.

Next, the Commission concludes that even if it be assumed that the settlement agreement is best characterized as an Idaho Code § 72-711 compensation agreement, the agreement would not receive different treatment under the provisions of Idaho Code § 72-318 than it would if it is more appropriately characterized as an Idaho Code § 72-404 agreement. The agreement does not waive Petitioner's rights to compensation under the Act. Rather, by the subject agreement, Defendants and Petitioner merely agreed to resolve the specific claim for benefits at issue in this case. *See Emery v. J.R. Simplot Co.*, 141 Idaho 407, 111 P.3d 92 (2005). Further, we find that if the agreement is best characterized as an Idaho Code § 72-711 agreement, it still passes muster under *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 207 P.3d 1008 (2009), vis-à-vis the ISIF.

Finally, Petitioner argues that there is specific statutory language in Idaho Code § 72-711 which imposes an additional obligation on the Commission which is not imposed by the provisions of Idaho Code § 72-404. Idaho Code § 72-711 provides:

> If the employer and the afflicted employee reach an agreement in regard to compensation under this law, a memorandum of the agreement shall be filed with the commission, and, if approved by it, thereupon the memorandum shall for all purposes be an award by the commission and be enforceable under the provisions of section 72-735, unless modified as provided in section 72-719. An agreement shall be approved by the commission only when the terms conform to the provisions of this law.

Therefore, where the terms of the compensation agreement do not "conform to the provisions of this law", the Commission is without authority to approve such a settlement. Petitioner argues that as illustrated by *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014) the "credit" taken in the agreement is illegal under Idaho workers' compensation law and has been illegal ever since the statutory scheme was enacted. Therefore, the Commission was not authorized to approve the settlement in question, even though the settlement was approved prior the issuance of *Corgatelli, supra.* We disagree with the premise that it has always been contrary to Idaho law to allow the type of credit at issue in this case. As the Commission went to some lengths to explain in the Order on Petition for Declaratory Ruling, it is implicit in the landmark decision of *Carey v. Clearwater Road Dep't*, 107 Idaho 109, 686 P.2d 54 (1984) that the type of credit at issue in this case, is not only allowed, but anticipated by the apportionment scheme adopted by the Court in that decision. While the Court has now ruled that such "credits" are inapposite to its construction of the statutory scheme, and while we are constrained to apply that construction prospectively, we decline to do so retroactively. Nor has Petitioner cited the Commission to any authority which would support the retroactive application of the *Corgatelli* Court's construction of the statutory scheme. Finally, it is possible that the *Corgatelli* Court did not intend the broad interpretation that the Commission has given to that case. For this reason as well, we decline to apply it in the fashion urged by Petitioner, without receiving further direction from the Court. An appeal of this decision would afford Petitioner the opportunity to test whether the Commission's interpretation of *Corgatelli* is correct, and if so, whether the Commission has erred in failing to retroactively apply that rule not only to this settlement agreement, but to all past settlement agreements and decisions of the Commission which endorse the taking of a similar credit.

For the reasons stated above the Commission continues to adhere to its original decision.

DATED this 25th day of November, 2015.

INDUSTRIAL COMMISSION

R.D. Maynard, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of November, 2015, a true and correct copy of the foregoing Order Denying Petitioner's Motion for Reconsideration was served by regular United States Mail upon each of the following:

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MERIDIAN ID 83680

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Attorney for Claimant

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INDUSTRIAL COMMISSION

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY DAVIS, Claimant / Petitioner / Appellant, vs. HAMMACK MANAGEMENT, INC., Employer, and IDAHO STATE INSURNACE FUND, Surety, and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants / Respondents.	I.C. No. 2005 - 501080 NOTICE OF APPEAL Filing Fee: $94.00 [Rule 23(a)(3) I.A.R.]

ORIGINAL

TO: THE ABOVE NAMED DEFENDANTS / RESPONDENTS, HAMMACK MANAGEMENT, INC., AND THE IDAHO STATE INSURANCE FUND, AND THEIR ATTORNEY, JON BAUMAN, AND TO THE STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, AND THEIR ATTORNEY, KENNETH MALLEA, AND TO THE SECRETARY OF THE INDUSTRIAL COMMISSION.

NOTICE IS HEREBY GIVEN THAT:

1. The above named Claimant / Petitioner / Appellant, Gary Davis, appeals against the above named Defendants / Respondents to the Idaho Supreme Court against the Industrial Commission's 10.6.15 Order on Petition For Declaratory Ruling and 11.25.15 Order Denying Petitioner's Motion For Reconsideration.

2. The Claimant / Petitioner / Appellant has the right to appeal from the above described orders because the Orders described above are final and appealable Orders pursuant to Rule 11(d) I.A.R.

3. Preliminary statement of the issues on appeal:

(a) Did the Industrial Commission exceed the limited jurisdiction granted to it by the Idaho Workers' Compensation Act when it entered its 6.26.14 Order granting Employer an invalid credit for PPI benefits previously paid against its obligation to pay Claimant the full measure of his total and permanent disability benefits even though such a credit is not authorized by Idaho Code §72-408 and Idaho Code §72-409?

(b) Did the Industrial Commission err by not applying the holding in *Corgatelli v. Steel West, Inc.,* 157 Idaho 287, 335 P.3d 1150 (2014) retroactively to its 6.26.14 Order of Approval and Discharge and declaring the PPI credit granted to Employer void?

(c) Did the Industrial Commission err when it ruled that its 6.26.14 Order should not be declared void and set aside pursuant to Idaho Code §72-711 even though it granted Employer an invalid PPI credit not authorized by Idaho Code §72-408 and Idaho Code §72-409 which did not conform to the provisions of the workers' compensation act?

(d) Did the Industrial Commission err when it ruled that its 6.26.14 Order should not be declared void and set aside pursuant to Idaho Code §72-318(1) even though it granted Employer an invalid PPI credit not authorized by Idaho Code §72-408 and Idaho Code §72-409 which relieved Employer in whole or in part from its liability to pay the Claimant the full measure of his statutory total and permanent disability benefits?

(e) Did the Industrial Commission err when it ruled that its 6.26.14 Order should not be declared void and set aside pursuant to Idaho Code §72-318(2) even though it granted Employer an invalid PPI credit not authorized by Idaho Code §72-408 and Idaho Code §72-409 which required the Claimant to unlawfully waive his right to receive the full measure of his statutory total and permanent disability benefits?

(f) Did the Industrial Commission err when it ruled that the "subject to the credit" language of the stipulation was not ambiguous when it defined the date when the Industrial Special Indemnity Fund is obligated to begin paying Claimant the full measure of his statutory total and permanent disability benefits?

(g) Did the Industrial Commission err when it ruled that the Claimant is not entitled to an award of attorney's fees from Employer and ISIF pursuant to Idaho Code §72-804 even though both Employer and the ISIF contested the Claimant's claim for the full measure of his total and permanent disability benefits without reasonable grounds in direct violation

of the express language of the stipulation and Idaho Code §72-408 and Idaho Code §72-409?

4. No portion of the record has been sealed by order of the Commission or a Court.

5. The Claimant / Petitioner / Respondent does not request a transcript of the proceedings below because the Industrial Commission's 6.26.14 Order of Approval and Discharge was entered by the Industrial Commission based on a Stipulation For Entry of Award Against Defendants and there was no hearing before the Industrial Commission.

6. The Claimant / Petitioner / Appellant requests the following documents to be included in the Industrial Commission's / agency's record in addition to those automatically included under Rule 28, I.A.R:

(a) The 6.26.14 Stipulation For Entry of Award Against Defendants and the corresponding Order of Approval and Discharge entered by the Industrial Commission on 6.26.14;

(b) Claimant / Petitioner / Appellant's 2.26.15 Petition For Declaratory Ruling;

(c) Claimant / Petitioner / Appellant's 2.26.15 Affidavit In Support of Petition For Declaratory Ruling;

(d) Claimant / Petitioner / Appellant's 2.26.15 Memorandum in Support of Petition For Declaratory Ruling including Exhibits 1 - 5;

(e) Defendant Employer's 3.11.15 Objection and Response to Claimant's Petition For Declaratory Ruling Which Interprets and Clarifies the Stipulation For Entry of Award Against Defendants and Order of Approval and Discharge entered by the Industrial Commission on 6.26.14;

(f) Defendant ISIF's 3.11.15 Limited Appearance To Challenge Subject Matter Jurisdiction and Service of Process;

(g) Claimant / Petitioner / Appellant's 3.17.15 Consolidated Reply Memorandum in Support of Claimant's Petition For Declaratory Ruling;

(h) The Industrial Commission's 10.6.15 Order on Petition For Declaratory Ruling;

(i) Claimant / Petitioner / Appellant's 10.23.15 Motion For Reconsideration of the Industrial Commission's 10.6.15 Order on Petition For Declaratory Ruling;

(j) Claimant / Petitioner / Appellant's 10.23.15 Brief in Support of Motion For Reconsideration of the Industrial Commission's 10.6.15 Order on Petition For Declaratory Ruling;

(k) Defendant ISIF's 11.2.15 Response To Petitioner's Motion For Reconsideration of the Industrial Commission's 10.6.15 Order On Petition For Declaratory Ruling;

(l) Defendant Employer's 11.4.15 Response To Petitioner's Motion For Reconsideration of the Industrial Commission's 10.6.15 Order on Petition For Declaratory Ruling; and,

(m) Industrial Commission's 11.25.15 Order Denying Petitioner's Motion For Reconsideration.

7. Claimant / Petitioner / Appellant requests that Exhibits 1 – 5 submitted with the Claimant's Memorandum In Support of Petition For Declaratory Ruling be included in the Industrial Commission's administrative agency's record on appeal.

8. I certify:

(a) That a copy of this Notice of Appeal does not have to be served on any reporter because the parties stipulated that the Claimant was totally and permanently disabled and the Industrial Commission did not have to conduct a hearing so there is no transcript to order.

(b) That service has been made upon all parties required to be served pursuant to Rule 20.

Respectfully submitted this 31st day of December, 2015.

ELLSWORTH, KALLAS & DEFRANCO, PLLC

By: ______________________
RICK D. KALLAS – ~~Attorney For~~ Appellant
Attorney for Claimant

Certificate of Service

I HEREBY CERTIFY that on the 31st day of December, 2015, I caused to be served a true and correct copy of Claimant / Petitioner / Appellant's Notice of Appeal by the method indicated below upon the following persons:

Kenneth L. Mallea Mallea Law Offices 78 SW 5th Ave., Ste. 1 P.O. Box 857 Meridian, Idaho 83680	[X] U.S. Mail, Postage Prepaid [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile @ 208.888.2789
Jon M. Bauman Elam & Burke 251 E. Front Street, Ste. 300 P.O. Box 1539 Boise, ID 83701	[X] U.S. Mail, Postage Prepaid [ ] Overnight Mail [ ] Hand Delivery [ ] Facsimile @ 208.384.5844

____
Rick D. Kallas

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

GARY DAVIS, Claimant-Appellant, v. HAMMACK MANAGEMENT, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants-Respondents.	**SUPREME COURT NO. __________** **CERTIFICATE OF APPEAL OF GARY DAVIS**

Appeal From:	Industrial Commission Chairman R.D. Maynard presiding.
Case Number:	IC 15-000107 (IC 2005-501080)
Order Appealed from:	ORDER ON PETITION FOR DECLARATORY RULING ENTERED OCTOBER 6, 2015 and ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION ENTERED NOVEMBER 25, 2015
Attorney for Appellant:	RICK D. KALLAS 1031 E. PARK BOULEVARD BOISE, ID 83712-7722
Attorney for Respondents:	JON M. BAUMAN P.O. BOX 1539 BOISE, ID 83701 KENNETH L. MALLEA P.O. BOX 857 MERIDIAN, ID 83680
Appealed By:	GARY DAVIS, Claimant
Appealed Against:	HAMMACK MANAGEMENT, INC. and IDAHO STATE INSURANCE FUND and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND
Notice of Appeal Filed:	DECEMBER 31, 2015
Appellate Fee Paid:	$94.00 SC Fee paid & $100 Industrial Commission deposit paid
Reporter/Transcript:	**No reporter; no hearing held in this matter and no transcript.**
Dated:	DECEMBER 31, 2015

Dena K. Burke, Assistant Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

CERTIFICATION OF APPEAL

I, DENA K. BURKE, the undersigned Assistant Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing is a true and correct photocopy of the **NOTICE OF APPEAL FILED DECEMBER 31, 2015; THE COMMISSION'S ORDER ON PETITION FOR DECLARATORY RULING ENTERED OCTOBER 6, 2015 and ORDER DENYING PETITIONER'S MOTION FOR RECONSIDERATION ENTERED NOVEMBER 25, 2015,** herein, and the whole thereof, in IC case number 15-000107 (2005-501080) for **Claimant GARY DAVIS**.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Commission this 31ST day of DECEMBER, 2015.

Dena K. Burke
Assistant Commission Secretary

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

Kenneth L. Mallea
MALLEA LAW OFFICES
78 SW 5th Avenue, Suite 1
P.O. Box 857
Meridian, ID 83680
Telephone: (208) 888-2790
Fax: (208) 888-2789
Email: klm@mallealaw.com
Idaho State Bar No. 2397

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RECEIVED
INDUSTRIAL COMMISSION

Attorneys for Defendant/Respondent/Cross-Appellant
State of Idaho, Industrial Special Indemnity Fund

BEFORE THE INDUSTRIAL COMMISSION

STATE OF IDAHO

* * * * * * * *

GARY DAVIS, Claimant/Appellant/Cross-Respondent, vs. HAMMACK MANAGEMENT, INC., Employer/Respondent, and STATE INSURANCE FUND, Surety/Respondent, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendant/Respondent/Cross-Appellant.	I.C. No. 2005-501080 **NOTICE OF CROSS-APPEAL**

TO: THE ABOVE-NAMED CROSS-RESPONDENT, GARY DAVIS, AND HIS ATTORNEY, RICK D. KALLAS, 1031 E. Park Boulevard, Boise, ID 83712 AND RESPONDENTS HAMMACK MANAGEMENT, INC. and STATE INSURANCE FUND AND THEIR ATTORNEY, JON BAUMAN, P.O. Box 1539, Boise, ID 83701 AND THE CLERK OF THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO.

NOTICE IS HEREBY GIVEN THAT:

1. The above-named cross-appellant, STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, appeals against the above-named cross-respondent, GARY DAVIS, to the Idaho Supreme Court from the Idaho Industrial Commission's October 6, 2015 Order on Petition for Declaratory Ruling and November 25, 2015 Order Denying Petitioner's Motion for Reconsideration.

2. That the party has a right to cross-appeal to the Idaho Supreme Court, and the judgments or orders described in Paragraph 1 above are appealable orders under and pursuant to I.A.R., Rule 11(d).

3. Preliminary statement of the issues on appeal:

a. Whether the Industrial Commission had subject matter jurisdiction over the Petition for Declaratory Ruling filed in this case?

b. Whether a Petition for Declaratory Ruling under JRP 15 may allow a party to subsequently challenge by appeal the merits of a stipulated settlement and order of approval where no motion for reconsideration or appeal had previously been taken?

c. Whether a final order on a petition for declaratory ruling may extend the time for appeal on the merits of a case that had been dismissed with prejudice 16 months earlier?

d. Does a party have the right by application of JRP 15, to directly appeal a ruling in a subsequent proceeding with the same parties and issues that were previously dismissed with prejudice?

e. Does JRP 15, as applied in this case, violate I.C. §72-718?

4. The cross-appellant requests the following documents to be included in the Industrial Commission's/agency's record in addition to those automatically included under Rule 28, I.A.R. and those designated by the appellant in the initial notice of appeal:

None.

5. I certify:

a. That the cross-appellant is exempt from paying any clerk's fee or filing fee because cross-appellant is an agency of the State of Idaho.

b. That service has been made upon all parties required to be served pursuant to Rule 20.

Respectfully submitted,

Dated: January 13, 2016

Kenneth L. Mallea
Attorney for Cross-Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of January, 2016, a true and correct copy of the within and foregoing document was served upon:

Rick D. Kallas
1031 East Park Boulevard
Boise, ID 83712
Attorney for Claimant/Appellant/Cross-Respondent

Jon M. Bauman
P.O. Box 1539
Boise, ID 83701
Attorney for Employer/Surety

[signature]

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

<table>
<tr><td>GARY DAVIS,

Appellant/Cross Respondent,

v.

HAMMACK MANAGEMENT, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety,

Respondents/Cross Respondents,

and

STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND,

Respondent/Cross Appellant.</td><td>SUPREME COURT NO.

CERTIFICATE OF CROSS APPEAL</td></tr>
</table>

Appeal From:	Industrial Commission, R.D. Maynard, Chairman presiding
Case Number:	IC 15-000107 (2015-501080)
Order Appealed from:	Order on Petition for Declaratory Ruling, filed October 6, 2015 and Order Denying Petitioner's Motion for Reconsideration, filed November 25, 2015. (Copies of these documents were sent to the Court on December 31, 2015 with the Ceritificate of Appeal)
Attorney for Appellant/Cross Respondent:	Rick D. Kallas 1031 E. Park Blvd. Boise, ID 83712-7722

Attorney for Respondents/ Cross Respondents:	Jon M. Bauman PO Box 1539 Boise, ID 83701
Attorney for Respondent/Cross Appellant:	Kenneth L. Mallea PO Box 857 Meridian, ID 83680
Cross Appeal By:	Respondent/Cross Appellant, ISIF
Appealed Against:	Appellant/Cross Respondent, Gary Davis and Respondents/Cross Respondents, Hammack Management, Inc., Employer, and Idaho State Insurance Fund, Surety.
Notice of Cross/Appeal Filed:	January 13, 2016
Appellate Fee Paid:	The Cross Appellant is exempt from paying fees.
Name of Reporter:	No hearing was held in this matter.
Dated:	January 15, 2016

Kenna Andrus

Assistant Commission Secretary

CERTIFICATION OF APPEAL

I, Kenna Andrus, the undersigned Assistant Commission Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing is a true and correct photocopy of the Notice of Cross-Appeal, and the whole thereof, in IC case number 15-000107 (2015-501080) for Gary Davis.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Commission this 15th day of January, 2016.

Kenna Andrus
Assistant Commission Secretary

INDUSTRIAL COMMISSION
SEAL
STATE OF IDAHO

CERTIFICATION OF RECORD

I, Kenna Andrus, the undersigned Assistant Commission Secretary of the Industrial Commission, do hereby certify that the foregoing record contains true and correct copies of all pleadings, documents, and papers designated to be included in the Agency's Record Supreme Court No. 43863 on appeal by Rule 28(b)(3) of the Idaho Appellate Rules and by the Notice of Appeal, pursuant to the provisions of Rule 28(b).

I further certify that all exhibits offered or admitted in this proceeding, if any, are correctly listed in the List of Exhibits.

DATED this 8th day of February, 2016.

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

Kenna Andrus

Assistant Commission Secretary

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

GARY DAVIS, Appellant/Cross Respondent, v. HAMMACK MANAGEMENT, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Respondents/Cross Respondents, and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Respondent/Cross Appellant.	**SUPREME COURT NO. 43863** **NOTICE OF COMPLETION**

TO: Stephen W. Kenyon, Clerk of the Courts;
Rick D. Kallas for the Appellant/Cross Respondent;
Jon M. Bauman for the Respondents/Cross Respondents; and
Kenneth Mallea for the Respondent/Cross Appellant.

YOU ARE HEREBY NOTIFIED that the Clerk's Record was completed on this date and, pursuant to Rule 24(a) and Rule 27(a), Idaho Appellate Rules, copies of the same have been served by regular U.S. mail upon each of the following:

Attorney for Appellant/Cross Respondent:

Rick D. Kallas
1031 E Park Blvd
Boise, ID 83712

Attorney for Respondents/Cross Respondents:

Jon M. Bauman
PO Box 1539
Boise, ID 83701-1539

Attorney for Respondent/Cross Appellant:

Kenneth Mallea
PO Box 857
Meridian, ID 83680

YOU ARE FURTHER NOTIFIED that pursuant to Rule 29(a), Idaho Appellate Rules, all parties have twenty-eight days from the date of this Notice in which to file objections to the Clerk's Record or Reporter's Transcript, including requests for corrections, additions or deletions. In the event no objections to the Clerk's Record or Reporter's Transcript are filed within the twenty-eight day period, the Clerk's Record and Reporter's Transcript shall be deemed settled.

DATED at Boise, Idaho, this 8th day of February, 2015.

Kenna Andrus
Assistant Commission Secretary