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IN THE SUPREME COURT OF THE STATE OF IDAHO

GARY DAVIS,

Appellant/Cross-Respondent,

vs.

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

Respondents,

and

STATE OF IDAHO, INDUSTRIAL
SPECIAL INDEMNITY FUND,

Respondent/Cross-Appellant,

Case No. 43863

RESPONDENTS' BRIEF

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RESPONDENTS' BRIEF

Appeal from the Idaho Industrial Commission,
Chairman R.D. Maynard, Presiding

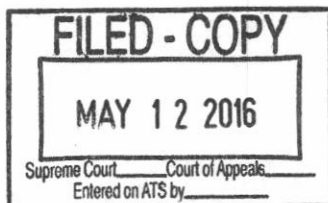
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I. STATEMENT OF THE CASE

A. Nature of the Case.

Appellant/Cross-Respondent Gary Davis (“Davis”), Respondents Hammack Management, Inc. (“Employer”) and Idaho State Insurance Fund (“Surety”) and Respondent/Cross-Appellant State of Idaho Industrial Special Indemnity Fund (“ISIF”) entered into a negotiated Stipulation for Entry of Award Against Defendants (the “Stipulation”) pursuant to Rule 12.D of the Judicial Rules of Practice and Procedure resulting in the Industrial Commission’s (“Commission”) issuance of the Order of Approval and Discharge, dated June 26, 2014 (the “Order”), which dismissed Davis’ claims with prejudice. The Order fully resolved Davis’ claims based on injuries stemming from a workplace accident on November 9, 2004, and is a final judgment, or “award” of the Commission. Due to this Court’s holdings in *Corgatelli v. Steel West, Inc.*, decided after the Order was entered, Davis filed 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, dated February 26, 2015 (the “Petition for Declaratory Ruling”), seeking to reform provisions of the Stipulation. The Commission denied Davis’ Petition for Declaratory Ruling and Davis’ subsequent motion for reconsideration. Davis appeals from the Commission’s decisions and seeks a determination on whether the holding in *Corgatelli* should be applied retroactively to a final award of the Commission.

B. Course of Proceedings.

The Commission entered its Order on Petition for Declaratory Ruling, filed October 6, 2015, finding it lacked subject matter jurisdiction to revise the Stipulation approved by final

decision of the Commission. (R: Vol. I, p. 109, l. 23-p.110, l. 1-5.) The Commission subsequently entered its Order Denying Petitioner's Motion for Reconsideration, filed November 25, 2015 (R: Vol. I, p. 138.). Davis subsequently appealed the Commission's decisions. (R: Vol. I, p. 143.)

C. Concise Statement of Facts.

The Employer/Surety generally agrees with Davis' Statement of Facts except as set forth herein. The parties negotiated and entered into the Stipulation with the intent to resolve Davis' claims and to apportion liability based on the existing interpretation of the Workers' Compensation Law. Consistent with the generally accepted understanding that total permanent disability is inclusive of impairment, and to avoid the risk of paying twice, Employer sought a credit for the amount of permanent physical impairment ("PPI") benefits paid against Employer's allocation of total and permanent disability benefits. At the time the Stipulation was entered into by the parties, the entitlement to a credit was commonplace and accepted as implicit in this Court's holding in *Carey v. Clearwater County Road Dept.* 107 Idaho 109, 686 P.2d 54. The Order approving the Stipulation was entered by the Commission dismissing Davis' claims with prejudice. In entering the Order, the Commission found that the Stipulation was in the "interests of justice and the best interests of the parties." (R: Vol. I, p. 11, ll 2-3.) Based on this Court's subsequent decision in *Corgatelli v. Steel West, Inc.*, Davis filed his Petition for Declaratory Ruling seeking to re-open the Commission's final decision and reform the Stipulation. (R: Vol. I, p. 13.) The Petition for Declaratory Ruling was not a new action; rather, Davis filed the pleading using the existing Commission case number in the original underlying matter. The Commission denied the Petition for Declaratory Ruling holding, in part, the

Commission lacked subject matter jurisdiction to reform the Stipulation and that the *Corgatelli* decision did not apply retroactively. (R: Vol. I, p.109, l.23 – p. 110, l. 1-4.) In response, Davis filed his Motion for Reconsideration of the Industrial Commission’s October 6, 2015 Order on Petition for Declaratory Ruling, which was denied by the Commission in its Order Denying Petitioner’s Motion for Reconsideration. (R: Vol. I, p. 113; p. 138.)

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

The Surety and Employer are seeking an award of attorney fees pursuant to Idaho Appellate Rule 11.2 on the grounds and for the reasons that the Notice of Appeal and Appellant’s Brief were filed frivolously and for an improper purpose as set forth below.

III. ARGUMENT

A. Standard of Review on Appeal.

“When this Court reviews a decision from the Industrial Commission, it exercises free review over questions of law but reviews questions of fact only to determine whether substantial and competent evidence supports the Commission's findings.” *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 290, 335 P.3d 1150, 1153 (2014), reh’g *denied* (Oct. 29, 2014), *citing Vawter v. United Parcel Serv., Inc.*, 155 Idaho 903, 906–07, 318 P.3d 893, 896–97 (2014). “Substantial evidence is more than a scintilla of proof, but less than a preponderance.” *Id.*, *citing Zapata v. J.R. Simplot Co.*, 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999). All facts and inferences are viewed in the light most favorable to the party who prevailed before the Commission. *Id.*, *citing Zapata*, 132 Idaho at 515, 975 P.2d at 1180. The Court exercises free review over issues of statutory interpretation. *Id.*, *citing Sanders v. Bd. of Trs. of Mountain Home Sch. Dist. No. 193*, 156 Idaho 269, 272, 322 P.3d 1002, 1005 (2014).

B. The Order of Approval and Discharge Dated June 26, 2014, Entered Pursuant to the Stipulation for Entry of Award Against Defendants, Dismissed the Complaint in the Underlying Matter With Prejudice, Barring Any Further Proceedings.

1. The Order dismissing the Complaint with prejudice bars Davis' attempt to reform the Stipulation.

The parties resolved the underlying workers' compensation claim by entering into a Stipulation. (R: Vol. I, pp. 1-10.) As a result, the Commission entered its Order on June 26, 2014, approving the Stipulation and dismissing the Complaint with prejudice. (R: Vol. I, p. 11.) (Emphasis added.) "A dismissal with prejudice connotes an adjudication or final determination on the merits and extinguishes or bars any future claim." *Telford v. Smith County, Texas*, 155 Idaho 497, 504, 314 P.3d 179, 186 (2013) (additional citations omitted). The Order constituted a final, appealable order disposing of all of Davis' claims. The Commission did not indicate any intent to retain jurisdiction over the underlying case. See *Kindred v. Amalgamated Sugar Co.*, 118 Idaho 147, 795 P.2d 309 (1990).

Idaho Code § 72-718 further supports finding the Order is final as there was no motion for reconsideration or appeal of the Order:

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; provided, within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the decision, or the commission may rehear or reconsider its decision on its own initiative, and in any such events the decision shall be final upon denial of a motion for rehearing or reconsideration or the filing of the decision on rehearing or reconsideration. Final decisions may be appealed to the Supreme Court as provided by section 72-724¹, Idaho Code.

¹¹ Idaho Code § 72-724 states: "[a]n appeal may be made to the Supreme Court by such parties from such decisions and orders of the commission and within such times and in such manner as prescribed by Rule of the Supreme Court."

Idaho Code § 72-718 (emphasis added).

Davis did not move for reconsideration and he did not appeal the Order. Failure to timely appeal the Order deprives this Court of jurisdiction. Idaho Code §§ 72-718, 72-724; *See also Hansen v. Denney*, 158 Idaho 304, 308, 346 P.3d 321, 325 (2015); *Freeman v. Sunshine Min. Co.*, 75 Idaho 292, 271 P.2d 1022 (1954) (“Requirements of statutes relative to perfecting an appeal in a workmen’s compensation case are mandatory and jurisdictional, and failure to comply therewith deprives court of jurisdiction.”)

This Court previously upheld the Commission’s decision to dismiss a claimant’s petition for determination as to the correct amount of compensation on the grounds claimant failed to timely move to reconsider or appeal the agreement, precluding further proceedings concerning the correct disability rate. *Drake v. State, Indus. Special Indem. Fund*, 128 Idaho 880, 920 P.2d 397 (1996). In *Drake*, claimant entered into a lump sum settlement agreement resolving all claims. *Id.* A year and a half later, claimant petitioned the Commission seeking a determination as to the proper compensation amount, asserting that ISIF was paying below the agreed upon “statutory rate.” *Id.* The Commission dismissed the petition asserting the agreement fully adjudicated the compensation issue. *Id.* On review, this Court found the lump sum settlement agreement² constituted a final decision of the Commission, and held:

The Agreement between Drake and the ISIF contemplated payment at the statutory rate and stated that Drake was earning \$5.06 an hour. Furthermore, the Agreement explicitly stated that “no portion is a mere recital.” With this in mind, we believe the Commission correctly determined that the \$5.06 hourly wage in

² The fact the claimant in *Drake* had entered into a lump sum settlement agreement is of no particular significance as the agreement constituted a final decision of the Commission, which has the same effect as the Order in this matter.

the Agreement was the base rate to be used in computing Drake's average weekly wage. If Drake believed that his hourly wage was something other than the \$5.06 amount, the time to have raised this issue was during the settlement process or by way of a motion for rehearing or reconsideration. Drake's failure to due [sic] so prohibits further proceedings concerning the correct permanent disability rate under the Agreement. We affirm the Commission's decision to dismiss the petition.

Id. at 882, 920 P.2d at 399 (emphasis added).

As Davis failed to seek reconsideration of or appeal the Order, he is prohibited from further proceedings concerning the credit issue under the Stipulation.

Alternatively, Davis' claim seeking to set aside the credit is barred by the doctrine of *res judicata*. This Court has held that the doctrine of *res judicata* applies to agency decisions, including decisions of the Industrial Commission. *Magee*, 152 Idaho at 202, 268 P.3d at 470, citing *Welch v. Del Monte Corp.*, 128 Idaho 513, 516, 915 P.2d 1371, 1374 (1996).

“A valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim.” *Wernecke v. St. Maries Joint Sch. Dist. No. 401*, 147 Idaho 277, 288, 207 P.3d 1008, 1019 (2009), citing *Hindmarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). “Claim preclusion, or *res judicata*, bars a subsequent action between the same parties upon the same claim.” *Id.*, citing *Ticor Title Co. v. Stanion*, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007).

The Order constitutes a valid final judgment by the Commission. The issue of the Employer/Surety's entitlement to a credit was fully “adjudicated” by the Commission as the credit was specifically addressed in Paragraph 12 of the Stipulation. (R: Vol. I, p. 6, ¶ 12.) Finally, the parties in the underlying workers' compensation action resulting in the entry of the Order dismissing Davis' claims with prejudice are the same as the parties to Davis' Petition for

Declaratory Ruling and this appeal. Under the facts and circumstances of this case *res judicata* should bar Davis' claim to set aside the credit, which was previously brought to conclusion in 2014.

Likewise, the Commission lacked jurisdiction to modify the Stipulation. Idaho Code § 72-719 sets forth the limited circumstances under which the Commission would be able to modify the Order, none of which apply in this matter:

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

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

(b) Fraud.

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

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

(4) This section shall not apply to a commutation of payments under section 72-404[, Idaho Code].

Idaho Code § 72-719.

The Stipulation identifies the date of the accident causing the injury as November 9, 2004. (R: Vol. I, p.2.) Claimant's Petition for Declaratory Ruling was not filed until February 26, 2015, more than ten (10) years after the accident date. (R: Vol. I, p.13.) Furthermore, Davis

is not claiming a change in the nature or extent of his injuries or disablement, or fraud.

Therefore, grounds have not been established to modify the terms of the Stipulation.

Davis cannot end-run a jurisdictional issue by filing a declaratory action, in the same previously dismissed case, requesting the Commission reform the terms of the Stipulation. It is important to properly characterize the Stipulation. The Stipulation is not a lump-sum settlement agreement as contemplated by Idaho Code § 72-404³, or a compensation agreement under Idaho Code § 72-711⁴; rather the Stipulation is an agreement among the parties to resolve the underlying claims, which is authorized pursuant to Rule 12.D, JRP, which states: “The Commission may, on presentation of sufficient grounds or good cause, dismiss a complaint pursuant to stipulation by the parties.”⁵ See also *Emery v. J.R. Simplot Co.*, 141 Idaho 407, 410, 111 P.3d 92, 95 (2005) (Court held dismissals of workers’ compensation claims under Idaho Code §§ 72-404, 72-711 are not the *only* method to permanently settle claims; stipulations to dismiss with prejudice are appropriate.)

“A stipulation is a contract, and we will apply contractual principles of interpretation when reviewing a stipulation.” *Straub v. Smith*, 145 Idaho 65, 69, 175 P.3d 754, 758 (2007),

³ Idaho Code § 72-404 states: “[w]henver 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.”

⁴ Idaho Code § 72-711 states: “[i]f 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.”

⁵ The Comments to Subsection D state, in pertinent part: “In those situations where...the dismissal will be with prejudice, the stipulation must contain sufficient information for the Commission to approve the request.”

citing *Maroun v. Wyreless Sys., Inc.*, 141 Idaho 604, 611, 114 P.3d 974, 981 (2005); *Win of Michigan, Inc. v. Yreka United, Inc.*, 137 Idaho 747, 750–51, 53 P.3d 330, 333–34 (2002). “The determination and legal effect of a contractual provision is a question of law.” *Id.*, citing *Maroun*, 141 Idaho at 611, 114 P.3d at 981. Our primary objective when interpreting a contract is to discover the mutual intent of the parties at the time the contract is made. *Id.*, citing *Opportunity, L.L.C. v. Ossewarde*, 136 Idaho 602, 607, 38 P.3d 1258, 1263 (2002). “If possible, the intent of the parties should be ascertained from the language of the agreement as the best indication of their intent.” *Id.*

The Stipulation was not a contract of adhesion. The terms of the Stipulation were negotiated by the parties. This Court’s decision in *Corgatelli v. Steel West, Inc.*, decided an issue of first impression holding there is no statutory authority for an employer to receive credit for PPI benefits paid before the award of total and permanent disability benefits. 157 Idaho 287, 292, 335 P.3d 1150, 1155 (2014). Prior to the *Corgatelli* decision it was long-standing, common practice for the employer to be entitled to a credit for PPI due to the understanding that total permanent disability is inclusive of impairment.⁶ See *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984); *Nielson v. State, Indus. Special Indem. Fund*, 106 Idaho 878,

⁶ Since the *Carey* decision, employers have been entitled to a credit for PPI benefits paid prior to the time a claimant was deemed to be totally and permanently disabled. This is how the system has worked for thirty plus years. As it was generally accepted in the normal course and scope of cases involving ISIF it was not challenged, and therefore, there is a dearth of case law addressing the credit issue, particularly as it was accepted by all. It cannot be overstated that *Corgatelli* presents a sea change in how total and permanent disability cases will be resolved, with a negative downside falling on the injured employee as sureties will be resistant to paying permanent impairment benefits until disability is determined. See, *Lori (Stogner) Brownlee, Claimant*, IC 2007-017523, 2015 WL 4994297, at *14 (Idaho Ind. Com. July 20, 2015).

684 P.2d 280 (1984)⁷. The impact of *Corgatelli* is significant: either the employer pays PPI benefits timely and accepts the risk of paying twice if claimant is later deemed totally and permanently disabled, or claimant goes without PPI benefits during litigation. However, at the time Davis' claim was resolved by Stipulation, *Corgatelli* had not been decided, and the credit for PPI previously paid was accepted by all workers' compensation practitioners, and by the parties to the Stipulation.

The fact a credit was being claimed was not hidden. Paragraph 12 of the Stipulation states, in pertinent part: "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 [Davis] beginning October 1, 2013, leaving a total of 90 weeks of benefits to be paid by Surety" (R: Vol. I, p. 6.) If Davis did not believe the Surety was entitled to a credit then he could have negotiated that provision out of the Stipulation, but he did not. Likewise, if there so obviously was a lack of statutory authority, Davis could have refused to sign the Stipulation or immediately appealed the Order and asserted arguments similar to those made in *Corgatelli*, which was not done. Finally, the *Corgatelli* decision was issued in August 2014, with rehearing denied in October of 2014. Davis' Petition for Declaratory Ruling (R: Vol. I, pp. 13-17) was not filed until February 26, 2015, nearly eight (8) months after the Order was entered.

⁷ See also, *Daryl Patterson, Claimant*, IC 2006-505350, IC 2009-004209, 2011 WL 6042996, at *17-18 (Idaho Ind. Com. Nov. 10, 2011); *Trudy Deon, Claimant*, IC 2007-005950, IC 2008-032836, 2013 WL 6699885, at *11 (Idaho Ind. Com. Nov. 4, 2013); *Sidney Hurst, Claimant*, IC 95-944570, 1999 WL 222527, at *12-13 (Idaho Ind. Com. Mar. 26, 1999), etc.

As the credit was a negotiated term of the Stipulation, and the Order is a final determination on the merits, the Commission was correct in finding it did not have jurisdiction to review, or reform the Stipulation. (R: Vol. I, pp. 109-110.)

C. The Surety's entitlement to a credit for PPI benefits previously paid to Davis set forth in Paragraph 12 of the Stipulation is valid and does not constitute an impermissible waiver under Idaho Code § 72-318(2).

Idaho Code § 72-318(2) provides: “[n]o agreement by an employee to waive his rights to compensation under this act shall be valid.” Whether a contract violates a statute is a question of law for the Court to determine from all the facts and circumstances of each case. *Wernecke*, 147 Idaho at 281, 207 P.3d at 1012, *citing Trees v. Kersey*, 138 Idaho 3, 6, 56 P.3d 765, 768 (2002). A contract made for the purpose of furthering any matter prohibited by statute is illegal, unenforceable, and void. *Id.*, *citing Kunz v. Lobo Lodge, Inc.*, 133 Idaho 608, 611, 990 P.2d 1219, 1222 (Ct.App.1999) (*citing Porter v. Canyon County Farmers' Mut. Fire Ins. Co.*, 45 Idaho 522, 525, 263 P. 632, 633 (1928)).

Under the facts and circumstances of this case the Stipulation was not an “agreement by an employee to waive his rights to compensation under [the Workers’ Compensation] act.” This Court’s decision in *Emery v. J.R. Simplot Co* is controlling. 141 Idaho 407, 111 P.3d 92 (2005). In *Emery*, claimant was injured, and later filed a claim seeking additional compensation from his employer. *Id.* at 408-409, 111 P.3d at 93-94. Claimant’s counsel advised him of the risks and expense of proceeding and the parties agreed to stipulate to dismiss with prejudice. *Id.* at 409, 111 P.3d at 94. The Stipulation was approved by the Commission and an order was entered. *Id.* Claimant retained new counsel and moved to vacate the Commission’s dismissal of his claim, which was ultimately denied. *Id.* On appeal, claimant asserted the stipulation to dismiss his

claim with prejudice constituted an invalid agreement pursuant to Idaho Code § 72-318(2). *Id.* at 410, 111 P.3d at 95. The Court disagreed and held:

Emery's argument focuses on I.C. § 72-318(2). However, the stipulation to dismiss Emery's claim with prejudice is not an "agreement by an employee to waive his rights to compensation under [the Workers' Compensation] act." I.C. § 72-318(2). Emery was not waiving his rights to compensation under the act. He stipulated to dismiss his claim with respect to the injury he suffered on March 10, 2001. The stipulation did not relieve Simplot of liability for any injury he might suffer in the future while employed by Simplot. Emery and Simplot agreed to resolve the specific claim at issue in this case. The Commission's finding that the parties had not created a "scheme" to avoid the employer's obligations under the workers' compensation statutes is supported by substantial evidence.

Id. (Emphasis added.)

The Court's decision in *Wernecke v. St. Maries Joint School Dist. No. 401* is not on point, but supports the analysis in *Emery*. In *Wernecke*, the Court held Idaho Code § 72-318(2) applies to all agreements purporting to waive rights to compensation under the statute, not just agreements between employers and employees. 147 Idaho 277, 282, 207 P.3d 1008, 1013 (2009). In that case, the claimant was injured and settled her claim with the employer and the State Insurance Fund. *Id.* at 280-281, 207 P.3d at 1011-1012. She later entered into a lump sum settlement agreement with ISIF. *Id.* As part of that agreement the ISIF denied that claimant was totally and permanently disabled and barred her from recovering any additional compensation from ISIF for any claim of any nature. *Id.* Claimant was subsequently injured and filed a complaint against ISIF. *Id.* ISIF asserted claimant was barred from any further recovery due to the prior settlement. *Id.* The claimant in *Wernecke* conceded that based on this Court's holding in *Emery*, Idaho Code § 72-318 permits a claimant to compromise a claim arising out of a past

injury. *Id.* at 283-284, 207 P.3d at 1014-1015. The Court held, “agreements attempting to waive compensation rights stemming from future unknown injuries are generally invalid.” *Id.* at 284, 207 P.3 at 1015.

Like *Emery*, Davis’ pending case was resolved by Stipulation. There was no intent to waive compensation rights stemming from future unknown injuries. Additionally, at the time the parties entered into the agreement, it was the general and common practice among practitioners to allow the Surety a credit for the previously paid PPI. *See Carey*, 107 Idaho 109, 686 P.2d 54; *Nielson*, 106 Idaho 878, 684 P.2d 280.⁸ This was the intent and the understanding amongst the parties and likely why Davis did not challenge the inclusion of the credit in Paragraph 12 of the Stipulation at the time it was signed. Certainly, there was no “scheme” to avoid payments due and owing under the Law. There is simply no impermissible waiver of rights in the Stipulation.

D. As a Case of First Impression, the Holding in *Corgatelli* Should Not Be Applied Retroactively.

The holding in *Corgatelli v. Steel West, Inc.* should not apply retroactively due to the number of cases that would have to be reopened and the significant unanticipated financial harm to employers.

The usual rule is that decisions of this Court apply retroactively to all past and pending cases. *State v. Tipton*, 99 Idaho 670, 587 P.2d 305 (1978). For policy reasons, however, this Court has discretion to limit the retroactive application of a particular decision. We may hold that it does not apply even to the case in which the decision was announced; or that it applies only to that case and not to other past or pending cases; or that it applies to both that case and pending cases, but not to past cases. *Jones v. Watson*, 98 Idaho

⁸ *See also, Daryl Patterson, Claimant*, IC 2006-505350, IC 2009-004209, 2011 WL 6042996, at *17-18 (Idaho Ind. Com. Nov. 10, 2011); *Trudy Deon, Claimant*, IC 2007-005950, IC 2008-032836, 2013 WL 6699885, at *11 (Idaho Ind. Com. Nov. 4, 2013); *Sidney Hurst, Claimant*, IC 95-944570, 1999 WL 222527, at *12-13 (Idaho Ind. Com. Mar. 26, 1999), etc.

606, 570 P.2d 284 (1977). When deciding whether to limit the retroactive application of a decision, we weigh three factors: (1) the purpose of the decision; (2) the reliance upon the prior law; and (3) the effect upon the administration of justice if the decision is applied retroactively. *Thompson v. Hagan*, 96 Idaho 19, 523 P.2d 1365 (1974). We balance the first factor against the other two to determine whether to limit the retroactive application of the decision. *Jones v. Watson*, 98 Idaho 606, 570 P.2d 284 (1977).

BHA Investments, Inc. v. City of Boise, 141 Idaho 168, 173, 108 P.3d 315, 320 (2004).

In balancing the factors, the retroactive application of *Corgatelli* should be limited and should not be applied to past decisions.

1. The purpose of the *Corgatelli* decision was statutory interpretation.

This Court's decision in *Corgatelli v. Steel West, Inc.* decided an issue of first impression holding there is no statutory authority for an employer to receive credit for PPI benefits paid before the award of total and permanent disability benefits. 157 Idaho 287, 292, 335 P.3d 1150, 1155 (2014).

2. Reliance upon the prior law.

Based in significant part on this Court's decision in *Carey*, which apportioned liability for non-medical factors in total and permanent disability cases between the employer/surety and ISIF, there was general recognition that the *Carey* decision stood for the proposition that total and permanent disability was inclusive of impairment. 107 Idaho 109, 686 P.2d 54 (1984). As a result, employer/surety was entitled to a credit in the amount of PPI benefits paid prior to a determination of total and permanent disability. There has been significant reliance on the ruling in the *Carey* decision in the thirty-two (32) years since its issuance.

3. The effect upon the administration of justice if the *Corgatelli* decision is applied retroactively is significant.

This third factor weighs “the number of cases that would be reopened if the decision is applied retroactively.” *BHA Investments, Inc.*, 141 Idaho at 173, 108 P.3d at 320. As set forth above, prior to the *Corgatelli* decision, and based on the *Carey* decision, it was long-standing, common practice for the employer to be entitled to a credit for PPI benefits paid due to the understanding that impairment is inclusive of total permanent disability. There are likely thousands of potential cases at risk for being re-opened if *Corgatelli* is applied retroactively. If *Corgatelli* is applied retroactively employers will be significantly harmed due to this unplanned and unforeseen new liability.

Based on the foregoing, the balancing of the above factors weighs in favor of declining to extend *Corgatelli* retroactively.

E. The Commission Did Not Err in Ruling Davis Was Not Entitled to an Award of Attorney’s Fees Pursuant to Idaho Code § 72-804.

Idaho Code § 72-804 states:

If the commission or any court before whom any proceedings are brought under law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

The decision that grounds exist for awarding a claimant attorney's fees is a factual determination which rests with the Commission. *Lopez v. Amalgamated Sugar Co.*, 107 Idaho 590, 591, 691 P.2d 1205, 1206 (1984). The determination that a claimant is not entitled to attorney fees will be affirmed if it is supported by substantial and competent evidence. *Page v. McCain Foods, Inc.*, 145 Idaho 302, 311-312, 179 P.3d 265, 274-275 (2008).

Davis has failed to show entitlement to attorney fees under Idaho Code § 72-804. The underlying workers' compensation claim was fully resolved by a negotiated Stipulation resulting in the Commission entering the Order dismissing Davis' claims with prejudice. Pursuant to the terms of the Stipulation, the Employer and Surety acknowledged their obligation to make payments under the Workers' Compensation Law and the parties agreed to the apportionment of liability for non-medical factors. (R: Vol. I, p. 4, ¶ 8; pp. 4-5, ¶10.) Davis did not seek reconsideration of or appeal from the Order. He cannot thereafter submit a demand for additional payment inconsistent with the terms of the Stipulation (R: Vol. I, pp. 53-54), and then seek an award of attorney fees for non-payment under Idaho Code § 72-804. Such action is not a "contested" claim as contemplated by the statute and the Commission, Employer and Surety were reasonable in their reliance on the terms of the Stipulation. Davis is therefore not entitled to an award of fees under Idaho Code § 72-804.

F. The Employer and Surety are Entitled to an Award of Attorney Fees Pursuant to Idaho Appellate Rule 11.2.

The Employer and Surety request they be awarded attorney fees incurred in defending this appeal pursuant to Idaho Appellate Rule 11.2, which states, in pertinent part:

The signature of an attorney or party constitutes a certificate that the attorney or party has read the notice of appeal, petition, motion, brief or other document; that to the best of the signer's knowledge,

information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If the notice of appeal, petition, motion, brief, or other document is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the notice of appeal, petition, motion, brief or other document including a reasonable attorney's fee.

I.A.R. 11.2.

Under the facts and circumstances of this case, the imposition of sanctions pursuant to Idaho Appellate Rule 11.2 is warranted as (a) the Notice of Appeal (R: Vol. I, p. 143) and the Appellant's Brief are not well grounded in fact or warranted by existing law. Additionally, a good faith argument has not been made for the extension, modification, or reversal of existing law; and (b) the Notice of Appeal and Appellant's Brief were filed for the improper purpose to harass or cause unnecessary delay or needless increase in the cost of litigation.

Here, Davis failed to seek reconsideration of or appeal from the Order approving the Stipulation, negotiated by the parties, dismissing the Complaint with prejudice. At the time the Stipulation was entered into, there was no question as to the Employer/Surety's entitlement to the credit at issue evidenced by Davis' signature on the Stipulation. The Order was a final award barring any subsequent actions. The Petition for Declaratory Ruling attempted to circumvent the jurisdictional deadlines that had already run. Thus, this appeal was brought without a reasonable basis in fact or law and for an improper purpose.


Of significance is the fact Davis could have raised the arguments made in *Corgatelli v. Steel West, Inc.*, in the underlying matter, but elected to proceed with entering into the Stipulation. Additionally, Davis failed to seek reconsideration of or an appeal from the Order for the purpose of asserting the arguments that ultimately prevailed in *Corgatelli*. The Order was entered constituting a final award of the Commission on June 26, 2014. As the time for reconsideration or appeal from the Order had passed, the Commission did not have jurisdiction to consider Davis' Petition for Declaratory Ruling. See Idaho Code §§ 72-718 and 72-724. Alternatively, Davis' subsequent action is barred by the doctrine of *res judicata*. See *Magee v. Thompson Creek Min. Co.*, 152 Idaho 196, 202, 268 P.3d 464, 470 (2012). As the law is well-settled, the appeal is frivolous and without basis in fact or law and was only made for the improper purpose to harass or to needlessly increase the costs of litigation.

IV. CONCLUSION

The Order on Petition for Declaratory Ruling and the Order Denying Petitioner's Motion for Reconsideration of the Commission should be affirmed and the Respondents awarded their attorney fees and costs on appeal.

DATED this 12th day of May, 2016.

ELAM & BURKE, P.A.

By: 
Jon M. Bauman, Of the firm
Attorneys for Respondents/Cross-Respondents,
Hammack Management, Inc. and Idaho State
Insurance Fund

CERTIFICATE OF SERVICE

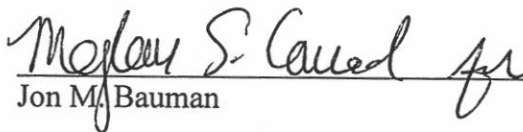
I HEREBY CERTIFY that on the _____ day of May, 2016, I caused a true and correct copy of the foregoing document to be served as follows:

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