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# Davis v. Hammack Management, Inc Respondent's Brief 2 Dckt. 43863

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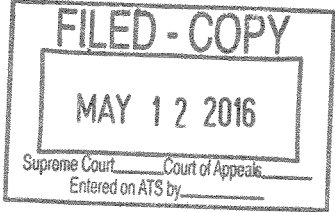
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BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

\* \* \* \* \*

<p>GARY DAVIS,</p> <p>Appellant/Cross-Respondent,</p> <p>vs.</p> <p>HAMMACK MANAGEMENT, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety,</p> <p>Respondents,</p> <p>and</p> <p>STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND,</p> <p>Respondents/Cross-Appellants.</p>	<p>SUPREME COURT NO. 43863</p> <p><b>RESPONDENT/CROSS- APPELLANT INDUSTRIAL SPECIAL INDEMNITY FUND'S BRIEF</b></p>  <p>FILED - COPY MAY 12 2016 Supreme Court _____ Court of Appeals _____ Entered on ATS by _____</p>
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APPEAL FROM THE INDUSTRIAL COMMISSION, STATE OF IDAHO

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Chairman, R.D. Maynard, Presiding

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**I. STATEMENT OF THE CASE.**

**A. Nature of the Case.**

This is a worker's compensation case in which the Claimant, the Employer/Surety and the ISIF entered into a compensation agreement styled as the Stipulation for Entry of Award Against Defendants (R. pp.18-29). Prior to signature by the parties and counsel, the compensation agreement was provided to Claimant for review and approval. The language, content, and benefits provided for in the compensation agreement were negotiated terms on which Claimant and Claimant's counsel had a full and complete opportunity to review, consider, and request amendments. In fact, prior to the final compensation agreement, Claimant's counsel did request certain changes to the document, which were made. Upon review and acceptance, the compensation agreement was then signed by Claimant and by Claimant's counsel.

The Stipulation for Entry of Award Against Defendants was reviewed and approved by the Idaho Industrial Commission on June 26, 2014. Upon approval, the Employer/Surety began making payments as called for in the agreement and the ISIF began to make its agreed upon payment to Claimant in the amount of the "differential", equal to the difference between the Employer/Surety's obligation at 55% of the average state weekly wage for the year of injury (2004) and the 45% benefit rate due Claimant under I.C. §72-408 and §72-409. All of these payment obligations and liabilities to the Defendants were fully and completely set forth within the compensation agreement and approved by the Industrial Commission. The Claimant did not challenge or seek reconsideration of the Order of Approval and likewise did not appeal to this Court.

Eight months after the Industrial Commission entered its Order of Approval and Discharge, Claimant filed his Petition for Declaratory Ruling (R. pp.13-17), seeking to

amend, modify and reform the Commission's Order of Approval and Discharge to claim additional benefits, not provided for in the compensation agreement. The asserted premise for Claimant's Petition for Declaratory Ruling was this Court's decision in *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014).

**B. Course of the Proceedings Below.**

Following the filing of Claimant's Petition for Declaratory Ruling, the ISIF filed a Limited Appearance to challenge subject matter jurisdiction and service of process. The ISIF maintained in its response that the Industrial Commission lacked subject matter jurisdiction to consider the Petition for Declaratory Ruling on its merits and contended that all matters related to Claimant's claim for benefits arising out of his 2004 industrial injury, and all benefits related to any pre-existing conditions, were fully and finally determined by the Commission's Order of Approval and Discharge and that neither the agreement nor the Commission's Order could be modified as requested by Claimant to seek additional income benefits not provided for in the compensation agreement (R. pp.76-81). The Employer likewise filed its objection and response to Claimant's Petition for Declaratory Ruling (R. pp.69-75).

The Industrial Commission entered its Order on the Petition for Declaratory Ruling on October 6, 2015 (R. pp.99-112). The Commission concluded that the parties' Stipulation for Entry of Award, and the Commission's Order of Approval and Discharge thereon, were not susceptible to collateral attack by Claimant under any theory advanced by the Claimant (or any other theory). The Commission noted that its June 26, 2014 Order dismissed Petitioner's Complaint with prejudice. Because no Motion to Reconsider had been filed, and no appeal had been taken to this Court, the Order of Approval and Discharge was final and conclusive as to all matters relating to Claimant's

benefits. Claimant then filed a Motion for Reconsideration (R. pp.131-133). The Defendants responded to the Motion for Reconsideration, and the Industrial Commission entered its Order Denying Petitioner's Motion for Reconsideration on November 25, 2014 (R. pp.138-142).

The Claimant then filed his Notice of Appeal to this Court, and the ISIF filed its Notice of Cross-Appeal.

**C. Statement of the Facts.**

The only facts which are presented to this Court in this record arise out of the Stipulation for Entry of Award. The majority of the Claimant's version of "Statement of the Facts" in Appellant's Opening Brief (pp.7-11) have no relationship to any "facts" and instead present Claimant's legal theories and arguments in hopes of avoiding the clear and unambiguous language of the compensation agreement and somehow seeking modification of the Industrial Commission's Order of Approval and Discharge. The facts as are relevant to the pending appeal and cross-appeal are discussed below in ISIF argument.

**II. ADDITIONAL ISSUES PRESENTED ON CROSS-APPEAL.**

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

B. 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?

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



### **III. CROSS-APPEAL ARGUMENT.**

#### **A. Industrial Commission Jurisdiction Limited.**

The Idaho Industrial Commission is an executive and administrative agency of the Executive Department of the state. Idaho Constitution Art. IV, §20. This constitutional section limits the executive agencies to no more than 20 separate agencies. The Idaho Industrial Commission is one of the agencies as provided in Idaho Code §67-2402. Although Art. IV, §20 limits the state legislature to the creation of 20 executive agencies, the Industrial Commission is entirely the creation of the legislature and has no constitutional dimension or constitutional power. Unlike the constitutional officers recognized in Art. IV, §20 the Industrial Commission's powers and duties arise purely by statute and not in any way, shape or form from the Idaho Constitution. The constitutional officers recognized in Art. IV, §20 are the office of Governor, Lieutenant Governor, Secretary of State, State Controller, State Treasurer, Attorney General and Superintendent of Public Instruction. These seven constitutional officers fall outside the Idaho Administrative Procedure Act's definition of agency when exercising constitutional powers, including (but not limited to) making rules and determining contested cases. These seven constitutional officers, in the exercise of their constitutional powers, are not subject to the Idaho Administrative Procedure Act's provisions governing agencies. Idaho Code §67-5201(2).

This Court has consistently held that administrative agencies of the state, including the Idaho Industrial Commission, have no jurisdiction, power, or authority other than that which is expressly given to them by the legislature. The Court in *Idaho Power Co. v. Idaho Public Util. Com'n*, 102 Idaho 744, 639 P.2d 442 (1981), held and stated as follows:

(4) Because the Commission was created by statute, the Commission has no jurisdiction other than that which the legislature has specifically granted to

it. *Washington Water Power Co. v. Kootenai Environmental Alliance*, 99 Idaho 875, 879, 591 P.2d 122, 126 (1979). *Accord, United States v. Utah Power & Light Company*, 98 Idaho 665, 570 P.2d 1353 (1977); *Lemhi Tel. Co. v. Mountain States Tel. & Tel. Co.*, 98 Idaho 692, 571 P.2d 753 (1977). The Commission therefore exercises limited jurisdiction, with nothing being presumed in favor of its jurisdiction. *Id.* As the court stated in *Washington Water Power Company, supra*,

“[a]s general rule, administrative authorities are tribunals of limited jurisdiction and their *jurisdiction is dependent entirely upon the statutes reposing power in them* and they cannot confer it upon themselves, although they may determine whether they have it. If the provisions of the statutes are not met and compliance is not had with the statutes, no jurisdiction exists.” (Emphasis added.) 99 Idaho at 879, 591 P.2d at 126.

*Id.* at Idaho p.750.

In the case of *in re Wright*, 148 Idaho 542, 224 P.3d 1131 (2010) the Court reiterated that “an administrative agency is a creature of statute, limited to the power and authority granted it by the legislature (citations omitted)”, 148 Idaho at 548. With respect to the Industrial Commission itself, this Court has held that: “As a creature of legislative invention, the Commission may only act pursuant to an enumerated power, whether it be directly statutory or based upon rules and regulations properly issued by the Commission under Idaho Code §72-508”. *Curr v. Curr*, 124 Idaho 686 at 691, 864 P.2d 132 at 137 (1993). The Court further identified the Commission’s jurisdiction as follows: “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. (citation omitted.)”, 124 Idaho at 690, 864 P.2d at 136. See also *Deon v. H & J, Inc. and ISIF*, 157 Idaho 665, 339 P.3d 550 (2014) where the Court noted that “the Commission derives its authority solely from statutory law and does not have the ability to operate in the equitable realm.” 157 Idaho at 669.

In its adjudication of cases filed against Employers and Sureties and/or the ISIF for benefits, the Commission must proceed in accordance with statutory law. The statutory law both enables and limits the Industrial Commission in the adjudicatory process.

**B. Industrial Commission Order of Approval Final.**

The Stipulation for Entry of Award Against Defendants (R. 1 through 12) was approved by the Industrial Commission on June 26, 2014. The Order of Approval and Discharge is found at R. p.11. The Commission Order approved the Stipulation for Entry of Award Against Defendants and dismissed the Claimant's case with prejudice.

Under Idaho Code §72-711, a compensation agreement between the Claimant and Employer/Surety, and also between a Claimant and the ISIF, upon approval by the Industrial Commission, “shall for all purposes be an award by the Commission and be enforceable under the provisions of §72-735, unless modified as provided in §72-719.”

Under Idaho Code §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, unless any party filed for reconsideration before the Commission or appealed the final decision to the Idaho Supreme Court.

Idaho case law has consistently held that Idaho Code §72-711 and §72-718 provide that upon approval by the Industrial Commission of a compensation agreement, such approval is final and conclusive as to all matters related to benefits payable for the industrial injury. *Davidson v. H.H. Keim Co.*, 110 Idaho 758, 718 P.2d 1196 (1986), *Sines v. Appel*, 103 Idaho 9, 644 P.2d 331 (1982).

As of June 26, 2014, all of Mr. Davis' claims against Employer/Surety and the ISIF for benefits arising out of the industrial injury and all pre-existing conditions were fully and finally determined. No Motion for Reconsideration, as provided in Idaho Code §72-718,

was filed. Likewise, no appeal from the Commission's Order of Approval was taken to this Court. Consequently, the June 2014 Order of Approval was final and conclusive as to all matters presented in Industrial Commission proceeding No. 2005- 501080.

The instant appeal against the ISIF is governed by this Court's decision in *Drake v. State of Idaho, Industrial Special Indemnity Fund*, 128 Idaho 880, 920 P.2d 397 (1996). In *Drake*, the ISIF and the Claimant entered into an agreement whereby the ISIF agreed to pay Claimant "monthly benefits at the statutory rate." The agreement recited Claimant's actual wage at the time of the accident and provided that the agreement fully and finally disposed of any and all claims of any kind and character Claimant had or may have known that he had or may have had against the ISIF. Due to the Claimant's very low actual wage, his benefit rate under Idaho Code §72-408 and §72-409 was at the statutory minimum of 45% of the prevailing average weekly state wage. A year and a half after the agreement was entered into and approved by the Commission, the Claimant filed a "Petition for Determination of Correct Permanent Disability Rate and Request for Hearing", arguing that the ISIF was not paying at the correct rate and that instead a higher rate was payable and should be ordered. This Court summarized the factual and procedural background on appeal as follows:

"The Commission found that the disability rate had been fully adjudicated by way of the Agreement's compromise and settlement. Because the Agreement constituted a final decision of the Commission, Drake should have sought review of the disability rate contained within the Agreement through a motion for reconsideration or rehearing. As a result, the Commission held that Drake's failure to do so barred any further proceedings. Drake appealed."

*Id* at p.881, 920 P.2d at 398.

In its opinion, the Court cited to prior case law and stated that:

“A liable party and an injured employee are permitted to enter into a settlement with regard to compensation, but the agreement must be approved by the Commission. I.C. §72-711. Upon approval, the agreement is for all purposes considered to be an award by the Commission. *Id.* The approved agreement constitutes a final decision of the Commission which is subject to a motion for reconsideration or rehearing pursuant to I.C. §72-718. *Davidson v. H.H. Keim Co.*, 110 Idaho 758, 760, 718 P.2d 1196, 1198 (1986).”

*Id.* at p.882.

The Court noted that the compensation agreement’s recitation of the hourly wage and the rate to be paid was approved by the Commission. If the Claimant believed, at some later date, that his hourly wage had been incorrectly recited, or that the benefit rate was too low, such issue had to have been raised by way of a Motion for Reconsideration or Rehearing. The Court held that:

“Drake’s failure to do so prohibits further proceedings concerning the correct permanent disability rate under the Agreement.”

*Id.* at 882.

Accordingly, the Court held that the Industrial Commission was correct in dismissing Claimant’s Petition for correcting or modifying the award. The ISIF respectfully suggests that the Industrial Commission in this appeal should likewise have summarily dismissed the Petitioner for Declaratory Ruling as a back door attempt to amend, modify and reform the Stipulation for Entry of Award and the Order of Approval. After the time to file a Motion for Reconsideration, or the time to take an appeal from the Order of Approval of June 26, 2014 had expired, any further proceedings to correct, amend, modify or reform the agreement were prohibited. As the Court held in *Drake*: The Claimant’s failure to challenge the agreement’s terms and provisions related to his benefits “prohibits further proceedings.” See also *Morris v. Hap Taylor and Sons, Inc. and Liberty*

*Ins. Co.*, 154 Idaho 633, 301 P.3d 639 (2013): decision of the Commission approving Compensation Agreement is “final and conclusive” absent proof of fraud. And *Harmon v. Lute’s Const. Co. and Industrial Indemnity Co.*, 112 Idaho 291, 732 P.2d 260 (1986):

“It is clear that all claims regarding disability (as affected by both medical and non-medical factors) were fully settled by the agreement and fully adjudicated when the agreement was approved by the Industrial Commission. Therefore, pursuant to I.C. §72-718, the lump sum agreement may not be modified by the Industrial Commission, absent allegations and proof of fraud by Mr. Harmon.”

*Id.* at p.295, P.2d at p. 264.

As of June 26, 2014, any and all claims for benefits as against Employer/Surety and the ISIF were fully and finally determined, and a final and conclusive adjudication of all claims for benefits was entered. The Industrial Commission lacked subject matter jurisdiction to entertain and consider issues raised in the Petition for Rehearing.

In the Stipulation for Entry of Award and approval thereof, it is abundantly clear that Mr. Davis’ claims for benefits, including benefits for total and permanent disability, were fully agreed to and determined by the Commission. Absent a viable claim under §72-719 for fraud, and filed within five years of the date of injury (which expired in 2009), there is simply no statutory authority or jurisdiction for this Commission to reopen or revisit the disability income benefits clearly provided for in the agreement. There is no statute authorizing the Commission to exert continuing jurisdiction over a matter which had been fully and finally determined. Under Idaho Code §72-718, and the decisions of this Court, it is clear that the Commission lacked jurisdiction over the subject matter of Claimant’s benefits for impairment and disability under the Idaho Workers Compensation Law.

In its Order on Petition for Declaratory Ruling the Industrial Commission did affirmatively state that it lacked subject matter jurisdiction to entertain revision of the

compensation agreement which had been approved by final decision and order of the Commission. (RP 109-110)<sup>1</sup> In this declaration the Commission was manifestly correct. However, the Commission then went on to entertain and consider Claimant's fall back argument that the ISIF obligation for full statutory benefits somehow commenced prior to 250 weeks after October 1, 2013. Despite the Commission's recognition that it lacked subject matter jurisdiction to allow attack upon, or modification of, the final and approved agreement, it then proceeded to review the issue on its merits. The ISIF suggests that the Commission recognized that it lacked subject matter jurisdiction to entertain the Petition but that it then felt obliged to consider the arguments presented under *Corgatelli* for retroactive application and for some accelerated date of the ISIF agreed upon and ordered date of liability. The Commission's consideration of the issues presented in Claimant's Petition was perhaps intended to be of service to the parties and perhaps useful to this Court on appeal, but the Commission's recognition that it lacked subject matter jurisdiction over this proceeding should have ended further analysis or discussion.

The Petition for Declaratory Ruling should have been summarily dismissed by the Commission for failure of subject matter jurisdiction. It was error for the Commission to proceed to consider the petition on its merits or to consider and dispose of the arguments raised therein.

### **C. JRP 15 Cannot Create Jurisdiction.**

The Idaho Industrial Commission has adopted JRP 15 governing declaratory rulings. The rule in its entirety provides as follows:

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<sup>1</sup> Note however that the declaration by the Commission that it lacked subject matter jurisdiction over the Petition for Declaratory Ruling was qualified: the Commission elsewhere stated that: "Assuming that the Commission has continuing jurisdiction over the LSSA, an 'actual' controversy between Petition and the other parties to the LSSA appears to exist since Petitioner may net a larger recovery depending on how the controversy is resolved." (R. p.101)

## **RULE 15.**

### **DECLARATORY RULINGS**

#### **A. Purpose.**

The Commission provides this format for rulings on the construction, validity, or applicability of any workers' compensation statute, rule, or order.

#### **B. "Person" Defined.**

The word "person" whenever used in this rule, shall be construed to mean any person, partnership, governmental agency or department, unincorporated association or society, or other corporation of any character whatsoever. Such a person shall be the petitioner in the proceeding.

#### **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.

#### **D. Service on Parties.**

The petitioner shall serve a copy of the petition on all other persons to the actual controversy at the time the petition is filed with the Commission. All persons so served shall be deemed parties to the declaratory ruling proceeding. A declaratory ruling shall not be binding on persons not made parties to the proceeding.

#### **E. Time for Responses or Replies.**

Within 14 days after service of a petition, any party served may file a written response thereto, stating with specificity the facts and the law on which the responding



party relies. Within 10 days after service of the response, the petitioner may file a reply. The Commission may shorten or extend the time for filing a response or reply upon the filing of a motion and a showing of good cause; made within the original time allowed. All such responses or replies shall be served on all other parties.

**F. Disposition of Petition.**

On receipt of a petition and after the time for filing all responses and replies has passed, the Commission may:

1. On motion of any party, or on its own motion, hold a hearing on the facts and/or law;
2. Conduct such investigation or inquiry as it deems proper, or call for a submission of such facts, evidence, or information as it deems necessary to enable it to make a determination of the issue or issues;
3. Issue a written ruling which shall have the force and effect of a final order or judgment; or
4. Decline to make a ruling when:
  - a. The Commission lacks jurisdiction over the issue or issues presented;
  - b. There is no actual controversy;
  - c. The petitioner would not be directly affected by a resolution of the issue presented;
  - d. The petitioner does not provide sufficient facts or other information on which the Commission may base a ruling;
  - e. The issue on which a determination is sought is or should be the subject of other administrative or civil litigation or appeal; or
  - f. It appears to the Commission that there is other good cause why a declaratory ruling should not be made.

As the Court will note, JRP 15 purports to give the Commission authority to resolve “an actual controversy over the construction, validity or applicability of a statute, rule, or order...” (JRP 15 C.). The rule does not in any way limit the Commission’s purported authority over an “order” no matter how long ago any such order may have been entered. Nor does the rule as written limit the Commission’s authority in a case that

had been fully and finally determined and that was final and conclusive as to all matters raised in such case in accordance with Idaho Code §72-718. At the time Mr. Davis' Petition for Declaratory Ruling was filed, the ISIF filed a responsive memorandum suggesting that the Commission lacked subject matter jurisdiction over the issues and matters asserted in the Petition, and that the Petition should have been summarily dismissed. JRP 15, subsection F. 4.a. specifically affords to the Commission authority to decline to make a ruling when: "the Commission lacks jurisdiction over the issue or issues presented...".

As set forth above in this brief, the ISIF respectfully maintains that the Industrial Commission lacks subject matter jurisdiction to entertain, consider, or rule upon the Petition for Declaratory Ruling. JRP 15, in purporting to allow the Commission to rule upon any controversy involving any order, regardless of when such order was entered, violates Idaho Code §72-718. JRP 15, as applied in this case, violates the Commission's statutory mandate and cannot be said to confer subject matter jurisdiction over the Petition for Declaratory Ruling.

In the *Idaho Power Co. v. Idaho Public Util. Com'n*, supra, this Court considered a challenge to the IPUC's authority to promulgate certain rules related to attorney's fees and costs. In reviewing the rules governing attorney's fees and costs in consumer intervenor proceedings, the Court held that the general rule making power of the Commission did not extend to rules governing attorney's fees and costs, and the Court held that such rules violated the enabling legislation and therefore the jurisdiction of the Commission.

As noted in the *Curr v. Curr* decision, supra, in determining the authority and jurisdiction of an agency, the Court will closely view the enabling statute and will presume nothing in favor of an agency's jurisdiction.

In applying Idaho Code §72-718 to the pending appeal, this Court has consistently held that:

“In construing legislative acts it is not the business of the court to deal in any subtle refinements of the legislation, but our duty is to ascertain, if possible, from a reading of the whole act, and amendments thereto, the purpose and intent of the legislature and give force and effect thereto.”

*State v. Grose Close*, 67 Idaho 71, 171 P.2d 863 (1946)

The plain meaning of a statute will prevail unless clearly expressed legislative intent is contrary or unless plain meaning leads to absurd results. *State v. Ankney*, 109 Idaho 1, 704 P.2d 333 (1985); *Walker v. Hensley Trucking*, 107 Idaho 572, 691 P.2d 1187 (1984).

In reviewing JRP 15, it is clear that the rule, perhaps unintentionally, purports to afford unto the Commission jurisdiction over controversies relating to “orders” regardless of whether or not such orders have become final and conclusive under I.C. §72-718 or whether such orders are beyond any applicable statute of limitations. To give effect to JRP 15 as applied in this case, the Court would ignore the clear and unequivocal language of Idaho Code §72-718 which provides finality to the Order of Approval entered in this case in June 2014. The Commission cannot boot strap itself into jurisdiction in contravention of the clear and unequivocal language of the enabling statute.

As an alternative to ruling that JRP 15, as applied in this case, violates Idaho Code §72-718, the Court could determine that the Commission was simply in error in proceeding to consider the merits under JRP 15. As the Court will note, JRP 15, at Section 4.a. affords to the Commission the authority to decline to make a ruling in a case when the Commission

lacks jurisdiction over the issue or issues presented. As an alternative to the subject matter jurisdiction argument under JRP 15, the ISIF would likewise maintain that the Commission was in error in proceeding to entertain the Petition for Declaratory Ruling on its merits. The ISIF maintains that the case had been fully and finally adjudicated in June of 2014 without appeal or reconsideration. As such, there was no continuing jurisdiction over the Claimant's case, and JRP 15 could not and does not revive a concluded case simply by including the term "ruling" in JRP 15 C.

#### **IV. ISIF RESPONSE TO MR. DAVIS' APPEAL.**

##### **A. The Industrial Commission Had Subject Matter Jurisdiction in Case No. 2005-501080.**

The Appellant in this case seeks retroactive application of this Court's decision in *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014) to modify and reform a final and conclusive Order of the Industrial Commission. The device being attempted by Claimant is to collaterally attack the Commission's Order by way of a challenge to the Commission's subject matter jurisdiction. The device fails and the Claimant's efforts to challenge the subject matter jurisdiction of the Commission in underlying case No. 2005-501080 likewise must fail.

Idaho Code Title 72, Chapter 7 lays out the "procedures" governing proceedings before the Industrial Commission. Under Idaho Code §72-707 all questions arising under Title 72, "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. The issues of Claimant's benefits against the Employer/Surety and the ISIF were "settled by agreement or stipulation of the interested parties with the approval of the commission." Furthermore, the proviso in §72-707 which confers

jurisdiction to the Commission except as otherwise herein provided includes the finality statute of Idaho Code §72-718. Likewise, this Court has held that: “Generally, the Commission’s jurisdiction is limited to adjudicating certain complaints filed by a worker’s compensation Claimant against an employer or an employer’s surety.” *Owsley v. Idaho Indust. Com’n*, 141 Idaho 129, 134, 106 P.3d 455, 460 (2005) (Emphasis omitted). In Case No. 2005-501080, there was no attack on the Commission’s subject matter jurisdiction. Of course not, as there was no Motion for Reconsideration and there was no direct appeal to this Court. Only after the Claimant’s counsel awakened to the Court’s decision in *Corgatelli* was the Petition for Declaratory Relief filed, some eight months after the Commission’s Order of Approval dating from June 2014. And to add additional confusion and procedural error, Claimant used the same case number as was used in the underlying case, which was fully settled and final by Order of Approval, in the Petition for Declaratory Ruling; this in an effort to show that somehow the underlying case was still pending or that the Commission still had jurisdiction.

It is clear that the Industrial Commission had subject matter jurisdiction over the complaints filed in the underlying case. The parties stipulated and agreed to the benefits as set forth in the Stipulation for Entry of Award and as approved by the Industrial Commission on June 26, 2014. The Commission was not deprived of subject matter jurisdiction by virtue of a subsequently issued opinion by this Court and the Commission had full jurisdiction and authority to approve the parties’ compensation agreement.

The Claimant’s attempt, by way of collateral attack to the Commission’s subject matter jurisdiction by the vehicle of the Petition for Declaratory Ruling, fails. Alleged error of a lower court or of an administrative agency does not deprive the tribunal of

subject matter jurisdiction. See Robert J. Martineau, *Subject Matter Jurisdiction as a New Issue on Appeal: Reining in an Unruly Horse*, 1988 BYU L. Rev.1 (1988).

**B. Idaho Code §72-318 and *Wernecke* Do Not Support Claimant's Appeal.**

Claimant argues that the Commission's Order of Approval dated June 26, 2014 is void under Idaho Code §72-318(2), which provides that no agreement by an employee to waive his rights to compensation under this act shall be valid. As correctly stated by the Commission in its Order on Petition for Declaratory Ruling, Idaho Code §72-318 does not authorize Claimant's collateral attack on the compensation agreement. The Commission properly noted that, with respect to the ISIF, the compensation agreement was valid in that it provided compensation for the past injury at issue in the case, and that it provided for statutory benefits to Claimant to begin at a future date. With respect to the Employer and Surety, the Commission properly noted that the compensation agreement involved a past injury, which is a kind and type of agreement "all together appropriate under Idaho Code §72-318."

The Commission discussed the Court's opinion in *Wernecke v. St. Mary's Joint School District No. 401*, 147 Idaho 277, 207 P.3d 1008 (2009). The Commission correctly noted that the compensation agreement clearly recited the essential elements of ISIF liability and in fact discharged that liability at a point in time 250 weeks from the date Claimant reached MMI. Moreover, as the Commission correctly noted, this Court held in *Emery v. J.R. Simplot Co.*, 141 Idaho 407, 111 P.3d 92 (2005): an agreement and Stipulation for Dismissal with prejudice, of a past industrial injury, even with no compensation paid, is not void under Idaho Code §72-318.

The compensation agreement entered into between the parties in this case and the Order of the Industrial Commission approving the agreement, is not subject to attack

under Idaho Code §72-318(2) or under the *Wernecke* decision of this Court. The ISIF proceeded in full accordance with the mandates of *Wernecke* in entering into the Stipulation for Entry of Award. Mr. Davis bargained for and received, from the ISIF, full statutory disability income benefits beginning at a date 250 weeks from MMI. In return, and as approved by this Court, he did waive any and all future claims, known or unknown, or claims which might relate to any future industrial accidents or injuries. But he did not waive any claims for the past or pending claim in the underlying case. Moreover, in approving the Stipulation for Entry of Award, the Commission was able to review the Stipulation and conclude that the elements and requirements of *Wernecke* had been fully met.

In negotiating and executing the Stipulation for Entry of Award, the Claimant did not “waive” any benefit. Rather, he bargained for the benefits (and the credit to Surety) as set forth in the Stipulation and as approved by the Commission. The agreement settled and compromised a long pending case dating from the industrial injury occurring on November 9, 2004. The compensation agreement and the Commission’s Order determined the benefits payable to Claimant and Claimant released any and all other claims of any kind or nature against the Defendants. The compensation agreement and Order of Approval fully concluded this case and Claimant’s attempts to bootstrap himself into additional benefits by way of his Petition for Declaratory Ruling should be rejected.

**C. *Corgatelli* Decision Not Applicable to ISIF.**

Appellant spends considerable argument in support of the retroactive application of this Court’s decision in *Corgatelli*, *supra*. Insofar as that decision addressed permanent physical impairment benefits which may be payable to a Claimant, it is self-evident that the case is entirely inapplicable to any liability of the ISIF under Idaho Code

§72-332. By definition, permanent partial impairment is solely the duty and liability of the Employer and Surety. The ISIF, on the other hand, is liable only for its apportioned share of any total and permanent disability held by this Court in *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984). As the Industrial Commission noted in some detail in its Order on Petition for Declaratory Ruling (R. pp.103-105), the *Carey* decision apportioned only non-medical factor disability and did not require that the Employer and Surety in the three cases pay permanent partial physical impairment a second time. Thus in *Carey*, the Employer and Surety was given a credit against total disability obligations for permanent partial impairment which had been previously paid.

The parties in negotiating and agreeing to the Stipulation for Entry of Award proceeded in accordance with the Court's holding in *Carey*, supra, and as the Commission specifically noted in its Order Denying Petitioner's Motion for Reconsideration (R. pp.138-142):

“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 County Road Dept.*, 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.”

(R. p.141)

The Commission declined to apply the Court's decision in *Corgatelli*, supra, retroactively in this case or to relieve Claimant from the clear and unambiguous terms of the Stipulation for Entry of Award. The Commission further noted, with regard to retroactive application, that:

“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 the *Corgatelli* Court did not intend a 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.”

(R. p.141)

Although the Court’s decision in *Corgatelli* regarding permanent partial impairment benefits is not applicable to the ISIF, mention must be made of Appellant’s insinuations that the Defendants were somehow prescient of the as yet unreleased Court’s ruling in *Corgatelli*. Appellant’s Brief states the following:

“In this case, the Employer and the ISIF cannot argue in good faith that they relied on the validity of the Industrial commission’s ruling in *Corgatelli* when they inserted the invalid PPI credit into paragraphs 11 and 12 of the compensation agreement in June of 2014 because the Defendants in this case were the same Defendants in *Corgatelli* and knew that the Claimant in *Corgatelli* was challenging the validity of the PPI credit on appeal before the Idaho Supreme Court when they slipped the invalid PPI credit into paragraphs 11 and 12 of the compensation agreement.”

(Appellant’s Opening Brief p. 28)

The suggestion is made that the Defendants “inserted the invalid PPI credit” and “slipped the invalid PPI credit” into the negotiated and agreed upon compensation agreement because the Defendant State Insurance Fund and ISIF were parties to *Corgatelli*. So Claimant seeks retroactive application of a case because two parties in this case somehow knew what the Idaho Supreme Court would do in the *Corgatelli* case? Whatever abilities (and however limited) or experience undersigned counsel may possess, prescience of this Court’s rulings is not among them. The Claimant’s attempt to have the *Corgatelli* ruling made retroactive in this case as against the Employer and Surety is built on quicksand.

**D. The Stipulation for Entry of Award, and Order of Approval Clearly Delineate the ISIF Liability.**

Nor can it be said that the Defendants “slipped” any term or provision into the compensation agreement. On the contrary, the agreement was negotiated and drafted, and provided to Claimant’s counsel for review and requested changes. Following Claimant’s counsel’s review of the draft Stipulation, he requested certain changes and they were made. Such changes are not in the record, but the Stipulation was certainly fully executed by Mr. Davis and by Mr. Kallas in his role as counsel. At no time prior to execution of the Stipulation did Claimant’s counsel object to the clear and unambiguous obligation for benefits to be paid by Defendants, nor was any objection made to the now alleged “invalid credit” to Employer/Surety for prior permanent partial impairment benefits paid.

As the Court will note in reviewing the Stipulation, this case presented a wide range of physician impairment ratings both for pre-existing impairments and for the industrial injury. Paragraph 8 of the Stipulation reflected the wide range of impairments which had been assigned by various physicians over the course of time. (R. p.4 ¶8). In Paragraph 10 of the Stipulation, the Defendants and the Claimant agreed that Employer/Surety would be responsible for 250 weeks of total and permanent disability income benefits commencing as of Claimant’s MMI date, October 1, 2013. (R. pp. 4-5, ¶10)

Paragraphs 11 and 12 of the Stipulation recited the apportioned liability to the Surety and the Surety’s responsibility for payment of disability income benefits in the amount of 55% of the average state weekly wage for the year of injury (2004). The agreement then provided that the ISIF liability would commence for the differential (difference between the prevailing average weekly wage for 2013 and thereafter and the

Surety's responsibility for 55% of the average state weekly wage for the year of injury). See *Carey v. Clearwater County*, supra, holding that a Surety's obligation in a total and permanent disability case was to pay 55% of the average state weekly wage in effect for the year of injury. This "differential" obligation of the ISIF, which has been paid monthly in accordance with the agreement, will continue to be paid according to the agreement until 250 weeks from the MMI date of October 1, 2013. At the expiration of said 250 week period, the agreement provided that the ISIF would pay Claimant his full statutory income benefits at 45% of the then prevailing average state weekly wage until Claimant's death. Paragraph 12 of the Stipulation recognized Surety's prior paid impairment of 27% whole person and that Surety had advance 5% whole person benefits against a future determination of permanent disability. Those combined benefits equaled a total of 160 weeks of Employer/Surety obligation in the total and permanent disability case. This credit was applied to the obligation of the Surety and clearly recited that the Surety would then have a responsibility for 90 weeks of benefits upon approval of the Industrial Commission.

The credit to the Surety for impairment and total and permanent disability benefits advanced was in full accord with existing Industrial Commission decisions and long standing practice. This credit was agreed to by the Claimant and the document was approved and executed by Claimant's counsel. The Claimant's current attempt to modify, amend and reform the agreement is contrary to the plain language of the agreement and contrary to all concepts of finality required under Idaho Code §72-718.

**E. ISIF Liability Clear Under Stipulation and Order.**

As noted above, the Stipulation for Entry of Award clearly establishes the liability for the ISIF to pay statutory income benefits at the rate of 45% of the prevailing average

state weekly wage. As clearly set forth in Paragraph 11 of the Stipulation, and as noted above, the prevailing rate of 45% of the average state weekly wage as of October 2013 and thereafter exceeded the benefit rate payable by Employer/Surety in the amount of 55% of the average state weekly wage for 2004, the year of the industrial injury. Therefore, the ISIF carefully recited its obligation for the differential and reflected that amount in Paragraph 11 as 9.60 per week for the remainder of 2013. For the calendar year 2014, the agreement provided that the ISIF shall be obligated to pay Claimant the differential amount of 14.10 per week. At the expiration of the apportioned 250 week period of disability to Employer/Surety, the ISIF will begin paying Claimant his full statutory income benefits, said amount being 45% of the then prevailing average state weekly wage until Claimant's death.

Although the ISIF maintains that the Industrial Commission should not have reached the merits of Claimant's arguments regarding ISIF liability, it is certainly clear that the Industrial Commission properly analyzed Claimant's arguments and rejected each and every one of them. In answer to Claimant's contention that the Stipulation for Entry of Award was "ambiguous", the Commission stated that:

"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."

(R. p.110)

The Commission further stated that:

"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."

(R. p.111)

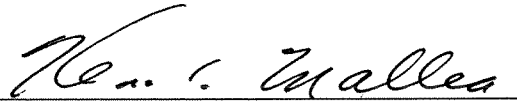
In response to Claimant's Motion for Reconsideration, the ISIF explicated the credit issue as being grounded in the ISIF liability for any differential payable in a total and permanent disability case where the Surety is responsible for 55% of the actual state wage in effect for the year of injury and the ISIF is responsible for benefits payable at the then prevailing average state weekly wage. In this case the ISIF liability for the differential was fully recited in the agreement as a per week obligation. In no way can the Stipulation for Entry of Award be construed in the tortured manner sought by Claimant. The phrase "subject to" merely provided that even though the Employer/Surety would not be making payments for the 160 week period reflecting benefits it had already paid, the ISIF was nevertheless obligated to and would continue to pay the "differential" up to the expiration of Surety's apportioned 250 weeks responsibility for total and permanent disability.

Eight months after the Industrial Commission's Order of Approval, the Claimant attempted to rewrite the compensation agreement. The Claimant somehow wants to retain all benefits clearly provided for in the compensation agreement, and also be awarded additional benefits, not bargained for and not provided for in the agreement, by retroactive application of *Corgatelli* or by virtue of Idaho Code §72-318, or by virtue of a tortured argument regarding ISIF liability. The Stipulation for Entry of Award was negotiated and bargained for between and among all parties. The Defendants may not be relieved of the liabilities clearly provided for, and likewise the Claimant may not increase the benefits bargained for and provided in the Stipulation.

**V. CONCLUSION.**

The Petition for Declaratory Ruling should have been summarily denied by the Industrial Commission for the failure, as a matter of law, of subject matter jurisdiction. Alternatively, it was an error for the Commission to entertain the Petition on the merits under JRP 15. F. 4(a). Finally, the Order of the Industrial Commission denying the Petition for Declaratory Ruling correctly disposed of the Petition in concluding that the June 2014 Order of Approval and Discharge was a final and conclusive determination of any and all claims for benefits Claimant had against the Employer/Surety and the ISIF.

Dated: May 12, 2016.



Kenneth L. Mallea  
Kenneth L. Mallea  
Attorney for Respondent/Cross-Appellant

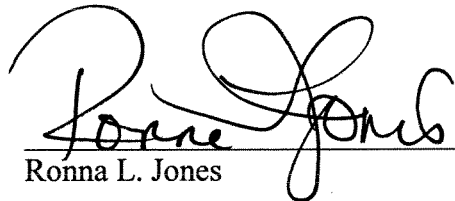
**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 12 day of May, 2016, a true and correct copy of the within and foregoing document was served upon:

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by U.S. mail  
 by hand delivery  
 by facsimile  
 by overnight mail

  
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Ronna L. Jones

