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# Davis v. Hammack Management, Inc Appellant's Reply Brief Dckt. 43863

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BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

<p>GARY DAVIS, Claimant / Appellant / Cross Respondent,</p> <p>vs.</p> <p>HAMMACK MANAGEMENT, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Respondents and STATE OF IDAHO INDUSTRIAL SPECIAL INDEMNITY FUND, Respondent / Cross-Appellant.</p>	<p>Supreme Court No. 43863</p> <p><b>CLAIMANT / APPELLANT / CROSS-RESPONDENT'S REPLY BRIEF</b></p>
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APPEAL FROM THE INDUSTRIAL COMMISSION, STATE OF IDAHO

Chairman, R.D. Maynard, Presiding

Attorney For Claimant / Appellant / Cross-Respondent

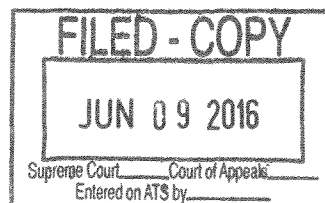
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**(I) ARGUMENT**

**(A) REBUTTAL OF EMPLOYER’S ARGUMENTS**

The Claimant is submitting a consolidated Reply Brief and will first address the Employer’s Arguments and then the ISIF’s Arguments.

**(1) THE EMPLOYER HAS CONCEDED THAT THE INDUSTRIAL COMMISSION EXCEEDED ITS LIMITED JURISDICTION AND ENTERED A VOID ORDER BY AWARDING EMPLOYER A PPI CREDIT NOT AUTHORIZED BY IDAHO CODE §72-408**

Idaho Code §72-408 is the section of the Idaho workers’ compensation Act which defines the amount of total and permanent disability benefits that the Employer and the ISIF are obligated to pay an injured worker who has become totally and permanently disabled:

72-408. INCOME BENEFITS FOR TOTAL AND PARTIAL DISABILITY. Income benefits for total and partial disability during the period of recovery, and thereafter in cases of total and permanent disability, shall be paid to the disabled employee subject to deduction on account of waiting period and subject to the maximum and minimum limits set forth in section 72-409, Idaho Code, as follows:

- (1) For a period not to exceed a period of fifty-two (52) weeks, an amount equal to sixty-seven per cent (67%) of his average weekly wage and thereafter an amount equal to sixty-seven per cent (67%) of the currently applicable

average weekly state wage<sup>1</sup>.

The literal words of Idaho Code §72-408 clearly do not authorize the Industrial Commission to give Employers a credit for PPI benefits paid before the Claimant is deemed totally and permanently disabled.

The objective of statutory interpretation is to give effect to legislative intent. *Robison v. Bateman–Hall*, 139 Idaho 207, 210, 76 P.3d 951, 954 (2003). Because “the best guide to legislative intent is the words of the statute itself,” the interpretation of a statute must begin with the literal words of the statute. *In re Permit No. 36–7200*, 121 Idaho 819, 824, 828 P.2d 848, 853 (1992); *McLean v. Maverik Country Stores, Inc.*, 142 Idaho 810, 813, 135 P.3d 756, 759 (2006). Where the statutory language is unambiguous, “this Court does not construe it, but simply follows the law as written.” *McLean*, 142 Idaho at 813, 135 P.3d at 759. “Legislative definitions of terms included within a statute control and dictate the meaning of those terms as used in the statute.” *State v. Yzaguirre*, 144 Idaho 471, 477, 163 P.3d 1183, 1189 (2007). “If the statute as written is socially or otherwise unsound, the power to correct it is legislative, not judicial.” *In re Estate of Miller*, 143 Idaho 565, 567, 149 P.3d 840, 842 (2006). *Mayer v. TPC Holdings, Inc.*, Idaho Supreme Court Docket No. 43468, filed 3.24.16 (emphasis supplied).

The statutory construction question which is dispositive of all other issues in this case can be stated as follows:

Did the version of Idaho Code §72-408 that existed when the Industrial Commission entered its 6.26.14 Order give the Industrial Commission the statutory authority to grant the Employer a PPI credit for PPI benefits paid before the parties stipulated that the Claimant was totally and permanently disabled? Answer: No.

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<sup>1</sup> The Claimant’s total permanent disability (TPD) rate in this case is 45% of the average weekly state wage because 67% of his average weekly wage was less than 45% of the average weekly state wage and Idaho Code §72-409(1) states that the weekly benefit amounts set forth in Idaho Code §72-408(1) are subject to “a minimum of forty-five percent (45%) of the currently applicable average weekly state wage”.

If this Court applies proper canons of statutory construction to the plain and unambiguous words of Idaho Code §72-408, the Court should reach the same conclusion that it reached in *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014) and hold that the Industrial Commission exceeded its limited jurisdiction when it granted Employer a PPI credit which was not authorized by Idaho Code §72-408 or any other provision of the entire workers' compensation act that were in existence when the Industrial Commission entered its 6.26.14 Order:

**1. There is no statutory basis in worker's compensation law to credit the employer for permanent physical impairment benefits paid to the employee before the award of total and permanent disability benefits. ...**

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, 1154-1155 (2014) (bold in original) (emphasis supplied).

Even if this Court decides that its holding in *Corgatelli* cannot be applied retroactively to the compensation agreement that was approved by the Industrial Commission in its 6.26.14



Order just 60 days before *Corgatelli* was decided <sup>2</sup>, that would not change the plain and literal words of Idaho Code §72-408 as they existed on the date when the Industrial Commission granted the Employer the invalid PPI credit in its 6.26.14 Order.

If the Industrial Commission had properly applied basic canons of statutory construction and simply followed the plain and unambiguous wording of Idaho Code §72-408 as written when it entered its 10.6.15 Order denying the Claimant's Petition For Declaratory Relief, the Commission would have reached the same conclusion reached by this Court in *Corgatelli* and set aside its 6.26.14 Order as void because the Commission gave Employer a PPI credit that it had no statutory authority to grant. The Industrial Commission cannot judicially construct a PPI credit for the Employer that was not authorized by the literal words of Idaho Code §72-408 on the date when the Commission entered its 6.26.14 Order:

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. Our decision is consistent with other jurisdictions that have considered similar issues and interpreted their workers' compensation statutes. *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150, 1154-1155 (2014) (emphasis supplied). .

The Employer in this case has admitted in its 5.12.16 Respondent's Brief that it clearly understands this Court' holding in *Corgatelli* and realizes that the Industrial Commission does not have the statutory authority to give an Employer credit for PPI payments paid before the Claimant is deemed totally and permanently disabled:

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<sup>2</sup> The Claimant has asked this Court to apply its holding in *Corgatelli* retroactively to the unique facts in this case. See discussion at pp. 28-34 of the Claimant's 4.15.16 Opening Brief.

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). (See p. 9, Ll. 10-13 of Employer's 5.12.16 Respondent's Brief) (emphasis supplied).

If the Employer understands that there is no statutory basis for the Industrial Commission to give an Employer a credit for PPI benefits paid before the Claimant is deemed totally and permanently disabled, then why has the Employer taken the unreasonable position throughout these proceedings that it is entitled to claim an invalid PPI credit that the Industrial Commission did not have the authority to grant?

All of the Employer's arguments are based on the false premise that the Commission's 6.26.14 Order is a valid final Order when the Employer knows that it is a void Order because the Commission did not have the statutory authority to grant the PPI credit. The Court should Order the Employer to pay the Claimant's attorney's fees at every stage of this litigation because it has denied the Claimant all of the total and permanent disability benefits that he is entitled to receive under Idaho Code §72-408 knowing the whole time that the Industrial Commission did not have the statutory authority to grant Employer the PPI credit <sup>3</sup>.

The bedrock principle at the heart of the Claimant's appeal is that the Industrial Commission exceeded the limited jurisdiction granted to it by Idaho Code §72-408 when it granted Employer a PPI credit not authorized by Idaho Code §72-408 <sup>4</sup>:

The Commission has no jurisdiction other than that which the legislature has specifically granted to it. The Commission therefore exercises limited

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<sup>3</sup> See Claimant's argument for attorney's fees at pp. 40-42 of Claimant's 4.15.16 Opening Brief and at pp. 28-30, *infra*.

<sup>4</sup> The Industrial Special Indemnity Fund agrees with the premise that the Industrial Commission only has limited jurisdiction and can only perform those acts specifically authorized by statute. See pages 8-10 of ISIF's 5.12.16 Response Brief.

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).

In *Curr v. Curr*, 124 Idaho 686, 864 P.2d 132 (1993), the Court pointed out: "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 I.C. § 72-508." *Id.* at 691, 864 P.2d at 137. *St. Alphonsus Regional Medical Center v. Edmondson*, 130 Idaho 108, 111, 937 P.2d 420, 424 (1997).

As an agency of limited jurisdiction that derives its authority from the workers' compensation Act, the Industrial Commission had a duty to follow the plain and literal words of Idaho Code §72-408 as written by the legislature and did not have the authority to judicially construct a credit which is not authorized by Idaho Code §72-408:

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 [Industrial Commission] cannot judicially construct a credit for employers into worker's compensation law. *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150, 1154-1155 (2014).

Since the Industrial Commission did not have the authority to judicially construct a PPI credit into the language of Idaho Code §72-408, this Court should enter a dispositive ruling that the Commission's 6.26.14 Order is void:

A judgment of a court without jurisdiction is void, and void judgments may be attacked at any time. *Burns v. Baldwin*, 138 Idaho 480, 486, 65 P.3d 502, 508 (2003) (emphasis supplied).

[A] judgment by a tribunal without authority, or which exceeds or lies beyond its authority, is necessarily void, and may be shown to be so in collateral proceedings, even though it be a court of general jurisdiction, because no authority derived from the law can transcend the source from whence it came. 33 Idaho at 462, 195 P. at 627 (emphasis added), cited with approval in

*Spaulding v. Childrens' Home Finding and Aid Society of North Idaho, Inc.*, 89 Idaho 10, 25, 402 P.2d 52, 67 (1965). We have also stated that "[a] void judgment is a nullity, and no rights can be based thereon; it can be set aside on motion or can be collaterally attacked at any time." *Prather v. Loyd*, 86 Idaho 45, 50, 382 P.2d 910, 915 (1963) (citations omitted). Thus, the issue of whether a court has exceeded its jurisdiction is always open to collateral attack in Idaho. *Andre v. Morrow*, 106 Idaho 455, 459, 680 P.2d 1355, 1359 (1984) (emphasis supplied).

Granted that a court has jurisdiction of the parties and subject matter of an action, its judgment may nevertheless be void if it does not have jurisdiction to render the particular relief which the judgment undertakes to grant. *Maloney v. Zipf*, 41 Idaho 30, 237 P. 632; *Baldwin v. Anderson*, 51 Idaho 614, 8 P.2d 461; *Curtis v. Siebrand Bros. Circus & Carnvial Co.*, 68 Idaho 285, 194 P.2d 281.

The action of the court in granting a lien to the husband and against the community property of the parties was in excess of its authority and void.

Judgments may be entered in cases where the court has undoubted jurisdiction over the subject-matter, and of the parties, yet nevertheless may be void because the court decided some question which it had no power to decide, or granted some relief which it had no power to grant. If a court grants relief which under no circumstances it has any authority to grant, its judgment is to that extent void, \* \* \*. (\* \* \* *Gile v. Wood*, 32 Idaho 752, 188 P. 36; *Bridges v. Clay County Supervisors*, 57 Miss. 252; *Seamster v. Blackstock*, 83 Va. 232, 2 S.E. 36, 5 Am.St.Rep. 262; \* \* \*)' *Wright v. Atwood*, 33 Idaho 455, at page 461, 195 P. 625, at page 627. *Martin v. Soden*, 81 Idaho 274, 284-285, 340 P.2d 848, 854-855 (1959) (emphasis supplied).

Although the Claimant argued to the Industrial Commission that it should set aside its 6.26.14 Order because the Commission lacked jurisdiction to award a PPI credit that was not authorized by Idaho Code §72-408, the Commission completely ignored the Claimant's statutory construction arguments and lack of jurisdiction arguments and did not even mention Idaho Code §72-408 a single time in its 10.6.15 Order denying the Claimant's Petition For Declaratory Relief (R. pp. 99-112). The Commission's decision to completely ignore the plain

language of Idaho Code §72-408 without discussion or analysis is difficult to comprehend since the Commission literally derives its authority from the statute and the plain words of Idaho Code §72-408 should determine the validity of the Commission's 6.26.14 Order and the outcome of this case.

When the Employer filed its Respondent's Brief on 5.12.16, the Employer adopted the same approach as the Industrial Commission and completely ignored the Claimant's limited jurisdiction arguments and statutory construction arguments and did not even mention Idaho Code §72-408 a single time in its entire 18-page Brief. If the Employer truly believed that the plain and unambiguous language of Idaho Code §72-408 gave the Industrial Commission the authority to grant Employer a PPI credit when the Commission entered its 6.26.14 Order, then the Employer had an obligation to present contrary legal argument and contrary legal authority in its 5.12.16 Respondent's Brief to support that position:

Theories and defenses should be determined by the parties, not the tribunal. Just as in *Sales*, where we held it was error for the district court to raise an affirmative defense not raised by the parties, the Commission erred here in raising collateral estoppel, which was never raised by Employer/Surety before the Commission invited briefing on the issue. Although Employer/Surety may not have known the complete substance of the ISIF agreement, there is no question it knew ISIF had settled with Deon and therefore knew ISIF had accepted some level of liability to Deon. Despite this knowledge, either intentionally or by oversight, Employer/Surety chose not to raise estoppel theories as a defense to Deon's claim. In *Heitz*, we held that a party is bound by the theory upon which it tries its case. We cannot speak to the reasons Employer/Surety failed to assert estoppel, but just as in *Sales* and *Heitz*, Employer/Surety is held to that choice. The Commission cannot raise the defense of collateral estoppel for Employer/Surety even if it felt Employer/Surety would have prevailed had it chosen to raise the issue. Our system works best when the parties devise their own litigation strategies. *Deon v. H&J, Inc.*, 157 Idaho 665, 671, 339 P.3d 550, 557 (2014) (emphasis supplied).

The Employer in this case chose to remain silent on the fundamental threshold issue of whether the Industrial Commission exceeded its limited jurisdiction by granting a PPI credit not authorized by Idaho Code §72-408. The Employer in this case chose to remain silent on whether the Industrial Commission properly employed the canons of statutory construction when it interpreted the literal words of Idaho Code §72-408.

By choosing to remain silent and not present any contrary argument or legal authority on these threshold jurisdictional issues, the Employer has effectively conceded the merit of the Claimant's arguments and admitted that Industrial Commission exceeded its limited jurisdiction because the plain language of Idaho Code §72-408 does not give the Industrial Commission the jurisdiction to award a PPI credit:

When the opening brief contains no authority on an issue presented, it is immaterial that the party provides authority either in a reply brief or in supplemental briefing because the issue had already been waived. *See Estes*, 132 Idaho at 87, 967 P.2d at 289. *Gallagher v. State*, 141 Idaho 665, 669, 115 P.3d 756, 760 (2005).

The Employer in this case chose to remain silent and not offer any contrary argument or legal authority in opposition to the Claimant's limited jurisdiction and statutory construction arguments because the Employer cannot refute the logic of this Court's holding in *Corgatelli* and just invent a PPI credit which does not exist anywhere in the entire workers' compensation Act. If the Employer wants the legal right to claim a PPI credit against its obligation to pay total and permanent disability benefits, then its remedy is to ask the legislature to amend Idaho

Code §72-408 because the Industrial Commission and the Court do not have the authority to legislate from the bench and judicially construct a credit which does not exist in the statute.

- (2) THE EMPLOYER HAS CONCEDED THAT THE INDUSTRIAL COMMISSION EXCEEDED ITS LIMITED JURISDICTION AND ENTERED A VOID ORDER WHEN IT APPROVED A COMPENSATION AGREEMENT THAT DID NOT CONFORM TO THE PROVISIONS OF THE LAW IN DIRECT VIOLATION OF IDAHO CODE §72-711

The Claimant also argued in his 4.15.16 Opening Brief that the Industrial Commission exceeded the limited jurisdiction granted to it by Idaho Code §72-711 when it approved a compensation agreement that did not conform to the provisions of the law:

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** (underline and bold supplied).

The compensation agreement approved by the Industrial Commission in its 6.26.14 Order did not conform to the provisions of the workers' compensation Act because Idaho Code §72-408 does not authorize the Commission to grant the Employer a PPI credit.

When the Employer admitted on page 9 of 5.12.16 Respondent's Brief that it clearly understood this Court's holding in *Corgatelli* and admitted that it knows that there is absolutely no statutory authority in the entire workers' compensation Act which gives the Industrial Commission the statutory authority to award the Employer a PPI credit, that was tantamount to an admission that the Industrial Commission exceeded the limited jurisdiction of Idaho Code §72-711 when it approved a compensation agreement which did not conform to the provisions

of the law. However, rather than offer cogent legal argument and authority to support its position that the Commission did not exceed the limited jurisdiction granted to it by Idaho Code §72-711 when it approved a compensation agreement which did not conform to the provisions of the law, the Employer simply chose to dodge the Idaho Code §72-711 issue by making the absurd argument that the stipulation in this case was not really a compensation agreement subject to the requirements of Idaho Code §72-711, but rather a mere stipulation to dismiss like the stipulation to dismiss found in *Emery v. J.R. Simplot Co.*, 141 Idaho 407, 111 P.3d 92 (2005):

The Stipulation is not a lump-sum settlement agreement as contemplated by Idaho Code § 72-404, or a compensation agreement under Idaho Code § 72-711; 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" *See also Emery v. J.R. Simplot Co.*, 141 Idaho 407, 410, 111 P.3d 92, 95 (2005) (See p. 8, Ll. 5-11 of Employer's 5.12.16 Response Brief) (emphasis supplied).

The Employer cannot avoid the limited jurisdiction problem created by Idaho Code §72-711 simply by making the absurd argument that the compensation agreement in this case is not really a compensation agreement but merely a stipulation to dismiss like the stipulation in *Emery*. Unlike the stipulation in *Emery*, the compensation agreement in this case requires the Employer and the ISIF to make periodic monthly payments of total and permanent disability benefits to the Claimant each month beginning on the stipulated date of MMI on 10.1.13 and continuing each month thereafter for the rest of the Claimant's life pursuant to Idaho Code §72-408 and Idaho Code §72-409. The stipulation in this case is clearly a compensation agreement



which requires periodic payments and is clearly subject to the requirements of Idaho Code §72-711.

There are only 2 types of agreements that can be used by the Employer and the ISIF under the workers' compensation Act to resolve their liability for the payment of total and permanent disability benefits: (1) the parties can enter into a lump sum settlement agreement which must be approved by the Industrial Commission pursuant to Idaho Code §72-404; or (2) the parties can enter into a compensation agreement like the one in this case which requires the periodic payment of monthly total and permanent disability benefits pursuant to Idaho Code §72-408 and Idaho Code §72-409 which must be approved by the Industrial Commission pursuant to Idaho Code §72-711:

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) (emphasis supplied).

If the Employer was going to seriously contend that the compensation agreement in this case was not really a compensation agreement that is subject to the requirements of Idaho Code §72-711, then the Employer had an obligation to present cogent legal argument and legal authority to support its argument that the compensation agreement in this case was not subject to the requirements of Idaho Code §72-711:

When the opening brief contains no authority on an issue presented, it is immaterial that the party provides authority either in a reply brief or in supplemental briefing because the issue had already been waived. *See Estes*, 132

Idaho at 87, 967 P.2d at 289. *Gallagher v. State*, 141 Idaho 665, 669, 115 P.3d 756, 760 (2005).

The Employer's entire legal analysis of the Claimant's Idaho Code §72-711 argument consisted of deliberately mischaracterizing the compensation agreement as a mere stipulation to dismiss. By choosing to remain silent on the merits of the Idaho Code §72-711 limited jurisdiction issue and not make any cogent legal argument or cite any contrary legal authority, the Employer has effectively conceded that the 6.26.14 Order granting the invalid PPI credit is void pursuant to Idaho Code §72-711 because it did not conform to the provisions of the act.

- (3) THE EMPLOYER HAS CONCEDED THAT THE INDUSTRIAL COMMISSION EXCEEDED ITS LIMITED JURISDICTION AND ENTERED A VOID ORDER WHEN IT VIOLATED IDAHO CODE §72-318(1) BY APPROVING A COMPENSATION AGREEMENT THAT RELIEVED THE EMPLOYER OF PART OF ITS LIABILITY TO PAY CLAIMANT ALL TOTAL AND PERMANENT DISABILITY BENEFITS THAT ARE REQUIRED BY IDAHO CODE §72-408

The Claimant has already established that Idaho Code §72-408 did not give the Industrial Commission the statutory authority to grant Employer a credit for PPI benefits paid before the Claimant was deemed totally and permanently disabled. Since the compensation agreement in this case relieved the Employer of its liability to pay a portion of the total and permanent disability benefits that are required by Idaho Code §72-408, the agreement must be declared invalid under Idaho Code §72-318(1):

72-318. INVALID AGREEMENTS -- PENALTY. (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 (emphasis and bold supplied).

The plain and unambiguous language of Idaho Code §72-318(1) clearly states that any agreement, contract or device which relieves an Employer in whole or in part from any liability created by the Act must be treated as an invalid agreement. Based on the basic canons of statutory construction announced by this Court *Mayer*, the Industrial Commission had a duty to simply follow the plain and unambiguous language of Idaho Code §72-318(1) as written and declare the compensation agreement invalid because it relieved the Employer of having to pay Claimant \$39,649.50 in total and permanent disability benefits that the Employer is obligated to pay pursuant to Idaho Code §72-408.

The Claimant argued that the compensation agreement in the case must be declared invalid under Idaho Code §72-318(1) at pages 21-23 of his 4.15.16 Opening Brief. However, when the Employer filed its 5.12.16 Respondent's Brief, the Employer completely ignored the Claimant's Idaho Code §72-318(1) arguments and failed to present any cogent legal argument or legal authority to support its position that the compensation agreement in this case did not violate Idaho Code §72-318(1). The Employer did not even mention Idaho Code §72-318(1) a single time in its entire Brief:

When the opening brief contains no authority on an issue presented, it is immaterial that the party provides authority either in a reply brief or in supplemental briefing because the issue had already been waived. *See Estes*, 132 Idaho at 87, 967 P.2d at 289. *Gallagher v. State*, 141 Idaho 665, 669, 115 P.3d 756, 760 (2005).

By choosing to remain completely silent on the Idaho Code §72-318(1) issue and not make any cogent legal argument or cite any contrary legal authority in response to the Claimant's Idaho Code §72-318(1) arguments, the Employer has effectively conceded the merit of the Claimant's Idaho Code §72-318(1) argument and this Court should declare the compensation agreement invalid to the extent that it relieved the Employer of part of its obligation to pay all of the total and permanent disability benefits that are required by Idaho Code §72-408.

(4) IDAHO CODE §72-318(2) PROHIBITS ALL AGREEMENTS WHICH REQUIRE AN EMPLOYEE TO WAIVE HIS RIGHTS TO COMPENSATION UNDER THE ACT

The Claimant has proven that Idaho Code §72-408 does not authorize the Industrial Commission to grant the Employer a credit for PPI benefits paid before the Claimant was deemed totally and permanently disabled. Since the compensation agreement in this case required the Claimant to give Employer an invalid PPI credit of \$39,649.50 and thereby waive his rights to receive all of the total and permanent disability benefits that he is entitled to receive under Idaho Code §72-408, the agreement must be declared invalid under Idaho Code §72-318(2):

72-318. INVALID AGREEMENTS -- PENALTY.

(2) **No agreement by an employee to waive his rights to compensation under this act shall be valid.** (emphasis and bold supplied)

The plain and unambiguous language of Idaho Code §72-318(2) states that all agreements which require the employee to waive his rights to compensation under the act are invalid. Based on the canons of statutory construction discussed in *Mayer*, the Industrial

Commission had a duty to simply follow the plain language of Idaho Code §72-318(2) as written and declare the compensation agreement invalid because it required the Claimant to waive his right to receive \$39,649.50 in total and permanent disability benefits that the Employer is required to pay pursuant to Idaho Code 72-408.

The Industrial Commission erred when it failed to apply basic canons of statutory construction and simply follow the plain and unambiguous language of the statute as written. Instead, the Commission misinterpreted this Court's holdings in *Emery v. J.R. Simplot Co.* 141 Idaho 407, 111 P.3d 92 (2005) and *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 207 P3d 1008 (2009) and ruled that Idaho Code §72-318(2) can only be used to invalidate agreements which require the Claimant to waive his rights to benefits that would be paid out of future claims.

The Employer actually responded to the Claimant's Idaho Code §72-318(2) argument and argued at page 11 of its 5.12.16 Respondent's Brief that *Emery* is controlling on this issue. Nothing could be further from the truth. The facts in *Emery* are clearly distinguishable from the facts in this case. The agreement in *Emery* was nothing more than a mere stipulation to dismiss a doubtful and dubious claim with prejudice which did not require the Employer to pay the Claimant any compensation for signing the stipulation to dismiss with prejudice.

The Commission found in *Emery* that the stipulation to dismiss did not violate Idaho Code §72-318(2) or Idaho Code §72-711 because the agreement did not require the payment of any compensation:

In its August 29, 2003, order denying the motion to vacate the Commission determined that I.C. § 72-711 was not relevant to this case because the stipulation was not "an agreement in regard to compensation." The Commission reasoned that since the stipulation addressed only the complaint filed by Emery and "not the income or medical benefits for which Defendant was or was not liable .... it cannot be considered an enforceable award of the Commission." Similarly, the Commission refused to characterize the stipulation as an agreement for a "lump sum" payment under I.C. § 72-404. Thus, the Commission's refusal to vacate its prior order approving the stipulation was based on its findings that there was consideration supporting the agreement, and that the agreement did not violate I.C. § 72-318(2). In other words, I.C. §§ 72-711 and 72-404 were not relevant to the determination of whether the Commission had the authority to approve the stipulation to dismiss with prejudice. *Emery v. J.R. Simplot Co.*, 141 Idaho 407, 411, 111 P.3d 92, 96 (2005) (emphasis supplied).

What is clear from this passage from *Emery* is that if the stipulation to dismiss had required the periodic payment of total and permanent disability benefits like the compensation agreement in this case, it would have been subject to Idaho Code §72-711 and Idaho Code §72-318(2). However, because the stipulation to dismiss did not require the payment of compensation, it did not violate Idaho Code §72-711 or Idaho Code §72-318(2). The converse is true in this case because the compensation agreement approved by the Commission in its 6.26.14 Order required the Employer and the ISIF to pay the Claimant total and permanent disability benefits at 45% of the average weekly state wage beginning on 10.1.13 and continuing each month thereafter for the rest of his life pursuant to Idaho Code §72-408 and Idaho Code §72-409 (R., p. 5, ¶11, Ll. 10-12).

After stating that the Claimant was entitled to receive total and permanent disability benefits at the statutory rate of 45% of the Average Weekly State Wage (AWSW), paragraphs 11 and 12 of the compensation agreement then required the Claimant to waive \$39,649.50 of his

total and permanent disability benefits based on the invalid PPI credit that the Industrial Commission had no statutory authority to grant to the Employer.

Paragraphs 11 and 12 of the compensation agreement obviously require the Claimant to waive his rights to receive \$39,649.50 in total and permanent disability benefits that are required to be paid pursuant to Idaho Code §72-408 and must be declared invalid based on the plain and unambiguous language of Idaho Code §72-318(2).

The Employer cited *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 207 P.3d 1008 (2009) for the proposition that Idaho Code §72-318(2) can only be used to invalidate agreements that waive compensation rights stemming from future unknown injuries<sup>5</sup>. The Industrial Commission misinterpreted this Court's holding in *Wernecke* in the same manner (R. p. 109, Ll. 5-15). However, the plain and literal words of Idaho Code §72-318(2) do not limit application of that code section to agreements which only waive rights to compensation arising from future claims. Just like this Court held in *Corgatelli*, the Commission and the Court do not have the authority to judicially construct limitations which do not appear in the literal words of the statute. This Court should take this opportunity to clarify that the plain and literal language of Idaho Code §72-318(2) applies to all agreements that require the Claimant to waive his right to compensation and is not limited to only agreements which require the Claimant to waive his right to benefits arising from future claims.

**1. Idaho Code Section 72-318(2) Applies to All Agreements Purporting To Waive Rights to Compensation Under the Act.**

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<sup>5</sup> See p. 13, Ll. 1-3 of Employer's 5.12.16 Respondent's Brief.

The cases on which ISIF relies to support its argument do not consider the issue of whether section 72-318(2) only applies to agreements between an employee and an employer. In *Osick v. Public Employee Retirement System of Idaho*, 122 Idaho 457, 835 P.2d 1268 (1992), we held that an agreement offsetting the amount an employee was receiving under worker's compensation against the employee's public employee retirement benefits did not violate section 72-318. *Id.* at 461, 835 P.2d at 1272. The agreement did not relieve the employer from its liability under the Act or otherwise reduce the employee's worker's compensation benefits. *Id.* Instead, only PERSI (the Public Employee Retirement system) was relieved of part of its liability to pay disability retirement benefits and the relevant Idaho law did not prohibit a reduction of disability retirement benefits. *Id.* Therefore, the claimant received his full entitlement of worker's compensation, and no violation of section 72-318 occurred. *Id.* Notably absent from the case is any discussion of whether section 72-318(2) applies to employee agreements with parties other than the employer. ISIF, however, extracts the following quote from *Osick*: " I.C. § 72-318 does not, however, prohibit a reduction of disability retirement benefits. It only prohibits an agreement by an employee to relieve an employer of an obligation that the employer has because of the [worker's] compensation laws." *Osick*, 122 Idaho at 461, 835 P.2d at 1272. Based on this quote, ISIF argues that the statute " only" prohibits certain agreements between employees and employers. When reading *Osick* in its entirety, however, it is apparent that ISIF's position is incorrect. The rationale behind the Court's holding was that because the obligation and amount of worker's compensation benefits were not affected by offsetting the amount PERSI was obligated to pay for disability retirement benefits, no violation of Idaho Code section 72-318 occurred. *Id.* ...

In keeping with the purposes of the Act, section 72-318(2) must be interpreted to prohibit all agreements that waive an employee's rights to compensation under the Act. To hold otherwise would mean that subsection (2) is mere surplusage and would require a tortured interpretation of the statutory language. *Wernecke, supra*, at 147 Idaho 283, 207 P.3d 1014 (2009) (underline supplied).

The *Wernecke* Court analyzed the *Osick* agreement and held that it did not violate Idaho Code §72-318 because it *did not relieve the employer from its liability under the Act or otherwise reduce the employee's worker's compensation benefits.* The exact opposite is true in this case. Paragraphs 11 and 12 of the compensation agreement grant the Employer an invalid



PPI credit which is not authorized by Idaho Code §72-408. Paragraphs 11 and 12 relieve the Employer of its liability to pay the Claimant all of the total and permanent disability benefits that he is entitled to receive under Idaho Code §72-408. And paragraphs 11 and 12 definitely reduced the amount of the Claimant's total and permanent disability benefits by \$39,649.50. If the *Osick* agreement had these characteristics, this Court would have declared it invalid under Idaho Code §72-318(2).

This Court has recently held that any agreement can be declared invalid under Idaho Code §72-318 if the Claimant can prove that the agreement violates any provision of the act or is illegal for some other reason.

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) (underline supplied).

Unlike the Claimant in *Morris*, the Claimant in this case has alleged and proved that the invalid PPI credit that the Commission granted to the Employer violated Idaho Code §72-408, Idaho Code §72-711, Idaho Code §72-318(1) and Idaho Code §72-318(2). Since the invalid PPI credit in the compensation agreement relieves the Employer of its liability to pay the Claimant the full measure of his future total and permanent disability benefits from week 90 to week 225 and requires the Claimant to waive \$39,649.50 in future total and permanent disability benefits

in violation of Idaho Code §72-408, the Court should reverse the Industrial Commission and declare the PPI credit void under Idaho Code §72-318(1) and Idaho Code §72-318(2).

(5) THIS COURT'S HOLDING IN CORGATELLI SHOULD BE APPLIED RETROACTIVELY TO THE FACTS OF THIS CASE

The Employer argues that this Court's holding in *Corgatelli* should not be applied retroactively because an unknown number of cases would have to be re-opened and forcing Employers to reimburse Claimants for the invalid PPI credits that they took in violation of Idaho Code §72-408 might cause significant financial harm to other Employers<sup>6</sup>. The Court should reject this argument because it rests on pure speculation. There is absolutely no reliable evidence in the record before this Court which quantifies the actual number of total and permanent disability cases still in existence where the Employer received an invalid PPI credit that the Industrial Commission was not authorized to grant under Idaho Code §72-408. The Court should not deprive the Claimant in this case of the sure and certain relief of \$39,649.50 in total and permanent disability benefits that he is entitled to receive under Idaho Code §72-408 based on pure speculation about the amount of invalid PPI credits that other Employers might be required to reimburse in future cases.

The Employer has also asked this Court to weigh the equities and protect Employers from the financial harm that they might suffer if they have to reimburse totally and permanently disabled workers for the invalid PPI credits that they were never legally authorized to claim in the first place. The Claimant agrees with the Employer that this Court should balance the

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<sup>6</sup> See p. 13, Ll. 14-16 and p. 15, Ll. 7-10 of Employer's 5.12.16 Respondent's Brief.

equities and ask itself which party is in the better position to bear the financial risk of the invalid

PPI credit:

The totally and permanently disabled injured worker who is living on a fixed income but did not receive all of the total and permanent disability benefits that he is entitled to receive under Idaho Code §72-408 or the corporate Employer who has worker's compensation insurance to cover the risk of having to reimburse injured workers for the invalid PPI credits that they took without authority in violation of Idaho Code §72-408?

The public policy of this state requires the Employer / Surety to bear the financial burden of providing the injured worker with all of the sure and certain relief that he is entitled to receive under the workers' compensation Act:

Idaho's workers' compensation law is remedial legislation. It is a well-known canon of statutory construction that remedial legislation is to be liberally construed to give effect to the intent of the legislature. *State By and Through Alan G. Lance v. Hobby Horse Ranch Tractor and Equip. Co.*, 129 Idaho 565, 567, 929 P.2d 741, 743 (1996) (citing NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 60.01 at 147 (5th ed. 1992)). The intent of the Idaho Legislature in enacting the workers' compensation law was to provide "sure and certain relief for injured workmen . . . regardless of questions of fault and to the exclusion of every other remedy." ...

"The policy dictating Idaho adoption of its workers' compensation law is stated as: The welfare of the state depends upon its industries and even more upon the welfare of its wageworkers. The state of Idaho, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for injured workmen and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as is otherwise provided in this act, and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as is in this law provided. I.C. § 72-201. 'We must liberally construe the provisions of the workers' compensation law in favor of the employee, in order to serve the humane purpose for which the law was promulgated.'" *Murray-Donahue v. Nat'l Car Rental Licensee Ass'n*, 127 Idaho 337, 340, 900

P.2d 1348, 1351 (1995) (citing *Davaz v. Priest River Glass Co., Inc.*, 125 Idaho 333, 337, 870 P.2d 1292, 1296 (1994)). *Page v. McCain Foods, Inc.*, 141 Idaho 342, 345, 109 P.3d 1084, 1087 (2005).

The public policy of this state is to provide sure and certain relief to injured workers and their families. This Court should liberally construe the language of Idaho Code §72-408 in favor of the injured worker and balance the equities by requiring the Employer to provide the Claimant with all of the total and permanent disability benefits that he is entitled to receive under Idaho Code §72-408.

Based on the arguments made by the Claimant at pp. 27-34 of his 4.15.16 Opening Brief and a proper balancing of the equities between the totally and permanently disabled worker and the corporate employer, the Claimant respectfully requests that the Court apply its holding in *Corgatelli* retroactively to the unique facts present in this case and set aside the Industrial Commission's 6.26.14 Order as a void Order that the Commission lacked jurisdiction to enter.

(6) THE COURT SHOULD REJECT ALL OF THE EMPLOYER'S OTHER ARGUMENTS THAT ARE BASED ON THE FALSE PREMISE THAT THE INDUSTRIAL COMMISSION'S 6.26.14 ORDER WAS A VALID FINAL ORDER

The Employer has made the following arguments in an effort to convince this Court that it lacks jurisdiction to consider the issues raised by the Claimant's appeal:

- (a) The Complaint was dismissed with prejudice by a valid final order (*See* p. 4 of Employer's Brief);
- (b) The Claimant did not file a motion for reconsideration or an appeal from a valid final order as required by Idaho Code §72-718 (*See* pp. 4-6 of Employer's Brief);
- (c) The doctrine of *res judicata* bars the Claimant's attempt to modify the Commission's valid final order (*See* pp. 6-7 of Employer's Brief);
- (d) The Commission lacks jurisdiction to modify a valid final order pursuant to Idaho Code §72-719 more than 5 years after the date of the industrial accident (*See* pp. 7-8 of Employer's Brief);

- (e) The stipulation to dismiss with prejudice was merged into a valid final order pursuant to JRP 12(D) (*See* pp. 8-11 of Employer's Brief); and,
- (f) Granting the Employer an invalid PPI credit in violation of Idaho Code §72-408 does not constitute an impermissible waiver under Idaho Code §72-318(2) (*See* pp. 11-13).

All of these arguments rest on the same false premise that the Industrial Commission's 6.26.14 Order is a valid final Order which cannot be modified. However, if the Court agrees with the Claimant's argument and rules that the Commission's 6.26.14 Order is not a valid final Order, but rather a void Order because the Commission exceeded its limited jurisdiction by granting the Employer a PPI credit that is not authorized by Idaho Code §72-408 or any provision of the Workers' Compensation Act, then all of the Employer's arguments that are based on the false premise of a valid final order must fail:

However, neither of these doctrines applies in the case of a contract that violates the law. If a contract is illegal and void, the court will leave the parties as it finds them and refuse to enforce the contract. The contract cannot be treated as valid by invoking waiver or estoppel. *Whitney v. Cont'l Life & Accident Co.*, 89 Idaho 96, 105, 403 P.2d 573, 579 (1965). Therefore, because the Agreement was illegal and violative of the Act, ISIF cannot rely on the doctrines of waiver and estoppel to enforce the Agreement against Wernecke. Absent limited circumstances not present here, this Court will not enforce an illegal contract, regardless of the fact that the parties knowingly entered into that contract. ...

In order for claim preclusion to bar a subsequent action there are three requirements: (1) same parties; (2) same claim; and (3) a valid final judgment. *Id.* at 124, 157 P.3d at 618. ...

Because we have determined that the Agreement and ensuing order were void, there is no " valid final judgment," and *res judicata* does not bar the present claim. ...

One of the five elements is that there was a final judgment on the merits in the prior litigation. *Id.* Whether collateral estoppel bars the litigation of an issue is a question of law which we freely review. *Maroun v. Wyreless Sys., Inc.*, 141

Idaho 604, 617, 114 P.3d 974, 987 (2005). In this case, the Agreement and order were void and cannot be the basis for imposing collateral estoppel because there is no valid final judgment.

III.

Because the Agreement violates the Act and because the Commission's order is void, we vacate the Commission's decision and remand the case for further proceedings. *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 287-288, 207 P.3d 1008, 1018-1019 (2009) (emphasis supplied).

The Claimant in this case has conclusively proved that the Industrial Commission's 6.26.14 Order was not a valid final Order because the Industrial Commission exceeded the limited jurisdiction granted to it by Idaho Code §72-408 and Idaho Code §72-711 when it granted Employer the invalid PPI credit. Since all of the Employer's arguments are based on the false premise that the Industrial Commission entered a valid final order, all of the Employer's arguments must fail. This Court should declare the 6.26.14 Order void and set it aside pursuant to its holdings in *Burns v. Baldwin*, 138 Idaho 480, 486, 65 P.3d 502, 508 (2003), *Andre v. Morrow*, 106 Idaho 455, 459, 680 P.2d 1355, 1359 (1984) and *Martin v. Soden*, 81 Idaho 274, 284-285, 340 P.2d 848, 854-855 (1959).

(7) THE INDUSTRIAL COMMISSION ERRED WHEN IT RULED THAT THE CLAIMANT WAS NOT ENTITLED TO AN AWARD OF ATTORNEY'S FEES PURSUANT TO IDAHO CODE §72-804

This Court has held that an award of attorney's fees is appropriate under Idaho Code §72-804 if any of the following conditions has been met :

Attorney fees are awardable under Idaho Code § 72-804, if the employer/surety (a) contested a claim without a reasonable ground; or (b) neglected or refused to pay the compensation within a reasonable time after receipt of a written claim; or (c) discontinued payment of compensation without reasonable grounds. Whether or not grounds exist for awarding a claimant attorney fees under the

statute is a factual determination that rests with the Industrial Commission. *Gooby v. Lake Shore Mgmt. Co.*, 136 Idaho 79, 29 P.3d 390 (2001). The Commission's decision regarding the awarding of attorney fees will be upheld if it is based upon substantial, competent evidence. *Id. Lorca-Merono v. Yokes Washington Foods, Inc.*, , 137 Idaho 446, 456, 50 P.3d 461, 471 (2002).

The Employer has admitted that it understands this Court's holding in *Corgatelli* and realizes that there is absolutely no statutory provision in the entire workers' compensation Act which gives the Industrial Commission the authority to grant the Employer a PPI credit:

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). (*See* p. 9, Ll. 10-13 of Employer's 5.12.16 Respondent's Brief) (emphasis supplied).

If the Employer knows that there was no statutory authority for the Industrial Commission to grant its PPI credit, then it is axiomatic that the Employer likewise knows that the Commission's 6.26.14 Order is void because the Industrial Commission acted beyond its limited jurisdiction when it granted a PPI credit that is not authorized by any provision in the entire workers' compensation Act. In spite of that knowledge, the Employer has: (a) contested the Claimant's right to receive all of his total and permanent disability benefits that he is entitled to receive under Idaho Code §72-408 without reasonable grounds; (b) neglected or refused to pay the Claimant all of his total and permanent disability compensation benefits within a reasonable time after receipt of the Claimant's 1.15.15 written claim for benefits without reasonable grounds (R. pp. 53-54); and (c) discontinued payment of compensation without reasonable grounds.

The Employer's refusal to pay Claimant all of his total and permanent disability benefits that are required by Idaho Code §72-408 is based on the false premise that the Industrial Commission had the statutory authority to grant the Employer the invalid PPI credit in its 6.26.14 Order. After reading this Court's holding in *Corgatelli*, the Employer knew for certain that the Industrial Commission exceeded its limited jurisdiction when it granted the Employer a PPI credit that is not authorized by any provision of workers' compensation Act. After reading this Court's holding in *Corgatelli*, the Employer knew for certain that the Industrial Commission's 6.26.14 Order was void because the Industrial Commission exceeded its limited jurisdiction when it granted a PPI credit not authorized by statute.

The Employer's cannot justify its refusal to pay the Claimant all the total and permanent disability benefits that he is entitled to receive under Idaho Code §72-408 based on the false pretense of a valid final order when the Employer knows that it is really a void order entered in excess of the Commission's limited jurisdiction. Pretending that a void Order is a valid final Order when you know that position is false is clearly unreasonable conduct that should justify an award of attorney's fees under Idaho Code §72-804.

This Court should reverse the Industrial Commission's denial of the Claimant's request for attorney's fees and award the Claimant attorney fees and costs against the Employer beginning on the date when Claimant made his claim for the payment of total and permanent disability benefits on 1.15.15 through all stages of this claim pursuant to Idaho Code §72-804 and this Court's holding in *Stevens- McAtee v. Pottlatch Corp.*, 145 Idaho 325, 337, 179 P.3d 288, 300 (2008).



(8) THERE IS NO FACTUAL OR LEGAL BASIS TO AWARD EMPLOYER ATTORNEY'S FEES AGAINST CLAIMANT OR CLAIMANT'S COUNSEL PURSUANT TO IDAHO APPELLATE RULE 11.2

This Court held in *Corgatelli* that there is absolutely no statutory basis for the Industrial Commission to grant an Employer a credit for PPI benefits paid before the Claimant was deemed totally and permanently disabled. Based on that holding, it is axiomatic that the Industrial Commission did not have the statutory authority or jurisdiction to award the Employer in this case a PPI credit of \$39,649.50 in its 6.26.14 Order. Since the Commission lacked the statutory jurisdiction to grant the PPI credit, it is axiomatic that the Commission's 6.26.14 Order is void to the extent that the Commission granted Employer relief that the Commission did not have the authority to grant. This Court always has the authority to set aside void Orders at any time. *Burns v. Baldwin*, 138 Idaho 480, 486, 65 P.3d 502, 508 (2003), *Andre v. Morrow*, 106 Idaho 455, 459, 680 P.2d 1355, 1359 (1984) and *Martin v. Soden*, 81 Idaho 274, 284-285, 340 P.2d 848, 854-855 (1959).

The Claimant's Petition For Declaratory Ruling and this Appeal are clearly warranted by existing law and by the good faith argument for the extension of existing law. The plain and literal language of Idaho Code §72-408 supports the Claimant's position that the Industrial Commission lacked jurisdiction to grant Employer a PPI credit. Employer did not even discuss how this Court should interpret Idaho Code §72-408 once in its entire 18-page 5.12.16 Respondent's Brief or address the Claimant's limited jurisdiction argument.

The Claimant's argument that the Commission exceeded its limited jurisdiction granted to it under Idaho Code §72-711 when it approved a compensation agreement that did not

conform to the provisions of the law is supported by the plain language of Idaho Code §72-408 and Idaho Code §72-711. The Employer did not discuss the merits of the Claimant's Idaho Code §72-711 arguments but instead chose to dodge the Idaho Code §72-711 issue by making the absurd statement that the compensation agreement in this case was not really a compensation agreement but merely a stipulation to dismiss, even though the agreement requires the periodic payment of total and permanent disability benefits each month for the rest of the Claimant's life pursuant to Idaho Code §72-408 and Idaho Code §72-409.

The Claimant's argument that the compensation agreement in this case should be treated as an invalid contract under plain language of Idaho Code §72-318(1) is supported by existing law because the compensation agreement is obviously an agreement, contract or device which relieves the Employer in whole or in part from its liability to pay all of the total and permanent disability benefits that Employer is obligated to pay Idaho Code §72-408. The Employer did not even address the Claimant's Idaho Code §72-318(1) arguments in its 5.12.16 Respondent's Brief.

The Claimant's argument that the compensation agreement in this case violates the plain language of Idaho Code §72-318(2) is supported by existing law because the compensation agreement obviously requires the Claimant to waive his right to receive \$39,649.50 in PPI benefits that the Claimant is entitled to receive under Idaho Code §72-408. The Employer did not even address the plain language of Idaho Code §72-318(2) but attempted to avoid the outcome of a proper statutory analysis by misinterpreting this Court's holding in *Emery* and *Wernecke*.

The Claimant's argument that this Court's holding in *Corgatelli* should be applied retroactively to the unique facts of this case is supported by existing law and by a good faith argument for the extension of existing law. The Employer asked the Court to weigh the equities and protect Employers in other cases from the financial burden of having to reimburse totally and permanently disabled workers for invalid PPI credits that the Employers took in violation of Idaho Code §72-408. A balancing of the equities supports Claimant's position.

The Employer argues that the Claimant's Appeal was filed for an improper purpose to harass, cause unnecessary delay and needlessly increase the cost of litigation. This argument is truly ironic since it is actually the Employer's unreasonable refusal to pay the Claimant all of his total and permanent disability benefits that he is entitled to receive under Idaho Code §72-408 based on the false premise that the Commission's 6.26.14 void Order is a valid final Order that is truly unreasonable, vexatious and harassing.

The Employer has admitted that it knows that the Industrial Commission did not have any statutory authority to grant the invalid PPI credit but it continues to hide behind the false premise that the Commission's 6.26.14 Order was a valid final Order which bars all future proceedings. The Employer's refusal to pay the benefits required by Idaho Code §72-408 based on a void Order that the Industrial Commission lacked the jurisdiction to enter is clearly frivolous and without any foundation in fact or law.

Given the facts of this case, the Claimant could have easily asserted a claim for attorney's fees against Employer's Defense counsel pursuant to I.A.R. 11.2 because he has evidently advised his clients to refuse to pay all of the total and permanent disability benefits

that the Claimant is entitled to receive pursuant to Idaho Code §72-408 and Idaho Code §72-409 based on the false premise that a void Order is a valid final order when he clearly knows otherwise. The Claimant chose to not waste this Court's scarce judicial resources with unnecessary *ad hominen* attacks.

**(B) REBUTTAL OF THE ISIF'S ARGUMENTS**

**(1) THE ISIF CANNOT RAISE NEW ISSUES ON APPEAL THAT IT DID NOT RAISE IN ITS LIMITED APPEARANCE BEFORE THE INDUSTRIAL COMMISSION**

The Claimant filed his Petition For Declaratory Ruling with the Industrial Commission pursuant to JRP 15 on 2.26.15 (R., pp. 13-17). The ISIF filed on its Limited Appearance To Challenge Subject Matter Jurisdiction and Service of Process with the Industrial Commission on 3.12.15 (R., pp. 76-81). The ISIF did not address the substantive merits of any of the arguments that the Claimant made to the Industrial Commission in support of his Petition For Declaratory Ruling but chose to limit the scope of its Limited Appearance to challenging the Industrial Commission's exercise of subject matter jurisdiction and personal jurisdiction:

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 (R., p. 77, Ll. 5-13) (emphasis supplied).

The ISIF admitted that the Judicial Rules of Practice and Procedure Under the Idaho Workers' Compensation Law (JRP) do not authorize a Limited Appearance for the purpose of

challenging jurisdiction so the ISIF asked the Industrial Commission to analogize to the standards which govern I.R.C.P. 12(b). However, this Court has held that the Idaho Rules of Civil Procedure do not apply to proceedings before the Industrial Commission:

However, Page cannot rely on I.R.C.P. 6(a). 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.<sup>[4]</sup> I.C. § 72-508. *Page v. McCain Foods, Inc.*, 145 Idaho 302, 311, 179 P.3d 265, 274 (2008).

Pursuant to Idaho Code §§ 72-508 and 72-707," the Commission adopted the Judicial Rules of Practice and Procedure " as governing judicial matters under its jurisdiction as provided by the Idaho Workers' Compensation Law." J.R.P., intro. cmt. *Warren v. Williams & Parsons PC CPAS*, 157 Idaho 528, 535, 337 P.3d 1257, 1265 (2014).

If this Court decides to consider the arguments made by the ISIF in its Limited Appearance even though its Limited Appearance is not authorized by the JRP and the IRCP do not apply to proceedings before the Industrial Commission, the Court should limit the scope of its analysis to the ISIF's lack of subject matter jurisdiction argument and lack of personal jurisdiction argument because those were the only arguments made by the ISIF in its 3.12.15 Limited Appearance:

The longstanding rule of this Court is that we will not consider issues that are presented for the first time on appeal. E.g., *Kinsela v. State, Dep't of Finance*, 117 Idaho 632, 634, 790 P.2d 1388, 1390 (1990). Recently we applied the rule to dismiss the appeal in a case where the state asked us to rule on an issue that was not raised in the trial court. *State v. Martin*, 119 Idaho 577, 808 P.2d 1322 (1991).

The rationale for this rule was first stated by the Supreme Court of the Territory

of Idaho in 1867:

It is for the protection of inferior courts. It is manifestly unfair for a party to go into court and slumber, as it were, on [a] defense, take no exception to the ruling, present no point for the attention of the court, and seek to present [the] defense, that was never mooted before, to the judgment of the appellate court. Such a practice would destroy the purpose of an appeal and make the supreme court one for deciding questions of law in the first instance. *Smith v. Sterling*, 1 Idaho 128, 131 (1867).

In *Johnson v. Diefendorf*, 56 Idaho 620, 633, 57 P.2d 1068, 1073 (1936), the Court refused to discuss or decide the validity of a statute on grounds that were not pleaded or submitted to the trial court. In *Oregon Shortline R.R. v. City of Chubbuck*, 93 Idaho 815, 817, 474 P.2d 244, 246 (1970), the Court declined to decide whether a statute was unconstitutional when the issues had not been raised by the pleadings nor argued or decided in the trial court. *Sanchez v. Arave*, 120 Idaho 321, 322, 815 P.2d 1061, 1062 (1991).

The ISIF did not make any of the following arguments in its Limited Appearance before the Industrial Commission and this Court should disregard these arguments in their entirety:

- (1) the *Corgatelli* argument on page 19;
- (2) the Idaho Code §72-707 argument on pages 19-20;
- (3) the *Owsley* argument on page 20;
- (4) the law review arguments on pages 20-21;
- (5) the Idaho Code §72-318(2) argument on pages 21-22;
- (6) the *Wernecke* arguments on page 21-22;
- (7) the *Emery* argument on page 21;
- (8) the *Corgatelli* arguments on pages 22-23;
- (9) the *Carey* argument on page 23;
- (10) the *Corgatelli* arguments on pages 23-24; and
- (11) the plain and unambiguous language arguments on pages 26-28.

Since the ISIF made all of these new arguments for the first time on appeal, the Court should disregard all of the ISIF arguments except the lack of subject matter jurisdiction argument and the lack of personal jurisdiction argument that were properly preserved in the

ISIF's 3.12.15 Limited Appearance filed with the Industrial Commission <sup>7</sup>.

(2) THE INDUSTRIAL COMMISSION HAD SUBJECT MATTER JURISDICTION TO DETERMINE THE VALIDITY OF ITS 6.26.14 ORDER PURSUANT TO JRP 15

Idaho Code §72-508 grants the Industrial Commission the authority to adopt reasonable rules and regulations that are necessary to accomplish the purposes of the workers' compensation Act. The primary public policy purpose of the Act is to provide the injured worker with sure and certain relief:

The adoption of the Administrative Procedure Act ("APA") in 1965, served as a general statutory grant of rule-making authority to administrative agencies to promulgate rules and regulations to effect the purposes of the specific acts they are required to administer. See *Mead v. Arnell*, 117 Idaho 660, 666, 791 P.2d 410, 416 (1990). In addition, the state legislature has, by statute, empowered the Commission to issue rules and regulations necessary to accomplish the purposes of the Workers' Compensation Act. I.C. § 72-508. The purpose of the Workers' Compensation Act, enacted under the broad canopy of the police power, is stated in I.C. § 72-201 to provide "sure and certain relief for injured workmen and their families...." ...

Given the broad empowerment provided by I.C. § 72-508, coupled with the purpose underlying the Workers' Compensation Act, i.e., to provide "sure and certain relief for injured workmen and their families," I.C. § 72-201, we cannot agree with Rhodes' contention. *Rhodes v. Industrial Com'n*, 125 Idaho 139, 141-142, 868 P.2d 467, 469-470 (1993).

A. Statutory Authority

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 I.C. § 72-508. <sup>[1]</sup>

<sup>[1]</sup> Idaho Code § 72-508 enables the Commission to issue rules and regulations necessary to accomplish the purposes of the Workers' Compensation Act. The underlying purpose of the Workers' Compensation Act is stated in I.C. § 72-201

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<sup>7</sup> The ISIF did not address the lack of personal jurisdiction issue in its 5.12.16 Respondent's Brief and has therefore waived that issue.

to provide "sure and certain relief for injured workmen and their families...."  
*Curr v. Curr*, 124 Idaho 686, 691, 864 P.2d 132, 137 (1993).

Pursuant to the rule making authority granted to it by Idaho Code §72-508, the Industrial Commission adopted the Judicial Rules of Practice and Procedure Under the Idaho Workers' Compensation Law (JRP). JRP 15 A. describes the purpose of the Commission's Declaratory Rulings rule as follows:

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

JRP 15 clearly gives the Industrial Commission the subject matter jurisdiction to rule on the validity of any Order. The Claimant used this rule to challenge the validity of the Industrial Commission's 6.26.14 Order. In spite of the plain and unambiguous language of JRP 15 A., the ISIF argued at pages 14-19 of its 5.12.16 Respondent's Brief that the Industrial Commission does not have jurisdiction under JRP 15 to determine the validity of its 6.26.14 Order. This is a very disingenuous argument for the ISIF to make considering that the ISIF filed a Petition For Declaratory Relief pursuant to JRP 15 and asked the Commission to rule on the validity of a prior Order approving a LSSA in the famous case of *Wernecke v. St. Maries Joint School Dist. No. 401*, 147 Idaho 277, 207 P.3d 1008 (2009):

ISIF, on the other hand, argued that the Agreement barred any further recovery from ISIF and filed a petition for a declaratory ruling pursuant to Rule 15 of the Commission's Judicial Rules of Practice and Procedure. Wernecke argued that the Agreement violated the Worker's Compensation Act (the Act), and was therefore void. The Commission granted ISIF's petition, finding the Agreement valid. It further held that Wernecke's present claim against ISIF was barred by the doctrines of *res judicata*, collateral estoppel, and quasi-estoppel, and that she had waived her right to pursue another claim against ISIF. Wernecke appeals



from the Commission's order. *Id.* at 147 Idaho 281, 207 P. 3d 1012 (emphasis supplied).

Since the ISIF used JRP 15 to obtain a Declaratory Ruling interpreting the validity of a prior Order in *Wernecke*, the ISIF cannot seriously contend in this case that the Commission lacked subject matter jurisdiction under JRP 15 to interpret the validity of its 6.26.14 Order. The Court should reject this spurious argument based on its holding in *Williams v. Blue Cross of Idaho*, 151 Idaho 51, 260 P.3d 1186 (2011).

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 pursuant to JRP 15 and asked the Commission to interpret the legal rights of all interested persons to the settlement proceeds (including the rights of a non-party subrogee).

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 subject matter 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:

[T]he 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. Id. at 151 Idaho 155-156, 260 P.3d 1190-1191 (emphasis supplied).

This Court's holding in *Williams* makes it absolutely clear that the Industrial Commission had subject matter jurisdiction to clarify the parties' legal rights under the compensation agreement and determine the validity of the Industrial Commission's 6.26.14 Order pursuant to Idaho Code §72-707, Idaho Code §72-711 and JRP 15. The Court should reject all of the ISIF's lack of subject matter jurisdiction arguments because they lack merit.

(3) THE INDUSTRIAL COMMISSION'S 6.26.14 ORDER WAS NOT A VALID FINAL ORDER BUT A VOID ORDER THAT CAN BE ATTACKED AND SET ASIDE AT ANY TIME

The only substantive argument that the ISIF has properly preserved for appeal is that the Industrial Commission lacked subject matter jurisdiction to consider the Claimant's Petition For Declaratory Ruling <sup>8</sup>. However, this argument lacks merit because it is based on the false premise that the Industrial Commission entered a valid final Order in its 6.26.14 Order of Approval and Discharge. The Commission's 6.26.14 Order cannot be considered a valid final Order for the following reasons:

1. The Commission did not have jurisdiction under Idaho Code §72-408 to grant the Employer a PPI credit not authorized by the statute and the Commission cannot judicially construct a credit which does not exist in the statute;
2. The Commission did not have jurisdiction under Idaho Code §72-711 to approve a compensation agreement which did not conform to the provisions of the law because it granted Employer a PPI credit not authorized by Idaho Code §72-408;
3. The compensation agreement is invalid under Idaho Code §72-318(1) because it is an agreement, contract or device which relieved the Employer of its liability to pay

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<sup>8</sup> See pp. 10-14 of the ISIF's 5.12.16 Respondent's Brief.

Claimant all of the total and permanent disability benefits that he is entitled to receive under Idaho Code §72-408; and,

4. The Compensation agreement is invalid under Idaho Code §72-318(2) because it required the Claimant to waive his right to receive \$39,649.50 in total and permanent disability benefits that he is entitled to receive under Idaho Code §72-408.

What is ironic about the ISIF's position in this case is that it has agreed with the Claimant's primary contention that the Industrial Commission only has limited jurisdiction and can only perform those acts which are specifically authorized by statute. *See Curr v. Curr*, 124 Idaho 686, 864 P. 132 (1993) and *St. Alphonsus Regional Medical Center v. Edmondson*, 130 Idaho 108, 937 P.2d 420 (1997). The ISIF even cited this Court's holding in *Idaho Power Co. v. Idaho Public Util. Com'n*, 102 Idaho 744, 639 P.2d 442 (1981) where the Court held that a void Order could be collaterally attacked even though there was a statute directly on point which stated that final orders could not be collaterally attacked.

The ISIF cannot admit that the Industrial Commission has limited jurisdiction and can only perform those acts which are specifically authorized by statute, but then turn around and take the totally inconsistent position that the Industrial Commission had the authority to judicially construct a PPI credit of \$39,649.50 in its 6.26.14 Order of Approval and Discharge when it knows that the literal words of Idaho Code §72-408 did not authorize the Industrial Commission to grant Employer such a PPI credit.

This Court should reject all of the ISIF's lack of subject matter jurisdiction arguments because they are all based on the same false premise that the Industrial Commission's 6.26.14 Order is a valid final Order. Since the Industrial Commission did not have the statutory

authority to grant Employer a PPI credit and approved a compensation agreement which did not conform to the provisions of the law, this Court should declare the 6.26.14 Order void and set aside the invalid PPI credit. This Court always has the authority to set aside void Orders at any time. *Burns v. Baldwin*, 138 Idaho 480, 486, 65 P.3d 502, 508 (2003), *Andre v. Morrow*, 106 Idaho 455, 459, 680 P.2d 1355, 1359 (1984) and *Martin v. Soden*, 81 Idaho 274, 284-285, 340 P.2d 848, 854-855 (1959).

- (4) THE ISIF ADMITS THAT THE STIPULATION IN THIS CASE IS A COMPENSATION AGREEMENT THAT IS SUBJECT TO THE APPROVAL REQUIREMENTS OF IDAHO CODE §72-711

The ISIF also agreed with the Claimant's position that the stipulation in this case is a compensation agreement that is subject to approval requirements of Idaho Code §72-711.

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." See page 10 of ISIF's 5.12.16 Respondent's Brief, Ll. 9-12 (underline in original).

The ISIF quoted a portion of Idaho Code §72-711 but left out the most important last sentence:

72-711. Compensation agreements. **An agreement shall be approved by the commission only when the terms conform to the provisions of this law** (underline and bold supplied).

The compensation agreement approved by the Commission in this case clearly did not conform to the provisions of this law because it granted Employer an invalid PPI credit of \$39,649.50 that the Industrial Commission was not authorized to grant to Employer under Idaho Code §72-408 or any other provision of the workers' compensation act. *Corgatelli v. Steel West*,

*Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014). This Court should declare the 6.26.14 Order void and set it aside to the extent that it granted Employer a PPI credit that the Commission did not have jurisdiction to award.

The ISIF cited this Court's holding in *Drake v. State of Idaho, Industrial Special Indemnity Fund*, 128 Idaho 880, 920 P.2d 397 (1996) to support its argument that the Industrial Commission lacks subject matter jurisdiction<sup>9</sup>. The holding in *Drake* actually supports the Claimant's arguments because this Court held that a compensation agreement must be approved by the Industrial Commission pursuant to the requirements of Idaho Code §72-711:

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 128 Idaho 882, 920 P. 2d 399 (1996) (emphasis supplied).

This case is clearly distinguishable from *Drake*. In *Drake*, the Claimant did not argue that the Industrial Commission exceeded the limited jurisdiction granted to it by Idaho Code §72-408 by giving the Employer a PPI credit against its obligation to pay total and permanent disability benefits that is not authorized by Idaho Code §72-408 or any other provision in the workers' compensation Act. In *Drake*, the Claimant did not argue that Industrial Commission's Order approving the compensation agreement was void under Idaho Code §72-711 because the Industrial Commission lacked the jurisdiction to approve a compensation agreement that did not conform to the provisions of the workers' compensation Act. In *Drake*, the Claimant did not

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<sup>9</sup> See pp. 11-14 of ISIF's 5.12.16 Respondent's Brief.

argue that the compensation agreement was invalid under Idaho Code §72-318(1) because it was an agreement, contract or device that relieved the Employer of its liability to pay all total and permanent disability benefits that are required by Idaho Code §72-408. In *Drake*, the Claimant did not argue that the compensation agreement was invalid under Idaho Code §72-318(2) because it required the Claimant to waive his right to receive all of the total and permanent disability benefits that he was entitled to receive under Idaho Code §72-408. In *Drake*, the Claimant did not have a decision from the Idaho Supreme Court directly on point like *Corgatelli* which clearly stated that the Industrial Commission did not have any statutory authority or jurisdiction to grant the PPI credit that was awarded to Employer in this case.

Unlike the Claimant in *Drake*, the Claimant in this case has alleged and proved that the Industrial Commission's 6.26.14 Order is void because the Industrial Commission exceeded its limited jurisdiction when it granted relief to the Employer that the Industrial Commission did not have the statutory authority to grant. This Court should exercise its inherent authority to set aside the void Order. This Court always has the authority to set aside void Orders at any time. *Burns v. Baldwin*, 138 Idaho 480, 486, 65 P.3d 502, 508 (2003), *Andre v. Morrow*, 106 Idaho 455, 459, 680 P.2d 1355, 1359 (1984) and *Martin v. Soden*, 81 Idaho 274, 284-285, 340 P.2d 848, 854-855 (1959).

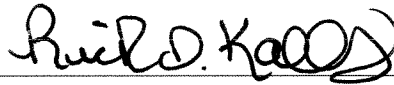
## **(II) CONCLUSION**

Based on the appellate standards set forth in Idaho Code §72-732(2), the Claimant respectfully asks this Court to declare the Industrial Commission's 6.26.14 Order void because the Industrial Commission acted without jurisdiction or in excess of its powers when it granted

Employer a PPI credit that is not authorized by Idaho Code §72-408 or any other provision in the Idaho workers' compensation Act.

Respectfully submitted this 9<sup>th</sup> day of June 2016.

Ellsworth, Kallas, & DeFranco, PLLC



Rick D. Kallas – of the firm  
Attorney For Claimant / Appellant / Cross-Respondent

CERTIFICATE OF MAILING

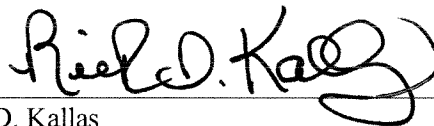
I HEREBY CERTIFY that on this 9th day of June, 2016, I mailed 2 copies of the foregoing Appellant / Cross-Respondent's Brief, postage prepaid, to the following:

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