5-9-2018

Oliveros v. Rule Steel Tanks, Inc. Clerk's Record v. 2 Dckt. 45782

Vol. 2 of 3

LAW CLERK

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

BRYAN OLIVEROS, Claimant/Appellant, v. RULE STEEL TANKS, INC., employer, and, ADVANTAGE WORKERS COMPENSTATION INSURANCE CO., Defendants/Respondents	**SUPREME COURT NO. 45782** **AGENCY'S RECORD VOLUME 2**

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Attorney for Appellant

Wm. Breck Seiniger, Jr.
947 W. Myrtle St.
Boise, ID 83702

Attorney for Respondents

R. Daniel Bowen
PO Box 1007
Boise, ID 83701-1007

45782

TABLE OF CONTENTS

INDEX

EXHIBITS LIST

REPORTER'S TRANSCRIPT:

The Appellant did not request the Reporter's transcript from December 7, 2011. This transcript will not be filed with the Supreme Court.

Reporter's Transcript taken February 27, 2017, will be lodged with the Supreme Court.

Claimant's Exhibits:

1. Vocational evaluation records from Doug Crum, CDMS, dated November 18, 2009
2. Vocational evaluation records from Doug Crum, CDMS, dated April 7, 2016
3. Pictures of Bryan Oliveros' right extremity and hand
4. Milan Institute Enrollment Agreement, Page 1
5. Milan Institute Financial Aid Information Estimate
6. Milan Institute AR Student Ledger
7. Milan Institute Student Transcript
8. Milan Institute Certificate of Completion
9. Screen Shot of Bryan Oliveros' Idaho State Board of Pharmacy Active License
10. Deposition of Bryan Oliveros, dated January 24, 2017
11. Calculation of Total Temporary Benefits during retraining
12. Summary of Requests for authorization and Reimbursement for Retraining
13. Pinnacle Risk Management claims file (to be supplied by Defendant)
14. Douglas N. Crum, CDMS, CV
15. Notice of service (Labeled Exhibit 15)

16. Interrogatories and Requests for Production to Defendants

1a. Vocational evaluation records from Doug Crum, CDMS, dated November 18, 2009

2a. Pertinent correspondence from May 2009- November 2011

Defendants' Exhibits:

1. Form 1

2. Medical records from Canyon County Paramedics

3. Medical records from St. Alphonsus Regional Medical Center

4. Medical records of Dominic Gross, M.D. / Katherine Laible, PA-C

5. Medical records from St. Luke's Idaho Elks Rehab

6. Medical records of Beth Rogers, M.D.

7. Medical records of Michael McClay, PH.D.

8. Advanced Arm Dynamics report of April 1, 2011

9. Industrial Commission Rehabilitation Division Records

10. Transcript of Claimant's deposition taken September 1, 2011

1a. Transcript of Claimant's deposition taken July 5, 2013

2a. Transcript of Claimant's deposition taken January 24, 2017

Depositions:

1. Deposition of MacJulian Lang, taken December 15, 2011

2. Deposition of Dominic Gross, M.D., taken February 22, 2012

3. Deposition of Bryan Oliveros, taken September 1, 2011
See Defendant's Exhibit 10

11. Transcript of Claimant's deposition taken July 5, 2013
See Defendants' Exhibit 1a

12. Deposition of Bryan Oliveros, dated January 24, 2017
See Claimant's Exhibit 10 and Defendants' Exhibit 2a

Additional Documents:

1. Claimant's Opening Brief, filed August 7, 2012

2. Defendant's Post-Hearing Brief, filed August 29, 2012

3. Claimant's Reply Brief, filed September 12, 2012

4. Claimant's Opening Post-Hearing Memorandum, filed April 24, 2017

5. Defendants' Post-Hearing Brief, filed May 17, 2017

5. Claimant's Post-Hearing Reply Memorandum, filed June 5, 2017

6. Memorandum in Support of Claimant's Motion for Reconsideration, filed September 14, 2017

7. Memorandum in Support of Defendants' Response to Claimant's Motion for Reconsideration and in Support of Defendants' Objection to Claimant's Motion for Extension of Time to file a Supplemental Memorandum in Support of Motion for Reconsideration, filed September 21, 2017

8. Reply Memorandum in Support of Claimant's Motion for reconsideration, filed October 18, 2017

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRYAN OLIVEROS, Claimant, v. RULE STEEL TANKS, INC., Employer, and ADVANTAGE WORKERS COMPENSATION INSURANCE CO., Surety, Defendants.	**IC 2008-024772** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** FILED AUG 25 2017 INDUSTRIAL COMMISSION

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Boise, Idaho, on February 22, 2017.[1] W. Breck Seiniger of Boise represented Claimant. R. Daniel Bowen of Boise represented Defendants. The parties submitted oral and documentary evidence at hearing and submitted post-hearing briefs. No post-hearing depositions were taken. The matter came under advisement on June 6, 2017.

[1] This is the second hearing in this matter. The first was held by Referee Just on December 7, 2011, and dealt with the limited issue of whether Claimant was entitled to a certain prosthetic appliance for his right hand finger amputations. The findings from that hearing, published in November 2012, are discussed herein to the extent necessary, and incorporated by reference as if set forth in whole.

ISSUES

The issues to be decided are:

1. Whether and to what extent Claimant is entitled to retraining reimbursement benefits;

2. Whether Claimant is entitled to temporary disability benefits while in the period of retraining;

3. Whether and to what extent Claimant is entitled to disability benefits; and

4. Whether Claimant is entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

CONTENTIONS OF THE PARTIES

Claimant asserts that he suffered a 75% permanent partial disability as a result of his subject industrial injury, without factoring in mitigation of such disability resulting from Claimant's self-financed "retraining" [2] as a pharmacy tech. If Claimant's post-high school training and education are considered, his disability is reduced to 55% permanent partial disability. Because Claimant's post secondary education was a significant factor in reducing his permanent disability from 75% to 55%, Defendants should be required to pay for 52 weeks of such "retraining" in addition to benefits for Claimant's permanent partial disability of 55%. Since Claimant did not work while "retraining" he is entitled to 52 weeks of TTD benefits. If Defendants are not obligated to pay for Claimant's "retraining" they should be required to pay permanent partial disability benefits for Claimant's permanent disability

---

[2] The Referee, but not the Claimant, uses quotation marks around the word retraining, since the undersigned cannot legitimately call Claimant's post-secondary education retraining. Retraining implies Claimant was previously trained in some career, and had to be *re*trained, *i.e.* trained again, due to the accident in question. Technically, while Claimant obtained work-skill training post-accident, he did not receive retraining in the popular sense of the word.

as of the date of MMI, to wit, at the rate of 75% PPD.

Defendants argue that Claimant, who suffered his injury while still in high school, is not entitled to retroactive reimbursement of his post-secondary education and training under the guise of retraining benefits. To his credit, Claimant "thrived" after his industrial accident, acquiring skills, training, and education which allowed him to obtain gainful employment. He suffered no permanent disability in excess of his 32% whole person impairment. Claimant is not entitled to retraining, TTD, and/or PPD benefits. Defendants are not liable for attorney fees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant and Douglas Crum taken at hearing;

2. Claimant's exhibits 1 through 10, 12, and 14 through 16 admitted at hearing;[3]

3. Defendants' exhibits 1 and 2, admitted at hearing;

4. The Industrial Commission file and record in this matter, including the exhibits admitted at the first hearing.

FINDINGS OF FACT

RELEVANT PREVIOUSLY PUBLISHED FINDINGS

As footnoted above, Referee Just conducted a previous hearing in this matter, and Findings of Fact and Conclusions of Law flowed therefrom. Those facts and legal conclusions are binding, and serve as a framework herein. While all such facts and legal conclusions are incorporated herein by reference, certain facts and conclusions

---

[3] Claimant's Exhibit 11 was withdrawn at hearing; 13 was not admitted due a sustained objection to its admission, and Exhibits 14, 15, and 16 were offered and admitted during the course of the hearing.

are reiterated, summarized, and/or paraphrased herein to provide clarity. Additional facts from the 2017 proceedings are also included as required to support the conclusions.

1. At the time of the 2011 hearing, Claimant was twenty-one years of age.

2. At the time of his industrial accident, July 30, 2008, Claimant had not yet graduated from high school. In addition to his high school studies, Claimant worked part-time in a fast-food restaurant, earning between $7.00 and $7.50 per hour.

3. During his summer vacation in 2008, Claimant started a temporary summer job at Rule Steel Tanks, Inc., where his father also worked. His rate of pay was $7.00 per hour. Claimant's job was operating a metal press that shaped pieces of steel. On Claimant's second day of work, he caught the fingers of his dominant right hand in the metal press, resulting in a traumatic amputation of portions of all four fingers on his dominant hand, associated crush injuries, and some degloving injuries on what remained of his fingers.

4. Claimant's severed fingertips were not replantable because of significant soft tissue and bone damage in the residual fingers.

5. Following several surgeries, Claimant emerged with a right hand that includes an uninjured thumb, and portions of each of his four fingers.[4]

6. By April 6, 2009, Claimant was medically stable. Claimant received an impairment rating of 32% whole person, with permanent restrictions related to the use of his right hand.

---

[4] For a finger-by-finger description of the loss, see the November 12, 2012 Findings of Fact.

POST-2011 FINDINGS

7. Claimant obtained a GED in 2009, after missing too much school due to his injury to graduate with his classmates. From there, Claimant attended Lewis-Clark State College in Lewiston for an academic year. He then attended College of Western Idaho (online) briefly in the summer of 2010. He dropped his class at CWI after about three weeks.

8. Claimant, both before and briefly after the accident in question worked part time at a local Dairy Queen, but beginning in the summer of 2011 he gained employment at WDS, which was a Verizon call center. He worked there through that November. His job duties included assisting customers with billing issues. He used a computer and phone set extensively. Claimant became unemployed in December 2011. Thereafter, he unsuccessfully sought work at numerous banks for a teller position, at call centers, and for jobs operating machines.

9. Claimant discussed a career as a pharmacy technician (PT) with relatives and concluded he should pursue that option. He began a course of study leading to a PT certificate at Carrington College in the fall semester of 2012. Soon after enrolling there, he discovered he could obtain his PT certificate from the Milan Institute for less money, and the Institute was much closer to his home. Claimant quit Carrington College and enrolled at Milan Institute to complete his ten-month training course.

10. Claimant's PT program required him to complete a one-month unpaid pharmacy internship, which he accomplished in May 2013, and received his PT certificate thereafter. Claimant financed his PT education with a grant, student loans, and financial help from his parents.

11. Claimant was not employed or working for income during the time he was undergoing his PT training.

12. About two months after obtaining his PT certificate, Claimant found work at Terry Reilly Pharmacy in Nampa as a PT. His starting salary was $11.80 per hour,[5] with paid medical, vision, and dental benefits after two months. Claimant worked for Terry Reilly Pharmacy for two years.

13. Next, Claimant went to work for TigerDirect doing telephone sales. That job paid $14.50 per hour. Claimant went into this employment knowing it would not be his career job. TigerDirect was bought out, and Claimant lost his job there.

14. After applying at numerous pharmacies and banks, Claimant found a job working as a teller at KeyBank. He worked there from February 2016 through September of that year. His rate of pay was $11.50 per hour. He was released after a customer filed a complaint against him.

15. In December 2016, Claimant found employment with Albertsons Pharmacy's corporate offices in Boise. He works as a third-party coordinator, whereby he processes claims for pharmacies when there are issues at the point of purchase. Claimant continued to be employed in this position at the time of hearing. His hourly wage is $15.87 plus health, dental, vision, and 401(k) benefits after three months. Claimant enjoys working there and plans on staying with Albertsons long term if possible. After one year of employment, there are multiple opportunities for advancement with the company.

16. Claimant's job at Albertsons requires a pharmacy tech license (which Claimant possesses), and call center experience is desired, as is prior experience working with insurance companies and Medicare/Medicaid. Claimant had experience in all these categories when hired.

---

[5] At hearing, Claimant indicated he started at $12.80, but at his 2013 deposition (DE 1), taken a month after starting employment at Terry Reilly, Claimant testified he was making $11.80. The Referee finds Claimant's 2013 testimony is more accurate as to his starting salary.

DISCUSSION AND FURTHER FINDINGS

In this proceeding, Claimant asks the Commission to order Defendants to reimburse him for a portion of his post-secondary education, which he deems to be "retraining." He also seeks benefits for his permanent partial disability. The twist presented herein is Claimant's argument that if Defendants are not obligated to pay for his training, then Claimant's disability should be analyzed as of the date Claimant reached MMI, with no consideration of his subsequent training and experience. Claimant acknowledges that by the time of hearing his disability rating was reduced due to his post-secondary education, training, and experience. However, Claimant argues that since Defendants did not pay for such education, they should not get the benefit of Claimant showing initiative and bettering his employment situation after his accident.

RETRAINING AND ASSOCIATED TTD BENEFITS

17. Idaho Code § 72-450 provides, in pertinent part:

> ... [I]f the commission deems a permanently disabled employee, after the period of recovery, is receptive to and in need of retraining in another field, skill or vocation in order to restore his earning capacity, the commission may authorize or order such retraining and during the period of retraining or any extension thereof, the employer shall continue to pay the disabled employee, as a subsistence benefit, temporary total or temporary partial disability benefits as the case my be. The period of retraining shall be fixed by the commission but shall not exceed fifty-two (52) weeks unless the commission, following application and hearing, deems it advisable to extend the period of retraining, in which case the increased period shall not exceed fifty-two (52) weeks.

18. Breaking Idaho Code § 72-450 into its component parts, the following are points to be considered:

(1) The Commission has discretion (but not a statutory obligation) to authorize or order retraining benefits when;

(A) Claimant is permanently disabled after reaching MMI, and

(B) Claimant is receptive to retraining into a different field, skill, or vocation than the Claimant previously held, and

(C) The retraining is designed to restore Claimant's earning capacity.

(2) When retraining is authorized or ordered, the retraining benefits will not exceed 52 weeks, unless after hearing the Commission deems it advisable to extend the period of retraining for up to an additional 52 weeks.

19. Applying the technical phrasing of Idaho Code § 72-450 to the instant case, it appears Claimant does not meet all the criteria for application of the statute. While Claimant is undeniably permanently disabled, well beyond his date of medical stability, and was receptive to training, the remainder of the statute is less clear.

20. For starters, Claimant did not have an established "field, skill, or vocation" at the time of his accident from which he was thereafter precluded due to his injuries. Arguably, Claimant's time-of-injury skills centered on working for fast food establishments while going to school. After the accident, he returned to the fast food industry, at least temporarily. Thus he proved he could still pursue those skills required to work at a fast food restaurant. His one-plus day's experience at Rule Steel did not imbue Claimant with skills, was not his chosen field, and was never considered by him to be a place where he intended to pursue his vocation. Instead, both pre- and post-accident, Claimant had aspirations to attend college after high school. Claimant's fulfilled desire of attending institutions of higher learning after high school hardly fits the common definition of "retraining into a different field, skill, or vocation."

21. The next issue confronting Claimant as regards the language of the statute in question is the fact that he did not need retraining in order to restore his previous earning capacity. At the time of his accident, Claimant had a minimum wage earning capacity.

Had he not been injured, there is no proof Claimant, without further education, would have likely started his post-high school career at anything other than a low to minimum wage job. While his further education certainly enhanced his earning ability, Claimant's earning capacity was not seriously undermined by his industrial accident, as admitted by Claimant's vocational rehabilitation expert.

22. Juxtaposed against the technical reading of Idaho Code § 72-450, with its prerequisites and limitations, is the time-honored axiom that "[t]he provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee." *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). "The humane purposes which it serves leave no room for narrow, technical construction." *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). While this language is often thrown into opinions without any real purpose or application to the particular facts in question, in this case a chief issue to be decided rests upon the application of this concept.

23. There are several arguments in favor of allowing reimbursement of some of Claimant's post-high school education, even though his situation clearly does not align with the four corners of the statutory language. The objective of the statute seems to include giving an injured worker an opportunity to re-enter the workforce when the only thing preventing re-entry is the worker's lack of training in a skill the worker can perform even with whatever permanent disabilities prevent him or her from returning to their time-of-injury employment.

24. In the present case, Claimant was at a cross roads when confronted with his post-injury permanent disability and no real work skills. He could have lamented his condition, maximized his perceived disabilities and focused on what he could not do. Conversely, Claimant could have resolved to not let his injury define him. Faced with these alternatives,

Claimant chose to discover his capabilities, adapt to his situation, further his education, and strive to make a life for himself and his new family. In the process, he incurred substantial educational expenses.

25. Defendants concede that Claimant overcame his obstacles, gained a useful education, obtained work, and started what hopefully will be a successful career. However, they argue that Claimant did exactly what he wanted to do even before his accident – get college training and transition that education into a career. Defendants should not be required to pay for Claimant's education when it was not pursued as an alternative to what he would have done but for his injuries. Defendants' obligation is defined statutorily, not charitably or equitably.

26. While both positions on this issue have merit, and while the liberal construction of the Act should not automatically preclude reimbursement of training expenses in this unique situation, nevertheless it appears Claimant's post-secondary education was not directed by his injury. Claimant had a vision of continuing his education after high school even before his accident. There is nothing in the record to establish that "but for" the accident, Claimant would have chosen a different path after high school. To his credit, Claimant did not abandon his pre-accident goals because of his permanent disability, but rather found a way to achieve them in spite of his disability. Unfortunately, within the parameters of the Act, there is no provision for rewarding individuals like Claimant who pull themselves up after a life-changing accident. To require Defendants to pay for schooling that was part of Claimant's pre-injury planning even without the accident is not proper.

27. Claimant has failed to prove he is entitled to retraining benefits for his post-secondary education.

28. Since Claimant is not entitled to benefits under Idaho Code § 72-450, he is also not entitled to temporary disability benefits as contemplated by the statute for the time he attended college.

PERMANENT PARTIAL DISABILITY (PPD)

29. Permanent disability results when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected. Idaho Code § 72-423. Evaluation (rating) of permanent disability is an appraisal of the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of impairment and by pertinent nonmedical factors provided in Idaho Code § 72-430. Idaho Code § 72-425. Idaho Code § 72-430(1) provides that in determining percentages of permanent disabilities, account should be taken of the nature of the physical disablement, the disfigurement if of a kind likely to handicap the employee in procuring or holding employment, the cumulative effect of multiple injuries, the occupation of the employee, and his or her age at the time of the accident causing the injury, consideration being given to the diminished ability of the affected employee to compete in an open labor market within a reasonable geographical area considering all the personal and economic circumstances of the employee, and other factors as the Commission may deem relevant. The test for determining whether Claimant has suffered a permanent disability greater than permanent impairment is "whether the physical impairment, taken in conjunction with nonmedical factors, has reduced [the claimant's] capacity for gainful employment." *Graybill v. Swift & Company*,

115 Idaho 293, 294, 766 P.2d 763, 764 (1988). Claimant bears the burden of establishing his claim for permanent disability benefits.

30. Claimant hired Douglas Crum, a local vocational rehabilitation consultant, to conduct a vocational assessment and render an opinion as to Claimant's permanent disability in light of his medical and non-medical factors. He prepared two reports and gave live hearing testimony.

31. In his first report, dated November 16, 2009, Mr. Crum noted that before the accident Claimant was in very good health with no pre-existing physical limitations. Claimant was capable of performing medium and heavy physical-demand jobs. The limitations placed on Claimant post-accident eliminated his ability to perform heavy physical-demand jobs.

32. Mr. Crum felt that Claimant, pre-injury, had access to 7.3% of the jobs in his labor market of Ada and Canyon counties. Mr. Crum opined that post-accident, and without training, Claimant had access to only 1.4% of the jobs in his labor market.

33. Regarding wage loss, Mr. Crum felt that although Claimant had a history of minimum wage work, it would not be fair to use that as his wage baseline, since those jobs were temporary and/or summer work. But for the accident, Claimant would have had the capacity to eventually earn significantly more than minimum wage. However, Mr. Crum felt that without additional education, post-accident, Claimant would be relegated to low to minimum wage jobs indefinitely. Mr. Crum cited to statistics from Minnesota State Department of Health which concluded that disabled individuals were three times more likely to live below the poverty line than non-disabled individuals, earn nearly 23% less, and were more than twice as likely to be unemployed. Given these statistics, Mr. Crum felt it was imperative for Claimant to obtain further education beyond high school.

34. Mr. Crum believed that Claimant was unable to perform not only his time-of-injury job, but also "most other jobs he could reasonably perform" before his injury. CE 1, p. 7. As such, Mr. Crum assigned Claimant an 80% loss of labor market rating. Mr. Crum did not assign Claimant a significant wage loss component.

35. Mr. Crum concluded that without "retraining" Claimant would experience PPD in the range of 75% inclusive of his 32% PPI.

36. Mr. Crum prepared a second report on April 7, 2016. By then Claimant had undergone a functional capacity evaluation, which placed Claimant in the medium duty category. He had also completed his schooling at Milan Institute, and obtained his pharmacy tech certificate.

37. In reviewing Claimant's wage history after high school, Mr. Crum noted Claimant had held several jobs significantly in excess of minimum wage.

38. Due to Claimant's additional on-the-job training, and education culminating in a pharmacy tech certificate, Claimant's then-current market access loss was reduced from his prior estimate of 80% to 55%. Given Claimant's significant wage increases since his high school jobs, Mr. Crum felt that when wages are factored in, Claimant's PPD inclusive of his impairment, was 45%.

39. Defendants retained, but did not utilize, a vocational rehabilitation expert. Instead Defendants rely on the record to support their theory that Claimant has suffered no PPD in excess of PPI. They note that Claimant was released to his time-of-injury job in 2009, has since held several jobs which paid more than he was making at the time of his injury, including jobs at a call center and a bank, for which Claimant had no prior training. Claimant did what many high school graduates do – continued his education, got several jobs

which increased his pool of experience and better defined his vocational interests, and taught him how to interact with people in a business setting and on the phone. Outside of work, Claimant returned to his pre-injury activities including soccer, basketball, and working out at the gym. He had no trouble obtaining employment over the years since high school. Summing up Defendants' position, they noted "Claimant has a visible deformity but functional use of his right hand. He demonstrated the ability to return to the labor market and obtain and maintain employment. ... As such, Claimant has not demonstrated that he suffered a disability in excess of his impairment." Ds' Brief, p. 16.

40. Defendants are also critical of Mr. Crum's opinions. They note that he inflated Claimant's potential job market by including jobs for which Claimant had never expressed an interest or aptitude in pursuing, and also by including skilled labor positions such as carpentry, or welding; jobs for which Claimant had no background, training, or interest. They note that even without his injury, those skilled labor positions were not jobs which Claimant could perform. Furthermore, Claimant's visible deformation of his right hand has not kept him from obtaining employment as needed, and any argument that employers would be reluctant to hire him due to his "problem" hand has been proven inaccurate.

Permanent Partial Disability Analysis

41. Analysis of PPD in this case must start with a mistaken assertion raised at multiple points in Claimant's briefing. He argues that because Mr. Crum's testimony, including his opinions, are unrebutted and not inherently improbable, they *must* be taken as true. Citing to *Pierstorff v. Gray's Auto Shop*, 58 Idaho 438, 447, 448, 74 P.2d 171, 175 (1937), Claimant argues that the undersigned may not "arbitrarily or capriciously disregard the testimony of a witness unimpeached by any of the modes known to the law, if such testimony does not

exceed probability." He also notes that "evidence, uncontradicted, must be accepted as true." *Swanson v. State,* 114 Idaho 607, 609, 759 P. 898, 900 (1998).

42. The undersigned accepts Mr. Crum's factual testimony as true. However, expert opinions are not facts, and do not need to be accepted even if uncontradicted. "The opinion of an expert is not binding on the trial court, and, as long as it does not act arbitrarily, the trial court may reject expert testimony even when it is uncontradicted." *Miller v. Callear*, 140 Idaho 213, 218, 91 P.3d 1117, 1122 (2004). Furthermore, "[t]he opinions of an expert are not binding upon the trier of fact, but are advisory only." *Clark v. Truss,* 142 Idaho 404, 408, 128 P.3d 941, 945 (2006). Finally, specifically with regard to PPD analysis, the Commission considers all relevant medical and nonmedical factors and evaluates the *purely advisory opinions of vocational experts. See Eacret v. Clearwater Forest Indus.,* 136 Idaho 733, 40 P.3d 91 (2002); *Boley v. State, Industrial Special Indem. Fund,* 130 Idaho 278, 939 P.2d 854 (1997). (Emphasis added.)

43. The next issue to resolve is the appropriate time for assessing Claimant's permanent physical disability. Claimant argues it would be patently unfair to allow Defendants to sit idly by while Claimant, at his own expense, obtained the post-secondary education he needed to succeed in his employment, thus driving down his PPD rating, only to swoop in and use that additional education as a sword to slash Claimant's PPD benefits. Claimant argues that if Defendants are not required to reimburse Claimant for his "retraining" expenses, they should not get the benefit of relying on his decreased PPD rating springing therefrom. Since Defendants do not have to reimburse Claimant for his educational expenses, Claimant asserts the undersigned should evaluate Claimant's PPD at the time of MMI.

44. Defendants meet this argument with a shrug. They argue that with or without the additional schooling, Claimant can not prove PPD in excess of his 32% PPI.

45. The Idaho Supreme Court in *Brown v. The Home Depot,* 152 Idaho 605, 272 P.3d 577 (2012), held that, as a general rule, Claimant's disability assessment should be performed as of the date of hearing. Under Idaho Code § 72-425, a permanent disability rating is a measure of the injured worker's "present and probable future ability to engage in gainful activity." Therefore, the Court reasoned, in order to assess the injured worker's "present" ability to engage in gainful activity, it necessarily follows that the labor market, as it exists at the time of hearing, is the labor market which must be considered.

46. Permanent disability is a measure of present and future ability to engage in gainful activity. The record divulges no reason why Claimant's present and future ability to engage in gainful activity would be more accurately measured at any time other than the date of the hearing. Claimant's "equitable" argument, while enticing, does not advance the proper analysis considerations. At the time Claimant reached MMI he was still a "work in progress" with regard to his ability to engage in gainful employment. By his own admission, he intended, accident or not, to further his education after high school. It was never his intention to forgo further education and enter the work force upon high school graduation. To judge his ability to obtain and hold employment at a point in time when he was not seeking to enter the workforce on a career basis, makes no legal sense. Therefore, Claimant's disability will be determined as of the hearing date.

47. Mr. Crum's opinions are of little advisory benefit in evaluating Claimant's PPD. To begin with, his reports and live testimony do not provide even a sample of the job categories which supposedly Claimant is now precluded from obtaining

due to his injury. Mr. Crum testified he did not consider jobs such as medical doctors and lawyers when calculating Claimant's loss of potential jobs, but his reports do not list the categories of jobs included. While there was argument that skilled labor jobs were included, it is not self-evident where this information may be found. Such information is not contained in Mr. Crum's reports or in his testimony.

48. Apart from being conclusory in nature, history has shown Mr. Crum's first report to be incorrect. The implication of the Minnesota study was that Claimant would have a difficult time finding employment, making more than minimum wage, and escaping poverty. In reality, he has always been able to find a job within a reasonable time, found employment for jobs greater than minimum wage, and now has a job with Albertsons which is very much a career opportunity. Even before any additional education, Claimant returned to working at fast food jobs (which Mr. Crum's report indicated Claimant would have difficulty doing), and got a job at a call center. Mr. Crum's assertion that Claimant's hand injury will "severely impact his vocational options for the rest of his life" appears to be vastly overstated, thanks to Claimant's drive, desire, adaptability, and perseverance.

49. While Mr. Crum lists many of Claimant's assets in his report, he fails to highlight those assets when preparing his analysis. Claimant is fluent in Spanish and English, both spoken and written, is good at math, and has significant skills with basic computer programs used in business, including spreadsheets, Photoshop, and Word. He took advanced computer classes in high school including business applications and principles of marketing. He has a strong interest in business, and enjoyed his business classes. He has no prior impediments to employment, nor a criminal record. Claimant continues to pursue the hobbies he enjoys, and is willing to try new business opportunities, even if he is not sure he will be able to succeed.

50. Claimant has no desire to do heavy manual labor, and apparently never did. He consistently projected his future as one which included higher education and a job in business, not heavy labor and/or construction. Through his education, he has been able to escape many of the same jobs his injury precluded him from doing.

51. Certainly Claimant lost the ability to do any job which exceeds his lifting, pulling, and carrying limitations imposed in 2009, including those jobs in a heavy category or which require frequent fine grasping with the right hand. No one is arguing that Claimant has no permanent disability. The issue is whether his disability exceeds his 32% whole person impairment rating.

52. Within the job categories Claimant has expressed an interest in, few lost opportunities come to mind. Claimant has shown a strong desire to adapt, and succeed. As noted at hearing, he would have difficulty putting tiny screws into tiny holes with his right hand. Other similar jobs requiring fine manipulation with his right hand would be precluded, as would jobs which require over 20 pounds lifting, 5 pound gripping and carrying with his right hand, pushing and pulling more than 75 and 50 pounds, respectively. *See* CE 2, p. 10. Those restrictions leave a plethora of jobs available to Claimant, given his motivation to work.

53. Applying the listed factors in Idaho Code § 72-430, Claimant clearly incurred a graphic permanent physically-noticeable injury which will impact his ability to obtain or hold certain employment opportunities. On the other hand, he has no pre-existing limiting conditions which hinder his ability to work. He has chosen career opportunities which minimize the effect of his disability, by consistently opting for office work. Claimant is young, confident, and willing to learn. He has technology skills prevalent within his age group. His attitude

and drive will serve him well in the open labor market. Contrary to Mr. Crum's testimony that employers do not want to hire "problems" such as Claimant's deformed hand, it appears many are willing to give Claimant just such an opportunity.

54. When considering the totality of the evidence, and ignoring for now Claimant's PPI rating and benefits paid, which will be discussed below, it does not appear Claimant has suffered a loss of more than 30% of his *applicable* labor market, and no loss of earning capacity. Since earning capacity is of minor relevance when compared to loss of job market, the Referee finds Claimant's non-medical PPD is 25%.

55. Claimant argues he is entitled to PPD benefits even if they do not exceed his impairment rating and corresponding benefits paid thereunder, citing as authority *Davis v. Hammack Mgmt.,* 161 Idaho 791, 391 P.3d (2017). While *Davis* dealt with the Commission's jurisdiction to enforce a compensation agreement, ruling that the Commission lacked jurisdiction to approve the proposed stipulation, the latest word specifically on the issue at hand is *Dickinson v. Adams County*, 2017 IIC 0007 (March 21, 2017). *Dickinson* is controlling law on this issue.

56. As explained by *Dickinson* "permanent impairment," is actually only payable as a component of disability-less-than-total under Idaho Code § 72-428. Impairment is not a separately owed and payable benefit apart from PPD. Disability paid under the heading of "permanent partial impairment" or PPI is included, and credited against any payment made under PPD. Sometimes PPD will be larger than PPI, since PPD includes those non-medical factors that impact Claimant's ability to be gainfully employed, and sometimes it will not. Here PPD is not greater than the PPI rating previously given. Since Claimant has been paid "impairment," benefits, which are actually disability benefits, of 32% whole person, a finding of

25% whole person PPD is subsumed within the 32% whole person benefit previously paid. Claimant is entitled to the larger of the disability components, which in this case is the PPI payments previously paid.

57. Claimant has failed to prove he is entitled to payment of additional benefits for PPD not in excess of the 32% PPI benefits previously paid under Idaho Code § 72-428.

ATTORNEY FEES

58. Attorney fees are not granted to a claimant as a matter of right under the Idaho Workers' Compensation Law. They may be recovered only under the circumstances set forth in Idaho Code § 72-804, which provides for an award of attorney fees to a claimant if the employer or surety contest a claim without reasonable ground, refuses to pay compensation provided by law, or discontinues payment of benefits without reasonable grounds. The decision that grounds exist for awarding a claimant attorney fees is a factual determination that rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976).

59. As Claimant failed to carry his burden of proving his entitlement to the benefits which were the subject of this proceeding, there is no basis for the award of attorney fees.

CONCLUSIONS OF LAW

1. Claimant has failed to prove he is entitled to reimbursement and corresponding temporary total disability benefits under Idaho Code § 72-450;

2. Claimant has failed to prove he is entitled to additional permanent partial disability benefits in excess of the 32% whole person impairment benefits previously paid;

3. Claimant has failed to prove he is entitled to an award of attorney fees under Idaho Code § 72-804.

RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, the Referee recommends that the Commission adopt such findings and conclusions as its own and issue an appropriate final order.

DATED this 27th day of July, 2017.

INDUSTRIAL COMMISSION

Brian Harper

Brian Harper, Referee

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August, 2017, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION** was served by regular United States Mail upon each of the following:

W BRECK SEINIGER
942 MYRTLE STREET
BOISE ID 83702

R DANIEL BOWEN
PO BOX 1007
BOISE ID 83701-1007

Kenna Andrus

jsk

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRYAN OLIVEROS, Claimant, v. RULE STEEL TANKS, INC., Employer, and ADVANTAGE WORKERS COMPENSATION INSURANCE CO., Surety, Defendants.	**IC 2008-024772** **ORDER** FILED AUG 25 2017 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Brian Harper submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has failed to prove he is entitled to reimbursement and corresponding temporary total disability benefits under Idaho Code § 72-450.

2. Claimant has failed to prove he is entitled to additional permanent partial disability benefits in excess of the 32% whole person impairment benefits previously paid.

3. Claimant has failed to prove he is entitled to an award of attorney fees under Idaho Code § 72-804.

4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 25th day of August, 2017.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

R.D. Maynard, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August, 2017, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

W BRECK SEINIGER
942 MYRTLE STREET
BOISE ID 83702

R DANIEL BOWEN
PO BOX 1007
BOISE ID 83701

jsk

ORIGINAL

Wm. Breck Seiniger, Jr. (ISB # 2387)
Seiniger Law Offices, P.A.
942 W. Myrtle Street
Boise, Idaho 83702
Phone: (208) 345-1000
Fax: (208) 345-4700
Attorneys for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Bryan Oliveros, *Claimant,* *vs.* Rule Steel Tanks, Inc., *Employer*, *and* Pinnacle Risk Management, *Surety,* *Defendants.*	I.C. No. 08-024772 **CLAIMANT'S MOTION FOR RECONSIDERATION**

Comes now the claimant, by and through his attorney of record, and moves this Honorable Commission to reconsider its Findings of Fact, Conclusions of Law, and Recommendation entered in this matter on August 25, 2017. The grounds upon which this motion is based are set forth in the memorandum filed here with.

September 13, 2017.

Wm. Breck Seiniger, Jr.
Attorney for Claimant

CERTIFICATE OF SERVICE

On September 13, 2017 I served the foregoing by facsimile transmission on:

Dan Bowen
1311 W. Jefferson
P.O. Box 1007
Boise, ID 83701-1007
Fax: (208) 344-9670

Wm Breck Seiniger, Jr.
Attorneys for Claimant

R. DANIEL BOWEN (ISB #2673)
BOWEN & BAILEY, LLP
1311 W. JEFFERSON ST.
P.O. BOX 1007
BOISE, ID 83701-1007
Telephone: (208) 344-7200
Facsimile: (208) 344-9670

Attorneys for Defendants

BEFORE THE INDUSTRIAL COMMISSON OF THE STATE OF IDAHO

BRYAN OLIVEROS, Claimant, v. RULE STEEL TANKS, INC., Employer, and ADVANTAGE WORKERS COMPENSATION INSURANCE CO., Surety, Defendants.	**I.C. No.: 2008-024772** **RESPONSE TO CLAIMANT'S MOTION FOR RECONSIDERATION AND OBJECTION TO CLAIMANT'S MOTION FOR EXTENSION OF TIME TO FILE SUPPLEMENTAL MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION**

COME NOW Defendants, by and through counsel of record, responding to Claimant's Motion for Reconsideration, objecting to the same, as is discussed further in Defendants' own memorandum. Further, Defendants object to Claimant's Motion for Extension of Time to File Supplemental Memorandum based upon Idaho Code § 72-718 and Industrial Commission Rules

of Judicial Procedure, Rule G, which state that motions to reconsider shall be made within 20 days of the date of the final decision and shall be supported by a brief filed with the motion, (emphasis added). The rule does not allow for extensions of time for additional briefing.

DATED this 21st day of September, 2017.

BOWEN & BAILEY, L.L.P.

R. DANIEL BOWEN - of the Firm
Attorneys for Defendants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21st day of September, 2017, a true and correct copy of the foregoing document was served upon the following party(ies) in the method indicated:

W BRECK SEINIGER ESQ
SEINIGER LAW OFFICES
942 W MYRTLE ST
BOISE ID 83702
FAX: (208) 345-4700

☐ U.S. MAIL
☐ HAND DELIVERY
☑ FACSIMILE

R. Daniel Bowen

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRYAN OLIVEROS, Claimant, v. RULE STEEL TANKS, INC., Employer, and ADVANTAGE WORKERS COMPENSTATION INSURANCE CO., Surety, Defendants.	**IC 2008-024772** **ORDER ON CLAIMANT'S MOTION FOR RECONSIDERATION** **FILED** JAN 05 2018 INDUSTRIAL COMMISSION

On or about September 14, 2017, Claimant filed his timely Motion for Reconsideration of the Commission's August 25, 2017 Order adopting the Findings of Fact and Conclusions of Law authored by Referee Harper. Claimant filed a contemporaneous brief in support of his motion as required by JRP Rule 3(G). In his supporting brief, Claimant argues that the Commission erred in declining to award Claimant disability in excess of his 32% PPI rating. First, the Commission erroneously concluded that because Claimant had designs upon pursuing higher education even before the work accident, there was insufficient proof that the education he pursued following the work accident was necessitated by that accident. Further, since the vocational evidence established that Claimant's post-accident education was responsible for significantly reducing his disability, it was error for the Commission to decline to award Claimant reimbursement for the expenses associated with those educational endeavors. Finally, the Commission's finding that Claimant's post-injury education diminished his disability was inconsistent with the

Commission's observation that since Claimant was able to work in the fast food industry both before and after the subject accident this augured against a finding that he suffered accident-produced disability.

The other major basis for Claimant's Motion for Reconsideration is his assertion that the Commission erred in not granting Claimant disability in the amount of 25% of the whole person, over and above the 32% PPI rating previously paid. Per *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014) disability and impairment are separate classes of benefits, and are therefore separately payable. In treating impairment as a component of disability, the Commission denied Claimant the separate awards of impairment and disability envisioned by *Corgatelli* and the subsequent case of *Davis v. Hammack Management, Inc.*, 161 Idaho 791, 391 P.3d 1261 (2017).

Defendants responded on September 21, 2017. Defendants argue that while the Commission's decision that Claimant is not entitled to payments above and beyond the 32% impairment rating previously paid as disability is potentially at odds with both *Corgatelli* and *Davis*, it is entirely consistent with *Mayer v. TPC Holdings, Inc.*, 160 Idaho 223, 370 P.3d 738 (2016), and the recent Commission decision *Dickinson v. Adams County*, 2017 IIC 0007 (2017), discussing the conflicting holdings of *Corgatelli* and *Mayer*. As to Claimant's other arguments, Defendants assert that the Commission did not err in recognizing that Claimant's post-accident educational activities improved his access to the labor market; the Commission's decision does not penalize Claimant for advancing his own interests.

Claimant filed a timely Motion for Reconsideration pursuant to Idaho Code § 72-718. Pursuant to that section, the Commission may rehear or reconsider its decision based on the arguments of the parties. A motion for reconsideration must be properly supported by a

recitation of the factual findings and/or legal conclusions with which the moving party takes issue. However, the Commission is not ordinarily inclined to re-weigh evidence and arguments simply because a case was not resolved in the moving party's favor.

In this matter, it was the principal thrust of Claimant's claim that he suffered significant disability as a consequence of the permanent limitations / restrictions stemming from the July 30, 2008 accident involving his right hand. Claimant acknowledged that his post-accident educational and employment-related activities significantly improved his access to the labor market following the accident. He argued that Employer should be required to reimburse Claimant for the expenses associated with his education pursuant to Idaho Code § 72-450, or, failing that, his disability should be evaluated without taking into consideration the education he pursued, at his own expense, following the subject accident. In other words, Employer should not be allowed to avoid reimbursing Claimant for the expenses associated with his education while, at the same time, enjoying the benefits of Claimant's admirable impetus to pull himself up by his own boot straps, thus improving his employment opportunities.

The Commission first determined that Claimant did not qualify for retraining benefits pursuant to Idaho Code § 72-450. In order to qualify for benefits under that section, it must be demonstrated that the injured worker is "in need of retraining in another field, skill or vocation in order to restore his earning capacity. . ." As developed in the original decision, this language implies that at the time of injury a claimant had an established field, skill or vocation from which he was precluded as a consequence of the accident. Claimant did not require retraining in order to "restore" his time-of-injury earning capacity because the accident did not leave him unable to exploit any previously held skill or vocation. Claimant could not be said to be in need of retraining in some other field when the evidence failed to demonstrate an initial or established

field in which he was no longer able to compete because of his injuries. In other words, the statute, on its face, does not anticipate the type of educational training that is at issue here. Claimant did not pursue a course of retraining, but he assuredly pursued a course of training by acting upon his desire to pursue education secondary to his high school graduation. We decline to characterize Claimant's designs upon obtaining an education as the retraining anticipated by Idaho Code § 72-450.

Claimant's fallback position is that if Defendants cannot be required to pay retraining benefits pursuant to Idaho Code § 72-450, they should not reap the fruits of Claimant's pursuit of further education. Essentially, Claimant would have us evaluate his disability as though he had done nothing to help himself following the accident.

Such cases come before us infrequently, but they do arise. Such individuals, because of bad advice, or by dint of their own reasoning, conclude that the greater their disablement, the greater will be their award of disability under the workers' compensation system. Although workers' compensation, as envisioned, is intended to assist injured workers in their recovery and return to work, there is no denying that for a small handful of workers, the Act creates a perverse incentive for a poor outcome following a work injury; the Act pays benefits for those who are yet disabled, notwithstanding their having reached maximum medical improvement. When these cases arise, they are always somewhat disheartening, as they represent a failure of some sort along the way.

On the other hand, this case represents the most hopeful outcome of a work injury. What Claimant did is what everyone should do. Paradoxically, this means he is not as disabled as he would otherwise have been, and will not recover an award to compensate him for disability over and above disability caused by impairment, since he has none. This is what is supposed to

happen, and we commend Claimant for his drive, and for getting on with his life. We appreciate that Claimant may feel he is being penalized for doing the right thing. However, in the long run, the course he chose will serve him much better than the modest disability award he might have realized, had he sat on his hands and done nothing to improve his situation after reaching MMI. Claimant's laudable perseverance does not mean, however, that Defendants must assume financial responsibility for all that Claimant has done on his own behalf in order to take advantage of the facts that exist as of the date of hearing. We find no basis to measure Claimant's disability on some date other than the date of hearing. Nor do we accept Claimant's argument that because evaluation as of that date happens to inure to the advantage of Defendants, they must either pay for Claimant's education or forego reliance on the facts of this case as they have developed though the date of hearing. Nothing in the statutory scheme or case law forces this choice on Defendants. We are satisfied that the evidence demonstrates that the subject accident did not materially change Claimant's designs upon pursuing education after high school. This he did, and those facts must be taken into account when evaluating Claimant's disability.

Claimant also argues that the Commission erred in acknowledging that Claimant suffered disability of 25% of the whole person as a consequence of the subject accident, yet concluding that no further award of disability was payable, since Claimant has already received payment of a 32% disability rating based on impairment. Per Claimant, the Commission's decision is at odds with the explicit direction of the Court in *Corgatelli v. Steel West, Inc.,* 157 Idaho 287, 333 P.3d 115 (2014) and, more recently, *Davis v. Hammock Management,* 161 Idaho 791, 391 P.3d 1261 (2017). In response, Defendants point out that the Commission has addressed this precise issue in the recent case of *Dickinson v. Adams County*, 2017 IIC 0007 (2017). In *Dickinson*, the

Commission noted that *Corgatelli* recognizes that PPI and PPD are entirely different classes of workers' compensation benefits, and that nothing in the statutory scheme recognizes that an employer is allowed to credit the payment of a PPI rating against a subsequent obligation to pay disability. Claimant argues that the rule of *Corgatelli* requires surety to pay both the 32% PPI rating and the 25% disability award. We recognize that *Corgatelli* supports this proposition. However, as we explained in *Dickinson*, *Corgatelli* cannot be reconciled with certain language appearing in the subsequent case of *Mayer v. TPC Holdings, Inc.*, 160 Idaho 223, 370 P.3d 738 (2016). *Mayer* contains the following footnote by Justice Burdick, the author of the majority opinion.

> TPC attempts to make much of the fact that Idaho Code section 72–428 uses the term "permanent disability" to describe awards specified under section 72–428's "scheduled permanent impairments." This interchange of terms, TPC argues, makes the use of the term "permanent disability" ambiguous in section 72–431. However, the forerunner of Idaho Code section 72–428 was enacted in 1917, and since that time the Idaho Code has always referred to a disability award, not an impairment award. Although the term "impairment award" has crept into the vernacular of the workmen's compensation bar, Idaho's Workmen's Compensation Law only provides for an award of income benefits based on disability, not impairment. *Fowler v. City of Rexburg*, 116 Idaho 1, 3 n. 5, 773 P.2d 269, 271 n. 5 (1988) ("Income benefits payable under the Workmen's Compensation Law, with the exception of retraining benefits, I.C. § 72–450, are based upon disability, either temporary or permanent, but not merely impairment."). A "permanent impairment" as the definitions themselves make clear, is simply a component of a "permanent disability." I.C. §§ 72–422, –423. Thus, any final award made under Idaho's Workmen's Compensation Law is properly referred to as a disability award. *Fowler*, 116 Idaho at 3 n. 5, 773 P.2d at 271 n. 5 ("While in some cases the non-medical factors will not increase the permanent disability rating over the amount of the permanent impairment rating, the ultimate award of income benefits is based upon the permanent disability rating, not merely the impairment rating."); see also *Woodvine v. Triangle Dairy*, 106 Idaho 716, 722, 682 P.2d 1263, 1269 (1984).

Id. at FN 1. (Emphasis supplied).

As we explained in *Dickinson*, once it is recognized that impairment is a component part of disability, then the objections raised by the *Corgatelli* Court to the payment of PPI as a credit against a subsequent award of disability tend to evaporate. Further, as developed in *Dickinson*, while certain portions of the statutory scheme do appear to create a distinction between impairment and disability, impairment is only payable as disability pursuant to the provisions of Idaho Code § 72-428 and Idaho Code § 72-429. There is no separate statutory mechanism authorizing the payment of impairment as something other than disability. We find no reason to depart from the analysis developed in *Dickinson*, and conclude the *Mayer* represents the current state of the law on this issue. Of course, *Davis* was decided subsequent to *Mayer*, and as Claimant has noted, *Davis* cites *Corgatelli* with approval on the question of whether or not PPI can be applied as a credit against an award of disability.

A review of *Davis* reveals that it is less about parsing *Corgatelli*, and more about considering the application of *Wernecke v. St. Maries Joint School Dist.*, 147 Idaho 277, 207 P.3d 1008 (2009). *Davis* involved the Commission's approval of a lump sum settlement which recognized employer's right to a credit in the amount of a previously paid PPI award, to be applied against its obligation to pay permanent partial disability calculated under Idaho Code § 72-428. Two months after the Commission's approval of the *Davis* lump sum, the Court issued *Corgatelli*. The *Davis* Court noted that *Corgatelli* establishes that Idaho law does not endorse the application of the payment of PPI as a credit against a subsequent disability award. However, the issue before the Court in *Davis* was whether the Commission had jurisdiction to approve a settlement which violated the Act. The answer, made clear by *Wernecke*, is no. While *Corgatelli* was the basis for the finding that the Commission acted outside the bounds of its jurisdiction, *Corgatelli* was not, itself, the subject of further discussion by the Court; the

rationale of that decision received no further treatment or illumination, and *Davis*, except in recognizing the rule of *Corgatelli*, leaves us no closer to understanding how *Corgatelli* might be reconciled with what seems to be an entirely different point of view expressed in *Mayer*. For these reasons, we do not find *Davis* instructive on the questions which are the subject of our analysis in *Dickinson*.

It is more frequently the case that impairment, though a component of a disability award, does not represent the full extent of Claimant's disability, once account is taken of the various non-medical factors referenced at Idaho Code § 72-430. Here, however, Claimant's impairment paid as disability is found to more than adequately compensate him for whatever disability he has suffered as a consequence of the subject accident. It would, indeed, award Claimant a windfall to require the payment of an additional 25%, over and above the 32% disability award that has already been paid, since that 32% rating represents impairment paid as disability, and Claimant has failed to demonstrate that he has suffered disability in excess of his impairment.

For the foregoing reasons, we deny Claimant's Motion for Reconsideration.

DATED this 5th day of January, 2018.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

R.D. Maynard, Commissioner

ATTEST:

Assistant Commission Secretary

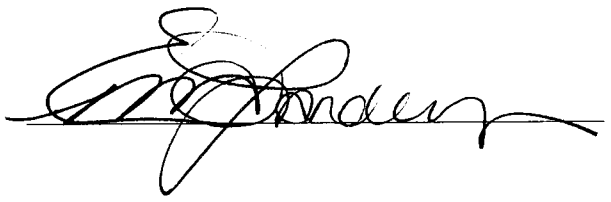
CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of January, 2018, a true and correct copy of the foregoing **ORDER ON CLAIMANT'S MOTION FOR RECONSIDERATION** was served by regular United States Mail upon each of the following:

W BRECK SEINIGER
942 MYRTLE ST
BOISE ID 83702

R DANIEL BOWEN
PO BOX 1007
BOISE, ID 83701

el



ORIGINAL

Wm. Breck Seiniger, Jr. (ISB # 2387)
Seiniger Law Offices, P.A.
942 W. Myrtle Street
Boise, Idaho 83702
Phone: (208) 345-1000
Fax: (208) 345-4700
Attorneys for Claimant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

Bryan Oliveros, *Claimant, Appellant* *vs.* Rule Steel Tanks, Inc., *Employer*, and Pinnacle Risk Management, *Surety,* *Defendants, Respondents*	I.C. No. 08-024772 **NOTICE OF APPEAL**

TO: THE ABOVE NAMED RESPONDENTS RULE STEEL TANKS, INC., *Employer*, and PINNACLE RISK MANAGEMENT, *Surety* and DAN BOWEN, their attorney, (whose address is Dan Bowen, Bowen & Bailey, 1311 W. Jefferson, P.O. Box 1007, Boise, ID 83701-1007, Fax: (208) 344-9670, Email: info@bowen-bailey.com) and THE CLERK OF THE IDAHO INDUSTRIAL COMMISSION.

NOTICE IS HEREBY GIVEN THAT:

1. ORDERS APPEALED

The above-named appellant, Bryan Oliveros, appeals against the above-named respondents to the Idaho Supreme Court from all orders entered in this case, including but not limited to the following:

1.1 *Order* entered on August 25, 2017 by Thomas E Limbaugh, Chairman;

1.2 *Order on Claimant's Motion for Reconsideration* entered on January 5, 2018 by Thomas E Limbaugh, Chairman.

2. COPIES OF THE ORDERS BEING APPEALED

Please see the attached.

3. RIGHT TO APPEAL

The orders described in paragraph 1 above are appealable orders under and pursuant to Rule 11(d)(1) I.A.R.

4. PRELIMINARY STATEMENT OF ISSUES

a. Did the Idaho Industrial Commission err in adopting the findings of fact and conclusions of law of referee Brian Harper? (*Order* entered on August 25, 2017)

4.2 ISSUES RELATED TO THE IDAHO INDUSTRIAL COMMISSION'S 2017-2018 ORDERS REGARDING CLAIMANT'S ENTITLEMENT TO RETRAINING BENEFITS

a. Did the Idaho Industrial Commission err in failing to give Idaho Code § 72-450 the liberal construction to which the Claimant is entitled? (Order entered on August 25, 2017; Order on Claimant's Motion for Reconsideration entered on January 5, 2018)

b. Did the Idaho Industrial Commission err in concluding that the claimant failed to prove that he was entitled to reimbursement and corresponding total temporary disabilities under Idaho code section 72 – 450? (Order entered on August 25, 2017; Order on Claimant's Motion for Reconsideration entered on January 5, 2018)

4.3 ISSUES RELATED TO THE IDAHO INDUSTRIAL COMMISSION'S 2017-2018 ORDERS REGARDING CLAIMANT'S ENTITLEMENT TO PERMANENT DISABILITY BENEFITS

a. Did the Idaho Industrial Commission err in concluding that the claimant failed to prove that he was entitled to permanent partial disability benefits in excess of the 32% whole person impairment benefits previously paid? (Order entered on August 25, 2017; Order on Claimant's Motion for Reconsideration entered on January 5, 2018)

4.4 ISSUES RELATED TO THE IDAHO INDUSTRIAL COMMISSION'S ARBITRARY AND CAPRICIOUS DISREGARD OF CONTROLLING IDAHO SUPREME COURT PRECEDENT REGARDING UNIMPEACHED AND UNREBUTTED TESTIMONY

a. Did the Idaho Industrial Commission err as a matter of law in concluding that it had discretion to disregard the unrebutted opinions of Claimant's vocational expert, Douglas Crum, in contravention of the holding of Pierstorff v. Gray's Auto Shop, 58 Idaho 438, 447, 448, 74 P.2d 171, 175 (1937) (Pierstorff, first tried to the Industrial Commission, remains applicable to adjudications by the Idaho Industrial Commission, Swanson v. State, 114 Idaho 607, 609, 759 P.2d 898, 900, (1988)) and its progeny? (Order entered on August 25, 2017; Order on Claimant's Motion for Reconsideration entered on January 5, 2018)

b. Did the Idaho Industrial Commission err as a matter of law in arbitrarily or capriciously disregard the unrebutted opinions of Claimant's vocational expert, Douglas Crum, which was unimpeached by any of the modes known to the law, and did not exceed probability in contravention of the holdings in Pierstorff v. Gray's Auto Shop, 58 Idaho 438, 447, 448, 74 P.2d 171, 175 (1937) Jeffrey v. Trouse, 100 Mont. 538, 50 P.2d 872, 874 [(1935)] and Gerdon v. Con Paulos, Inc., 160 Idaho 335, 343, 372 P.3d 390, 398, 2016 . (Order on Claimant's Motion for Reconsideration entered on January 5, 2018; Order on Claimant's Motion for Reconsideration entered on January 5, 2018)

c. Did the Idaho Industrial Commission err as a matter of law in failing to follow the law as laid down in Pierstorff v. Gray's Auto Shop, 58 Idaho 438, 447, 448, 74 P.2d 171, 175 (1937) and its progeny? (Order entered on August 25, 2017; Order on Claimant's Motion for Reconsideration entered on January 5, 2018)

4.5 ISSUES RELATED TO THE IDAHO INDUSTRIAL COMMISSION'S ARBITRARY AND CAPRICIOUS DISREGARD OF CONTROLLING IDAHO SUPREME COURT PRECEDENT REGARDING THE IDAHO SUPREME COURT'S INTERPRETATION OF IDAHO CODE § 72-425 CONTROLLING IDAHO SUPREME COURT PRECEDENT CONCERNING PERMANENT IMPAIRMENT AND PERMANENT DISABILITY BENEFITS

a. Did the Idaho Industrial Commission err as a matter of law in its interpretation of Idaho Code § 72-425 and disregarding the precedent of the Idaho Supreme Court laid down in Corgatelli v. Steel West, Inc., 157 Idaho 287, 335 P.3d 1150 (2014) and reiterated the holding in Corgatelli in Davis v. Hammack Mgmt., 161 Idaho 791, 795, 391 P.3d 1261, 1265, (2017) concerning deduction of permanent impairment benefits from permanent disability benefits? (Order entered on August 25, 2017; Order on Claimant's Motion for Reconsideration entered on January 5, 2018)

b. Did the Idaho Industrial Commission err in denying Claimant's Motion for Reconsideration of the Order entered on August 25, 2017? (Order on Claimant's Motion for Reconsideration entered on January 5, 2018)

4.6 ISSUES RELATED TO CLAIMANT/APPELLANTS CONSTITUTIONAL RIGHTS

a. Did the violate Claimant's Constitutional rights and the Doctrine of Separation of Powers by ignoring, and thereby effectively overruling, the Idaho Supreme Court's decisions in Corgatelli v. Steel West, Inc., 157 Idaho 287, 335 P.3d 1150 (2014) and Davis v. Hammack Mgmt., 161 Idaho 791, 795, 391 P.3d 1261, 1265, (2017). (Order on Claimant's Motion for Reconsideration entered on January 5, 2018)

b. Did the violate Claimant's Constitutional right to equal protection by ignoring, and thereby effectively overruling, the Idaho Supreme Court's decisions in Corgatelli v. Steel West, Inc., 157 Idaho 287, 335 P.3d 1150 (2014) and Davis

v. Hammack Mgmt., 161 Idaho 791, 795, 391 P.3d 1261, 1265, (2017). (Order on Claimant's Motion for Reconsideration entered on January 5, 2018)

5. SEALING OF THE RECORD

Has an order been entered sealing all or any portion of the record? No.

If so, what portion?

5.1 Is a reporter's transcript requested? No, transcripts of the hearings previously prepared will be included in the Agency's Record as exhibits.

6. AGENCY RECORD REQUESTED

The appellant requests the following documents to be included in the Agency's Record in addition to those automatically included under Rule 28, I.A.R.

a. All exhibits offered during the hearing of December 7, 2011;

b. The transcript of the hearing of February 22, 2017;

c. All exhibits offered during the hearing of February 22, 2017;

d. *Memorandum In Support Of Claimant's Motion For Reconsideration* filed September 14, 2017;

e. *Reply Memorandum In Support Of Claimant's Motion For Reconsideration* filed October 18, 2017;

7. I certify:

(a) That a copy of this notice of appeal has been served on each reporter of whom a transcript has been requested as named below at the address set out below: Not applicable.

(b) (1) ☐ That the clerk of the district court or administrative agency has been paid the estimated fee for preparation of the reporter's transcript.

(2) ☐ That the appellant is exempt from paying the estimated transcript fee because _____

(c) (1) ☒ That the estimated fee for preparation of the clerk's or agency's record has been paid.

(2) ☐ That the appellant is exempt from paying the estimated fee for the preparation of the record because _____

(d) (1) ☒ That the appellate filing fee has been paid.

(2) ☐ That appellant is exempt from paying the appellate filing fee because

_____

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

DATED February 15, 2018.

/s/ Wm. Breck Seiniger, Jr.
Wm. Breck Seiniger, Jr.
SEINIGER LAW
Attorneys for the Claimant/Appellant

CERTIFICATE OF SERVICE

On February 15, 2018, I served the foregoing by facsimile transmission on:

Dan Bowen
1311 W. Jefferson
P.O. Box 1007
Boise, ID 83701-1007
Fax: (208) 344-9670

/s/ Wm. Breck Seiniger, Jr.
Wm. Breck Seiniger, Jr.
SEINIGER LAW
Attorneys for the Claimant/Appellant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRYAN OLIVEROS, Claimant, v. RULE STEEL TANKS, INC., Employer, and ADVANTAGE WORKERS COMPENSATION INSURANCE CO., Surety, Defendants.	**IC 2008-024772** **ORDER** FILED AUG 25 2017 INDUSTRIAL COMMISSION

Pursuant to Idaho Code § 72-717, Referee Brian Harper submitted the record in the above-entitled matter, together with his recommended findings of fact and conclusions of law, to the members of the Idaho Industrial Commission for their review. Each of the undersigned Commissioners has reviewed the record and the recommendations of the Referee. The Commission concurs with these recommendations. Therefore, the Commission approves, confirms, and adopts the Referee's proposed findings of fact and conclusions of law as its own.

Based upon the foregoing reasons, IT IS HEREBY ORDERED that:

1. Claimant has failed to prove he is entitled to reimbursement and corresponding temporary total disability benefits under Idaho Code § 72-450.

2. Claimant has failed to prove he is entitled to additional permanent partial disability benefits in excess of the 32% whole person impairment benefits previously paid.

3. Claimant has failed to prove he is entitled to an award of attorney fees under Idaho Code § 72-804.

4. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 25th day of August, 2017.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

R.D. Maynard, Commissioner

Thomas P. Baskin, Commissioner

ATTEST:

Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of August, 2017, a true and correct copy of the foregoing **ORDER** was served by regular United States Mail upon each of the following:

W BRECK SEINIGER
942 MYRTLE STREET
BOISE ID 83702

R DANIEL BOWEN
PO BOX 1007
BOISE ID 83701

jsk

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRYAN OLIVEROS, Claimant, v. RULE STEEL TANKS, INC., Employer, and ADVANTAGE WORKERS COMPENSTATION INSURANCE CO., Surety, Defendants.	**IC 2008-024772** **ORDER ON CLAIMANT'S MOTION FOR RECONSIDERATION** FILED JAN 05 2018 INDUSTRIAL COMMISSION

On or about September 14, 2017, Claimant filed his timely Motion for Reconsideration of the Commission's August 25, 2017 Order adopting the Findings of Fact and Conclusions of Law authored by Referee Harper. Claimant filed a contemporaneous brief in support of his motion as required by JRP Rule 3(G). In his supporting brief, Claimant argues that the Commission erred in declining to award Claimant disability in excess of his 32% PPI rating. First, the Commission erroneously concluded that because Claimant had designs upon pursuing higher education even before the work accident, there was insufficient proof that the education he pursued following the work accident was necessitated by that accident. Further, since the vocational evidence established that Claimant's post-accident education was responsible for significantly reducing his disability, it was error for the Commission to decline to award Claimant reimbursement for the expenses associated with those educational endeavors. Finally, the Commission's finding that Claimant's post-injury education diminished his disability was inconsistent with the

Commission's observation that since Claimant was able to work in the fast food industry both before and after the subject accident this augured against a finding that he suffered accident-produced disability.

The other major basis for Claimant's Motion for Reconsideration is his assertion that the Commission erred in not granting Claimant disability in the amount of 25% of the whole person, over and above the 32% PPI rating previously paid. Per *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014) disability and impairment are separate classes of benefits, and are therefore separately payable. In treating impairment as a component of disability, the Commission denied Claimant the separate awards of impairment and disability envisioned by *Corgatelli* and the subsequent case of *Davis v. Hammack Management, Inc.*, 161 Idaho 791, 391 P.3d 1261 (2017).

Defendants responded on September 21, 2017. Defendants argue that while the Commission's decision that Claimant is not entitled to payments above and beyond the 32% impairment rating previously paid as disability is potentially at odds with both *Corgatelli* and *Davis*, it is entirely consistent with *Mayer v. TPC Holdings, Inc.*, 160 Idaho 223, 370 P.3d 738 (2016), and the recent Commission decision *Dickinson v. Adams County*, 2017 IIC 0007 (2017), discussing the conflicting holdings of *Corgatelli* and *Mayer*. As to Claimant's other arguments, Defendants assert that the Commission did not err in recognizing that Claimant's post-accident educational activities improved his access to the labor market; the Commission's decision does not penalize Claimant for advancing his own interests.

Claimant filed a timely Motion for Reconsideration pursuant to Idaho Code § 72-718. Pursuant to that section, the Commission may rehear or reconsider its decision based on the arguments of the parties. A motion for reconsideration must be properly supported by a

recitation of the factual findings and/or legal conclusions with which the moving party takes issue. However, the Commission is not ordinarily inclined to re-weigh evidence and arguments simply because a case was not resolved in the moving party's favor.

In this matter, it was the principal thrust of Claimant's claim that he suffered significant disability as a consequence of the permanent limitations / restrictions stemming from the July 30, 2008 accident involving his right hand. Claimant acknowledged that his post-accident educational and employment-related activities significantly improved his access to the labor market following the accident. He argued that Employer should be required to reimburse Claimant for the expenses associated with his education pursuant to Idaho Code § 72-450, or, failing that, his disability should be evaluated without taking into consideration the education he pursued, at his own expense, following the subject accident. In other words, Employer should not be allowed to avoid reimbursing Claimant for the expenses associated with his education while, at the same time, enjoying the benefits of Claimant's admirable impetus to pull himself up by his own boot straps, thus improving his employment opportunities.

The Commission first determined that Claimant did not qualify for retraining benefits pursuant to Idaho Code § 72-450. In order to qualify for benefits under that section, it must be demonstrated that the injured worker is "in need of retraining in another field, skill or vocation in order to restore his earning capacity. . ." As developed in the original decision, this language implies that at the time of injury a claimant had an established field, skill or vocation from which he was precluded as a consequence of the accident. Claimant did not require retraining in order to "restore" his time-of-injury earning capacity because the accident did not leave him unable to exploit any previously held skill or vocation. Claimant could not be said to be in need of retraining in some other field when the evidence failed to demonstrate an initial or established

field in which he was no longer able to compete because of his injuries. In other words, the statute, on its face, does not anticipate the type of educational training that is at issue here. Claimant did not pursue a course of retraining, but he assuredly pursued a course of training by acting upon his desire to pursue education secondary to his high school graduation. We decline to characterize Claimant's designs upon obtaining an education as the retraining anticipated by Idaho Code § 72-450.

Claimant's fallback position is that if Defendants cannot be required to pay retraining benefits pursuant to Idaho Code § 72-450, they should not reap the fruits of Claimant's pursuit of further education. Essentially, Claimant would have us evaluate his disability as though he had done nothing to help himself following the accident.

Such cases come before us infrequently, but they do arise. Such individuals, because of bad advice, or by dint of their own reasoning, conclude that the greater their disablement, the greater will be their award of disability under the workers' compensation system. Although workers' compensation, as envisioned, is intended to assist injured workers in their recovery and return to work, there is no denying that for a small handful of workers, the Act creates a perverse incentive for a poor outcome following a work injury; the Act pays benefits for those who are yet disabled, notwithstanding their having reached maximum medical improvement. When these cases arise, they are always somewhat disheartening, as they represent a failure of some sort along the way.

On the other hand, this case represents the most hopeful outcome of a work injury. What Claimant did is what everyone should do. Paradoxically, this means he is not as disabled as he would otherwise have been, and will not recover an award to compensate him for disability over and above disability caused by impairment, since he has none. This is what is supposed to

happen, and we commend Claimant for his drive, and for getting on with his life. We appreciate that Claimant may feel he is being penalized for doing the right thing. However, in the long run, the course he chose will serve him much better than the modest disability award he might have realized, had he sat on his hands and done nothing to improve his situation after reaching MMI. Claimant's laudable perseverance does not mean, however, that Defendants must assume financial responsibility for all that Claimant has done on his own behalf in order to take advantage of the facts that exist as of the date of hearing. We find no basis to measure Claimant's disability on some date other than the date of hearing. Nor do we accept Claimant's argument that because evaluation as of that date happens to inure to the advantage of Defendants, they must either pay for Claimant's education or forego reliance on the facts of this case as they have developed though the date of hearing. Nothing in the statutory scheme or case law forces this choice on Defendants. We are satisfied that the evidence demonstrates that the subject accident did not materially change Claimant's designs upon pursuing education after high school. This he did, and those facts must be taken into account when evaluating Claimant's disability.

Claimant also argues that the Commission erred in acknowledging that Claimant suffered disability of 25% of the whole person as a consequence of the subject accident, yet concluding that no further award of disability was payable, since Claimant has already received payment of a 32% disability rating based on impairment. Per Claimant, the Commission's decision is at odds with the explicit direction of the Court in *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 333 P.3d 115 (2014) and, more recently, *Davis v. Hammock Management,* 161 Idaho 791, 391 P.3d 1261 (2017). In response, Defendants point out that the Commission has addressed this precise issue in the recent case of *Dickinson v. Adams County*, 2017 IIC 0007 (2017). In *Dickinson*, the

Commission noted that *Corgatelli* recognizes that PPI and PPD are entirely different classes of workers' compensation benefits, and that nothing in the statutory scheme recognizes that an employer is allowed to credit the payment of a PPI rating against a subsequent obligation to pay disability. Claimant argues that the rule of *Corgatelli* requires surety to pay both the 32% PPI rating and the 25% disability award. We recognize that *Corgatelli* supports this proposition. However, as we explained in *Dickinson*, *Corgatelli* cannot be reconciled with certain language appearing in the subsequent case of *Mayer v. TPC Holdings, Inc.*, 160 Idaho 223, 370 P.3d 738 (2016). *Mayer* contains the following footnote by Justice Burdick, the author of the majority opinion.

> TPC attempts to make much of the fact that Idaho Code section 72–428 uses the term "permanent disability" to describe awards specified under section 72–428's "scheduled permanent impairments." This interchange of terms, TPC argues, makes the use of the term "permanent disability" ambiguous in section 72–431. However, the forerunner of Idaho Code section 72–428 was enacted in 1917, and since that time the Idaho Code has always referred to a disability award, not an impairment award. Although the term "impairment award" has crept into the vernacular of the workmen's compensation bar, Idaho's Workmen's Compensation Law only provides for an award of income benefits based on disability, not impairment. *Fowler v. City of Rexburg*, 116 Idaho 1, 3 n. 5, 773 P.2d 269, 271 n. 5 (1988) ("Income benefits payable under the Workmen's Compensation Law, with the exception of retraining benefits, I.C. § 72–450, are based upon disability, either temporary or permanent, but not merely impairment."). A "permanent impairment" as the definitions themselves make clear, is simply a component of a "permanent disability." I.C. §§ 72–422, –423. Thus, any final award made under Idaho's Workmen's Compensation Law is properly referred to as a disability award. *Fowler*, 116 Idaho at 3 n. 5, 773 P.2d at 271 n. 5 ("While in some cases the non-medical factors will not increase the permanent disability rating over the amount of the permanent impairment rating, the ultimate award of income benefits is based upon the permanent disability rating, not merely the impairment rating."); see also *Woodvine v. Triangle Dairy*, 106 Idaho 716, 722, 682 P.2d 1263, 1269 (1984).

Id. at FN 1. (Emphasis supplied).

As we explained in *Dickinson*, once it is recognized that impairment is a component part of disability, then the objections raised by the *Corgatelli* Court to the payment of PPI as a credit against a subsequent award of disability tend to evaporate. Further, as developed in *Dickinson*, while certain portions of the statutory scheme do appear to create a distinction between impairment and disability, impairment is only payable as disability pursuant to the provisions of Idaho Code § 72-428 and Idaho Code § 72-429. There is no separate statutory mechanism authorizing the payment of impairment as something other than disability. We find no reason to depart from the analysis developed in *Dickinson*, and conclude the *Mayer* represents the current state of the law on this issue. Of course, *Davis* was decided subsequent to *Mayer*, and as Claimant has noted, *Davis* cites *Corgatelli* with approval on the question of whether or not PPI can be applied as a credit against an award of disability.

A review of *Davis* reveals that it is less about parsing *Corgatelli*, and more about considering the application of *Wernecke v. St. Maries Joint School Dist.*, 147 Idaho 277, 207 P.3d 1008 (2009). *Davis* involved the Commission's approval of a lump sum settlement which recognized employer's right to a credit in the amount of a previously paid PPI award, to be applied against its obligation to pay permanent partial disability calculated under Idaho Code § 72-428. Two months after the Commission's approval of the *Davis* lump sum, the Court issued *Corgatelli*. The *Davis* Court noted that *Corgatelli* establishes that Idaho law does not endorse the application of the payment of PPI as a credit against a subsequent disability award. However, the issue before the Court in *Davis* was whether the Commission had jurisdiction to approve a settlement which violated the Act. The answer, made clear by *Wernecke*, is no. While *Corgatelli* was the basis for the finding that the Commission acted outside the bounds of its jurisdiction, *Corgatelli* was not, itself, the subject of further discussion by the Court; the

rationale of that decision received no further treatment or illumination, and *Davis*, except in recognizing the rule of *Corgatelli*, leaves us no closer to understanding how *Corgatelli* might be reconciled with what seems to be an entirely different point of view expressed in *Mayer*. For these reasons, we do not find *Davis* instructive on the questions which are the subject of our analysis in *Dickinson*.

It is more frequently the case that impairment, though a component of a disability award, does not represent the full extent of Claimant's disability, once account is taken of the various non-medical factors referenced at Idaho Code § 72-430. Here, however, Claimant's impairment paid as disability is found to more than adequately compensate him for whatever disability he has suffered as a consequence of the subject accident. It would, indeed, award Claimant a windfall to require the payment of an additional 25%, over and above the 32% disability award that has already been paid, since that 32% rating represents impairment paid as disability, and Claimant has failed to demonstrate that he has suffered disability in excess of his impairment.

For the foregoing reasons, we deny Claimant's Motion for Reconsideration.

DATED this 5th day of January, 2018.

INDUSTRIAL COMMISSION

Thomas E. Limbaugh, Chairman

Thomas P. Baskin, Commissioner

R.D. Maynard, Commissioner

ATTEST:

Assistant Commission Secretary

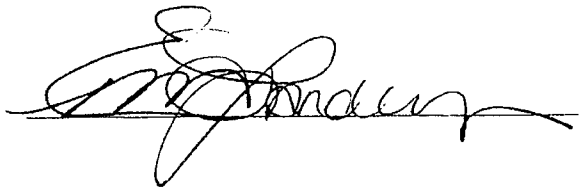
CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of January, 2018, a true and correct copy of the foregoing **ORDER ON CLAIMANT'S MOTION FOR RECONSIDERATION** was served by regular United States Mail upon each of the following:

W BRECK SEINIGER
942 MYRTLE ST
BOISE ID 83702

R DANIEL BOWEN
PO BOX 1007
BOISE, ID 83701

el



BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

BRYAN OLIVEROS,

Claimant/Appellant,

v.

RULE STEEL TANKS, INC.,

Employer,

and

ADVANTAGE WORKERS COMPENSATION INSURANCE CO.,

Surety,

Defendant/Respondents.

SUPREME COURT NO. 45782

CERTIFICATE OF APPEAL

Appeal From:	Industrial Commission, Thomas E. Limbaugh Chairman, presiding
Case Number:	IC 2008-024772
Order Appealed from:	Findings of Fact, Conclusions of Law, and Recommendation, filed August 25, 2017, Order, filed August 25, 2017, and Order on Claimant's Motion for Reconsideration, filed January 5, 2018
Attorney for Appellant:	Wm. Breck Seiniger, Jr. 947 W. Myrtle St. Boise, ID 83702
Attorney for Respondents:	R. Daniel Bowen PO Box 1007 Boise, ID 83701-1007

248

Appealed By:	Claimant/Appellant Bryan Oliveros
Appealed Against:	Defendants/Respondents Rule Steel Tanks, Inc., Employer, and Advantage Workers Compensation Insurance Co., Surety
Notice of Appeal Filed:	February 15, 2018
Appellate Fee Paid:	$94.00 to Supreme Court, and $100.00 to Industrial Commission Checks were received.
Name of Reporter:	Marlene "Molly" Ward M & M Court Reporting 101 S. Capitol Blvd. Ste. 503 Boise, ID 83702
Transcript Requested:	Standard transcript has been requested. Transcript has been prepared and filed with the Commission.
Dated:	February 16, 2018

Assistant Commission Secretary

CERTIFICATION OF APPEAL

I, Emma Landers, the undersigned Assistant Commission Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing are true and correct photocopies of the Notice of Appeal; Findings of Fact, Conclusions of Law, and Order; and Order on Claimant's Motion for Reconsideration, and the whole thereof, in IC case number 2008-024772 for Bryan Oliveros.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the official seal of said Commission this 16th day of February, 2018.

Dina Espinoza
Assistant Commission Secretary

Supreme Court No. 45781

R. DANIEL BOWEN (ISB #2673)
BOWEN & BAILEY, LLP
1311 W. JEFFERSON ST.
P.O. BOX 1007
BOISE, ID 83701-1007
Telephone: (208) 344-7200
Facsimile: (208) 344-9670
info@bowen-bailey.com

Attorneys for Defendants/Respondents

BEFORE THE INDUSTRIAL COMMISSON OF THE STATE OF IDAHO

BRYAN OLIVEROS, Claimant/Appellant, v. RULE STEEL TANKS, INC., and ADVANTAGE WORKERS COMPENSATION INSURANCE CO.. Defendants/Respondents.	Supreme Court No. _____ **I.C. No.: 2008-024772** DEFENDANTS/RESPONDENTS' REQUEST FOR ADDITIONAL AGENCY RECORD

TO: THE ABOVE NAMED APPELLANT, BRYAN OLIVEROS, and said Appellant's attorney, William Breck Seiniger, Jr., 942 W. Myrtle Street, Boise, Idaho 83702, (208) 345-1000, wbs@seinigerlaw.com, and the CLERK OF THE IDAHO INDUSTRIAL COMMISSION:

NOTICE IS HEREBY GIVEN, that the Respondents (RULE STEEL TANKS, INC. and ADVANTAGE WORKERS COMPENSATION INSURANCE CO.) in the above entitled proceeding hereby requests pursuant to Rule 19, I.A.R., the inclusion of the following material in the Reporter's Transcript or the Agency's Record in addition to that required to be included by the I.A.R. and the Notice of Appeal. Any additional transcript is to be provided in ☐ hard copy; ☐ electronic format; or ☑ both (check one):

A. The transcript of the hearing on 12/07/11;

B. Deposition transcripts:

a. Deposition of Claimant Bryan Oliveros (taken 09/01/11);

b. Deposition of Claimant Bryan Oliveros (taken 09/05/13);

c. Deposition of Claimant Bryan Oliveros (taken 01/24/17);

d. Deposition of Macjulian Lang (taken 12/15/11);

e. Deposition of Dominic Gross, M.D. (taken 02/22/12);

C. Briefs:

a. Claimant's Opening Brief (filed 8/02/12);

b. Defendants' Post-Hearing Brief (filed 08/29/12);

c. Claimant's Reply Brief (filed 09/12/12);

d. Claimant's Opening Post-Hearing Memorandum (filed 04/24/17);

e. Defendants' Post-Hearing Brief (filed 05/17/17);

f. Claimant's Post-Hearing Reply Memorandum (filed 06/02/17);

g. Claimant's Motion for Reconsideration (filed 09/13/17);

h. Memorandum In Support Of Defendants' Response to Claimant's Motion For Reconsideration And In Support Of Defendants' Objection To Claimant's Motion For An Extension Of Time To File Additional Memoranda (filed 09/21/17);

DATED this 21ST day of February, 2018.

BOWEN & BAILEY, L.L.P.

R. Daniel Bowen

R. DANIEL BOWEN - of the Firm
Attorneys for Defendants/Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 21ST day of February 2018, a true and correct copy of the foregoing document was served upon the following party in the method indicated:

Wm. Breck Seiniger, Jr.
SEINIGER LAW OFFICES
942 W MYRTLE ST
BOISE ID 83702
FAX: (208) 345-4700
wbs@seingerlaw.com

☐ U.S. MAIL
☐ HAND DELIVERY
☑ FACSIMILE

R. Daniel Bowen

R. Daniel Bowen

CERTIFICATION OF RECORD

I, Emma Landers, the undersigned Assistant Commission Secretary of the Industrial Commission, do hereby certify that the foregoing record contains true and correct copies of all pleadings, documents, and papers designated to be included in the Agency's Record Supreme Court No. 45781 on appeal by Rule 28(b)(3) of the Idaho Appellate Rules and by the Notice of Appeal, pursuant to the provisions of Rule 28(b).

I further certify that all exhibits offered or admitted in this proceeding, if any, are correctly listed in the List of Exhibits. Said exhibits will be lodged with the Supreme Court upon settlement of the Reporter's Transcript and Agency's Record herein.

DATED this 27th day of March, 2018.

Assistant Commission Secretary

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

BRYAN OLIVEROS, Claimant/Appellant, v. RULE STEEL TANKS, INC., Employer, and ADVANTAGE WORKERS COMPENSATION INSURANCE CO., Surety, Defendants/Respondents.	**SUPREME COURT NO. 45782** **NOTICE OF COMPLETION**

TO: STEPHEN W. KENYON, Clerk of the Courts;
Wm. Breck Seiniger, Jr. for the Appellant; and
R. Daniel Bowen for the Respondents.

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

Attorney for Appellant:

Wm. Breck Seiniger, Jr.
947 W. Myrtle St.
Boise, ID 83702

Attorney for Respondent(s):

R. Daniel Bowen
PO Box 1007
Boise, ID 83701-1007

YOU ARE FURTHER NOTIFIED that pursuant to Rule 29(a), Idaho Appellate Rules, all parties have twenty-eight days from the date of this Notice in which to file objections to the Clerk's Record or Reporter's Transcript, including requests for corrections, additions or deletions.

In the event no objections to the Clerk's Record or Reporter's Transcript are filed within the twenty-eight day period, the Clerk's Record and Reporter's Transcript shall be deemed settled.

DATED at Boise, Idaho, this 27th day of March, 2018.

Assistant Commission Secretary