BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY DAVIS, Claimant, Petitioner herein, v. HAMMACK MANAGEMENT INC., Employer, and STATE INSURANCE FUND, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Respondents herein.	**IC 15-000107** **(2005-501080)** **ORDER ON PETITION FOR DECLARATORY RULING** Filed October 6, 2015

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

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

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

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

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

Petitioner Properly Served Respondents

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

The Impact of *Corgatelli* on the Previously Approved LSSA

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

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

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

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

1. The petitioner must expressly seek a declaratory ruling and must identify the statute, rule, or order on which a ruling is requested and state the issue or issues to be decided;

2. The petitioner must allege that an actual controversy exists over the construction, validity or applicability of the statute, rule, or order and must state with specificity the nature of the controversy;

3. The petitioner must have an interest which is directly affected by the statute, rule, or order in which a ruling is requested and must plainly state that interest in the petition; and

4. The petition shall be accompanied by a memorandum setting forth all relevant facts and law in support thereof.

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

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

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

> Whenever the commission determines that it is for the best interest of all parties, the liability of the employer for compensation may, on application to the commission by any party interested, be discharged in whole or in part by the

> payment of one or more lump sums to be determined, with the approval of the commission.

Idaho Code § 72-404.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

ISIF's Obligation to Pay Benefits

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

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

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

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

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

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

Attorney Fees

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

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

ORDER

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

DATED this 6th day of October, 2015.

INDUSTRIAL COMMISSION

__/s/_____
R. D. Maynard, Chairman

__/s/_____
Thomas E. Limbaugh, Commissioner

__/s/_____
Thomas P. Baskin, Commissioner

ATTEST:
__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

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

RICK KALLAS	KENNETH MALLEA	JON BAUMAN
1031 EAST PARK BLVD	PO BOX 857	PO BOX 1539
BOISE ID 83712	MERIDIAN ID 83680	BOISE ID 83701

ka __/s/_____