

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

In the Matter of: )  
)  
RODNEY BERNAL, )  
)  
Decedent, )  
)  
\_\_\_\_\_  
KATELYNN ORDORICA, )  
)  
Claimant, )  
)  
and )  
)  
SHEILA BERNAL, )  
)  
Claimant, )  
)  
v. )  
)  
OLDCASTLE PRECAST, INC., )  
)  
Employer, )  
)  
and )  
)  
LIBERTY INSURANCE )  
CORPORATION, )  
)  
Surety, )  
)  
Defendants. )  
\_\_\_\_\_ )

**IC 2007-008487**

**FINDINGS OF FACT,  
CONCLUSIONS OF LAW,  
AND RECOMMENDATION**

June 20, 2008

**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Susan Veltman, who conducted a hearing in Boise, Idaho, on March 18, 2008. Jon M. Steele of Boise represents Claimant/Beneficiary Katelynn Ordorica. Darwin

Overson of Boise represents Claimant/Beneficiary Sheila Bernal. Monte R. Whittier of Boise represents Defendants. Katelynn Ordorica and Sheila Bernal submitted oral and documentary evidence. The parties waived the filing of post-hearing briefs. The matter came under advisement on May 23, 2008, and is now ready for decision.

### **ISSUE**

By agreement of the parties at hearing, the issue to be decided is:

Whether a re-apportionment of death benefits pursuant to Idaho Code § 72-414 is appropriate and, if so, to what extent.

In addition to the stated issue, Katelynn Ordorica asserted a constitutional challenge to Idaho Code § 72-413 based on violation of her equal protection rights. The Referee declined to consider this issue based on jurisdictional grounds and because it is not necessary to address the constitutionality of Idaho Code § 72-413 in order to determine the issue of re-apportionment of death benefits as specifically authorized by Idaho Code § 72-414. It is noted that the Idaho Supreme Court previously upheld the constitutionality of Idaho Code § 72-413 in *Meisner v. Potlatch Corp.*, 131 Idaho 258, 954 P.2d 676, 679 (1998).

### **STIPULATION OF FACTS NOT IN DISPUTE**

The parties were able to stipulate to multiple facts that are not in dispute, but are nonetheless relevant to this decision. Defendants filed a written stipulation to which Katelynn Ordorica and Sheila Bernal agreed. (Referee's Exhibit 1). Defendants' stipulation was accepted by order of the Commission. (Referee's Exhibit 2). Defendants agree that the parties at interest in this dispute are Katelynn Ordorica and Sheila Bernal. Defendants agree that they are liable for death benefits on this claim and are currently paying death benefits in accordance with Idaho Code § 72-413. Defendants will continue to make payment of death benefits pursuant to Idaho

### **RECOMMENDATION - 2**

Code § 72-413 until otherwise ordered by the Industrial Commission. Defendants were excused from participation in pre-trial conferences and the hearing.

At hearing, Katelynn Ordorica and Sheila Bernal stipulated as follows:

1. Rodney Bernal (Decedent) died on March 5, 2007, as the result of industrial injuries sustained on that day.

2. Katelynn Ordorica is the biological daughter of Decedent. She was born on May 1, 2000, and was seven years old at the time of hearing.

3. Sheila Bernal is the surviving spouse of Decedent. She was married to Decedent on January 28, 2006, while Decedent was serving a prison term.

4. Decedent was incarcerated from July 2003 until his release date of January 12, 2007.

5. Katelynn Ordorica does not reside with Sheila Bernal and does not receive any type of support from Sheila Bernal. Katelynn Ordorica resides with her biological mother, Rejina Ordorica.

6. Prior to his death, Decedent paid \$172 per month in child support to Rejina Ordorica for the benefit of Katelynn Ordorica. Decedent was \$7,994 in arrears in child support payments at the time of his death.

7. At the time of hearing, Katelynn Ordorica was receiving death benefit payments from Defendants in the amount of 5% of the average weekly state wage.

8. At the time of hearing, Sheila Bernal was receiving death benefit payments from Defendants in the amount of 45% of the average weekly state wage.

These stipulations are adopted by the Referee.

## **CONTENTIONS OF THE PARTIES**

Katelynn Ordorica seeks redistribution of death benefits as authorized by Idaho Code § 72-414 and asserts that the statutory distribution of death benefits set forth in Idaho Code § 72-413 fails to advance the legislative goal of providing relief to the families of workers who are killed on the job. She contends that her status as a dependant child of a deceased worker who does not live with the widow of the deceased worker leaves her with such a reduced benefit that she is “worthless” in the eyes of the law. The statutory distribution fails to consider the needs of any individual beneficiary and, under the facts of this case, results in injustice.

Sheila Bernal asserts that she should continue to receive 45% of the average weekly state wage. The classification of beneficiaries and statutory apportionment of benefits established by Idaho Code § 72-413 are constitutional and create a legal presumption that has not been overcome. Katelynn Ordorica has other sources of financial support and has not established that the current distribution of benefits is unjust.

## **NOTIFICATION OF ADDITIONAL BENEFICIARIES**

Testimony during hearing revealed that Decedent had other children, in addition to Katelynn Ordorica. The parties were aware of Decedent’s minor son living with his mother in Washington and Decedent’s daughter living in northern Idaho who was possibly under 18 at the time of Decedent’s injury and death. Based on this information, the Referee became concerned that there were potential necessary parties to this dispute that had not been joined or otherwise provided notice of the hearing. The Referee elected to make inquiries and perform investigation as authorized by Idaho Code § 72-714(3) in order to notify additional known beneficiaries of the pending litigation and to permit them to participate, if they chose to do so. The purpose of notifying additional beneficiaries was to avoid the potential for duplicitous litigation and/or the

issuance of a decision that would impact the rights of non-joined beneficiaries. The Industrial Commission was particularly concerned with protecting the rights of unrepresented minors. Although the hearing went forward on March 18, 2008, the hearing record remained open and proceedings were stayed until May 22, 2008, for this purpose. All parties were cooperative and prompt in responding to requests by the Referee for information.

Defendants confirmed that they were aware of and were paying death benefits to minor beneficiary, Michael Rodney Bernal, through his mother, Tina Zaiff, at the rate of 5% of the average weekly state wage. Defendants provided a mailing address for Ms. Zaiff in Washington. The address is presumed to be accurate since it is the address to which benefit checks are sent by Defendants. The checks are cashed on a regular basis. All parties complied with the Referee's request to send copies of pleadings to Ms. Zaiff. On March 20, 2008, the Referee sent a letter to Michael Rodney Bernal in care of Ms. Zaiff advising of the pending dispute and hearing held on March 18, 2008. The letter was sent via certified mail and was returned to the Industrial Commission on April 11, 2008, unclaimed. On that same date, the Referee re-sent the letter to Ms. Zaiff via regular U.S. Mail and that letter has not been returned. Ms. Zaiff did not respond to the letter on or before May 2, 2008, as requested. The letter advised Ms. Zaiff that the case would proceed without her son as a party if she failed to respond, in writing, to the Referee's letter and/or file a Complaint with the Industrial Commission on behalf of her son by May 2, 2008. In her correspondence sent to Ms. Zaiff, the Referee represented that, if she opted not to participate in this dispute on behalf of her son, that his benefits would continue in accordance with Idaho Code § 72-413 and would not be re-apportioned. (Referee's Exhibit 5).

Sheila Bernal provided the last known address for Decedent's biological daughter, Amanda Sisneros. Neither Ms. Sisneros, nor anyone acting on her behalf, filed a claim for death

benefits by the time of hearing and Defendants were not paying benefits to Ms. Sisneros. Based on representations at hearing that Ms. Sisneros might have been under the age of 18 at the time of Decedent's injury and death, the Referee made efforts to locate Ms. Sisneros to determine whether she was a potential beneficiary and/or a necessary party to the dispute.

The Industrial Commission was able to locate Ms. Sisneros in New Mexico. The Referee forwarded a questionnaire to Ms. Sisneros, seeking basic information to clarify her status as a potential beneficiary. Ms. Sisneros completed the questionnaire and signed it in the presence of a notary public on April 10, 2008. (Referee's Exhibit 9). Information obtained from Ms. Sisneros included a copy of her birth certificate. Ms. Sisneros was over 18 years old at the time of Decedent's industrial accident, and was not attending school. Additionally, Ms. Sisneros had been adopted by Mr. and Mrs. Chester Scheline when she was seven or eight years old. Ms. Sisneros was married approximately four months after Decedent's fatal injury. The Referee was satisfied that Ms. Sisneros is not a potential beneficiary and that she did not need to be involved in the determination of reapportionment of death benefits.

Testimony at hearing indicated that Decedent had additional children who were well over 18 years old at the time of Decedent's injury and death. By the time of hearing, more than one year had passed since Decedent's death. The only beneficiaries to make a timely claim for death benefits pursuant to Idaho Code § 72-701 are Katelynn Ordorica, Sheila Bernal and Michael Rodney Bernal.

The Referee is satisfied that reasonable efforts have been made to notify Decedent's beneficiaries of this litigation. The evidentiary record in this case was closed on May 23, 2008. Referee's Exhibits 3 through 13 document the efforts of the parties and the Industrial Commission to provide appropriate notice of this litigation to Decedent's beneficiaries.

## **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. Joint Exhibits 1 through 5<sup>1</sup>;
2. Testimony at hearing of Katelynn Ordorica's great grandfather Dan T. Morris, her grandmother Ann Ordorica, and her mother Rejina Ordorica;
3. Testimony at hearing of Sheila Bernal and her daughter Melony Franklin;
4. Referee's Exhibits 1 through 14<sup>2</sup>; and
5. The Industrial Commission Legal File.

After having considered all the above evidence the Referee submits the following findings of fact and conclusions of law for review by the Commission.

Throughout the findings of fact and conclusions of law, the parties, witnesses and other individuals referenced in this decision will initially be referred to by their full names with subsequent references limited to their first names. Many individuals referenced share common last names, but none of the individuals share first names. This manner of identification is to provide consistent identification without making the decision difficult to read and is not intended to show a lack of respect or formality.

## **FINDINGS OF FACT**

1. Decedent worked for Employer as a laborer. On March 5, 2007, he was standing at a job site when a bridge crane hit a parked crane which caused the load on the parked crane to

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<sup>1</sup> The parties discussed proposed Joint Exhibit 6 during the hearing and it was provisionally admitted by the Referee. This exhibit was withdrawn by agreement of the parties during a post-hearing telephone conference of May 19, 2008.

<sup>2</sup> The Referee's exhibits were compiled post-hearing, based on testimony at hearing about additional potential beneficiaries. The Referee identified these exhibits to the parties during a post-hearing telephone conference of May 19, 2008 and there was no objection to their inclusion in the record.

fall and strike him in the chest, crushing him against a wall. Decedent died from blunt force trauma as a result of the industrial injury. Documents filed with the Commission reflect that the injury occurred on Decedent's first day of work for Employer, but testimony indicated that Decedent had been employed by Employer for approximately one month prior to the accident.

### **Decedent's Relationship with Rejina Ordorica**

2. Decedent and Rejina Ordorica were never married, but had two children together, Katelynn Ordorica, born May 1, 2000, and Trevor Ordorica, born February 17, 2002. Trevor was killed in a house fire on February 17, 2006, on his fourth birthday.

3. Decedent and Rejina lived together for approximately eight years until July 2003 when Decedent was incarcerated for having sexual contact with a minor. During the period of time they lived together, Decedent would spend about 90% of his time as a member of the household and would spend the other 10% of his time "wandering." Rejina knew that Decedent would "run around" for a few days at a time and that he cheated on her with other women, but he would always come home to her and considered her his "old lady."

4. During the time Decedent lived with Rejina, he worked intermittently as a welder during which periods he contributed approximately \$1,000 per month to support Katelynn and Trevor. Decedent was not consistently employed because he had a drug problem. Both Decedent and Rejina used methamphetamine while living together. Decedent also experienced an inability to work after being shot in the arm a few weeks prior to going to prison.

5. Rejina regularly visited Decedent in prison. She was aware that Decedent had other relationships, but unaware that he had gotten married to another woman during his incarceration.

### **Katelynn Ordorica's Environment**

6. At the time of hearing, Katelynn was approaching her eighth birthday. She lives in Wilder with her mother, Rejina, maternal grandmother, Ann Ordorica, and her 20 month old half-sister, Sierra Ordorica. Katelynn is in the second grade at Homedale Elementary School and is not currently having academic or behavioral problems at school. She was previously having problems in Wilder Elementary School involving other girls “ganging up” on her, so she switched schools and has not experienced additional problems.

7. The home where Katelynn lives is owned by Ann’s ex-husband, Frank Ordorica (Katelynn’s grandfather). Ann pays Frank approximately \$450 per month in rent. Ann is the primary bread winner of the household. She works as a licensed practical nurse (LPN) at a rehabilitation center on a full time basis where she earns \$17.50 per hour.

8. Ann sustained respiratory injuries in the house fire of February 17, 2006, and was diagnosed with chronic obstructive pulmonary disease (COPD). Ann was hospitalized following the fire and continues to have debt related to medical expenses.

9. Rejina does not have stable employment. She has ongoing substance abuse problems, but reported a three month period of sobriety preceding the hearing. Rejina has had past periods of sobriety, but relapsed in 2006, after her son was killed in the fire. She completed two in-patient drug rehabilitation programs in the distant past. She is currently attempting to stay clean and sober on her own.

10. Rejina was sentenced to four days in jail for petty theft in late 2005 or early 2006 and was free on bond at the time of hearing. She will report to jail in the near future, but has been postponing it because she does not want to leave her children. Because of a previous failure to appear for sentencing, she is now facing up to 90 days of jail time.

11. At the time of hearing, Rejina was married to Ismael Guzman. Ismael lived in the Ordorica household briefly but is currently in federal prison and awaiting deportation. He did not work during the time he lived in the Ordorica household because of his immigration status and did not contribute financially to the household. Rejina married Ismael in 2007, after he was incarcerated.

12. The father of Katelynn's half-sister, Sierra, is a drug user whose whereabouts are unknown. Ismael is not Sierra's father, but Ismael "accepted paternity" and signed her birth certificate indicating that he is her father. Rejina does not receive child support from any source for the benefit of Sierra.

13. The most stable authority figure in Katelynn's life is her great grandfather, Dan T. Morris. Dan is in his early 80s and resides with his wife in Wilder, near the border of Homedale. His house is five miles away from the Ordorica house and he often spends time with Katelynn when she gets out of school in the afternoon. Dan is a World War II veteran who earned a college degree from College of Idaho in 1950. He previously ran an implement store and bought the International Harvester dealership in Homedale. He is currently semi-retired. Dan sells used farm equipment and receives Social Security benefits. During the past year, his farm equipment business brought in approximately \$3,500. In 2005 and 2006, his business brought in approximately \$12,000 per year.

14. Decedent often communicated with Katelynn through Dan. Dan received phone calls and letters for both Katelynn and Trevor from Decedent during his incarceration.

15. Dan regulates Katelynn's finances. Neither Rejina nor Ann has shown an aptitude for budgeting. Katelynn's workers' compensation death benefit checks and Social Security death benefit checks are payable to Rejina, but she signs them over to Dan, who "doles

out” money, as needed. Katelynn currently receives approximately \$115 per month in workers’ compensation death benefits and \$528 per month from Social Security.

16. Trevor’s death had a significant impact on all family members. Katelynn has been profoundly impacted by both the death of her brother and her father.

17. There is a wrongful death law suit pending against Frank relating to the February 2006 fire that resulted in Trevor’s death. The claim has been consistently denied and no settlement has been received for the wrongful death claim. The insurance company paid approximately \$94,000 to Frank for loss of the structure and approximately \$26,000 to Ann and Rejina for loss of furnishings. Frank used \$44,000 to pay off what he owed on the house that burned and used the remaining \$50,000 to rebuild a house on the same property.

18. During the house rebuilding, Ann, Rejina and Katelynn lived in a trailer on Dan’s property. They moved into the new house when it was completed.

#### **Decedent’s Relationship with Sheila Bernal**

19. Sheila met Decedent in 2001 and he made his initial proposal of marriage to her a few months later. At that time, Sheila declined the proposal and explained that she was not interested in a serious relationship. She and Decedent dated for a couple of years prior to Decedent’s incarceration in July 2003.

20. Sheila and Decedent did not live together prior to Decedent’s incarceration. Sheila was not initially aware of his relationship with Rejina but, as they dated, became aware that Decedent had children with someone else and put it together that Decedent lived with his children and their mother.

21. Sheila became a born-again Christian in early 2003 and encouraged Decedent to do the same. Decedent changed his lifestyle and became a spiritual leader among other inmates.

Upon release from prison, Sheila and Decedent were planning to attend church together but were unable to do so because one of the terms of Decedent's release from prison was that he was prohibited from fraternizing with women under 18 years old.

22. Sheila and Decedent were married on January 28, 2006. Decedent remained incarcerated for the first year of their marriage. They lived together as husband and wife during the six weeks following his release from prison, up until Decedent's death. They initially decided to get married in 2004, but were holding off so that they could get married in a church. However, they decided not to wait any longer and went through with the ceremony prior to Decedent's release.

### **Sheila's Living Situation and Financial Resources**

23. Sheila earned her GED and took one year of college level vocational courses in business. During Decedent's incarceration, Sheila worked as a collector for Citi Cards where she earned an annual salary of approximately \$22,000. She previously worked as a pipefitter's helper with her ex-husband. Sheila was working for a property management company immediately prior to Decedent's release from prison. The company went out of business and she collected unemployment benefits. She did not look for a new job because Decedent represented that he wanted to take care of her because she had previously taken care of him, and that she would not need to work.

24. During Decedent's incarceration, Sheila supported herself and supported Decedent by "putting money on his books" and buying him a television. Additionally, she provided occasional financial assistance to Decedent's adult sons.

25. At the time of hearing, Sheila was living on the workers' compensation death benefits of approximately \$1,112 per month, with occasional income from babysitting her

grandchildren. She does not receive Social Security death benefits. She is not aware of any other type of benefit or insurance proceeds to which she might be entitled. She hired an attorney to pursue a possible product liability lawsuit arising out of Decedent's death, but nothing has been filed and there has not been a determination that Decedent's death was the result of a faulty product.

26. Her monthly expenses include rent (\$450), utilities (\$200), gasoline, food (\$150), and car insurance. She has additional expenses relating to her step-son who is recently out of prison on parole and residing with her. Her other children and step-children are adults who do not reside with her. She owns her vehicle, a 2002 Windstar mini-van.

27. Sheila sustained injuries in a motor vehicle accident in 1997 and has ongoing problems with her back. She does not currently have health insurance.

28. Sheila testified that she is unemployed and too emotionally and physically "messed up" to return to work. She reported depression and weight gain as a result of Decedent's death. Her daughter, Melony Franklin, testified that her mother is not the same person she used to be and was "mopey and down." Melony is aware of her mother's back pain and doesn't think that her mother is ready to go back to work.

29. Sheila was not under a doctor's care at the time of hearing and no medical records were presented to establish an inability to work from either an emotional or physical standpoint.

### **DISCUSSION AND FURTHER FINDINGS**

30. Idaho Code § 72-413 states, in pertinent part:

**INCOME BENEFITS FOR DEATH.** If death results from the accident or occupational disease within four (4) years from the date of the accident, or manifestation of the occupational disease, the employer shall pay to or for the benefit of the following particular classes of dependents' weekly income benefits equal to the following percentages of the average weekly state wage as defined in

section 72-409, Idaho Code. The benefits payable hereunder shall be subject to annual adjustment as provided in section 72-409(2), Idaho Code...

(1) To a dependent widow or widower, if there be no dependent children, forty-five per cent (45%).

(2) To a dependent widow or widower, if there be dependent children, an additional five per cent (5%) of the average weekly state wage for each dependent child to and including a total of three (3). Such compensation to the widow or widower shall be for the use and benefit of the widow or widower and of the dependent children and the commission may from time to time apportion such compensation between them in such a way as it deems best....

Payments made for and on behalf of a dependent child or children shall be made to such child's or children's natural or adoptive surviving parent for the use and benefit of the child or children, if such child or children reside with such parent, notwithstanding the remarriage of such parent...

31. Based on the above statutory distribution, Sheila receives 45% of the average weekly state wage as a dependent widow and Katelynn and Michael Rodney Bernal each receive 5% of the average weekly state wage, payable to their respective mothers, as dependent children. The language of Idaho Code § 72-413(2) reflects an assumption that the dependent children of the deceased worker will have at least some affiliation with the surviving spouse. In the present case, Decedent fathered children with multiple women, none of whom are the surviving widow.

32. Idaho Code § 72-414 states:

APPORTIONMENT BENEFITS BETWEEN CLASSES. In case there are two (2) or more classes of persons entitled to compensation under section 72-413, [Idaho Code,] and the apportionment of such compensation as above provided, would result in injustice, the commission may, in its discretion, modify the apportionment to meet the requirements of the case.

Surprisingly, there is not a single published case addressing the application of Idaho Code § 72-414, in spite of the fact that it was part of the Workers' Compensation Act of 1971 and has been in effect since January 1, 1972.

33. Research of the legislative history behind Idaho Code § 72-414 failed to yield insight into the types or degree of injustice for which the statute was intended to provide relief. Idaho Code § 72-414 began as House Bill 73. Statements of Purpose for legislative bills are not available for 1971 and there is no substantive information contained in the committee minutes relating to the bill that became the Workers' Compensation Act of 1971. The only anecdotally relevant comment regarding the distribution of death benefits to dependent children is found in a statement filed by Samuel Kaufman, an advisory committee member and secretary of the Idaho Self-Insurers Association in 1971, which became an attachment to interim committee minutes. He noted that the definition of "child" should specify that a dependent child must be unmarried in order to receive death benefits because "If a boy can afford to get married several dollars a week is negligible [and if] a girl gets married her husband should contemplate supporting her." Such a comment is a helpful reminder that gender roles have changed over the past 40 years and confirms that the drafters of Idaho Code §§ 72-413 and 72-414 did not likely foresee the factual scenario demonstrated in this case.

34. Certainly, monetary benefits are a poor substitute for the loss of a loved one. Death benefits payable under the Idaho Workers' Compensation Act should not be construed as a fair replacement of a lost life to any beneficiary. In order to apply Idaho Code § 72-414, it is necessary to weigh the equities involved and apportion the death benefits in the manner that is the least unfair. The re-apportionment of benefits does not impact the monthly amount of benefits owed by Defendants and is merely a re-slicing of the pie.

35. The current distribution of 45% of the state average wage to Sheila and 5% of the state average wage to Katelynn results in a grave injustice and these death benefits are properly subject to re-apportionment. There was no evidence presented regarding the circumstances of

Michael and his benefits will remain at 5% of the state average wage and are not subject to re-apportionment.

36. Financial dependency by a child on a parent is by nature, whereas financial dependency between spouses is generally by choice. Katelynn is unable to support herself and her mother has failed to provide financial support for either herself or Katelynn. It is unrealistic to expect that Dan or other family members will be able to provide financial support to Katelynn on an ongoing basis. The fact that Decedent provided only intermittent support to Katelynn and was unable to comply with his child support obligations during periods of incarceration does not lessen Katelyn's need or make her less deserving.

37. Although Sheila's grief is real and sincere, there is no credible evidence that she is incapable of self-support. To the contrary, Sheila supported herself and partially supported Decedent for at least 50 weeks of their 58 week marriage. At the time of Decedent's death, Sheila was unemployed and dependent on Decedent. Accordingly, she should continue to receive at least some amount of death benefits.

38. A fair re-apportionment of the 50% of the state average wage shared between Katelynn and Sheila is to award 35% to Katelynn and 15% to Sheila.

#### **Effective Date of Modified Apportionment**

39. There is an absence of statutory guidance as to the effective date of the modified apportionment as determined by this decision. Retroactive application of this decision would result in undue hardship to Sheila who would be in a position to "pay back" benefits properly received pursuant to the statutory distribution set forth in Idaho Code § 72-413. Similarly, it would be unfair to require Defendants to double pay benefits previously issued and properly paid. Accordingly, the modified apportionment determined by this decision is effective as of the

first pay cycle immediately following Defendants' receipt of the Commission's Order in this case and is not retroactive.

### **Impact of Modified Apportionment on Related Statutory Provisions**

40. The modified apportionment of benefits has no impact on the duration of death benefits as outlined in Idaho Code § 72-412.

41. In the event that Sheila remarries, she remains entitled to a lump sum payment in accordance with Idaho Code § 72-413A. However, the weekly rate of benefits paid shall be paid at the rate of 15% of the average state wage, as opposed to 45% of the average state wage.

42. Idaho Code § 72-413A is subject to the modification of apportionment permitted by Idaho Code § 72-414 which allows apportionment "of such compensation as above provided."

43. Failure to reduce the benefit rate from 45% to 15% of the average state wage for the lump sum payment upon remarriage, if such situation arises, would result in Defendants' liability exceeding the maximum total payment. Idaho Code § 72-417 provides that the maximum weekly income benefits payable for all beneficiaries in death claims shall not exceed 60% of the average weekly wage of the deceased.

44. Idaho Code § 72-415 contemplates a beneficiary becoming ineligible and states:

CHANGE IN DEPENDENTS. Upon the cessation of the income benefits for death to or on account of any person, the income benefits of the remaining persons entitled to income benefits for the unexpired part of the period during which their income benefits are payable shall be that which such persons would have received if they had been the only persons entitled to income benefits at the time of the decedent's death.

45. In the event that minor beneficiary, Michael, ceases to be a beneficiary, benefits payable to Katelynn and Sheila will not revert to the statutory distribution set forth of Idaho Code § 72-413. Under such facts, application of Idaho Code § 72-415 would essentially "undo" this decision.

46. In the event that either Katelynn or Sheila cease to be beneficiaries, Idaho Code § 72-415 may properly be applied since benefits would no longer be apportioned between them and the analysis in this decision would become moot. To hold otherwise would result in a potential adverse impact on Michael.

### CONCLUSIONS OF LAW

1. A re-apportionment of death benefits between Katelynn Ordorica and Sheila Bernal pursuant to Idaho Code § 72-414 is appropriate.

2. Katelynn Ordorica's benefit rate is increased from 5% of the average weekly state wage to 35% of the average weekly state wage.

3. Sheila Bernal's benefit rate is reduced from 45% of the average weekly state wage to 15% of the average weekly state wage.

4. Michael Rodney Bernal's benefit rate is not affected by this decision and remains at 5% of the average weekly state wage in accordance with Idaho Code § 72-413.

### RECOMMENDATION

The Referee recommends that the Commission adopt the foregoing findings of fact and conclusions of law and issue an appropriate final order.

DATED this \_\_\_4\_\_\_ day of \_June\_\_\_\_\_ 2008.

INDUSTRIAL COMMISSION

\_\_\_\_\_  
/s/  
Susan Veltman, Referee

ATTEST:

\_\_\_\_\_  
/s/  
Assistant Commission Secretary

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

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and )  
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LIBERTY INSURANCE )  
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Defendants. )  
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**IC 2007-008487**

**ORDER**

June 20, 2008

Pursuant to Idaho Code § 72-717, Referee Susan Veltman submitted the record in the above-entitled matter, together with her proposed 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. A re-apportionment of death benefits between Katelynn Ordorica and Sheila Bernal pursuant to Idaho Code § 72-414 is appropriate.

2. Katelynn Ordorica's benefit rate is increased from 5% of the average weekly state wage to 35% of the average weekly state wage.

3. Sheila Bernal's benefit rate is reduced from 45% of the average weekly state wage to 15% of the average weekly state wage.

4. Michael Rodney Bernal's benefit rate is not affected by this decision and remains at 5% of the average weekly state wage in accordance with Idaho Code § 72-413.

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

DATED this 20 day of June, 2008.

INDUSTRIAL COMMISSION

/s/ \_\_\_\_\_  
James F. Kile, Chairman

/s/ \_\_\_\_\_  
R. D. Maynard, Commissioner

/s/ \_\_\_\_\_  
Thomas E. Limbaugh, Commissioner

ATTEST:

\_\_\_\_\_  
/s/  
Assistant Commission Secretary

### CERTIFICATE OF SERVICE

I hereby certify that on the \_\_20\_\_ day of \_\_June\_\_\_\_, 2008, a true and correct copy of the foregoing **Findings, Conclusions and Order** was served by regular United States Mail upon each of the following persons:

JON M STEELE  
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\_\_\_\_\_  
/s/