

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

ARCHIE HAVENS,)
)
 Claimant,)
)
 v.)
)
 STATE OF IDAHO, INDUSTRIAL)
 SPECIAL INDEMNITY FUND,)
)
 Defendant.)
 _____)

**IC 2005-505094
2007-021417**

ORDER

filed September 21, 2009

This matter came before the Industrial Commission on the parties' request for approval of that Lump Sum Settlement Agreement dated September 17, 2009. Supporting the proposed Lump Sum Settlement Agreement is Claimant's memorandum dated September 17, 2009, along with a number of medical and other records attached as exhibits to the proposed Settlement. Following a hearing held on September 16, 2009, pursuant to JRP 18(D), and being fully advised in the premises, the Industrial Commission enters this order approving the Lump Sum Settlement Agreement between Claimant and the Idaho Industrial Special Indemnity Fund (ISIF).

From the Lump Sum Settlement Agreement and the supporting documents referenced above, it appears that while employed by Defendant/Employer, Claimant suffered two industrial accidents, the first on February 22, 2005, and the second on March 28, 2007. These accidents caused injuries to Claimant's lumbar spine, for which he required significant medical/surgical treatment, and which ultimately resulted in the assignment of significant permanent physical impairment ratings. The claims were consolidated for the purpose of hearing, the State Insurance Fund (the Surety on the risk for both claims), previously settled its exposure by Lump Sum Settlement approved by the Industrial

Commission on September 8, 2009. Under the terms of that Agreement, medical benefits were left open.

Contemporaneous with the settlement of the claims against Employer/Surety, Claimant and the ISIF entered into a Lump Sum Settlement Agreement, under the terms of which the parties intend to resolve Claimant's claim that he is permanently and totally disabled, and that the Industrial Special Indemnity Fund (ISIF) is liable for the payment of some portion of the benefits that Claimant is entitled to by reason of his permanent and total disability.

The Commission reviews the proposed Lump Sum Settlement Agreement pursuant to the guidance given to the Commission in the recent case of *Wernecke v. St. Maries Joint School District*, 147 Idaho 277, 207 P.3d 1008, (2009). In connection with the approval of this, and other lump sum settlement agreements involving the ISIF, some further discussion of the Commission's responsibilities following *Wernecke, Supra*, is warranted.

The lump sum settlement agreement at issue in *Wernecke* purported to resolve the ISIF's responsibility for its share of claimant's permanent and total disability. However, in the text of the agreement, the ISIF specifically denied that claimant had satisfied, or could satisfy, the *prima facie* elements of her case against the ISIF. The Court found that the ISIF could not, on the one hand, request the Commission's approval of an agreement which absolved it of all future responsibility for claimant's permanent and total disability while, on the other hand, assert that the evidence did not support a finding that claimant could satisfy the elements of her *prima facie* case against the ISIF. The Court ruled that ISIF liability can only be invoked where it is demonstrated to the satisfaction of the Industrial Commission that claimant is, in fact, permanently and totally disabled, and that all elements of the *prima facie* case against the ISIF have been satisfied. Then, and only then, does the Industrial Commission have jurisdiction to ascertain whether the proposed settlement is in the "best

interest” of the parties, under Idaho Code § 72-404. The unambiguous direction given by the Court to the Commission concerning the Commission’s responsibility in evaluating a proposed lump sum settlement involving the ISIF, is worth reiterating:

ISIF’s liability may only be invoked when the conditions specified in the statute, as defined in *Garcia*, are present. That requires findings by the Commission.⁸ Unless the Commission finds that the requisite elements exist, it may not approve a lump sum settlement agreement involving ISIF. Such findings are for the benefit of both the claimant – to protect him or her from himself or herself – and of ISIF – to keep it from making unwarranted payments when there are no findings establishing ISIF’s liability.⁹ In this regard, the Commission plays a gatekeeper role and must scrupulously perform that function. The requisite findings may be made by the Commission upon a hearing on the merits or upon a stipulation of the parties considered and approved by the Commission.

....

ISIF’s liability under section 72-332 is not invoked unless the four elements requisite to such a claim are found by the Commission to be present. If the Commission does not make the requisite findings, it has no authority or jurisdiction to hold ISIF liable on a claim. In this case, the Commission merely gave its stamp of approval to the Agreement, making no findings as to whether ISIF’s liability under section 72-332 had been properly invoked. Without such findings, the Commission lacked statutory authority to approve the Agreement and its order purporting to do so is void.¹⁰

Wernecke, Supra (footnotes omitted).

I.

Accordingly, the Commission’s starting point in any lump sum settlement involving the ISIF is that no lump sum settlement agreement upon stipulation of the parties can be entertained unless it is clearly shown from the stipulation and supporting documents that claimant is, in fact, permanently and totally disabled and that the *prima facie* elements of ISIF liability are satisfied. If the stipulation and supporting documents, on its face, does not clearly and unambiguously support such a finding, the Industrial Commission does not have jurisdiction to entertain the lump sum settlement agreement. Very simply, the Industrial Commission may approve a lump sum settlement agreement between an injured worker and the ISIF only where it can be satisfied that the elements of ISIF

liability are met. This standard does not admit to any equivocation by the parties, conditional language, caveats or statement of alternative positions in the presentation of a proposed lump sum settlement agreement between claimant and the ISIF. Unless the parties are prepared to genuinely acknowledge claimant's permanent and total disability and ISIF liability, they should not submit a proposed lump sum settlement to the Commission for consideration. In conformance with *Wernecke, Supra*, the Industrial Commission will only consider such a lump sum settlement for approval where it appears that the stipulation of the parties supports the conclusion that ISIF liability is extant.

To satisfy the heightened scrutiny given to such lump sum settlement agreements by the Industrial Commission, practitioners should be warned that any doubt created by the lump sum settlement agreement, or supporting documentation, that the ISIF is not, in fact, liable for payment of benefits in a particular case, will result in the rejection by the Industrial Commission of the proposed lump sum. Language that equivocates, or states positions in the alternative, will only lead the Commission to conclude that doubt exists as to the existence of ISIF liability. The Industrial Commission has no jurisdiction to consider such a lump sum settlement agreement for approval.

It goes without saying that in support of such a lump sum settlement agreement, the parties' stipulation should contain factual averments sufficient to support a conclusion that ISIF liability exists. The Industrial Commission will not be satisfied by an unsupported (albeit unambiguous) stipulation that ISIF liability exists. The stipulation must recite those facts and circumstances which the parties contend support a finding that ISIF liability exists in a particular case.

II.

If the Industrial Commission is satisfied that ISIF liability exists in a particular case, it follows that the Commission is obligated, under Idaho Code § 72-404, to be satisfied that the amount

claimant is to receive pursuant to the proposed lump sum settlement is consistent with the finding that claimant is permanently and totally disabled, and that responsibility for some portion of claimant's permanent and total disability should be borne by the ISIF. In other words, the Commission must be satisfied that the proposed lump sum settlement is in the best interest of a worker who would otherwise receive statutory benefits for life. The amount proposed for resolution of the claim must appear reasonable in light of the Commission's finding that Claimant actually is permanently and totally disabled, and that the ISIF bears responsibility for some portion of that disability. It is the obligation of the proponents of a lump sum settlement, to provide the Industrial Commission with a recitation of the facts and circumstances which demonstrate that the proposed lump sum settlement amount is a good settlement for an injured worker who has satisfied his burden of demonstrating that the ISIF is liable for some portion of his permanent and total disability benefits.

To perform this evaluation, it is helpful to the Industrial Commission to first understand what the exposure of the ISIF would be absent a lump sum settlement, along with information explaining why it is in the best interest of claimant to accept a (presumably) smaller lump sum payment in commutation of a life-time periodic payment.

The Commission recognizes that the extent of ISIF liability may well be an issue that is in dispute. For example, although the parties may agree that the elements of ISIF liability are met, there may be a dispute over *Carey* apportionment. Therefore, it may be difficult to speculate what the ISIF's liability would be in the future, absent a lump sum settlement. In such circumstances, the parties should be prepared to describe the range of future ISIF exposure based on the scenarios that are in dispute concerning *Carey* apportionment.

Also, it will be helpful to the Commission to understand whether the claimant has a rated age

that would warrant the calculation of claimant's future entitlement at something other than the life expectancy for his sex and age.

After the parties articulate the ISIF's likely future exposure, or establish a range of future exposures, it may be helpful to the Industrial Commission's analysis for the parties to reduce those values to a present day value.

Once the Commission has an understanding of the potential future exposure of the ISIF for lifetime periodic payments, the Commission is in a much better position to undertake the evaluation of whether the proposed lump sum payment is in the best interests of the parties. There are many reasons why it may be in the best interest of the claimant to accept a smaller lump sum settlement now in lieu of receiving periodic payments over the balance of his lifetime.

As alluded to above, one reason a claimant may be willing to accept of smaller lump sum settlement is that there is a real dispute over the *Carey* apportionment formula utilized to establish the extent of the ISIF's liability. For example, claimant may have adduced medical proof establishing that claimant's pre-existing condition entitles him to a 50% PPI rating. The ISIF may have adduced similarly persuasive medical evidence tending to establish that claimant's pre-existing impairment only entitles him to a 5% PPI rating. In both scenarios, ISIF liability clearly exists, but depending on whose doctor is believed, the ISIF will either pay more, or less. This is a dispute or circumstance that may explain why the parties have reached the agreement that they have on a proposed lump sum settlement amount.

Similarly, a lump sum in the hand will sometimes serve claimant's interest better than the periodic payments he might be expected to receive absent a lump sum agreement. A claimant may justifiably decide to forego lifetime periodic payments for a lump sum, if he has immediate need for a large sum of money that cannot be satisfied by the small periodic payments which are his only

entitlement under the statute.

Under Idaho Code § 72-431, disability benefits for less than total and permanent disability are inheritable. However, disability benefits payable by the ISIF for permanent and total disability are not inheritable, and cease upon the injured workers death. Therefore, for an injured worker with a family, it might be in the claimant's best interest to enter into a lump sum settlement in order that some provisions might be made for claimant's survivors, in the event of his demise.

More generally, it is not unreasonable for an injured worker to decide that he does not want to bet that the actuaries are right about his life expectancy. Such an individual might prefer the certainty of a lump sum payment, and for this certainty, might be willing to accept a lump sum that is substantially smaller than the value of the periodic payments he would receive for the duration of his life expectancy. After all, nobody has a crystal ball, and nobody knows when death will come knocking.

Another circumstance that might explain a claimant's willingness to take a smaller lump sum settlement relates to issues created by the worker's receipt of Social Security disability benefits. In a particular case, an injured worker's receipt of periodic payments for permanent and total disability might result in the total or partial offset of the Social Security disability benefits he would otherwise receive. The risk that an injured worker will be subject to an offset of Social Security disability benefits can, in some cases, be significantly reduced by adjusting, i.e. lowering, the payments attributable to the injured worker on a monthly basis. Accordingly, for this reason, as well, it might be in the injured worker's best interest to accept a lump sum settlement that is significantly less than the periodic benefits he would be entitled to over his life expectancy.

This list, of course, is not intended to be exhaustive, but is illustrative of the fact that there may be many reasons for an injured worker to accept a lump sum settlement in a case with ISIF

liability that is significantly less than the periodic payments claimant could be expected to receive over his expected lifetime.

In a lump sum settlement agreement, or in supporting documents, the parties should provide the Industrial Commission with the particular facts and circumstances that explain why, in an admitted case of permanent and total disability with ISIF liability, the proposed lump sum amount is consistent with the finding of permanent and total disability. Specifically, the parties should provide the Commission with those facts and circumstances which explain why the proposed settlement amount is in the best interest of an injured worker who has satisfied his burden of establishing ISIF liability.

Finally, it is impossible to predict whether a proposed lump sum settlement will be approved by the Industrial Commission, this guidance notwithstanding. The parties may justifiably be concerned that an executed, but non-approved, lump sum settlement agreement may be used for evidentiary purposes in a subsequent proceeding before the Industrial Commission. Practitioners should be aware that the Industrial Commission attaches no evidentiary value to non-approved lump sum settlement agreements, and will not support the admission of the same into evidence in a subsequent proceeding for the purpose of establishing any of the facts set forth in such agreement.

III.

Turning to the facts of the instant matter, the Lump Sum Settlement Agreement at issue reflects that the parties unambiguously stipulate and agree that Claimant is permanently and totally disabled, and that the ISIF bears a responsibility for some portion of Claimant's permanent and total disability. Moreover, the Agreement, and supporting documents, include a recitation of the facts and circumstances of the case which support the parties' stipulation concerning permanent and total disability and ISIF liability. Finally, at the September 16, 2009, hearing on this matter, the Industrial

Commission had the opportunity to obtain additional information from the parties about the underlying facts and circumstances of the case. From the foregoing, it is apparent that Claimant is, indeed, permanently and totally disabled under the laws of this state. Further, it appears that the *prima facie* elements of ISIF liability have been satisfied. Although Claimant's pre-existing conditions of COPD and PVC do not appear to qualify as pre-existing permanent physical impairment, there is good agreement between the various physicians who have evaluated Claimant that he suffers from a 10% permanent physical impairment related to the 2005 work related low back injury. Moreover, since Claimant received his rating for this injury prior to the 2007 accident, it is clear that the 10% PPI rating from the 2005 accident can, and does, constitute a pre-existing permanent physical impairment for purposes of ISIF liability. (*See, Quincy v. Quincy*, 136 Idaho 1, 27 P.3d 410 (2001)).

In addition, the Commission is satisfied that other elements of ISIF liability are met as respects the 2005 accident; the stipulation of the parties, and the attachments to the Lump Sum Settlement Agreement, demonstrate that Claimant's pre-existing permanent physical impairment was manifest, constituted a subjective hindrance to Claimant and combined with the effects of the 2007 accident to cause Claimant's permanent and total disability.

Although the Commission finds that the *prima facie* elements of Claimant's case against the ISIF have been met, the issue of *Carey* apportionment does appear to be disputed. There it is not good consensus on the impairment rating which should attach to the 2007 accident. For example, Dr. O'Brien gave Claimant a 25% impairment rating for the effects of the 2007 accident, while Dr. Freidman was only able to justify awarding Claimant a 2% impairment rating for that same injury. Depending on what PPI rating is used in *Carey* calculations, the ISIF will assume responsibility for the payment of lifetime benefits either earlier, or later, thus impacting its total exposure for the

payment of benefits.

Claimant does not have a rated age. At age 52, he probably has a life expectancy of nearly 30 years. Let us assume, for the sake of discussion, that Claimant's life expectancy is exactly 30 years. Let us further assume a scenario most favorable to the ISIF on the issue of *Carey* apportionment. If the ISIF has responsibility for a 10% pre-existing permanent physical impairment, and Surety is saddled with responsibility for Dr. O'Brien's 25% impairment rating, the total impairment equals 35%, leaving 65% disability to be apportioned between the parties pursuant to the *Carey* formula. Therefore, Surety's responsibility is calculated as follows: $(25 \div 35) \times 65 = 46.15 + 25 = 71.15\%$ disability. This, in turn, equates to approximately 356 weeks of income benefits, or almost seven years. Assuming that none of these benefits have been paid to date, ISIF liability would not commence until Claimant reached approximately age 59. Thereafter, the ISIF would bear responsibility for the payment of lifetime benefits. If Claimant lived to 82 years of age (his life expectancy in this hypothetical), the ISIF would pay benefits for approximately 23 years. Even without consideration of the annual escalation of the average state weekly wage, it is apparent that the ISIF would pay over \$500,000 in benefits by the date of Claimant's death. The present value of this sum exceeds the \$85,000 proposed by the party in resolution of the claim against the ISIF.

Having determined that Claimant is permanently and totally disabled, the Commission must make some judgment as to whether the particular facts and circumstances of this case demonstrate that it is in Claimant's best interest to accept \$85,000 in exchange for giving up his right to lifetime benefits which probably have a value well in excess of the settlement amount, if one assumes that Claimant lives to his full life expectancy.

Although the record does not disclose that Claimant has a rated age, the Commission's observations of Claimant at the September 16, 2009, hearing, considered in light of other medical

information in the file, suggests that Claimant is in frail health from chronic COPD and PVC. That he will live to his full life expectancy is questionable.

More importantly, there is no guarantee that some other misfortune will not befall Claimant, resulting in his death, and the immediate curtailment of lifetime permanent and total disability benefits. One could argue that if Claimant declined a lump sum settlement, only to be hit by a truck the day after he made his decision to accept periodic payments of lifetime benefits, he chose poorly. It is entirely understandable that Claimant may not wish to run this risk, particularly where he has a disabled wife who would enjoy the inheritability of a lump sum settlement should Claimant expire suddenly.

Finally, Claimant's counsel has described a potential Social Security offset issue which justifies Claimant's acceptance of a lesser lump sum settlement in the hopes of ameliorating or preventing a Social Security offset.

In summary, having considered the parties' submissions, and having had the opportunity to question Claimant concerning his desires and expectations, the Industrial Commission is satisfied that the proposed Lump Sum Settlement amount is consistent with our finding that the ISIF bears some responsibility for Claimant's permanent and total disability. The Commission finds that the Lump Sum Settlement is in the best interest of the parties pursuant to Idaho Code § 72-404.

IT IS HEREBY ORDERED that the Lump Sum Settlement of the parties is APPROVED.

DATED this 21st day of September, 2009.

INDUSTRIAL COMMISSION

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 __21__ day of __September__, 2009 a true and correct copy of **Order** was sent by regular United States Mail upon each of the following:

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cjh

_____/s/_____