BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

KEITH MAYER, Claimant, v. TPC HOLDINGS, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORP., Surety, Defendants.	**IC 2012-004576** **FINDINGS OF FACT, CONCLUSION OF LAW, AND ORDER AND DISSENTING OPINION** Filed July 21, 2015

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Industrial Commission assigned the above-entitled matter to Referee Brian Harper. In lieu of hearing, the parties submitted the issue for resolution on a stipulation of facts and briefing. Claimant is represented by Michael Kessinger, Esquire, of Lewiston. Defendants are represented by Lea Kear, Esquire, of Boise. The matter came under advisement on March 31, 2015. Referee Harper submitted proposed Findings of Fact, Conclusion of Law and Recommendation for review and approval by the Commission pursuant to Idaho Code § 72-506(2). This case raises an issue which, at first blush, promises to yield to the clear language of an applicable statute. However, like many good problems, the closer one looks at it, the less it seems to admit a simple answer.

In his proposed Decision, Referee Harper intimated that if unconstrained by prior decisions of the Commission, he might be persuaded by the arguments raised by Defendants in

support of their interpretation of the provisions of Idaho Code § 72-431. However, Referee Harper recognized that *Martin v. Nampa Hwy. Dist.*, 1988 IIC 0367 (1988), is directly on point and compels the conclusion that disability less than total which was unspecified and unknown at the time of claimant's death survives the claimant's death from other causes. Accordingly, Referee Harper made a recommendation to the Commission which is consistent with the Commission's historic treatment of the issue in *Martin*. We agree with Referee Harper that the issues raised by Defendants are interesting and worthy of further discussion, all with a view towards ascertaining whether *Martin* was correctly decided. Therefore, we have chosen not to adopt Referee Harper's recommended Findings of Fact, Conclusion of Law and Recommendation, even though we ultimately come to the same conclusion concerning the interpretation of Idaho Code § 72-431.

ISSUE

The sole issue to be decided is whether permanent partial disability in excess of permanent partial impairment (PPI) survives the death of Claimant when such death is unrelated to the industrial injury and Claimant dies before the existence and/or extent of such disability is determined, but after Claimant reached maximum medical improvement (MMI) and was assigned a PPI rating.

EVIDENCE CONSIDERED

The record in this matter consists of the Stipulation of Facts and legal briefing supplied by the parties.

FINDINGS OF FACTS

1. On February 10, 2012, Claimant suffered a compensable industrial accident. Following treatment, Claimant was declared medically stable as of September 1, 2013. On

October 28, 2013, Dr. Goler performed an IME at Surety's request. He gave Claimant a 9% PPI rating.

2. On December 18, 2013, Dr. McNulty performed an IME at Claimant's request. He eventually assigned Claimant a 14% PPI rating. Claimant's treating physician, Dr. Dietrich, concurred with Dr. McNulty's 14% PPI rating. Surety averaged the impairment awards given by Dr. McNulty and Dr. Goler and commenced payment at the statutory rate.

3. On March 15, 2014, Claimant died from causes unrelated to the subject accident.

4. Following Claimant's death, Surety continued to pay PPI benefits until the full averaged rating, equaling $19,086.37, was paid. This award equates to 52.5 weeks of benefits at $363.55 per week, or 55% of the average state wage at Claimant's year of injury.

DISCUSSION

I

5. The parties evidently concede that should Claimant be found to be totally and permanently disabled as a consequence of the subject accident, Surety's obligation to pay such total and permanent disability benefits ends with Claimant's death, and such benefits are in no wise inheritable. The issue before the Commission is whether, under Idaho Code § 72-431, a similar rule obtains in the event that Claimant is found to be less than totally and permanently disabled as a result of the subject accident. Claimant contends that the provisions of Idaho Code § 72-431 clearly anticipate that an award of permanent disability less than total, made either before or after Claimant's death, is inheritable, while Defendants contend that the survival of both permanent partial and permanent total disability benefits are barred by the provisions of the statute.

Idaho Code § 72-431 provides:

> When an employee who has sustained disability compensable as a scheduled or unscheduled permanent disability less than total, and who has filed a valid claim in his lifetime, dies from causes other than the injury or occupational disease before the expiration of the compensable period specified, the income benefits specified and unpaid at the employee's death, whether or not accrued or due at the time of his death, shall be paid, under an award made before or after such death, to and for the benefit of the persons within the classes at the time of death and in the proportions and upon the conditions specified in this subsection and in the order named:
>
> (1) To the dependent widow or widower, if there is no child under the age of eighteen (18) or child incapable of self-support; or
>
> (2) If there are both such a widow or widower and such a child or children, one-half (1/2) to such widow or widower and the other one-half (1/2) to such child or children; or
>
> (3) If there is no widow or widower but such a child or children, then to such child or children; or
>
> (4) If there is no survivor in the above classes, then to the personal representative of the decedent.

The statute is a product of the comprehensive 1971 recodification of the Idaho workers' compensation laws, and has no antecedent in the prior statutory scheme. It seems straightforward enough, specifying that if an injured worker dies from causes unrelated to his accident or occupational disease, his survivors will be able to recover disability benefits payable to claimant if he is deemed to be less than totally and permanently disabled. Implicitly, this rule does not apply where claimant is found to be totally and permanently disabled. This is exactly the interpretation applied by the Commission in *Martin v. Nampa Hwy. Dist.*, 1988 IIC 0367 (1988). In *Martin*, claimant suffered a compensable work-related injury. At some point following her injury, she was given a PPI rating by a physician. However, the parties never came to agreement concerning the extent of Martin's entitlement to a PPI award prior to her death from an unrelated cause. Nor was there any agreement between the parties as to the extent and degree of Martin's disability in excess of physical impairment prior to her death. The issue before the Commission was whether Martin's claim for permanent partial disability benefits survived her death. Defendants did not argue that a claim for disability over impairment is

generally barred by the statute. Rather, they argued that since Martin's claim for permanent partial disability had not been adjudicated at the time of her death and no award had been entered, the claim was "unspecified" as that term is used in the statute. Rejecting this argument, and concluding that the claim for permanent partial disability benefits survived Martin, the Commission stated:

> The extent of a claimant's permanent partial disability is never finally determined until there is an award of the Commission following an evidentiary hearing or unless the parties have reached an agreement with regard to such permanent partial disability, reduced the agreement to writing and had the agreement approved by the Commission. Such approved agreement also constitutes an award of the Commission. We note that Sec. 72-431 specifically empowers the Commission to make an award both before and after the death of the claimant. We therefore conclude that 72-431 does not require that the extent of a claimant's permanent partial disability be specified by an award prior to the death of the claimant in order for the income benefits to survive the death of the claimant and be distributed to survivors. The reference in the statute to "the income benefits specified and unpaid at the employee's death" does not necessarily require that the benefits be specified by award prior to the death of the claimant. The Commission, may following the death of the claimant, conduct an evidentiary hearing and make an award and therein specify the income benefits due for permanent partial disability which were unpaid at the employee's death, and in the award distribute such benefits as may be determined to the named survivors. We therefore conclude that all permanent partial disability benefits, including disability from medical impairment as well as nonmedical factors, may be determined by the Commission subsequent to the death of the employee from unrelated causes and may then be awarded by the Commission to the classes specified in Section 72-431.

Therefore, a claim for permanent partial disability benefits survives the claimant's death even though claimant's entitlement to such an award was not adjudicated prior to death.

6. *Martin* seems to make it clear that the fact that Claimant's entitlement to disability less than total was not adjudicated or otherwise resolved prior to his death is not an impediment to the survival of a claim for disability less than total. *Martin* did not specifically address the somewhat different issue before the Commission in this case, i.e. whether claims for permanent partial disability as well as claims for total and permanent disability are barred by the

provisions of Idaho Code § 72-431. Again, a cursory reading of the statute seems to indicate that if permanent disability is less than total, then it has the potential to survive the death of the injured worker while disability that is total and permanent does not.

7. In addition to adopting Idaho Code § 72-431 as part of the 1971 recodification, the legislature also adopted, for the first time, definitions of impairment and disability. Permanent impairment is defined at Idaho Code § 72-422 as follows:

> "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of evaluation. Permanent impairment is a basic consideration in the evaluation of permanent disability, and is a contributing factor to, but not necessarily an indication of, the entire extent of permanent disability.

Permanent disability is defined at Idaho Code § 72-423 as follows:

> "Permanent disability" or "under a 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.

Under Idaho Code § 72-424, the evaluation of permanent impairment envisions a "medical appraisal of the nature and extent of the injury or disease as it affects an injured employee's personal efficiency in the activities of daily living …". Under Idaho Code § 72-425, permanent disability is evaluated by considering "the injured employee's present and probable future ability to engage in gainful activity as it is affected by the medical factor of permanent impairment and by pertinent nonmedical factors as provided in Section 72-430, Idaho Code." Case law construing these sections makes it clear that an injured worker's permanent impairment is but one component to be considered by the Commission in assessing such worker's permanent disability; a disability rating may exceed the claimant's impairment rating. *Baldner v. Bennett's, Inc.*, 103 Idaho 458, 649 P.2 1214 (1982). So far, the statutory scheme seems to recognize a

distinction between the concepts of permanent impairment and permanent disability. If these statutory definitions of impairment and disability are applied to the provisions of Idaho Code § 72-431, it is easy to appreciate why the statute can be interpreted to mean that an award of less than total and permanent disability does survive the death of the injured worker while an award of total and permanent disability does not. The statute specifically states that the income benefits owed to "an employee who has sustained disability compensable as a scheduled or unscheduled permanent disability less than total" shall be payable to the injured worker's survivors. If "disability" is a term of art, then it seems clear that what was intended is that permanent partial disability benefits are inheritable while total and permanent disability benefits are not.

8. However, though portions of the statutory scheme draw distinctions between what is meant by "impairment" and "disability", in other portions there is an unfortunate intermingling of the terms which confuses the resolution of the issue before the Commission. To begin, what exactly is meant by this language from Idaho Code § 72-431; "When an employee who has sustained disability compensable as a scheduled or unscheduled permanent disability less than total …"? If, as Claimant argues, the purpose of the statute is to make permanent partial disability inheritable, but not total and permanent disability, why doesn't the statute simply say, "When an employee who has sustained disability less than total …"? What is this business about "scheduled and unscheduled permanent disability less than total …"?

9. To understand what is meant by "scheduled and unscheduled disabilities less than total", reference must be made to the provisions of Idaho Code § 72-428 and Idaho Code § 72-429.

10. Idaho Code § 72-428 provides for the payment of certain scheduled benefits for total and partial losses of members of the body. The statute specifies in pertinent part:

> An employee who suffers a permanent disability less than total and permanent shall, in addition to the income benefits payable during the period of recovery, be paid income benefits for such permanent disability in an amount equal to fifty-five percent (55%) of the average weekly state wage stated against the following scheduled permanent impairments respectively:

There follows a specific indemnity schedule for total losses of body parts, and the number of weekly payments to be made as specific indemnity for such loss. Idaho Code § 72-428(5) recognizes that the injury to a specific body part may result in a partial as well as a total loss. That subsection provides:

> Partial loss or partial loss of use. Income benefits payable for permanent partial disability attributable to permanent partial loss or loss of use, of a member shall be not less than for a period as the permanent impairment attributable to the partial loss or loss of use of the member bears to total loss of the member.

Therefore, for the partial loss of a body part, the injured worker shall be paid a sum based on the relationship the partial loss of the body part bears to the total loss of the body part.

11. There are several things that are notable about the provisions of Idaho Code § 72-428. First, the specific indemnities recognized in that section are payable only in cases of disability less than total; a totally and permanently disabled worker is not entitled to the payments specified in this section. Second, the benefits payable pursuant to Idaho Code § 72-428 are payable in addition to whatever income benefits the injured worker was entitled to while in a period of recovery. In other words, the payment of Idaho Code § 72-428 benefits arises independent of any temporary disability from work. Third, the benefits payable pursuant to the statute, though characterized as payments for "permanent disability" are to be paid in an amount equal to 55% of the average weekly state wage stated against the "schedule of permanent impairments" listed in the body of the statute. Therefore, the specific indemnities identified for partial and total loss of body parts represent benefits for what can only be characterized as "permanent impairments". In short, what is clearly anticipated by Idaho Code § 72-428 is that if

an injured worker is less than totally and permanently disabled, he is entitled to receive the payment of permanent impairment for total or partial loss of the body parts referenced in the statute. It is unclear why the statute specifies income benefits paid pursuant to the statute are for "permanent disability" when the payments are intended for what can only be described as "permanent impairment".

12. Of course, Idaho Code § 72-428 does not capture the universe of potential permanent impairments that might befall an injured worker. Unscheduled permanent disabilities not included in the schedule of benefits enumerated in Idaho Code § 72-428 are dealt with in Idaho Code § 72-429. That section provides:

> In all other cases of permanent disabilities less than total not included in the foregoing schedule the amount of income benefits shall be not less than the evaluation in relation to the percentages of loss of the members, or of loss of the whole man, stated against the scheduled permanent impairments, as the disabilities bear to those produced by the permanent impairments named in the schedule. Weekly income benefits paid pursuant to this section shall likewise be paid at fifty-five percent (55%) of the average weekly state wage for the year of the injury as provided in section 72-428, Idaho Code.

The statute, particularly the first run-on sentence, is hardly a model of clarity, and has left at least one commentator scratching his head about what exactly the legislature intended. *See* MIKE WETHERELL, THE WORKER'S COMPENSATION LAW OF IDAHO 277 (4th ed. 1989). As with Idaho Code § 72-428, the statute is only intended to apply in less than total cases and is also clearly intended to treat those "disabilities" which are not included in the schedule of specific indemnity contained therein. In such cases, the income benefits payable to the injured worker for such "permanent disabilities" shall be "not less than the evaluation in relation to the percentages of loss of the members, or loss of the whole man, stated against the scheduled permanent impairments, as disabilities bear to those produced by the permanent impairments named in the schedule." It is difficult to understand what is intended by this language. It may mean that the

amount payable for an unscheduled impairment shall bear the same relation to the amount payable for a scheduled impairment as the severity of the unscheduled injury bears to the severity of a scheduled injury. It may mean something else. Possibly, it has something to do with how "permanent disability," as defined at Idaho Code § 72-425 and Idaho Code § 72-430 is to be calculated and paid. Possibly, it is only concerned with the calculation of what we typically think of as unscheduled "permanent impairment" as defined by Idaho Code § 72-422.

13. It is important to understand whether Idaho Code § 72-428 and Idaho Code § 72-429 deal only with the payment of "permanent impairment" versus "permanent impairment" and "permanent disability", because of the language of Idaho Code § 72-431: "When an employee who has sustained a disability compensable as a scheduled or unscheduled permanent disability less than total …". If Idaho Code § 72-428 and Idaho Code § 72-429 are intended only to specify the manner in which awards of permanent impairment are made, then Idaho Code § 72-431 would only seem to endorse the proposition that entitlement to PPI benefits (which are only payable in less than total cases) survive the death of the injured worker, notwithstanding that the statute refers to scheduled or unscheduled "permanent disability". Said slightly differently, it is clear that Idaho Code § 72-431 references scheduled and unscheduled benefits to which a claimant may be entitled under Idaho Code § 72-428 and Idaho Code § 72-429. If those statutes only treat the award of permanent impairment, despite the fact that those statutes freely use the term "disability", then it would seem that Idaho Code § 72-431 was only intended to treat the survival of what we conventionally refer to as a PPI award.

14. Although Idaho Code § 72-431 has no antecedent in prior law, the current Idaho Code § 72-428 and Idaho Code § 72-429 do have antecedents in the prior statutory scheme, and a

review of prior Idaho Supreme Court cases treating those earlier statutes may shed some light on the legislative intent in adopting Idaho Code § 72-428 and Idaho Code § 72-429.

15. Prior to the 1971 recodification, the concepts captured in the current Idaho Code § 72-428 and Idaho Code § 72-429 were captured in one statute, the former Idaho Code § 72-313. There were a number of iterations of that statute over the years, but immediately prior to the 1971 recodification, it read as follows:

> SPECIFIC INDEMNITIES FOR CERTAIN INJURIES. – (a) Specific Indemnity for Permanent Injury. An employee, who suffers a permanent injury less that total, shall, in addition to compensation, if any, for temporary total and temporary partial disability, be entitled to specific indemnity for such permanent injury equal to 60% of his average weekly wages, but not more than $43.00 nor less than $26.00 per week for the periods of time stated against the following scheduled injuries respectively:
>
> SPECIFIC INDEMNITY SCHEDULE

For loss of one:	For the following Number of weeks:
Arm at or near shoulder	240
At elbow	220
Between wrist and elbow	210
Hand	200
Thumb and Metacarpal bone thereof	70
At proximal joint	40
At second or distal joint	30
Index finger and Metacarpal bone thereof	40
At proximal joint	35
At middle joint	20
At distal joint	10
Middle finger and metacarpal bone thereof	40
At proximal joint	30
At middle joint	18
At distal joint	8
Ring Finger and metacarpal bone thereof	30
At proximal joint	20
At middle joint	10
At distal joint	5
Little finger and metacarpal bone thereof	20
At proximal joint	15
At middle joint	10

At distal joint..... 5
Leg at or so near hip joint as to preclude use of artificial limb 180
At or above knee where stump remains sufficient to permit use of artificial limb..... 150
Between knee and ankle..... 140
Foot at ankle..... 125
Great toe with metatarsal bone thereof..... 30
At proximal joint..... 15
At second or distal joint 10
Toe other than great toe with metatarsal bone thereof..... 12
At proximal joint..... 6
At second joint 3
At distal joint..... 3
Eye by enucleation..... 140
Total blindness of one eye 120
Ear, total deafness of one..... 35
Total deafness of second ear..... 115

(b) Computation of Specific Indemnity for Non-scheduled Injuries. In all other cases of permanent injury, less than total, not included in the above schedule, the compensation shall bear such relation to the periods stated in the above schedule as the disabilities bear to those produced by the injuries named in the schedule or to total disability (400 weeks).

(c) Specific Indemnity. –Computation of Minor's Wages. In case of a minor, under 18 years of age, receiving less weekly wages than paid to regular adult workmen employed in the same community or vicinity in the class of labor in which such minor was employed, the compensation provided for under this section shall be computed upon the basis of the wages received by such regular adult workmen.

Idaho Code § 72-313. (1967).

Comparing this provision to the current statutory scheme reveals that the former Idaho Code § 72-313(a) bears a strong resemblance to the provisions of Idaho Code § 72-428, while Idaho Code § 72-313(b) similarly resembles the provisions of Idaho Code § 72-429. Basically, the former Idaho Code § 72-313(b) anticipates that the compensation payable for unscheduled injuries shall bear the same relationship to the compensation payable for scheduled injuries as the severity of the unscheduled injury bears to the severity of the scheduled injuries. This language demonstrates that what was being treated in the former Idaho Code § 72-313(b) was payment of indemnity for bodily injury, i.e., what we would now call "permanent impairment".

16. At the time Idaho Code § 72-313 was in effect, the statutory scheme did not contain a provision similar to Idaho Code § 72-431. However, the issue of the inheritability of workers' compensation benefits was treated by the Court on several occasions over the decades, and Idaho Code § 72-313 figures prominently in the treatment of that issue. As developed *infra*, those cases strongly suggest that under the former, but similar, statute, only what we now call "permanent impairment" was intended to be inheritable by an injured worker's survivors.

17. In *Haugse v. Sommers Bros. Mfg. Co.*, 43 Idaho 450, 254 P. 212 (1927), Haugse suffered the loss of an eye as the result of a work-related accident. The workers' compensation surety entered into an agreement with Haugse to pay him $1,920, at the rate at $16.00 per week for 120 weeks as compensation for loss of the eye. This agreement was approved by the Industrial Commission, and payments were made thereon by surety until Haugse died from causes unrelated to the subject accident. Thereafter, surety asked that it be relieved from the obligation to pay the balance of the award. Surety appealed from an order of the district court requiring it to continue the payments. On appeal, surety argued that it is a policy of workers' compensation that injured workers receive benefits only during periods of incapacity for work, and that on termination of such incapacity (e.g., death), compensation should cease. The Court ruled, however, that these general principles did not apply to the specific injuries suffered by claimant. The applicable statute provided:

> In the case of the following injuries the compensation shall be fifty-five per centum of the average weekly wages, but not more than the weekly compensation provided in section 6231, in addition to all other compensation, for the periods stated against such injuries respectively, to wit: * * * One eye by enucleation, 120 [weeks]. * * *"

Therefore, unlike other workers' compensation benefits, the requirement to pay a scheduled benefit for the loss of an eye was unconditional, and required in addition to all other

compensation. Distinguishing between such a scheduled benefit, and other workers' compensation benefits, the Court stated:

> There is nothing in C. S. § 6234, or in the entire act, providing for a cessation of payments, for the loss of an eye by enucleation, on the death of the injured person. By its approval of the agreement the board awarded the workman $1,920. The award was in accordance with the statute, and was unconditional; it was not made to depend on a continuation of incapacity, or whether the workman lived throughout the life of the agreement; and the casualty company was not released from its obligation by the death of the injured workman.

The scheduled benefits payable for the loss of an eye did not depend on Haugse's incapacity from work. Therefore, surety was not released from its obligation by Haugse's death.

18. In *Mahoney v. City of Payette*, 64 Idaho 443, 133 P.2d 927 (1943), one Linder suffered bilateral upper extremity injuries as a consequence of a work-related accident. While still receiving treatment for his left upper extremity injuries Linder died from causes unrelated to the work accident. Surety contended that it did not have responsibility to continue paying the award following Linder's death. The Court disagreed, stating that the award to Linder was in the nature of liquidated damages and not compensation for disability which otherwise might cease with his death. As the Court explained:

> In other words, the award to survive must have been an award to the employee and the right thereto, though not determined, fixed at the time of the accident and before his death. If the award is not under the special schedule, the authorities almost uniformly hold it does not survive; therefore, the dependents could make no claim.

Therefore, there is a distinction to be drawn between benefits payable under a "special schedule", and other workers' compensation benefits, such as compensation for disability.

19. That such a distinction exists is made clear by *Peterson v. J.R. Simplot Co.*, 83 Idaho 120, 358 P.2d 587 (1961). Peterson suffered a severe right upper extremity injury as the result of a work-related accident. He died from causes unrelated to his work accident before he

had reached stability from his work-related injuries. Therefore, the extent of Peterson's residual permanent injury attributable to the work accident had not been determined as of the date of his death. Surety petitioned the Commission for permission to close its file without payment of a specific indemnity for Peterson's injury. The Industrial Accident Board declined to do so, and instead retained jurisdiction to determine the extent and degree of Peterson's entitlement to recovery for a permanent injury. The employer appealed this order. The Court had before it the provisions of Idaho Code § 72-313, set forth above, noting that compensation for permanent injury less than total was governed by that statute. However, from the evidence it was clear that Peterson's injury did not fall within one of the specific scheduled injuries identified at Idaho Code § 72-313(a). Rather, Peterson's upper extremity injury constituted one of the "nonscheduled" injuries referenced at Idaho Code § 72-313(b). The question before the Court was whether a claim for permanent partial disability survives the death of an injured employee if the death is unrelated to the industrial accident and if the claim is based on a nonscheduled injury. Citing *Mahoney, supra*, the Court first ruled that a claim for specific indemnity for permanent injury survives though the cause of the injured worker's death is unrelated to the industrial accident.

20. Concerning indemnity for nonscheduled injuries, the Court noted that prior to 1937 there was no provision to pay indemnity benefits for injuries other than those identified in the specific indemnity schedule. However, in 1937, the predecessor to Idaho Code § 72-313 was amended to provide a method of computation of specific indemnity for all permanent injuries less than total which are recognized as specific and comparable losses of the named body parts. Thereafter, all such losses, both scheduled and unscheduled, constituted permanent injuries within the purview of the specific indemnity schedule as set forth at Idaho Code § 72-313. This

strongly suggests that the immediate predecessor to the current Idaho Code § 72-428 and Idaho Code § 72-429 recognized that benefits payable for unscheduled indemnities were for permanent impairment and not permanent disability over and above impairment. This is reinforced by the following observation of the Court:

> Survivability of a claim for specific indemnity for permanent injury is grounded upon actual or comparable loss or physical impairment, and not upon loss of earning power or capacity to work. This aspect of the workmen's compensation law is recognized.

From this language, it could not be any plainer that the provisions of the former Idaho Code § 72-313 provided for the payment of scheduled and nonscheduled impairments, and that only such impairments (and not disability for loss of earning capacity) survive the death of an injured worker.

21. *Hix v. Potlatch Forest, Inc.*, 88 Idaho 155, 397 P.2d 237 (1964) is not a death case, but it does construe the former Idaho Code § 72-313. Hix suffered work-related injuries for which he was rated by a number of physicians. The Industrial Accident Board eventually averaged these ratings, awarding Hix 76.5% of the whole man (400 weeks), or 306 weeks of compensation at $30 per week. Hix did not quarrel with the 76.5% rating, but contended that it should have been paid to him against the provisions of Idaho Code § 72-310(a), which provided for the payment of benefits for total and permanent disability for work. Hix reasoned that if he had suffered total and permanent disability, he would have been entitled to the payment of 1,836 weeks of benefits based on his life expectancy of 43 years. Hix argued that he should have been paid 76.5% of the benefits that he would have received for this period had he been found to be totally and permanently disabled. The Court rejected this argument, but also rejected the calculation utilized by the Commission to compensate claimant for his injury. Rather, the Court concluded that claimant's less than total disability could only be compensated under the

provisions of Idaho Code § 72-313. The Court's treatment of Idaho Code § 72-313 makes it clear that the only benefits payable under that statute were for what we now describe as permanent impairment:

> This Court has considered the meaning and application of I.C. § 72-313, which evaluates the various bodily members where actual loss is occasioned, such as an arm, leg, eye, etc. In other cases of permanent injury not included in the schedule compensation shall bear such relation to the amount stated in the schedule as the disabilities bear to those produced by the injuries stated in the schedule. This latter provision of I.C. § 72-313, requiring nonscheduled permanent injuries to be evaluated by comparison to the listed permanent injuries, was effected in 1937 by an amendment, Idaho Sess. Laws 1937, ch. 241. Prior to that amendment, non-scheduled permanent injuries, unless they could be included in the listed classes of permanent injuries, could not be evaluated in terms of comparative loss of bodily members, and no compensation could be allowed therefor. See Barry v. Peterson Motor Co., 55 Idaho 702, 46 P.2d 77 (1935), again indicative that recovery under the workmen's compensation law must be by virtue of legislative fiat, and not otherwise.
>
> In determining specific indemnities payable for permanent injuries listed and referred to in I.C. § 72-313, disability for work, loss of earning power, or capacity to work are not factors to be considered. See *Kelly v. Prouty*, 54 Idaho 225, 245, 30 P.2d 769, 777 (1934), wherein it is stated;
>
> > '* * * The Compensation Law also provides for specific indemnities for certain injuries, as set forth in section 43-1113 [now I.C. § 72-313], when disability for work by reason of the loss of the various members of the body, enumerated is not to be taken in consideration. [Citation.] But the general theory and spirit of the act, except for the specific indemnities set forth in section 43-1113, is to the effect that compensation is provided to make good the loss of the earning power or capacity to work on account of the injury. * * * in determining those specific indemnities, the loss of earning power or capacity to work is not to be considered. * * *.'
>
> (Emphasis supplied.)

Hix went on to argue that even under the provisions of Idaho Code § 72-313, some provision should be made for the payment of disability above and beyond the specific indemnities identified in the statute. The Court rejected this argument, ruling that in cases of less than total

and permanent disability, claimant's entitlement to compensation must be evaluated under the specific loss or comparative loss of body parts referenced in Idaho Code § 72-313, and not otherwise.

22. One other case is worth discussing before leaving the former Idaho Code § 72-313. *Estate of Martin v. Woods*, 94 Idaho 870, 499 P.2d 569 (1972), though decided in June of 1972, involved interpretation of the former Idaho Code § 72-313. Martin received multiple injuries to his head, right upper extremity and torso as the result of an accident at a lumber mill. He was still receiving treatment for these severe injuries when he met his death on a hunting trip. Following proceedings on unrelated matters, Martin's widow petitioned the Industrial Accident Board, seeking an award of benefits based on specific indemnities for Martin's injuries and for an award of temporary total disability benefits and attorney's fees.

23. The Board found that Martin's specific indemnities "combined to constitute a total and permanent disability." The Board concluded that Martin was totally and permanently disabled, and that such total and permanent disability did not survive to the estate. Only in the event of a specific indemnity loss or comparative rating based upon a specific indemnity loss less than total can such an indemnity survive the death of the injured worker. Martin's estate appealed. The Supreme Court identified the principal issue as follows:

> The underlying problem facing appellant in this appeal is the fact that this Court has held that claims for specific indemnity for permanent injuries survive the death of the claimant (Peterson's Estate v. J. R. Simplot Co., 83 Idaho 120, 358 P.2d 587 (1961)), but there is no holding by this Court that benefits for total permanent disability survive the death of the injured workman.

Martin Estate v. Woods, 94 Idaho 870, 874, 499 P.2d 569, 573 (1972).

The Court ruled that it found no legislative authority for the proposition that claims for total and permanent disability survive the death of the employee. In reaching this conclusion, it relied, in

part, on *Peterson's Estate v. J.R. Simplot Co.*, *supra*. It cited that case for the proposition that while claims for specific indemnity for permanent injury survive the death of the injured worker, benefits payable for loss of earning power or capacity to work do not. Since an award of total and permanent disability is intended to compensate the injured worker for loss of earning power or capacity, such an award cannot, therefore, survive the death of the injured worker.

24. What is left undiscussed in *Martin* is whether a claim for disability over and above impairment, but less than total, is likewise not inheritable. However, the rationale of the Court's decision limiting the survival of benefits to the specific indemnities identified in Idaho Code § 72-313 applies with equal weight to disability benefits payable to an injured worker over and above permanent impairment which are also intended to compensate him for loss of earning power and capacity in the less than total case.

25. From a review of the former Idaho Code § 72-313 it can be concluded that it dealt with the payment of specific indemnities, both scheduled and unscheduled, for damage to, or loss of, parts of the body, i.e., what we would now treat as the payment of "permanent impairment". With this understanding of the former statute, the question becomes whether something other than the calculation of what is generally regarded as "permanent impairment" is contemplated by the provisions of the current Idaho Code § 72-428 and Idaho Code § 72-429.

26. Under Idaho Code § 72-428, an injured worker who has suffered anatomic loss recognized by that section shall be paid permanent disability less than total at 55% of the average weekly wage against the scheduled permanent impairments itemized in that section. Although the indemnity payable is clearly intended to compensate the injured worker for partial or total loss of use of a body member, the statute nevertheless characterizes these payments as payments for "permanent disability" less than total. It is puzzling and confusing that the statute

characterizes what we typically think of as the payment of "permanent impairment" as "permanent disability". We surmise that this is simply a recognition of the fact that permanent impairment is a component of permanent disability. Idaho Code § 72-422 provides in pertinent part:

> … Permanent impairment is a basic consideration in the evaluation of permanent disability, and is a contributing factor to, but not necessarily an indication of, the entire extent of permanent disability.

27. Idaho Code § 72-429 is more difficult to parse. Again, if the statute describes the method to compute both unscheduled "permanent impairment" and "permanent disability", i.e. disability over impairment but less than total, then Idaho Code § 72-431 must be construed to endorse the survival of claims for less than total disability over and above impairment, but not for total and permanent disability. On the other hand, if Idaho Code § 72-429 does nothing more than describe the method of computing the value which attaches to unscheduled anatomic injury, then PPI is the only benefit that survives the death of a worker from causes unconnected to the work accident.

28. Comparing the former Idaho Code § 72-313(b) to Idaho Code § 72-429 reveals certain fundamental similarities. Both statutes address a method by which certain unscheduled indemnity benefits may be calculated by reference to the scheduled benefits identified at Idaho Code § 72-428. Although Idaho Code § 72-429 addresses the calculation of unscheduled "permanent disability" less than total while Idaho Code § 72-313(b) speaks to the calculation of unscheduled "permanent injury", both statutes use a similar formula to calculate the value of the unscheduled indemnity and both base that calculation on a comparison to the list of scheduled benefits for anatomic injury referenced at Idaho Code § 72-428. To paraphrase, under the former Idaho Code § 72-313(b), for an unscheduled injury, the number of weeks of indemnity payable

for that injury is to the specific indemnities identified in the schedule as the severity of the unscheduled injury is to the severity of those identified in the schedule. The first sentence of Idaho Code § 72-429 seems to anticipate that for injuries not included in the Idaho Code § 72-428 schedule, the percentage of loss for such injury is to the scheduled indemnities as the severity of the injury in question is to the severity of the scheduled impairments. Arguably, like Idaho Code § 72-313(b), the current Idaho Code § 72-429 only addresses the calculation of what we generally understand to be unscheduled "permanent impairment". However, as developed above, we are mindful that as part of the 1971 recodification, Idaho adopted statutory provisions which define and distinguish the terms "permanent disability" and "permanent impairment". Since "permanent disability" is specifically defined at Idaho Code § 72-425 and Idaho Code § 72-430, we believe that the use of this term in Idaho Code § 72-429 cannot be disregarded. Idaho Code § 72-422 recognizes that "permanent impairment" is a component of "permanent disability". For permanent disability less than total, Idaho Code § 72-428 recognizes that one of the components of permanent disability is payment for anatomic injury based on the schedule set forth in that statute. For all other "permanent disabilities" less than total, Idaho Code § 72-429 specifies that the amount payable for such permanent disability shall be calculated as a percentage of the loss of a bodily member or the loss of the whole man in an amount that reflects the severity of the disability as compared to the scheduled impairments set forth at Idaho Code § 72-428. It is also notable that Idaho Code § 72-429 specifies that the income benefits paid pursuant to that section shall "likewise" be paid at 55% of the average state weekly wage. Although the statute is difficult to dissect, we see nothing in the language of Idaho Code § 72-429 which is inconsistent with the proposition that it is intended to speak not only to the payment of what we conventionally think of as unscheduled permanent impairment, but also to

what we conventionally think of as disability over and above impairment, less than total. Nowhere else in the statutory scheme does one find direction for the arithmetical calculation of disability. Only in Idaho Code § 72-429 does there exist the instruction that it be paid as a percentage of the whole person at 55% of the average state weekly wage. If Idaho Code § 72-429 does not speak to the calculation of disability in excess of impairment, then the accepted convention for calculating and paying such disability is not to be found in the statutory scheme.

29. Finally, although the Supreme Court's treatment of the provisions of Idaho Code § 72-429 is scant, we nevertheless believe that the Court's decision in *Carey v. Clearwater County Road Dept*, 107 Idaho 109, 686 P.2d 54 (1984) necessarily lends some support to the proposition that Idaho Code § 72-429 provides for the award and calculation of disability over and above impairment. *Carey*, of course, is important for articulating the method by which disability must be apportioned between employer and the ISIF in a case of total and permanent disability. It also addresses the question of whether, in discharging its obligation to pay a proportionate share of claimant's total and permanent disability, employer's responsibility to pay is subject to the annual escalation provisions of Idaho Code § 72-408. In treating this issue, the Court had occasion to consider the provisions of the then applicable version of Idaho Code § 72-429. The Court determined that the version of Idaho Code § 72-429 then in effect should not be construed to require defendants to pay their proportionate share of claimants' total and permanent disability subject to the annual escalator provisions of Idaho Code § 72-408. Implicit in the Court's treatment of this issue is a recognition that the 90% disability assigned to employer, inclusive of both impairment and disability in excess of impairment, was undertaken pursuant to the provisions of Idaho Code § 72-429. Therefore, although the Court did not

address the specific issue before the Commission in this case, the court impliedly recognized that the payment of disability over and above impairment is contemplated by the provisions of the statute.

30. While we acknowledge that the former Idaho Code § 72-313 appears to have treated only what we now describe by convention as the payment of permanent impairment, we conclude that Idaho Code § 72-428 and Idaho Code § 72-429 contemplate the payment of both impairment and disability in excess of impairment, but less than total. While we concede that this is a close question, and that the statutes, particularly Idaho Code § 72-429, could be otherwise construed, we find additional support for the position that we adopt in the axiom that the workers' compensation laws of this state should be construed in a manner that favors the payment of compensation. *See Ogden v. Thompson*, 128 Idaho 87, 910 P.2d 759 (1996). As developed below, once it is determined that the unscheduled disabilities less than total addressed by Idaho Code § 72-429 include disabilities over impairment, it follows that Idaho Code § 72-431 does contemplate that disability over and above impairment, but less than total, is inheritable by the survivors of an injured worker who dies from non-work-related causes. Therefore, our construction of Idaho Code § 72-429 is consistent with the direction that the workers' compensation laws should be construed in a manner which favors the payment of compensation.

31. As noted above, the provisions of Idaho Code § 72-431 have no antecedent in prior law. A history of the discussions, debates, conferences and legislative action leading to the comprehensive recodification of the workers' compensation laws in 1971 is sadly incomplete. However, it is known that model Workmen's Compensation and Rehabilitation Law (the Model Code) authored by the Council of State Governments figured in the deliberations of those

charged with considering how or whether to rework the statutory scheme.[1] Section 15 of the Model Code contains provisions relating to the payment of income benefits for disability. Subsection (a) treats the payment of total disability benefits, subsection (b) treats the payment of partial disability benefits, and subsection (c) treats the payment of scheduled income benefits. Subsection (c) makes provision for the payment of the kind of scheduled losses found in Idaho Code § 72-428. These subsections provide in pertinent part:

> Section 15. Income Benefits for Disability. Income benefits for disability shall be paid to the employee as follows, subject to the maximum and minimum limits specified in Section 16.
>
> (a) Total Disability: For total disability, 55 per cent of his average weekly wage during such disability, and 2-1/2 per cent of his average weekly wage for each dependent, up to a maximum of five (5), specified in subsection (t) of Section 2, except a wife living apart from her husband for justifiable cause or by reason of his desertion unless such wife is actually dependent on the employee. (footnote omitted.)
>
> (b) Partial Disability: For partial disability, 55 per cent of his decrease in wage-earning capacity during the continuance thereof, and 2-1/2 per cent of his average weekly wage for each dependent, up to a maximum of five (5), specified in subsection (t) of Section 2, except a wife living apart from her husband for justifiable cause or by reason of his desertion unless such wife is actually dependent on the employee. (footnote omitted.)
>
> (c) Scheduled Income Benefits: For total permanent bodily loss or losses herein scheduled, after and in addition to the income benefits payable during the period of recovery, scheduled income benefits in the amount of 55 per cent of the average weekly wage as follows: [there follows a list of scheduled indemnity for loss of body parts] . . . .

Subsection (h) of Section 15 reads as follows:

> When an employee, who has sustained disability compensable under subsection (c), and who has filed a valid claim in his lifetime, dies from causes other than the injury before the expiration of the compensable period specified, the income benefits specified and unpaid at the individual's death, whether or not accrued or due at his death, shall be paid, under an award made before or after such death, for the period specified in this subsection, to and for the benefit of the persons within

[1] *See* E.B. Smith, Policy Issues Raised by Proposed Adoption of the Plan of the Model Code as a Pattern for Idaho's Workmen's Compensation and Occupational Disease Compensation Laws (September 20, 1969) and E.B. Smith, Comparative Studies of the Model Code with Idaho's Workmen's Compensation and Occupational Disease Compensation Laws (date unknown).

> the classes at the time of death and in the proportions and upon the conditions specified in this subsection and in the order named.
> (1) To the widow or wholly actually dependent widower, if there is no child under the age of 18 or incapable of self-support; or
> (2) If there are both such a widow or widower and such a child or children, one-half to such widow or widower and the other half to such child or children; or
> (3) If there is no such widow or widower but such a child or children, then to such child or children; or
> (4) If there is no survivor in the above classes, then the parent or parents wholly or partly actually dependent for support upon the decedent, or to other wholly or partly actually dependent relatives listed in Section 17(a)(7) or to both, in such proportions as the Director may provide by regulation.

Subsection (h) bears striking similarity to the current Idaho Code § 72-431 and makes it very clear that under the Model Code only the payment of what we would now understand to be permanent impairment survives the death of the injured worker.

32. Of course, subsection (h) of the Model Code is not identical to the current Idaho Code § 72-431. Idaho Code § 72-431 does not address "subsection (c)" of the Model Code. Rather, it references "scheduled or unscheduled permanent disability less than total". This subtle difference has significant implications since it leads back to the foundational issue of what is intended by the provisions of Idaho Code § 72-428 and Idaho Code § 72-429. While it is interesting that the Model Code contemplated only the inheritability of what we conventionally think of as permanent impairment, the Model Code is not particularly helpful (in fact, it is not helpful at all) in determining whether disability over and above impairment, but less than total, is inheritable under Idaho law. To make this determination, we must understand the provisions of Idaho Code § 72-428 and Idaho Code § 72-429, and as developed above, we conclude that those statutes treat both the payment of "permanent impairment" and "permanent disability". Therefore, we conclude that under Idaho Code § 72-431, both permanent impairment and what we conventionally think of as disability over and above impairment, but less than total, survive the death of the injured worker from causes other than the work injury.

33. It is not lost on us that this interpretation of Idaho Code § 72-431 endorses the disparate treatment of the survivors of totally and permanently disabled workers and the survivors of those injured workers who are merely profoundly disabled at the time of death. We can think of no good reason that is consistent with the underlying principles of workers' compensation that would support this disparate treatment. We are also cognizant of how our interpretation of Idaho Code § 72-431 incentivizes the survivors of an injured worker to argue that the injured worker was profoundly, but not totally and permanently, disabled at the time of his death, when the injured worker, while alive, would be incentivized to argue that he is totally and permanently disabled. Similarly, employers are incentivized to argue for total and permanent disability of the deceased injured worker. Regardless, and despite the fact that alternate interpretations of Idaho Code § 72-429 can certainly be entertained, we continue to adhere to the implicit and explicit direction of *Martin v. Nampa Hwy. Dist*, 1988 IIC 0367 (1988). Were we to decide that only "permanent impairment" survives the death of the injured worker from causes other than the work injury, this would have an impact not only on the families of such workers, but also on the class of all less than totally disabled workers, dead or alive. For example, employers entertaining settlement with a less than totally disabled employee would necessarily enjoy some additional leverage over the injured worker to obtain a more favorable (to the employer) settlement. The possibility that an injured worker might die from causes unrelated to the work accident during the period that disability would be paid lowers the settlement value of the claim for disability. For cases in which an award of less than total disability has been made by the Commission, sureties might be less willing to pay such awards in a lump sum for the same reason, at least not without some reduction which recognizes the risk to the injured worker that he might die before the award can be paid. In other words, the same

considerations that come into play in a case of total and permanent disability would be engrafted to all claims for less than total and permanent disability.

II

34. In *Martin*, the injured worker died from causes unrelated to the work accident before evaluation of his disability could be conducted by the Industrial Commission. Construing Idaho Code § 72-431, the Commission concluded that the reference in the statute to "the income benefits specified and unpaid at the employee's death" did not require that the benefits be specified by an award made prior to the death of the injured worker. Further, the statute makes it clear that the benefits specified and unpaid at the employee's death are payable to the injured worker's survivors "whether or not accrued or due at the time of his death". In this context, "accrue" means to come into existence as a legally enforceable claim. "Accrue." Merriam-Webster Online Dictionary. http://merriam-webster.com (11 June 2015). Therefore, Claimant's survivors are entitled to the income benefits specified and unpaid at the time of the injured worker's death, even though no award had been made and claimant had no legally enforceable claim at the time he died. Therefore, the statute anticipates that the award defining Claimant's entitlement to disability benefits may be made after the injured worker's death. Defendants argue that this construction is at odds with *Davaz v. Priest River Glass Co., Inc.*, 125 Idaho 333, 870 P.2d 1292 (1994), and *Brown v. Home Depot*, 152 Idaho 605, 272 P.3d 577 (2012).

35. In *Brown*, the claimant's medical condition stabilized in 2005, but the hearing did not occur until 2009. The Commission awarded disability benefits using the 2005 date of medical stability. On appeal, the Supreme Court vacated the decision. In so doing, the Court examined the language of Idaho Code § 72-425, noting a permanent disability rating is a measure of a claimant's present and probable future ability to engage in gainful activity. The Court found

"the word 'present' implies that the Commission is to consider the claimant's ability to work as of the time evidence is received. There is no present opportunity for the Commission to make its decision apart from the time of hearing." *Id.* at 609, 581.

36. Defendants note that *Martin*, by necessity, contemplates an evidentiary hearing and findings based on a retrospective application. As such, they argue *Martin* is at odds with *Davaz* and *Brown* and therefore carries no precedential weight.

37. In response to this argument, it is first important to note that regardless of what might have been said in *Brown* about the preferred point in time for measuring disability, the specific language of Idaho Code § 72-431 anticipates that the Commission is empowered to conduct a retrospective evaluation of claimant's disability as though he had he not died from causes unrelated to the work accident. Necessarily, this involves the assessment of claimant's disability at a point in time removed from the date of hearing. Neither *Brown* nor *Davaz* contain any language suggesting that a general rule discussed in those cases was intended to impact the specific language of Idaho Code § 72-431.

38. Second, even if it be assumed that *Brown* has some application to this case, the *Brown* Court made it clear that the Commission has the latitude to apply *Brown* in a way that avoids injustices or nonsensical results. The specific examples given by the *Brown* Court were not all inclusive. Idaho Code § 72-431 recognizes the survival of both impairment and disability less than total. Were the Commission required to measure the injured worker's disability as of the date of hearing, no disability would ever be awarded in view of the fact that claimant's death was unconnected to the work accident and constitutes a superseding intervening cause primarily responsible for the injured worker's inability to work. This nonsensical result could not have been contemplated by those who drafted Idaho Code § 72-431. To give meaning to the statute

requires of the Commission that it evaluate claimant's disability not as of the date of hearing but as of a date just prior to the death of the injured worker. If applicable to this case, we believe that *Brown* affords the Commission sufficient leeway to make this adjustment.

CONCLUSION OF LAW

Permanent partial disability less than total survives the death of the injured worker. The disability of the deceased worker is to be evaluated as of a time immediately preceding decedent's death from causes unrelated to the work accident.

ORDER AND DISSENTING OPINION

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

1. Permanent partial disability less than total survives the death of the injured worker.

2. The disability of the deceased worker is to be evaluated as of a time immediately preceding decedent's death from causes unrelated to the work accident.

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

DATED this 21st day of July, 2015.

INDUSTRIAL COMMISSION

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

__/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

Commissioner Thomas E. Limbaugh dissenting.

1. For the reasons set forth below, I respectfully dissent from the majority decision concluding that under Idaho Code § 72-431 both impairment and disability less than total survive the death of the injured worker from causes other than the work injury. In my opinion, Idaho Code § 72-431 applies only to impairment, not disability, and the case of *Martin v. Nampa Hwy. Dist.,* 1988 IIC 0367 (1988), was decided incorrectly. The very thorough majority opinion discusses, and dismisses, the important facts of this issue which ultimately persuade me to conclude that Idaho Code § 72-431 applies only to impairment.

2. It is helpful to take a chronological approach to understanding the development of Idaho Code § 72-431 and its application to the issue of whether disability survives the death of an injured worker from causes other than the work injury. Prior to 1971, no statute addressed the inheritability of impairment or disability after a non-industrial death, but the issue was presented to the Commission and the Idaho Supreme Court. As discussed in the majority, the case law regarding this issue, prior to 1971, concludes that in this situation impairment benefits survive and disability benefits do not. *See Haugse v. Sommers Bros. Mfg. Co.,* 43 Idaho 450, 254 P. 212 (1927); *Mahoney v. City of Payette,* 64 Idaho 443, 133 P.2d 927 (1943); *Peterson v. J.R. Simplot Co.,* 83 Idaho 120, 358 P.2d 587 (1961); *Martin Estate v. Woods,* 94 Idaho 870, 499 P.2d 569 (1972). These decisions recognize the logic in allowing the inheritance of benefits related to the loss of function of a body part (impairment) and not allowing the inheritance of benefits for the loss of earning power or capacity to work (disability). The cases stress that disability is a replacement for wages, and you do not earn wages after your death.

3. The next big change in Idaho's Workers' Compensation Law came with the recodification in 1971. The new law included Idaho Code § 72-431. While there was no prior

Idaho statute detailing which benefits would be inheritable upon a non-industrial death, the Idaho Legislature had the prior case law, discussed above, and the Model Code as foundation from which it created the new laws. The relevant Model Code was published by the Council of State Governments in 1963 in a booklet titled *Program of Suggested State Legislation*. The influence of the Model Code can be seen in many sections of the law, particularly Idaho Code § 72-431.

4. The Model Code section which is clearly the base for Idaho Code § 72-431 addressed only the survival of impairment benefits. It is this Commissioner's view that the Model Code was the substantive base for Idaho Code §72-431, and the Model Code was only modified to fit Idaho's statute numbering plan which differed greatly from the Model Code's numbering. Below is the Model Code with deletions and insertions made to generate Idaho Code § 72-431 as it was passed in 1971 (the list of inheritable dependents is removed from the end of the statute for ease of reading).

> When an employee, who has sustained disability compensable as a scheduled or unscheduled permanent disability less than total ~~under section (c)~~ , and who has filed a valid claim in his lifetime, dies from causes other than the injury or occupational disease before the expiration of the compensable period specified, the income benefits specified and unpaid at the ~~employee's~~ ~~individual's~~ death, whether or not accrued or due at the time of his death, shall be paid, under an award made before or after such death, ~~for the period specified in this subsection,~~ to and for the benefit of the persons within the classes at the time of death and in the proportions and upon the conditions specified in this subsection and in the ordered named.

5. Section (c), stricken above, set forth the schedule of impairment ratings in the Model Code, just as Idaho Code § 72-428 sets forth Idaho's schedule of impairment ratings. The schedules are simply lists of body parts with a specific number assigned to each body part. Idaho Code § 72-429 then allows for impairment ratings for other injuries that cannot be classified into the schedule to be evaluated relative to the schedule, and uses the term unscheduled permanent

disability to describe those ratings. The language "under section (c)" was stricken and replaced with the equivalent portion of the Idaho Code, not by section number but by using the terms scheduled or unscheduled disability less than total.

6. The Model Code, used extensively in Idaho's 1971 recodification, is nearly the identical language in Idaho Code § 72-431. It is inherently improbable that the drafters of the 1971 recodification used the Model Code section regarding survival of impairment benefits, changing only a few words but intending it to result in an entirely different section which applied to disability instead of impairment. Further, if the intent was to apply to disability it seems that the new law would also have included a provision for application to impairment. The conspicuous absence of the more utilized section regarding inheritability of impairment again supports the conclusion that Section 431 is that section.

7. The majority concludes that Idaho Code §§ 72-428 and 429 contemplate the payment of both impairment and disability in excess of impairment. I do not agree. These sections help to create the confusion between the use of the terms impairment and disability, but it is a great leap to say that Section 428 applies to disability, as we currently use the term. Idaho Code §§ 72-428 and 429 address impairment and, by extension of the same design, Idaho Code § 72-431 addresses only impairment also.

8. Of course, my reading of Idaho Code § 72-431 requires the understanding that the distinction between impairment and disability is not consistently applied throughout Title 72. In fact, the passage of time has modified the use of the term disability. At the time of the recodification the term disability was used in a broad fashion which included what we now term impairment. This is evidenced by a review of the entire Model Code, which uses the terms disability and income benefits when describing what we now call impairment. In fact, the Model

Code's definition of "permanent physical impairment" is found in the last section that focuses solely on payment from a second injury fund for an employee who has preexisting "permanent physical impairment." *Program of Suggested State Legislation* by the Council of State Governments, p. 164 (1963). The variety of examples set forth in the majority, as well as the definition discussed above, establish that while the term disability was historically used to include impairment and disability, we currently make a cleaner distinction between impairment and disability.

9. Idaho Code § 72-431 uses the terms scheduled or unscheduled permanent disability less than total, in the same way that Section 428 details scheduled impairment ratings and in the same way Section 429 explains the proper evaluation of unscheduled impairment ratings. Idaho Code § 72-431 applies to scheduled and unscheduled impairment ratings and not to disability ratings awarded above the amount of impairment.

10. The final stop on the development of this issue is the Commission's decision in *Martin v. Nampa Hwy. Dist., 1988 IIC 0367 (1988).* I agree with the majority the *Martin* decision is on point and compels the conclusion that disability less than total survives the claimant's death from other causes. Yet, for the reasons stated above, I disagree with the conclusion in *Martin* and do not support its continued application.

11. Additionally, I cannot support the effect of the majority's conclusion that survivors of a claimant with a high disability rating who dies of unrelated causes will inherit the disability benefits, but the survivor's of a claimant who is totally and permanently disabled will inherit nothing. This illogical disparity between two classes of survivors cannot be reasonably explained.

12. It is this Commissioner's belief that the statue was never intended to apply to disability. *Martin* is incorrect and the legislative history, as well as prior case law, stand for the proposition that Idaho Code § 72-431 only applies to impairment. For the foregoing reasons, it is my opinion that Idaho Code § 72-431 allowing survivability to benefits, in less than total cases, applies only to impairment benefits. I respectfully dissent from the majority decision.

DATED this 21st day of July, 2015.

INDUSTRIAL COMMISSION

__/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of July, 2015, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSION OF LAW AND ORDER AND DISSENTING OPINION** was served by regular United States Mail upon each of the following:

MICHAEL T KESSINGER
PO BOX 287
LEWISTON ID 83501

LEA L KEAR
PO BOX 6358
BOISE ID 83707-6358

ka __/s/_____