

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

GARY BROWN,

Claimant,

v.

HOME DEPOT USA, INC.,

Employer,

and

AMERICAN HOME ASSURANCE
COMPANY,

Surety,
Defendants.

IC 2004-001660

**ORDER ON PETITION FOR
DECLARATORY RULING**

Filed August 2, 2017

On March 15, 2017, Defendants filed a request for declaratory ruling with supporting memorandum. Defendants argue that *Corgatelli v. Steel West*, 157 Idaho 287, 335 P.3d 1150 (2014) cannot be applied retroactively under *Davis v. Hammack Mgmt.*, 161 Idaho 791, 391 P.3d 1261 (2017), to void the PPI credit given to Defendants, and that Claimant cannot reopen the Commission's final April 26, 2013 Decision with a demand to pay an additional award of permanent physical disability (PPD).

On March 24, 2017, Claimant responded that the Court's holding in *Corgatelli, supra*, entitles Claimant to his entire disability award without giving Defendants an offset or credit for PPI previously paid, and that *Davis, supra*, allows the collateral attack of an award when a court has acted beyond its jurisdiction. Because the Commission has acted beyond its jurisdiction, Defendants' credit is void, and Claimant is entitled to his full payment of PPD. Claimant also

avers his entitlement to an award of § 72-804 Attorney Fees for Defendants' unreasonable denial of benefits.

On March 28, 2017, Defendants filed a reply. Defendants argue that Claimant is construing *Davis* too broadly, and that extending the holding of *Corgatelli* and *Davis* as Claimant argues would result in hundreds of settlements and decisions being reopened, without any time limitation. This approach would be disruptive to the workers' compensation system, and should not be adopted by the Commission.

On April 19, 2017, the Commission held a telephone conference with the parties to discuss the involvement of Commissioner Thomas P. Baskin, due to his recusal in the underlying case. On May 4, 2017, the parties notified the Commission that there was no agreement on Commissioner Baskin's participating in the declaratory ruling matter. Commissioner Baskin continues to be recused in this matter.

Procedural History of Claimant's Case

Claimant was injured January 31, 2004 and filed a Workers' Compensation Complaint on June 4, 2007. The issues were the extent of Claimant's permanent disability in excess of impairment, whether the ISIF was liable for a portion of that disability, apportionment of Claimant's permanent disability, and his entitlement to additional medical benefits. Implicit in the determination of these issues was whether Claimant's labor market access should be evaluated as of the date of maximum medical improvement or at the time of hearing. The Commission held that Claimant's labor market access for his disability should be evaluated as of the date of maximum medical improvement, and from that, Claimant had a 95% permanent disability. Claimant appealed, and on March 7, 2012, the Idaho Supreme Court issued an opinion that determined the Commission erred and held that Claimant's labor market at the time

of the hearing is the proper labor market for evaluating disability. The case was remanded to the Commission for further proceedings based on the conclusions of the Court.

On August 3, 2012 the Commission approved a settlement between Claimant and the Industrial Special Indemnity Fund, leaving Employer and Surety as the remaining Defendants. Claimant and Employer/Surety submitted additional briefing on remand. After considering the parties' arguments and in accordance with the conclusions of the Idaho Supreme Court, the Commission issued its April 26, 2013 Order concluding that Claimant had shown he was totally and permanently disabled, particularly when his disability was assessed as of the date of hearing. The Commission's Conclusions of Law were as follows:

1. Claimant has proven he suffers permanent disability of 100%.
2. Apportionment under the formula set forth in *Carey v. Clearwater County Road Department*, 107 Idaho 109, 686 P.2d 54 (1984), is appropriate with Employer responsible for 48% of Claimant's total disability, inclusive of impairment.
3. Claimant has proven his entitlement to additional medical benefits for medical expenses associated with his visits to Drs. Oak and Yang. He has not proven his entitlement to any other medical benefits currently.

Brown v. The Home Depot, 2013 IIC 0033.18.

The Commission notes, and the parties agree, that Claimant did not appeal or file a timely request for reconsideration of the April 26, 2013 Order. There is no dispute that Defendants took a credit for the 12% permanent partial impairment already paid to Claimant against their apportioned responsibility for Claimant's disability benefits. There was no further litigation in Claimant's case until the instant action was filed.

DISCUSSION

Judicial Rule of Practice and Procedure 15 provides a mechanism by which an interested party may apply to the Industrial Commission for declaratory rulings "on the construction, validity, or applicability of any workers' compensation statute, rule, regulation or order." (*See*,

JRP 15(A)). The petitioner must demonstrate that an “actual controversy” exists over the construction, validity, or applicability of the rule or statute in question. (*See*, JRP 15(C)). The Commission is free to decline to make a ruling on a petition when it appears that there is no actual controversy or there exists some other good cause why a declaratory ruling should not be made. (*See*, JRP 15(F)(4)).

Here, the parties have presented an actual controversy on the construction of several workers’ compensation cases, specifically whether the Idaho Supreme Court’s rulings in *Davis* and *Corgatelli* allow Claimant to modify the April 26, 2013 Order granting Defendants a credit for PPI paid. The Commission hereby GRANTS the petition for declaratory ruling.

Davis v. Hammack Management, Inc. Does Not Confer Jurisdiction to Modify the April 26, 2013 Conclusions of Law and Order of the Commission.

The Idaho Supreme Court issued its ruling in *Corgatelli, supra*, on August 25, 2014, sixteen months after Claimant’s case was decided on remand. In *Corgatelli*, the Court concluded on appeal from the Commission’s Findings of Fact, Conclusions of Law and Order that the Commission had erred when it allowed Steel West to offset liability for total and permanent disability benefits with PPI benefits previously paid to Mr. Corgatelli. The Court reasoned that under Title 72, Idaho Code, “partial permanent disability benefits and permanent physical impairment benefits are two separate forms of compensation” and that there were no statutory provisions to allow such a credit to be taken. *Id.* at 292, 1155. Decisions of the Commission subsequent to the *Corgatelli* decision have been made in accordance with its ruling.

On February 24, 2017, the Idaho Supreme Court issued its ruling on appeal from the Commission’s declaratory ruling in *Davis, supra*. At issue in *Davis* was the compensation agreement (“Stipulation”) entered into by the parties to resolve Mr. Davis’ workers’ compensation claim. The Stipulation contained a provision allowing defendant Hammack

Management to take a credit for PPI previously paid. The Commission approved the Stipulation on June 26, 2014, giving it the same effect as any other final order of the Commission pursuant to IC § 72-718. Two months after the Stipulation was approved, the ruling in *Corgatelli, supra*, was issued. Mr. Davis filed a petition for declaratory ruling from the Commission on the impact of *Corgatelli* on his stipulation, which the Commission declined to do on the basis that it lacked subject matter jurisdiction to revise an approved lump sum settlement agreement designed to resolve a claim for past injuries. On appeal, the Idaho Supreme Court concluded that the “credit disallowed in *Corgatelli* and the credit here both deprive an injured worker of benefits” and that the Commission had “approved the Stipulation in violation of the provisions of IC § 72-318”. *Id.* at 1266. The Court concluded that where the Commission has acted outside its statutory authority in approving a lump sum settlement agreement, that agreement is void and therefore subject to collateral attack.

After the issuance of the decision in *Davis*, Claimant’s counsel sent a letter to Defendants’ counsel demanding “the payment of total disability benefits still due Mr. Brown in the amount of the credit your clients took against the award.” Defendants’ Exhibit 3. Defendants propose that the Commission take a narrow view of *Davis* and conclude that such review is limited to compensation agreements and not to matters decided through litigation by the parties. Claimant argues that by allowing Defendants to take a credit for PPI previously paid against their portion of Claimant’s 100% total permanent disability, the Commission’s April 26, 2013 Order is void under *Davis* and therefore subject to review.

While the ruling in *Corgatelli* outlines the outcome in final orders of the Commission regarding the taking of a credit for impairment previously paid against an award of total and permanent disability (including the interpretation of IC §§ 72-406(2), -408, -425, -427, -428,

and -429), the ruling in *Davis* is the mechanism by which long-concluded agreements by the parties may be revisited if the Commission has approved such agreement without the authority to do so. As will be developed below, the statutory and legal bases for voiding the stipulation in *Davis* are inapplicable in Claimant's case.

The decision in *Davis* relies heavily on *Wernecke v. St. Maries School District*, 147 Idaho 277, 207 P.3d 1008 (2009), making it similarly instructive in the instant case. *Wernecke* involved two lump sum settlement agreements approved by the Commission, one between Ms. Wernecke and her employer and surety, and another between Ms. Wernecke and the Industrial Special Indemnity Fund ("ISIF") in 1994. The agreement with the ISIF included, in relevant part, a bar to Ms. Wernecke from recovering any additional compensation for any claim of any nature. After Ms. Wernecke suffered another industrial injury in 2002, she attempted to pursue total and permanent disability from the combination of her most recent industrial injury and her preexisting conditions. The ISIF refused, saying Ms. Werenecke was prevented from bringing future claims against the ISIF. The Commission agreed with the ISIF's position and issued a declaratory ruling stating Ms. Wernecke had waived her right to pursue another claim against the ISIF in the previous agreement and was therefore barred under the doctrines of *res judicata*, collateral estoppel, and quasi-estoppel. In interpreting the applicability of IC § 72-318(2) to Ms. Wernecke's case on appeal, the Idaho Supreme Court began with the literal language of the statute, considered as a whole, with words given their plain, usual, and ordinary meanings. *Wernecke* at 282, 1013 (citing *Paolini v. Albertson's, Inc.*, 143 Idaho 547, 549, 149 P.3d 822, 824 (2006)). Idaho Code § 72-318 provides:

- (1) No agreement by an employee to pay any portion of the premiums paid by his employer for workmen's compensation, or to contribute to the cost or other security maintained for or carried for the purpose of securing the payment of workmen's compensation, or to contribute to a benefit fund or department

maintained by the employer, or any contract, rule, regulation or device whatever designed to relieve the employer in whole or in part from any liability created by this law, shall be valid. Any employer who makes a deduction for such purpose from the remuneration of any employee entitled to the benefits of this act shall be guilty of a misdemeanor.

(2) No agreement by an employee to waive his rights to compensation under this act shall be valid.

As a case of first impression, the Court determined that IC § 72-318(2) was intended to “prohibit all agreements that waive an employee’s right to compensation under the Act.” *Wernecke*, at 283, 1014. Therefore, Ms. Wernecke’s agreement was void under IC § 72-318(2) because she had compromised her claim for total and permanent disability benefits by waiving the right to pursue recovery for any claim of any nature against the ISIF by entering into the lump sum agreement.¹

The *Wernecke* decision not only provides a thorough analysis on IC § 72-318(2), but also draws distinction between matters *adjudicated* by the Commission and matters *approved* by the Commission. Juxtaposed against IC § 72-318, which prohibits all agreements that waive an employee’s right to compensation, IC § 72-718 provides:

A decision of the commission, in the absence of fraud, shall be final and conclusive as to *all matters adjudicated by the commission* upon filing the decision in the office of the commission; provided, within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the decision, or the commission may rehear or reconsider its decision on its own initiative, and in any such events the decision shall be final upon denial of a motion for rehearing or reconsideration or the filing of the decision on rehearing or reconsideration. Final decisions may be appealed to the Supreme Court as provided by section 72-724, Idaho Code.

¹ The agreement in *Wernecke* was also faulty for lacking the jurisdictional elements of ISIF liability. Unlike *Wernecke*, Claimant’s decision cannot be overturned for lacking the jurisdictional elements of IC § 72-332. Reading the Act with its humane purposes in mind, the undersigned Commissioners conclude that, until ISIF’s liability is established under § 72-332, an agreement waiving an employee’s rights to claims against ISIF violates § 72-318(2). *Wernecke* at 285, 1016.

(emphasis added). This section of statute regarding the finality of a decision of the Commission has been applied to lump sum settlement agreements that are approved by the Commission. *See, Drake v. State, Indus. Special Indem. Fund*, 128 Idaho 880, 920 P.2d 397 (1996); *Davidson v. H.H. Keim Co., Ltd.*, 110 Idaho 758, 718 P.2d 1196 (1986) (holding that approved lump sum settlement agreements were final decisions of the Commission such that parties may follow procedures to move for reconsideration or rehearing). However, it is also utilized in establishing the finality of issues actually adjudicated by the Commission. When the Idaho Legislature enacted Title 72 in 1971, it added the phrase “as to all matters adjudicated” to the previous section of otherwise identical statute. The Court concluded that by adding this phrase, the Legislature “intended that decisions of the Commission be final and conclusive *only* as to those matters *actually adjudicated*.” *Woodvine v. Triangle Dairy, Inc.*, 106 Idaho 716, 721, 682 P.2d 1263, 1268 (1984)(emphasis in original). This was, in the Court’s opinion, an intentional “departure from the concept of ‘pure res judicata,’ applied prior to 1971.” *Id.* This conclusion was further extended by the Court:

A valid final judgment rendered on the merits by a court of competent jurisdiction is an absolute bar to a subsequent action between the same parties upon the same claim. *Hindmarsh v. Mock*, 138 Idaho 92, 94, 57 P.3d 803, 805 (2002). Claim preclusion, or *res judicata*, bars a subsequent action between the same parties upon the same claim. *Ticor Title Co. v. Stanion*, 144 Idaho 119, 123, 157 P.3d 613, 617 (2007).

In order for claim preclusion to bar a subsequent action there are three requirements: (1) same parties; (2) same claim; and (3) a valid final judgment. *Id.* at 124, 157 P.3d at 618. Claim preclusion generally bars adjudication not only on the matters offered and received to defeat the claim, but also as to matters relating to the claim which might have been litigated in the first suit. *Id.* at 126, 157 P.3d at 620. However, Idaho Code § 72–718 varies the doctrine of *res judicata* as applied to worker's compensation cases. *See Sund v. Gambrel*, 127 Idaho 3, 7, 896 P.2d 329, 333 (1995). Decisions by the Commission are conclusive only as to matters *actually adjudicated*, not as to all matters which could have been adjudicated. *Id.*; *see also Woodvine v. Triangle Dairy, Inc.*, 106 Idaho 716, 720–21, 682 P.2d 1263, 1267–68 (1984).

Wernecke at 288, 1019. Unless reconsideration or rehearing is granted by the Commission, such final and conclusive awards cannot be modified unless such modification is sought under the provisions of IC § 72-719.²

The undersigned Commissioners conclude that IC § 72-318(2) as interpreted by the Court in *Wernecke* and *Davis* is not applicable to Claimant's case, nor does the holding in *Davis* confer jurisdiction to void the Commission's April 26, 2013 Findings of Fact, Conclusions of Law and Order on Remand. Idaho Code § 72-318(2) applies to agreements wherein the claimant waives his or her right to compensation. Waiver is a voluntary, intentional relinquishment of a known right or advantage. *Wernecke*, 147 Idaho 277, 287, 207 P.3d 1008, 1018 (2009), (citing *Hecla Mining Co. v. Star-Morning Mining Co.*, 122 Idaho 778, 782, 839 P.2d 1192, 1196 (1992)). This stands in contrast to matters actually adjudicated by the Commission, wherein there is a decision on the merits of the case, not a waiver of claimants' right to compensation in exchange for

² Idaho Code § 72-719 provides the following grounds for a party to pursue the modification of an award of the Commission:

(1) On application made by a party in interest filed with the commission at any time within five (5) years of the date of the accident causing the injury or date of first manifestation of an occupational disease, on the ground of a change in conditions, the commission may, but not oftener than once in six (6) months, review any order, agreement or award upon any of the following grounds: (a) Change in the nature or extent of the employee's injury or disablement; or (b) Fraud.

(2) The commission on such review may make an award ending, diminishing or increasing the compensation previously agreed upon or awarded, subject to the maximum and minimum provided in this law, and shall make its findings of fact, rulings of law and order or award, file the same in the office of the commission, and immediately send a copy thereof to the parties.

(3) The commission, on its own motion at any time within five (5) years of the date of the accident causing the injury or date of first manifestation of an occupational disease, may review a case in order to correct a manifest injustice.

(4) This section shall not apply to a commutation of payments under section 72-404.

consideration paid by defendants. In the instant case, the issues of Claimant's permanent partial impairment and permanent disability were actually heard and decided by the Commission. Claimant did not pursue a motion for reconsideration, rehearing, or modification of the award before their respective statutes of limitation expired. This makes the Commission's April 26, 2013 Findings of Fact, Conclusions of Law and Order on Remand final and conclusive pursuant to IC § 72-718.

To do as Claimant suggests would potentially require the relitigation of hundreds of long-concluded workers' compensation cases. This would inherently violate the humane purpose for which the Idaho Workers' Compensation Act was designed while simultaneously creating great instability. Until the Court's ruling *Corgatelli*, the taking of a credit against an award of disability was a common practice in the Idaho workers' compensation industry. As was discussed in *Dickinson v. Adams County*, 2017 IIC 0007 (March 21, 2017), the practice of crediting defendants with impairment paid prior to a determination of total and permanent disability conferred several benefits on the workers' compensation system and parties to a case, including a source of income for the claimant while the parties determine how to pursue the case. Doing so is consistent with the Court's holding in *Corgatelli*, as "[a]ny payments of impairment made prior to the assessment of [c]laimant's disability are merely advances made towards [c]laimant's disability." *Id.* at 8. Maintaining the finality of matters actually adjudicated by the Commission is consistent with the purpose of Title 72, which is "designed to provide sure and certain relief for injured workers and their families and dependents". IC § 72-201. As the Commission has not exceeded its statutory authority, the Commission concludes that it does not have jurisdiction to revisit the April 26, 2013 Findings of Fact, Conclusions of Law and Order on Remand.

Attorney Fees

Because Claimant has not shown that the Commission has jurisdiction to void the final adjudication and considering the novelty of the Claimant’s arguments post-*Davis*, Claimant is not entitled to attorney fees.

ORDER

For these reasons, we conclude that the Court’s holding in *Davis*, while determinative for agreements entered into by the parties and approved by the Commission, does not confer jurisdiction to the Commission to modify final and conclusive matters actually adjudicated by the Commission.

DATED this 2nd day of August, 2017.

INDUSTRIAL COMMISSION

_____/s/_____
Thomas E. Limbaugh, Chairman

RECUSED

Thomas P. Baskin, Commissioner

_____/s/_____
R.D. Maynard, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of August, 2017, a true and correct copy of the **ORDER ON PETITION FOR DECLARATORY RULING** was served by United States Mail upon each of the following:

DANIEL A MILLER
401 W FRONT STREET, STE 401
BOISE ID 83702

W SCOTT WIGLE
PO BOX 1007
BOISE ID 83701-1007

_____/s/_____