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

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| TRUDY DEON,<br><br>Claimant,<br><br>v.<br><br>H & J, INC., d/b/a BEST WESTERN COEUR D'ALENE INN & CONFERENCE CENTER,<br><br>Employer,<br><br>and<br><br>LIBERTY NORTHWEST INSURANCE CORPORATION,<br><br>Surety,<br>Defendants. | **IC 2007-005950**<br>**IC 2008-032836**<br><br>**ORDER ON RECONSIDERATION**<br><br>**Filed November 4, 2013** |

This matter came before the Commission on the Commission's Notice of Reconsideration pursuant to I.C. § 72-718, filed May 3, 2013. Following a telephone conference with the parties, a briefing schedule was set. Both parties filed opening briefs and reply briefs. At issue is the question of the collateral estoppel effect, if any, of that lump sum settlement agreement between Claimant and the Industrial Special Indemnity Fund (ISIF) approved by the Commission and filed on November 8, 2012. Being fully advised in the law and in the premises, the Commission enters this Order on Reconsideration.

## INTRODUCTION

Claimant suffered the subject industrial accident on or about February 9, 2007. She filed her complaint against Employer/Surety on March 29, 2011. On or about June 9, 2011, Claimant filed her complaint against ISIF, alleging that she was totally and permanently disabled as a

consequence of the combined effects of the subject accident, and certain pre-existing impairments. The two complaints were consolidated by order of the Industrial Commission dated July 1, 2011. The case was set for hearing by order dated January 12, 2012. The noticed issues included, *inter alia*, whether Claimant was totally and permanently disabled, whether the ISIF bore some responsibility for Claimant's total and permanent disability and if so, how that liability should be apportioned between Employer and the ISIF under the *Carey* formula. On or about October 2, 2012, Claimant reached a tentative settlement with the ISIF at mediation. Claimant's claim against Employer/Surety went to hearing as scheduled on October 16, 2012. As of the date of hearing, the proposed lump sum settlement between Claimant and ISIF had not been executed by the parties. That settlement was eventually executed and submitted to the Commission for review and approval. The Commission approved the lump sum between Claimant and ISIF on or about November 8, 2012. That document is worthy of further review.

The settlement identifies two pre-existing conditions, a left lower extremity injury and a cervical spine injury. The settlement specifies that Claimant was given a 7% PPI rating for the pre-existing lower extremity injury. The settlement reflects some ambiguity, however, concerning the extent and degree of Claimant's impairment from her pre-existing cervical spine condition: Following an independent medical evaluation Claimant was awarded a 6% PPI rating for her cervical spine condition. However, the settlement also specifies that other medical providers, notably Dr. Sears, determined that Claimant suffered no ratable impairment for her cervical spine condition. Concerning Claimant's ratable impairment for the subject accident, the settlement agreement reflects that Claimant was given two independent ratings for her right upper extremity injury. Dr. McNaulty gave Claimant a 2% PPI rating while Dr. Stevens awarded Claimant a 1% PPI rating. At first blush, the settlement agreement appears to leave unresolved

the question of whether Claimant is entitled to a 6% or 0% impairment rating for her pre-existing cervical spine condition. However, other portions of the agreement clearly reflect that the parties ultimately agreed that Claimant was entitled to an impairment rating of some type for her cervical spine condition:

> WHEREAS, the Fund and the Claimant stipulate and agree that Claimant is totally and permanently disabled based upon the combined effects of the Claimant's pre-existing cervical spine injury and left lower extremity injury, combining with the injury to her right hand and wrist.

The quoted language strongly suggests that the parties stipulated and agreed that Claimant is entitled to an impairment rating for her cervical spine condition, otherwise, there would be no basis to include that condition among the pre-existing conditions which contributed to Claimant's total and permanent disability. With respect to Claimant's accident produced impairment, the agreement does not reflect whether the parties stipulated to whether Claimant was entitled to a 2% versus 1% impairment rating, although it does reflect the parties agreement that Claimant did suffer impairment of some type as a consequence of the accident.

As noted, the agreement reflects the parties stipulation and agreement that Claimant is totally and permanently disabled as the result of the combined effects of her pre-existing cervical and lower extremity conditions and her accident produced right upper extremity condition. Let it be assumed, for the sake of discussion, that Claimant suffered a 6% PPI rating for her cervical spine, and a 2% PPI rating for her accident caused condition. With these assumptions in mind, it is possible to calculate how responsibility for Claimant's total and permanent disability should be apportioned between Employer and the ISIF using the *Carey* formula;

$2/15 \times 85 = 11.5 + 2 = 13.05\%$

$13/15 \times 85 = 73.95 + 13 = 86.95\%$.

Therefore Employer would be responsible for the payment of disability in the amount of 13.05% of the whole person before ISIF would assume responsibility for the balance of total and permanent disability benefits for the rest of Claimant's life.

Interestingly, however, the parties to the lump sum settlement reached an agreement concerning the apportionment of Claimant's total and permanent disability that is apparently unrelated to the *Carey* apportionment arrived at by using the PPI ratings referenced in the lump sum settlement. The agreement specifies that responsibility between employer and the ISIF shall be apportioned as follows:

> WHEREAS, based upon the medical records, the Claimant and the Fund stipulate that a 60/40 Carey Formula apportionment with the Fund being responsible for 60% of the Claimant's total and permanent disability is appropriate in this case. This Carey Formula apportionment is based upon the impairment for Claimant's cervical spine injury and left lower extremity, and the significant impairment to Claimant's right hand and wrist as a result of the October 4, 2008, accident. It further takes into account the conflicting evidence concerning the Claimant's cervical impairment and her ability to return to medium level work as an HVAC technician after her cervical injury and lower extremity injury.

By the language of the agreement this "*Carey* apportionment" is a compromise which recognizes the fact that there is a dispute over the extent and degree of Claimant's cervical spine impairment, and the extent to which the pre-existing impairments affected her ability to engage in remunerative activities prior to the subject accident. However, even if one redacts the cervical spine condition from the *Carey* calculation, the apportionment yielded by that analysis does not resemble the 60/40 split referenced above:

$2/9 \times 91 = 20.02 + 2 = 22.02\%$

$7/9 \times 91 = 70.98 + 7 = 77.98\%$.

Simply, there is no way to juggle the various impairment numbers referenced in the lump sum to produce any type of *Carey* apportionment that comes close to the 60/40 split referenced in the agreement.

While acknowledging that Claimant is totally and permanently disabled as a result of the combined effects of the work accident and her pre-existing conditions, the parties to the lump sum agreement asked the Commission to approve an order commuting the ISIF's liability by the payment of a lump sum of $70,000.00. Essentially, the parties asked of the Commission to approve the payment of a lump sum amount in lieu of Claimant receiving weekly statutory total and permanent disability benefits for the rest of her life. The Industrial Commission accepted the averments of the parties that Claimant is totally and permanently disabled, and that her total and permanent disability arose as the result of the combined effects of the pre-existing lower extremity and cervical spine conditions and the accident produced right wrist injury. The Commission further found that the facts of the case warranted the commutation of Claimant's entitlement to life time permanent and total disability benefits by the lump sum payment of $70,000.00. The Commission approved the lump sum settlement agreement on or about November 8, 2012.

As noted, the claim against the Employer/Surety went to hearing on October 16, 2012. The transcript of hearing reveals that all parties were aware that the Claimant and ISIF had reached a tentative settlement of Claimant's claim against the ISIF, but that the proposed settlement had not been executed by Claimant. The matter went to hearing on remaining noticed issues, including issues relating to ISIF liability. Even though the ISIF had reached a tentative settlement with Claimant, Employer/Surety retained the right to argue that should Claimant be

found to be totally and permanently disabled, some portion of her total and permanent disability should be assigned to the ISIF.

The Commission entered its Findings of Fact, Conclusions of Law and Order on May 3, 2013 and determined, on the basis of the evidence adduced at hearing, that Claimant was totally and permanently disabled, but that Employer was entirely responsible for Claimant's total and permanent disability. Specifically, the Commission found that Claimant's October 4, 2008 industrial accident was the sole cause of her total and permanent disability and that the pre-existing impairments to her cervical spine and lower extremity did not combine with the effects of the work accident to contribute to Claimant's total and permanent disability.

Neither the parties, nor the Commission, appreciated that impact of the lump sum settlement agreement on the claim against Employer/Surety and, indeed, it was only as a result of the Commission decision placing full responsibility on the shoulders of Employer that the issue assumed some significance. The Commission can perhaps be criticized for not recognizing (or remembering) its approval of the lump sum settlement while drafting the decision in the case against Employer/Surety. However, the Commission necessarily relies on the parties to identify the issues that bear on the resolution of a case. Regardless, it is critical to the resolution of this matter that the Commission's decision regarding the liability of Employer/Surety be reconciled in some fashion with the Commission's approval of the lump sum settlement which recognized that some portion of Employer's liability is appropriately assigned to the ISIF. Pursuant to the authority granted it under I.C. § 72-718 to sua sponte reconsider its decision, the Commission notified the parties of its intention to reconsider the case and invited briefing on the question of whether, or to what extent, Claimant is collaterally estopped by the lump sum settlement

agreement from asserting that Employer is solely liable for Claimant's total and permanent disability.

Essentially, Claimant argues that Defendants' failure to raise collateral estoppel as an affirmative defense at any time during these proceedings constitutes a waiver of that defense by Defendants. Further, Claimant contends that collateral estoppel does not apply to the lump sum settlement at issue since that settlement does not constitute a prior adjudication on the merits.

For their part, Defendants argue that the lump sum settlement agreement is a final judgment, and that Claimant would be unjustly enriched if Employer/Surety was held solely responsible for Claimant's total and permanent disability where Claimant has already received a substantial lump sum settlement to commute the ISIF's shared responsibility for Claimant's total and permanent disability. Defendants argue that the lump sum settlement estops Claimant from now asserting that Employer should be held responsible for 100% of Claimant's total and permanent disability. Employer/Surety asks of the Commission that it revise its decision to be consistent with its previous order approving the sixty-forty apportionment of responsibility between Employer and the ISIF.

**DISCUSSION**

Under I.C. § 72-718, a decision of the Commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated; provided, within twenty (20) days from the date of filing the decision any party may move for reconsideration or rehearing of the decision. In any such event, the decision shall be final upon denial of a motion for rehearing or reconsideration, or the filing of the decision on rehearing or reconsideration.

The Commission may reverse its decision upon a motion for reconsideration, or rehearing of the decision in question, based on the arguments presented, or upon its own motion, provided

that it acts within the time frame established in I.C. § 72-718. See, *Dennis v. School District No. 91*, 135 Idaho 94, 15 P.3d 329 (2000) (citing *Kindred v. Amalgamated Sugar, Co.*, 114 Idaho 284, 756 P.2d 410 (1988)).

The Commission's Notice of Reconsideration was timely filed on May 3, 2013. As stated in that notice, the Commission's Notice of Reconsideration was not intended to foreclose the parties from themselves pursuing motions for reconsideration under I.C. § 72-718 on any other issues they believed appropriate for reconsideration. Neither party has filed such a motion.

On one important point there is no disagreement between the lump sum settlement and the Commission's decision in the subsequent case: Claimant is totally and permanently disabled. The issues before the Commission on reconsideration are as follows: (1) Is Employer entitled to rely on the doctrine of collateral estoppel to prevent Claimant from arguing that Employer bears responsibility for 100% of Claimant's total and permanent disability; and (2) If so, is Claimant estopped from relitigating the issue of how responsibility between Employer/Surety and the ISIF should be apportioned?

**I. Is Employer entitled to rely on the doctrine of collateral estoppel to prevent Claimant from arguing that Employer bears responsibility for 100% of Claimant's total and permanent disability?**

Res judicata is comprised of claim preclusion (true res judicata) and issue preclusion (collateral estoppel). Res judicata, or claim preclusion, bars a subsequent action between the same parties upon the same claim or upon claims relating to the same cause of action. *Ticor Title Company, v. Stanion*, 144 Idaho 119, 157 P.3d 613 (2007). As between Claimant and Employer/Surety the doctrine of res judicata is inapplicable inasmuch as Employer/Surety was not a party to the lump sum settlement agreement between Claimant and the ISIF. Although the

ISIF would have participated in the hearing had it not reached a settlement with Claimant, the claim against the ISIF was the subject of a separate complaint, which was consolidated with Claimant's complaint against Employer/Surety for the purposes of hearing only. The doctrine of res judicata is inapplicable to the resolution of this matter.

The doctrine of collateral estoppel exists to prevent the relitigation of an issue previously determined. The doctrine applies to prevent the relitigation of an issue decided in a previous case when the following elements are satisfied:

> (1) Did the party "against whom the earlier decision is asserted ... have a 'full and fair opportunity to litigate that issue in the earlier case?' " (2) Was the issue decided in the prior litigation "identical with the one presented in the action in question?" (3) Was the issue actually decided in the prior litigation? This may be dependent on whether deciding the issue was "necessary to [the prior] judgment." (4) "Was there a final judgment on the merits?" (5) "Was the party against whom the plea is asserted a party or in privity with a party to the prior adjudication?"

See *Magic Valley Radiology, PA v. Kolouch*, 123 Idaho 434, 849 P.2d 107 (1993); *Stoddard v. Haggadone Corp.*, 147 Idaho 186, 207 P.3d 162 (2009).

On the question of whether or not Claimant is barred from relitigating the issue of whether ISIF liability has been established, it is clear that the elements essential to the application of the doctrine of collateral estoppel have been satisfied.

First, Claimant had a full and fair opportunity to litigate this issue in the prior case against the ISIF. Necessarily, before the ISIF could be found liable in that case, Claimant bore the burden of demonstrating that she was totally and permanently disabled, and that all elements of ISIF liability were met. Claimant could not prevail against the ISIF without meeting her burden of proof in this regard. The previous claim against the ISIF afforded Claimant a full and fair opportunity to litigate these issues.

Next, the issue decided in the previous case is identical to the issue before the Commission in Claimant's claim against Employer/Surety. As demonstrated in the Commission's Findings of Fact, Conclusions of Law and Order, among the issues before the Commission are whether Claimant is totally and permanently disabled, and if so, whether apportionment is appropriate under the *Carey* formula. The issue of *Carey* apportionment would not arise except for a finding that all elements of ISIF liability had been met. Whether the elements of ISIF liability had been satisfied was argued by the parties and addressed by the Commission.

As noted above, Claimant's primary objection to the application of the doctrine rests on her assertion that the lump sum settlement does not constitute the litigation of any issue on the merits and that she therefore had no opportunity, much less a full and fair one, to litigate the issue of ISIF liability until the October 16, 2012 hearing before the Industrial Commission. The issue of whether or not a lump sum settlement constitutes a decision on the merits received extensive treatment in the case of *Jackman v. State Industrial Special Indemnity Fund*, 129 Idaho 689, 931 P.2d 1207 (1997). That case, which bears many similarities to the case at bar, warrants closer review.

As in the instant matter, *Jackman* involved separate complaints against employer/surety and the ISIF. Prior to the August 13, 1986 industrial accident Jackman suffered from long-standing problems with his hip. He had undergone a 1997 hip replacement surgery and a 1983 revision surgery. The evidence established that prior to the 1986 industrial accident claimant had significant limitations as a result of his hip condition. In August of 1986 claimant suffered a slip and fall which caused further injury to his hip. He underwent a second total hip revision surgery in 1987, and thereafter underwent a back surgery for unrelenting back pain. In 1989 claimant

was given a 33% impairment rating for his hip condition. Importantly, the impairment included consideration of the multiple surgeries on claimant's hip. In 1990 Jackman and employer/surety entered into a lump sum settlement. That agreement referenced the payment of a 33% impairment rating for claimant's right hip and low back condition by employer. The lump sum settlement did not reference any apportionment of that impairment rating between the work accident and claimant's documented pre-existing condition.

In 1994, claimant filed a complaint against the ISIF alleging, *inter alia*, that the combined effects of his pre-existing right hip condition and the subject accident left him totally and permanently disabled. The Commission found that claimant was totally and permanently disabled, and that the ISIF shared responsibility with employer for claimant's total and permanently disability. The ISIF appealed the Commission's decision to the Idaho Supreme Court. On appeal the ISIF argued that Jackman's claim against it was barred by the doctrine of collateral estoppel. Jackman argued that although the lump sum settlement agreement reflected the 33% impairment rating, that agreement did not address the issue of apportionment of that rating between pre-existing and accident produced conditions. Jackman argued that the evidence would show that claimant had a 13% impairment rating referable to his pre-existing hip condition and a 20% impairment rating referable to the 1986 accident. The Court rejected this argument, ruling that Jackman was collaterally estopped from arguing that the 33% impairment rating referenced in the lump sum (and paid by employer/surety) could later be apportioned between the subject accident and claimant's pre-existing condition in order to support a claim against the ISIF. In this regard the Court stated:

> Jackman cannot rely upon the same percentage impairment rating in order to attain further benefits from ISIF. Jackman must present additional evidence of impairment in order to increase his impairment rating. The issue presented in the proceeding against SIF and SHS, compensating Jackman for his impairment

> rating of 33% whole person, is identical to the issue Jackman presently raises: whether ISIF must compensate Jackman for a portion of the same 33% whole person impairment.

The Jackman Court also addressed Jackman's argument that the lump sum settlement did not constitute a final judgment on the merits. Citing *Davidson v. H. H. Keim Company*, 110 Idaho 758, 718 P.2d 1196 (1986), the Court ruled that a lump sum agreement approved by the Commission under I.C. § 72-404 constitutes a final decision of the Commission and is therefore a final judgment on the merits.

We believe that *Jackman* is controlling in the instant matter and that the lump sum settlement between Claimant and the ISIF estops Claimant from asserting that Employer bears 100% of the liability for Claimant's total and permanent disability.

In *Jackman*, the lump sum settlement specified that all of claimant's 33% impairment was apportioned to employer. This actually litigated the question of apportionment, and precluded claimant from asserting an apportionment scheme in subsequent litigation different from the apportionment reflected in the lump sum. Similarly, the lump sum in the instant matter specifically reflects the parties' agreement that Claimant is totally and permanently disabled, and that she suffered from certain pre-existing conditions which combined with the work accident to result in total and permanent disability. Therefore, this issue was actually litigated in the settlement. This is made even more clear by the recent case of *Wernecke v. St. Maries Joint School District No. 401*, 147 Idaho 277, 207 P.3d 1008 (2009). In that case, the Court made it clear that the Industrial Commission does not even have jurisdiction to consider a proposed lump sum settlement between an injured worker and the ISIF absent the Commission's threshold determination that the injured worker is indeed totally and permanently disabled and that all elements of ISIF liability have been satisfied. In this regard the Court stated:

> Section 72-318(2) sets out the State's policy that agreements purporting to waive an employee's rights to compensation under the Act are void. Section 72-332 provides a narrow exception for cases that meet the requirements therein specified. 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. 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. 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.
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> 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.

Here the parties stipulated that Claimant was totally and permanently disabled and that the liability of the ISIF was established because Claimant's pre-existing cervical spine and lower extremity impairments combined with her accident caused impairment to cause total and permanent disability. The Commission necessarily found the stipulated facts to be true in order to consider whether it was appropriate, under the facts of the case, for Claimant to commute her right to statutory life time benefits by the payment of the lump sum of $70,000.00. Therefore, as a prerequisite to the Commission's approval of the lump sum, the question of whether the ISIF bore responsibility for some portion of Claimant's total and permanent disability was actually and necessarily adjudicated.

Next, per *Jackman*, Supra, it is clear that the order approving the lump sum settlement does constitute a "final judgment on the merits".

Finally, the party against whom the doctrine of collateral estoppel is to be applied was a party to the previous action. Claimant was a party to the action against the ISIF and in that action alleged that the ISIF bore responsibility for her total and permanent disability. Claimant is

also a party to the action against Employer/Surety, and in that case, argues that 100% of the liability for her total and permanent disability should be born by Employer.

Based on the foregoing, the Commission concludes that the doctrine of collateral estoppel prohibits Claimant from relitigating the issue of whether the ISIF bears responsibility for some portion of Claimant's total and permanent disability. Claimant is estopped from asserting that Employer is entirely responsible for her total and permanent disability. Claimant is bound by the Commission's order approving the lump sum settlement, an order which establishes that some portion of Claimant's total and permanent disability must be born by the ISIF.

**II. Is Claimant estopped from relitigating the issue of how responsibility for Claimant's total and permanent disability should be apportioned between Employer and the ISIF?**

The next question before the Commission is whether the doctrine of collateral estoppel bars Claimant from relitigating how responsibility should be apportioned between the ISIF and Employer/Surety. First, it is worth noting that this is an issue that is different from the question of whether the ISIF bears some responsibility for Claimant's total and permanent disability. To say that the ISIF bears some responsibility for Claimant's total and permanent disability does not answer the more particularized inquiry of how that responsibility should be apportioned between the Employer and the ISIF. Indeed, disputes over the issue of apportionment are among the issues that are typically resolved in a lump sum settlement between an injured worker and the ISIF. *See Havens v. State of Idaho Industrial Special Indemnity Fund*, http://www.iic.idaho.gov/decisions/2009/09_09/havens_v_state_of_idaho.pdf (Sept. 21, 2009). Although the parties to a case may stipulate that the ISIF bears some responsibility for an injured worker's total and permanent disability, the parties may dispute the particular impairment ratings

which attach to the work related injury or claimant's pre-existing conditions. Identifying these impairment ratings is important to the application of the *Carey* formula for assigning responsibility between Employer/Surety and the ISIF in a total and permanent disability case. In *Jackman*, the evidence established that the issue of how an impairment rating should be apportioned was addressed in the lump sum settlement, and that Claimant could not argue for a different apportionment in a subsequent proceeding. In this regard, the *Jackman* Court stated:

> Jackman cannot rely upon the same percentage impairment rating in order to attain further benefits from ISIF. Jackman must present additional evidence of impairment in order to increase his impairment rating. The issue presented in the proceeding against SIF and SHS, compensating Jackman for his impairment rating of 33% whole person, is identical to the issue Jackman presently raises: whether ISIF must compensate Jackman for a portion of the same 33% whole person impairment.

The lump sum settlement in this case, too, addresses the issue of the apportionment of responsibility for Claimant's total and permanent disability between the ISIF and Employer/Surety. However, as developed above, it is difficult, if not impossible, to reconcile the stipulated 60/40 split with the various impairment ratings which are also referenced in the lump sum settlement. As well, the settlement does not purport to specify which of the conflicting impairment ratings the Commission should adopt in approving the lump sum. The language of the lump sum strongly suggests that the 60/40 apportionment referenced in the document represents a compromise of the apportionment issue which recognizes that the parties disputed certain facts which impacted how much of Claimant's total and permanent disability should be apportioned to the ISIF:

> WHEREAS, based upon the medical records, the Claimant and the Fund stipulate that a 60/40 Carey Formula apportionment with the Fund being responsible for 60% of the Claimant's total and permanent disability is appropriate in this case. <u>This Carey Formula apportionment is based upon the impairment for Claimant's cervical spine injury and left lower extremity, and the significant impairment to Claimant's right hand and wrist as a result of the</u>

> October 4, 2008, accident. It further takes into account the conflicting evidence concerning the Claimant's cervical impairment and her ability to return to medium level work as an HVAC technician after her cervical injury and lower extremity injury.

Emphasis added.

Unlike the uncontested recital of how the 33% impairment rating should be apportioned in *Jackman*, Supra, the sixty-forty apportionment referenced in the instant lump sum settlement agreement is not consistent with recitals made in other parts of that document, and appears to represent a compromise of the disputed issue of apportionment. As such, we do not regard the issue of how responsibility should be apportioned between the Employer and the ISIF to have been "actually litigated" in the lump sum settlement. Nor do we believe that deciding the issue of apportionment was necessary to our approval of the lump sum settlement. See *Brown v. State of Idaho Industrial Special Indemnity Fund*, 138 Idaho 493, 65 P.3d 515 (2003). In addition to disputed *Carey* apportionment the Commission determined that other facts supported its decision to approve the commutation of Claimant's right to lifetime benefits. Among these were Claimant's expressed need for immediate cash, and the fact that she wanted the peace of mind of a lump sum rather than statutory benefits; upon Claimant's death statutory benefits cease, leaving her survivors with no ongoing income stream. In summary we do no regard the issue of *Carey* apportionment to have been actually litigated by the lump sum settlement, nor necessary to our approval of the settlement.

For these reasons, we conclude that the lump sum settlement agreement does not bar litigation of the question of how responsibility for Claimant's total and permanent disability should be apportioned between the ISIF and Employer/Surety. Moreover, we do not believe that the doctrine of collateral estoppel would allow Employer/Surety, a non-party to the lump sum

settlement, to be bound by that document's recitation that Employer/Surety should be held responsible for 40% of Claimant's total and permanent disability.

Since we have found that the lump sum settlement does not bar litigation of the issue of apportionment, we are free to apportion responsibility between Employer and ISIF on the basis of the facts adduced at hearing. Again, the lump sum settlement agreement clearly anticipates that Claimant's total and permanent disability is a result of the combined effects of the pre-existing cervical spine and lower extremity impairments and the impairment from the subject accident. With this stipulation in mind, it is possible to ascertain how responsibility should be apportioned between Employer/Surety and the ISIF using the Commission's findings on impairment and the *Carey* formula. Under the *Carey* formula, the relative responsibilities of Employer/Surety and the ISIF are calculated as follows:

$4/17 \times 83 = 19.92 + 4 = 23.92$

$13/17 \times 83 = 63.08 + 13 = 76.08.$

Therefore, Employer is responsibility for disability of 23.92%, with credit for impairment paid to date.[1] The responsibility of the ISIF was settled by way of the aforementioned lump sum settlement agreement.

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[1] We recognize that Employer has only asked of the Commission that Claimant be required to honor the 60/40 split referenced in the lump sum settlement, while our decision obligates Employer to pay a substantially smaller portion of Claimant's total and permanent disability. However, Employer's position in this regard necessarily follows from its argument that the doctrine of collateral estoppel prevents relitigation of the issue of how disability should be apportioned. Because we have determined that the doctrine does not bar relitigation of that issue we do not feel bound by what might otherwise be regarded as Employer's waiver of a more favorable apportionment scheme.

## CONCLUSIONS AND ORDER ON RECONSIDERATION

In accordance with this decision on reconsideration, the Commission enters these revised conclusions of law and Order.

1. Claimant has proven that she suffers whole person impairment of 17% of the whole person referable to her pre-existing conditions, and a 4% whole person impairment referable to her 2008 industrial accident.

2. Claimant has proven that she suffers permanent disability of 85% inclusive of impairment, and has further proven that she is an odd-lot worker, totally and permanently disabled under the *Lethrud* test.

3. Claimant is estopped from asserting that 100% of Claimant's total and permanent disability should be born by Employer/Surety, and is bound by the prior lump sum settlement in which she stipulated and agreed that the ISIF bears some responsibility for her total and permanent disability on account of pre-existing cervical spine and lower extremity impairments.

4. The lump sum settlement agreement does not collaterally estop Claimant from adjudicating, in this proceeding, how Claimant's total and permanent disability should be apportioned between the ISIF and Employer.

5. Employer's responsibility for Claimant's total and permanent disability is calculated as follows under *Carey*, Supra:

$4/17 \times 83 = 19.92 + 4 = 23.92$

Employer is responsible for the payment of disability equaling 23.92%, with credit for impairment paid to date. The liability of the ISIF was previously compromised and commuted by the aforementioned November 8, 2012 lump sum settlement agreement.

6. Pursuant to I.C. § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 4th day of November, 2013.

INDUSTRIAL COMMISSION

__/s/_____
Thomas P. Baskin, Chairman

Participated but did not sign
_____
R.D. Maynard, Commissioner

__/s/_____
Thomas E. Limbaugh, Commissioner

**CERTIFICATE OF SERVICE**

I hereby certify that on the 4th_ day of November, 2013, a true and correct copy of the foregoing ORDER ON RECONSIDERATION was served by regular United States Mail upon each of the following:

STEVEN J NEMEC
1626 LINCOLN WAY
COEUR D'ALENE ID 83814

JOSEPH M WAGER
PO BOX 6358
BOISE ID 83707-6358

__/s/_____