BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

RUBIO IZAGUIRRE, Claimant, v. R&L CARRIERS SHARED SERVICES, L.L.C., Employer, and ZURICH AMERICAN INSURANCE CO., Surety, Defendants.	)	**IC 2008-011032** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** Filed January 31, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission (Commission) assigned the above-entitled matter to the Commissioners, who conducted a hearing in Boise, Idaho on July 26, 2011. Claimant, Rubio Izaguirre, was present in person and represented by Richard Owen, of Nampa. Defendant Employer, R&L Carriers, and Defendant Surety, Zurich American Insurance, were represented by Jon Bauman, of Boise. The parties presented oral and documentary evidence. Post-hearing briefs were later submitted and the matter came under advisement on September 27, 2011.

ISSUES

The issues to be decided by the Commission as the result of a pre-hearing conference and agreement at the hearing are listed below. They have been reordered from the Order Amending Hearing Issues to correlate with the flow of the discussion in this decision.

1. Whether the Industrial Commission has jurisdiction to evaluate the reasonable value of Claimant's third party claim including the claim of Claimant's wife, Sophia Izaguirre;

2. Whether the Industrial Commission has jurisdiction to evaluate the reasonable value of the elements of the claim brought by Clamant and his wife against the third party;

3. Whether the Industrial Commission has jurisdiction to evaluate the adequacy of the settlement made by Claimant in his third party case;

4. Whether the Release and Indemnity Agreement between Claimant, his wife, and the negligent third party, permits or effects a limitation on Defendants' right of subrogation under I.C. § 72-223;

5. Whether the unilateral characterization of the relative interests of Claimant and his wife in the proceeds of the third party settlement, as set forth in the November 13, 2009, letter of D. Scott Summer, Esq., is binding on Defendants;

6. Whether the recovery by Claimant's wife for loss of consortium in the third party action is a recovery against which Defendants may assert the I.C. § 72-223 right of subrogation;

7. If not, what percentage of the $200,000 third party settlement is attributable to the loss of consortium claim;

8. To what extent is Claimant's recovery in the third party action community property, and to what extent may Defendants assert an I.C. § 72-223 claim of subrogation to community property, one-half of which is the separate property of Claimant, and one-half of which is the separate property of Claimant's wife;

9. What is the amount of costs and attorney fees that should be deducted from Defendants' I.C. § 72-223 recovery pursuant to I.C. § 72-223(4)-(5);

10. The reasonable value of the elements of the claims of Claimant and his wife against the third party herein, including:

a. Claimant's past and future medical expense;
b. Claimant's past and future wage loss;
c. The value of Claimant's wife's past and future loss of consortium; and,
d. The value of Claimant's past and future general damage.

11. Whether or not the subrogation rights possessed by Surety herein allow Surety to attach that portion of Claimant's third party settlement which is attributed to Claimant's pain and suffering;

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant suffered a work-related motor vehicle accident resulting in an injury requiring medical treatment and indemnity benefits paid by Defendants. Thereafter, Claimant and his wife entered into a settlement with the third party responsible for the accident. The parties now seek direction from the Commission as to what portion of the proceeds of the third party settlement is subject to Defendants' subrogation claim.

Claimant contends that the Commission has jurisdiction to decide the reasonable value of the elements of the Claimant's third party claim, including the value of the claim of Claimant's wife for her loss of consortium. Claimant does not believe the Commission has jurisdiction to decide the adequacy of the third party settlement. Claimant concedes that the third party settlement and the execution of the Release and Indemnity Agreement do not have any effect on Defendants' right of subrogation in this case. Claimant avers that the attorney fees in the third party settlement, in the amount of thirty-five percent, cannot be modified. Claimant further contends that the loss of consortium damage in this case was damage suffered by the wife alone and is her sole and separate property. Claimant's recovery for pain and suffering, which is never paid by workers' compensation, is his own separate and personal property and not subject to the rights of subrogation.

Defendants agree with Claimant, that the Commission does not have jurisdiction to decide the adequacy of the third party settlement and that the characterization of the settlement has no binding effect on Defendants' right of subrogation. Defendants argue that they are entitled to a right of subrogation in the entirety of a third party settlement, subject only to a deduction for attorney fees and costs. They aver that the Commission does not have the jurisdiction to differentiate between the types of damages or attempt to apportion the settlement.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The Industrial Commission legal file;
2. Claimant's Exhibits 1-7, and 9-14 admitted at the hearing;
3. Defendants' Exhibits 1-9, 11-40, admitted at the hearing;
4. The testimony of Claimant, Sofia Izaguirre, Lene O'Dell, Martha Peterson, Kurt Holzer, and Merlyn Clark taken at the hearing.

FINDINGS OF FACT

1. Claimant was born in Mexico but moved to Texas when he was twelve years old. Two years later his family moved to California. Claimant completed the eighth grade and began working full time at the age of seventeen. At the time of the hearing, Claimant was 51 years old and resided in Caldwell, Idaho.

2. When Claimant was seventeen he met Sofia, his wife, and they were married three years later. Claimant and his wife moved to Idaho in 1995.

3. Claimant began driving truck when he was 26, and he has spent the majority of his life working as a driver for companies or as a self-employed driver. Most of Claimant's driving allowed him to be home at the end of every day, but some jobs included long hauls lasting up to five consecutive days on the road.

4. At the time of the February 2008 accident, Claimant was employed by R&L Carriers earning between $1,300 and $1,600 per week as well as receiving health insurance and disability insurance. Claimant was a combo driver, tasked with driving as well as loading and unloading merchandise.

5. On February 28, 2008, Claimant was involved in a motor vehicle accident. His semi-truck was struck by another semi-truck on the interstate near Snowville, Utah. Claimant's truck and two of the three trailers he was pulling were knocked over. Claimant first sought medical care on February 29, 2008, when he presented at West Valley Medical Center. He was diagnosed with an acute cervical strain and contusions on his chest and left knee, and taken off work for three days.

6. On March 3, 2008, Claimant presented at Saint Alphonsus Medical group Occupational Medicine and was seen by Kevin Chicoine, M.D. Claimant reported that he had mild, non-radiating pain in his neck. Dr. Chicoine imposed restrictions of no lifting, pushing, or pulling in excess of 25 pounds, as well as no squatting or kneeling. Claimant participated in physical therapy and the pain in his chest and neck resolved.

7. Claimant's knee pain continued and an MRI was performed on April 18, 2008, which revealed a left knee cartilage tear. On October 9, 2008, Claimant had arthoscopic surgery on the left knee by William Lindner, M.D. On November 14, 2008, Dr. Lindner released Claimant to full duty work, stating that if he cannot tolerate his work some accommodation from those duties will need to be made. Claimant continued with physical therapy until January 6, 2009.

8. On April 6, 2009, Paul Collins, M.D., conducted an independent medical examination (IME) at Defendants' request. Dr. Collins found some puffiness in Claimant's knee and minimal crepitation in Claimant's left knee. The doctor found that Claimant was not yet stable and recommended a home based exercise program and reported that Claimant seemed well-motivated. The prior restrictions of no squatting or kneeling and no pushing, pulling, or lifting more than 25 pounds were continued. Dr. Collins opined that Claimant did not need

replacement surgery, and Claimant should be given a year with appropriate treatment and therapy before making a decision about surgery.

9. On April 28, 2009, Dr. Lindner declared Claimant had reached maximum medical improvement. Dr. Lindner did not specify Claimant's permanent physical restriction; instead he stated that Claimant's permanent restrictions would be commensurate with the current level of restrictions. Dr. Lindner's prior restrictions were general limitations focused on avoiding work duties that Claimant was not capable of performing.

10. Peggy Wilson, PT, performed a Functional Capacity Assessment of Claimant on June 3, 2009. The results indicated that Claimant had the ability to function at a light-medium to medium work level, but his lifting was limited to 61 pounds. Ms. Wilson reported that Claimant had good eye-hand coordination, good dexterity, and manipulation, as well as good overall body mechanics.

11. Most recently, Claimant had an MRI on January 17, 2011. Dr. Richard Moore reviewed the MRI and concluded that Claimant needed a knee replacement.

12. When asked about his current restrictions at the time of the hearing, Claimant could not detail any limitations. He simply stated that if he has restrictions they are going to be the same as he had before. Claimant testified that he is able to get a full night's sleep without the use of any sleep aids, just Tylenol. He reported that his left knee pain only flares up once in awhile if he walks too much or exerts himself. At another point in the hearing, Claimant testified that his left knee bothers him constantly and keeps him awake part of the night. Claimant does not bend his left knee or squat.

13. Claimant worked continuously for R&L beginning three days after the accident until the surgery in October 2008. After surgery Claimant returned to work in November with a

note from Dr. Lindner stating that Claimant should be allowed to "self-select some of his duties." Claimant testified that he was repeatedly required to hook up trailers using a dolly weighing 2,500 pounds, which Claimant had to push and pull into position. Such work was beyond Claimant's capabilities and caused trouble with Claimant's knee. R&L terminated Claimant's employment on June 3, 2009, and on July 9, 2009, Claimant began working for Old Dominion driving a delivery truck.

14. Claimant worked for Old Dominion for two years, first part time then full time in March of 2010. The full time work for Old Dominion included working at night. The regular schedule was to leave home at 9:30 p.m. and return home at 8:30 a.m. At this time both Claimant and his wife had weekends off. During his work with Old Dominion, Claimant had pain in his knee some days when he used it too much. Claimant was laid off by Old Dominion on June 30, 2011, because Claimant did not divulge the February 2008 accident on his employment application.

15. During his time at Old Dominion, Claimant passed his Department of Transportation physical. Claimant indicated on the form that he had knee surgery on October 9, 2009. The form also reports that Claimant has no problems with the knee, though Claimant denied writing that or telling that to the examiner.

16. At hearing, Claimant testified that he believed he could return to his time of injury job with R&L Carriers with his current knee problems and restrictions. Further, Claimant believes that if he had not been laid off, he could still physically work at his prior job with Old Dominion.

Mrs. Izaguirre

17. Claimant and Mrs. Izaguirre were married in 1980. They have four grown children and three grandchildren. Mrs. Izaguirre has worked outside the home all but two years of their marriage. Mrs. Izaguirre handles the financial aspect of their marriage. Mrs. Izaguirre characterized their marriage as traditional. She testified that Claimant struggles to express his feelings and when he has pain in his knee he shuts down and keeps to himself. Mrs. Izaguirre explained that Claimant will sometimes confine himself to their bedroom even when their children and grandchildren are visiting. Even when Claimant is feeling well, kneeling on the ground to play with grandchildren is difficult. Additionally, connecting with Claimant was difficult because he worked nights. But since Claimant has been out of work he has been home more and the family relations are improving. Additionally, Claimant and his wife have met with their pastor twice for financial counseling since the accident.

Martha Peterson

18. Mrs. Peterson works for Intermountain Claims as a certified case manager. She has been involved as a nurse in the area of workers' compensation for 35 years.

19. Mrs. Peterson was requested to research the cost and recovery time for a total knee replacement, as it is the treatment Claimant may receive in the future. She opined that longevity of a knee replacement is 15 to 20 years. Generally, people under 50 get a different procedure, resurfacing or hemioplasties, to address the knee issues and hold off on a total replacement as long as possible due to the longevity of knee replacements.

20. Mrs. Peterson stated that a patient should be able to return to sedentary work approximately 60-65 days after surgery, and a patient would reach maximum medical

improvement (MMI) in eight to twelve months. During this time, a patient would standardly participate in six to eight weeks of physical therapy, attending three times per week.

21. Mrs. Peterson produced a letter estimating the cost of a total knee replacement at $8,550.00 with an assist of $2,565.00. The cost of a resurfacing was estimated at $6,000.00 with an assist of $1,800.00. These figures do not include hospital costs.

22. Mrs. Peterson opined that, given a good outcome for a total knee replacement on Claimant, he would be able to return to his time of injury job.

The Third Party Claims

23. June 2008, the Izaguirres retained D. Scott Summer to represent them in a lawsuit against the driver who caused Claimant's industrial accident. On October 22, 2009, Claimant and his wife settled their third party claim for $200,000. A letter drafted by Mr. Summer after the settlement breaks down the total settlement, attributing $100,000 to Mrs. Izaguirre's claim for loss of consortium and $100,000 to Claimant's personal injury claim. Per the attorney/client agreement, Mr. Summer was paid 35% of the settlement amount for his attorney fee, equaling $70,000.

24. At the date of the third party mediation, Surety had a subrogated interest of $43,518.65. Surety and the Izaguirres, through their attorney, agreed to the payment of a 25% attorney fee on the recovery of the subrogated amount. Thus, Mr. Summer reimbursed $32,623.99 to Surety, and retained $10,879.66 payable as attorney fees.

Kurt Holzer

25. Mr. Holzer is a personal injury attorney in Boise, Idaho. Mr. Holzer has substantial experience with loss of consortium cases in the state. Mr. Holzer was plaintiff's

counsel in a recent case including a loss of consortium claim, during which the jury awarded $560,000 for the wife's loss of consortium claim. *Phillips v. Erhart*, 151 Idaho 100 (2011).

26. Mr. Holzer was asked by Claimant to evaluate Mrs. Izaguirre's loss of consortium claim. Mr. Holzer reviewed Claimant's medical records and interviewed the Claimant and his wife. The interview focused on the Izaguirres' moral system, their view of the world, and how those were impacted by the Claimant's injuries. Mr. Holzer opined that Mrs. Izaguirre wants her husband to be the leader of the family, the decision maker to whom she can defer to when questions and issues arise. When Claimant secludes himself in their bedroom, Mrs. Izaguirre feels alone and without support. Mrs. Izaguirre also has a fearful attitude about the future and Claimant's ability to provide an income.

27. Starting with the understanding that the Izaguirres received $200,000 in the settlement, Mr. Holzer estimated that Mrs. Izaguirre's loss of consortium claim is valued at $50,000. He opined that a jury would have given $150,000 to Claimant and $50,000 to Mrs. Izaguirre.

Merlyn Clark

28. Mr. Clark is an attorney in Boise, Idaho focusing in commercial litigation, with a significant portion of time spent in mediation and arbitration. Mr. Clark estimated that around 100 cases involved a claim for loss of consortium, out of the approximately 700 cases he has mediated.

29. Particular to this case, Mr. Clark reviewed the medical records, correspondence, discovery responses, and deposition transcripts. He also reviewed some legal authorities on the matter of claims for loss of consortium in Idaho.

30. Mr. Clark found, in this case, that Claimant's injuries were not severe or disabling. Claimant was only off work for three days directly after the accident. He was off work after his arthroscopic surgery, and Dr. Lindner took Claimant off work because Employer required the performance of work beyond Claimant's restrictions. Mr. Clark found no evidence that Claimant's injuries and restrictions significantly interfered with his family life. In fact, when Claimant was off work he was able to interact with his family in ways he was unable to when working nights. As testified by Mrs. Izaguirre, it was his change to night work that interfered with their family life. Mr. Clark ultimately opined that the loss of consortium claim had a value of $3,000 to $5,000.

DISCUSSION AND FURTHER FINDINGS

Jurisdiction

31. The first issues raised in this matter are regarding the jurisdiction of the Commission over this unique case.

32. Claimant contends that the Commission does have jurisdiction to decide the reasonable value of the elements of the Claimant's third party claim, including the value of the claim of Claimant's wife for her loss of consortium. Claimant does not believe the Commission has jurisdiction to decide the adequacy of the third party settlement.

33. Defendants agree with Claimant, that the Commission does not have jurisdiction to decide the adequacy of the third party settlement. They further aver that the Commission does not have the jurisdiction to differentiate between the types of damages or attempt to apportion the settlement.

34. The Commission agrees that there is no need to evaluate the adequacy of the value of the third party settlement. The Commission is ill-equipped to assess a value on the

entirety of the claims brought by Claimant and his wife. Further, the settlement provides us with a realistic value of the claims by the inherent nature of a negotiated settlement which takes account of the strengths and weaknesses of the claims of the parties. Thus, the Commission will make no attempt at evaluating the adequacy of the third party claim.

35. According to Idaho Code § 72-707, "[a]ll questions arising under [the workers' compensation laws of this state], if not settled by agreement or stipulation of the interested parties with the approval of the commission, except as otherwise herein provided, shall be determined by the commission." The issue is whether the Commission has jurisdiction to evaluate the claims brought by Claimant and his wife, and the elements within those claims, including the loss of consortium claim. The reason that the Commission has been asked to evaluate the claims of the settlement is to facilitate the future reimbursement of Defendants' claim of subrogation. It is only in connection with the subrogation claim that this matter is before the Commission.

36. Defendants' claim of subrogation to proceeds of the third party settlement arises under Idaho Code § 72-223(3), which provides:

> If compensation has been claimed and awarded, the employer having paid such compensation or having become liable therefor, shall be subrogated to the rights of the employee, to recover against such third party to the extent of the employer's compensation liability.

37. The Idaho Supreme Court has repeatedly held that the Industrial Commission has jurisdiction over questions of subrogation claims under Idaho Code § 72-223. The Court stated that the question of whether the State Insurance Fund was entitled to subrogation pursuant to Idaho Code § 72-223(3) is a question arising under the workers' compensation law which is within the exclusive jurisdiction of the Industrial Commission. *Idaho State Ins. Fund ex rel. Forney v. Turner*, 130 Idaho 190, 938 P.2d 1228 (1997). The Court has also held that the

Industrial Commission has exclusive jurisdiction of whether a workers' compensation surety had waived its subrogation rights arising under Idaho Code § 72-223(3). *Van Tine v. Idaho State Ins. Fund*, 126 Idaho 688, 889 P.2d 717 (1994).

38. Pursuant to Idaho Code § 72-707, the Commission is given the jurisdiction to decide matters within its statutory scheme. Here the Commission is being asked to clarify the Defendants' subrogation rights under Idaho Code § 72-223. In order to determine the subrogation right, we must first look at the settlement and evaluate the claims that will be subject to the subrogation right. The questions presented arise under the workers' compensation law and require application of the workers' compensation law; thus, the Industrial Commission has jurisdiction.

The Third Party Settlement

39. The Izaguirres and the third party entered into a settlement agreement releasing the third party from liability on Claimant's personal injury claim as well as Mrs. Izaguirre's loss of consortium claim. The settlement total was $200,000. A November 13, 2009 letter, signed by the Izaguirres and their prior counsel, attributes $100,000 to Claimant and $100,000 to Mrs. Izaguirre's loss of consortium claim. In the pending matter, both Claimant and Defendants agree that the third party settlement and the November 13, 2009 letter memorializing the settlement do not have any binding effect on Defendants' right of subrogation in this case.

40. Claimant contends that the loss of consortium damage is his wife's separate property and that a portion of the settlement represents payment for damages not compensable under the Idaho Workers' Compensation laws; thus, those amounts are not subject to a claim for subrogation. Defendants argue that they are entitled to a right of subrogation in the entirety of a third party settlement, subject only to a deduction for attorney fees and costs.

41. The Idaho Supreme Court addressed the issue of whether an agreement between a third party tortfeasor and an injured employee can restrict the employer's subrogation rights. *Struhs v. Prot. Technologies, Inc.*, 133 Idaho 715, 721, 992 P.2d 164, 170 (1999). In *Struhs*, the claimant was injured in a motor vehicle accident and his workers' compensation surety paid $21,743.33 in benefits for his injuries. The responsible third party entered into a settlement with the claimant which stated that the settlement was paid for "general damages" alone, a category of damages that does not correspond to any of the various types of benefits payable under the workers' compensation laws. Therefore, claimant argued that surety's I.C. § 72-223 right of subrogation could not attach to the proceeds of the third party settlement. The Court rejected this argument, holding that claimant could not unilaterally characterize the third party recovery in an attempt to prevent surety from exercising its right of subrogation:

> It is a matter of first impression before this Court whether an agreement between a third-party tortfeasor and an injured employee can restrict the employer's subrogation rights. In automobile insurance cases, we have held that an insurer is not bound by a decision to which it was not a party. Vaught v. Dairyland Ins. Co., 131 Idaho 357, 361, 956 P.2d 674, 678 (1998); see also Anderson v. Farmers Ins. Co. of Idaho, 130 Idaho 755, 757, 947 P. 2d 1003, 1005 (1997). Employers have a statutory right to subrogation, and any characterization of damages to which the employer is not privy cannot change the employer's statutory rights. A contrary holding could lead to situations where employees and third-party tortfeasors reached unilateral agreements that would give the employee a double recovery or result in the culpable party not shouldering its full responsibility for damages – results that would be diametrically opposed to the purposes of the subrogation statute. See Presnell v. Kelly, 113 Idaho at 3, 740 P.2d at 45. Therefore, we hold that an employee and third party's unilateral actions cannot restrict an employer's subrogation rights.
>
> Other jurisdictions have reached a like result. In Minnesota, an employee may settle a tort claim with the third party without employer's consent, but such a settlement cannot affect the employer's subrogation rights. Naig v. Bloomington Sanitation, 258 N.W.2d 891, 893 (Minn. 1977). Similarly, the Colorado Court of Appeals held that where workers' compensation benefits extended only to "economic" benefits, the surety was not bound by an employee's unilateral settlement with a third party that classified the settlement as one purely for

> noneconomic damages. Sneath v. Express Messenger Serv. 931 P.2d 565, 568 (Colo. Ct. app. 1996).
>
> For these reasons, we affirm the Industrial Commission's conclusion that Wausau could exercise its subrogation rights against Struhs' settlement with the Army.

42. Of course, this case is different from *Struhs* in that Claimant does not insist upon the application of the allocation of the proceeds of settlement which was attempted by Claimant's former counsel. Indeed, Claimant acknowledges that such a unilateral allocation is invalid under *Struhs*. Rather, what Claimant proposes is that the evidentiary hearing of July 26, 2011 provided the parties an opportunity to adduce evidence and make argument on how the proceeds of settlement should be allocated, and in this way accomplish the allocation which was prohibited by claimant's unilateral attempt at the same in *Struhs*. In short, per Claimant, *Struhs* does not prohibit the protection of certain elements of a third party recovery from the subrogation claim of the surety. *Struhs* merely prohibits Claimant from undertaking this action unilaterally. Defendants, on the other hand, argue that the Idaho statutory scheme clearly anticipates that the right of subrogation attaches to the entirety of a third party recovery, less surety's responsibility for the payment of its proportionate share of costs and attorney fees. Defendants argue that *Struhs* is, at the very least, consistent with this proposition.

43. In the context of the question of whether or not a portion of the proceeds of a third party settlement are not subject to the I.C. § 72-223 right of subrogation, *Struhs* is just as important for what it does not say, as what it says. Having specifically found that the claimant in *Struhs* could not affect the surety's right of subrogation by incorporating certain language into the third party settlement to which surety was not a party, the Court concluded that the language of the agreement must be ignored, and that surety's right of subrogation was deemed to extend to the entire third party recovery. Had the Court been of the view that I.C. § 72-223 limited

surety's right of subrogation to that portion of the proceeds of a third party recovery which corresponded to workers' compensation benefits paid, it would, presumably, have found it necessary to remand the matter to the Commission for further proceedings along the lines of the inquiries which are before the Commission in the instant matter. That the Court did not do this in *Struhs*, is telling, and consistent with the plain language of I.C. § 72-223(3), which specifies:

> If compensation has been claimed and awarded, the employer having paid such compensation or having become liable therefor, shall be subrogated to the rights of the employee, to recover against such third party to the extent of the employer's compensation liability.

44. In connection with its discussion of the employer's obligation to pay its proportionate share of attorney fees and costs incurred by claimant in obtaining the third party recovery, the Court in *Cameron v. Minidoka Highway District*, 125 Idaho 801, 874 P.2d 1108 (1994) paraphrased the extent of the employer's right to be subrogated to the third party recovery as follows:

> Under this statute, when an employer is liable to a claimant for worker's compensation benefits, and the claimant obtains a recovery against a third party for the same injuries, the employer becomes subrogated to the claimant's rights in the third party recovery to the extent of the employer's compensation liability. I.C. Section 72-223(3). The plain wording of the statute entitled employers to benefit from third party recoveries to the extent of their compensation liability, whether the employer has already paid the compensation or the compensation liability remains to be paid in the future. It is undisputed in this case that the claimants' recovery from Union Pacific not only reimbursed the surety for the compensation benefits already paid to the claimants, it also extinguished all of the surety's liability to pay future compensation.

45. We believe that a plain reading of the statute fails to reveal an intention on the part of the legislature to limit a surety's subrogated interest in a third party recovery to that portion of the third party recovery which corresponds to a benefit payable under the workers' compensation laws of this state. To construe the provisions of I.C. § 72-223(3) otherwise, would

frustrate the statutes' dual purposes of achieving an equitable distribution between responsible parties by assuring that the discharge of an obligation be paid by the person who in equity and good conscience ought to pay it and to prevent the injured claimant from obtaining a double recovery for an injury. (*See, Presnell v. Kelly*, 113 Idaho 1, 740 P.2d 43 (1987).

46. In so ruling, we recognize that claimant and surety may, of course, make their own agreement concerning the allocation of the proceeds of a third party settlement. Disputes of the type currently before the Commission could be avoided by encouraging claimants and subrogated sureties to address whether and/or how the proceeds of a third party recovery are to be allocated, contemporaneous with the settlement of the third party claim. If claimant and the subrogated carrier cannot come to agreement, then perhaps the third party settlement will be impeded. However, that is preferable to avoiding the issue, settling the third party case, and trusting the Industrial Commission to ascertain how the proceeds of a third party settlement of a personal injury claim should be allocated to special and general damages, and whether the settlement corresponds to workers' compensation benefits paid. This is an assessment that we are both ill-equipped and disinclined to undertake. Our ruling today encourages resolution of this important issue at the front end, i.e., at the time of the resolution of the third party claim, as it should be.

47. Although we have found that the entire proceeds of the settlement of Mr. Izaguirre's claim are subject to the I.C. § 72-223 right of subrogation, this does not end our inquiry, since the settlement resolves not only Mr. Izaguirre's claim against the third party tortfeasor, but *also* Mrs. Izaguirre's claim against the third party tortfeasor for loss of consortium. Because the right created by I.C. § 72-223(3) for the benefit of the surety who has paid workers' compensation benefits, extends only to the "employee's" right to recover against a

negligent third party, we feel constrained by the language of the statute to ascertain which portion of the third party settlement is fairly attributable to Mrs. Izaguirre's claim for loss of consortium. We agree with Claimant that such portion of the third party settlement that is fairly attributable to the resolution of Mrs. Izaguirre's claim for loss of consortium is not subject to Surety's I.C. § 72-223(3) right of subrogation.

48. First, although the claim for loss of consortium does depend, in the first instance, on the fact that Mr. Izaguirre suffered an injury, and is, in that sense, derivative, it is also clear that the claim for loss of consortium is personal to Mrs. Izaguirre. As an element of non-economic damages, i.e. as a measure of Mrs. Izaguirre's loss of the companionship, services, and affection of her injured spouse, such damages constitute the separate property of Mrs. Izaguirre. *See, Rogers v. Yellowstone Park Company*, 97 Idaho 14, 539 P.2d 566 (1974). As such, the entire portion of the third party settlement attributable to Ms. Izaguirre's claim for loss of consortium is protected from the subrogation claim of Surety.

49. With the above findings, the Commission is now required to place a value on Mrs. Izaguirre's loss of consortium claim. The Commission agrees that Mrs. Izaguirre has suffered a loss of consortium, and that the settlement agreement resolves her claim. However, attaching a dollar amount to that loss is a difficult task of a type the Commission does not routinely perform.

50. The Commission will focus on the testimony of Claimant and his wife in its synthesis of the particular facts which demonstrate the loss of the aid, care, comfort, society, companionship, services, protection and conjugal affection of Claimant due to his injuries. Further, the expert opinions of Mr. Holzer and Mr. Clark will serve as guides in determining a monetary value for Mrs. Izaguirre's claim and will be discussed below.

51. The expert opinions on the overall value of all claims by the Claimant and his wife diverge, as one might expect. Mr. Holzer found that the Izaguirres had been undercompensated by the $200,000 settlement; while Mr. Clark found that they had been overcompensated, valuing the claim at $155,000. Thus, in comparing the opinions it is important to note that Mr. Holzer constrained his value of the loss of consortium claim to the total value of the settlement, even though he argued that the total settlement was low. In order to better compare the expert opinions we must place them into the confines of the $200,000 settlement. Mr. Holzer's loss of consortium calculation was made under the assumption of a $200,000 value of the total claims. However, Mr. Clark's valuation must be adjusted by using the ratio of $5,000 to $155,000. Accordingly, we calculate the high end of Mr. Clark's opined value to be approximately $6,450. Therefore, comparing the expert opinions under the assumption of a $200,000 value, we find the range of expert opinions to be from $6,450 to $50,000 attributable to Mrs. Izaguirre's loss of consortium claim.

52. Mr. Holzer testified that the loss of consortium claim is worth a third to a quarter of the entire settlement, but his written opinion ultimately states $50,000. Mr. Holzer further explained that he estimated the value of Claimant's claim and reached his conclusion on the value of the loss of consortium claim by defining the loss of consortium claim as having a value equal to some fraction of Claimant's claim. Mr. Holzer explained that Mrs. Izaguirre feels a loss in the marriage because of a lack in intimate companionship. Mrs. Izaguirre feels embarrassed to pressure Claimant and she suffers from emotional turmoil and anger at Claimant because he is not always emotionally and physically available.

53. Mr. Clark found no evidence that Claimant's injuries and restrictions significantly interfered with his family life. When Claimant was off work he was able to interact with his

family in ways he was unable to when working nights. As testified by Mrs. Izaguirre, it was his change to night work that interfered with their family life.

54. Mrs. Izaguirre has stable employment earning $20.70 per hour. She keeps the bank account for the couple, fills out any required forms or paperwork, and provides interpretation for Claimant when necessary. Mrs. Izaguirre testified that when Claimant's left knee was hurting him he would become grumpy. Claimant does not participate in as many physical activities such as bike riding, walking, and playing with the grandsons because of his knee.

55. The restrictions and pain caused by Claimant's left knee have changed the way he behaves and interacts with his wife. Yet the physical restrictions may not be as severe as Claimant now avers. When questioned about his restrictions, Claimant was unable to recall any restrictions for his knee. He is not taking any medication for pain relief other than Tylenol occasionally. The Izaguirres still take walks and ride bikes together. Additionally, Claimant has stated that he is physically able to return to work at his time of injury job.

56. Claimant was not working nights when the Izaguirres entered into the third party settlement and therefore, Claimant's absence from the family was less dramatic at the time a monetary value was accepted by the Izaguirres. Further by the time this case reached hearing, Claimant was no longer working nights and was home most of the time due to his unemployment. While it is uncertain what future work schedules Claimant may hold, it is clear that working nights is not a physician imposed restriction and is not something that has been mandated by Claimant's industrial injuries. The troubles felt by Mrs. Izaguirre while Claimant was working nights are understandable but they are not worthy of great value in her loss of consortium claim.

57. Mrs. Izaguirre looks to Claimant as the leader of the family. The loss of patriarchal leadership is indeed important, but the effect that Claimant's injury has had on his leadership role is in question. He is not on prescription medication and needs no aids to sleep at night. Working nights impeded Mrs. Izaguirre's time and companionship with Claimant, but as of the date of hearing, that impediment had been removed.

58. The Commission is more persuaded by the analysis of Mr. Clark. As opined by Mr. Clark, the testimony as a whole establishes that Claimant is not in severe pain and his injury has not produced minimal specific and concrete harm to Mrs. Izaguirre. Further, many of the problems created when Claimant was working at night are negligible for the reasons discussed above. Yet in adopting the opinion of Mr. Clark, the Commission finds it lacked sufficient recognition for the loss of familial leadership suffered by Mrs. Izaguirre. In reviewing the evidence, particularly the testimony of the Izaguirres and the legal experts, the Commission concludes that Mrs. Izaguirre's claim for loss of consortium, evaluated within the confines of the Izaguirres' third party settlement, has a value of $9,000, which is not subject to Defendants' right of subrogation. The remainder of the settlement is subject to subrogation, minus attorney fees and costs, for future compensation benefits.

Attorney Fees

59. The final issue is determining the amount of costs and attorney fees that should be deducted from Defendants' Idaho Code § 72-223 recovery pursuant to Idaho Code § 72-223(4)-(5). Idaho Code § 72-223(4)-(5) provide several options for how the attorney fees and costs may be borne by claimant and employer.

> 4) Unless otherwise agreed, upon any recovery by the employee against the third party, the employer shall pay or have deducted from its subrogated portion thereof, a proportionate share of the costs and attorney's fees incurred by the

employee in obtaining such recovery unless one (1) or more of the following circumstances exist:

(a) If prior to the date of a written retention agreement between the employee and an attorney, the employer has reached an agreement with the third party, in writing, agreeing to pay in full the employer's subrogated interest;

(b) If the employee alleges or asserts a position in the third party claim adverse to the employer, then the commission shall have jurisdiction to determine a reasonable fee, if any, for services rendered to the employer;

(c) If there is a joint effort between the employee and employer to pursue a recovery from the third party, then the commission shall have jurisdiction to determine a reasonable fee, if any, and apportion the costs and attorney's fees between the employee and employer.

(5) If the amount recovered from the third party exceeds the amount of the subrogated portion payable to the employer for past compensation benefits paid, then to the extent the employer has a future subrogated interest in that portion of the third party recovery paid to the employee, the employer shall receive a credit against its future liability for compensation benefits. Such credit shall apply as future compensation benefits become payable, and the employer shall reimburse the employee for the proportionate share of attorney's fees and costs paid by the employee in obtaining that portion of the third party recovery corresponding to the credit claimed. The employer shall not be required to pay such attorney's fees and costs related to the future credit prior to the time the credit is claimed. However, the employer and employee may agree to different terms if approved by the industrial commission.

60. Per I.C. § 72-223(4) "unless otherwise agreed," where a third party recovery is obtained, the surety shall pay from its share of the recovery, a proportionate share of the costs and attorney fees incurred by claimant in pursuit of the third party claim. The record establishes that following settlement of the third party claim, Claimant's then attorney, Scott Summer, took a 35% contingent fee, or $70,000. As well, Claimant incurred and paid costs in the amount of $307.60.

61. We have found that Mrs. Izaguirre's claim for loss consortium has a value of $9,000.00, thus leaving $191,000.00 of the $200,000.00 settlement subject to the claim of Surety. Surety's proportionate share of costs and fees incurred in connection with the pursuit of the third party claim is therefore $67,143.76.

62. Following settlement of the third party claim, Claimant's former counsel held in trust the sum of $43,518.65, representing the workers' compensation subrogation claim as of the date of the settlement of the third party claim. The proportionate share of costs and attorney fees attributable to a recovery of this sum is $15,298.46. Therefore, by operation of statute, Surety was only entitled to receive $28,251.19 as of the date of settlement of the third party claim. However, Mr. and Mrs. Izaguirre, through their former attorney, actually reimbursed to Surety the sum of $32,623.99, after having agreed to a reduction of the Surety's obligation to reimburse Claimant for its proportionate share of costs and attorney fees incurred in obtaining the sum of $43,518.65. Why Claimant's former attorney acceded to this arrangement is unclear, but the record is undisputed that the arrangement was a result of an agreement between Mr. and Mrs. Izaguirre and Surety.

63. I.C. § 72-223(4) makes it clear that the parties are authorized to make an agreement that surety shall reimburse claimant for something less than its proportionate share of attorney fees and costs. (*See*, I.C. § 72-223(4)). We feel constrained to honor this agreement, at least insofar as it relates to the $43,518.65 previously paid to Surety. However, we do not feel constrained to apply this same reduction to the balance of Surety's entitlement to the balance of the $191,000.00, which is subject to the Claimant's subrogation. There is no evidence that the parties have reached any agreement that Claimant shall be paid something other than what is contemplated by statute for attorney fees he incurred in obtaining the balance of the settlement subject to the subrogation claim. Therefore, on the balance of the settlement proceeds subject to Surety's right of subrogation ($147,481.35), Surety is obligated to pay the sum of $51,845.25 as its proportionate share of attorney fees and costs incurred by Claimant in pursuit of the third party recovery.

64. As set forth in the monetary breakdown above, the amount received by Claimant from the third party settlement exceeds the amount of the subrogated portion that has been paid to Defendants. At the time of the third party settlement, Claimant reimbursed Surety the sum of $32,623.99 for compensation paid as of that date. To the extent Defendants have a future subrogated interest in the remaining portion of the third party recovery paid to Claimant, Defendants shall received a credit against its future liability for compensation benefits. (*See,* Idaho Code §72-223(5)). Such a credit shall apply as future compensation benefits become payable, not necessarily upon issuance of this decision.

CONCLUSIONS OF LAW AND ORDER

1. The Commission has jurisdiction to evaluate the claims in Mr. and Mrs. Izaguirre's third party settlement and determine which claims will be subject to Defendants' right of subrogation under Idaho Code § 72-223.

2. The entire proceeds of the settlement of Claimant's claim are subject to the Idaho Code § 72-223 right of subrogation. Mrs. Izaguirre's claim for loss of consortium is not subject to the Idaho Code § 72-223 right of subrogation.

3. The value of Mrs. Izaguirre's loss of consortium claim portion of the third party settlement, which is not subject to Defendants' right of subrogation, is $9,000.

4. The prior recovery by Defendants of a portion of Claimant's third party settlement with a proportionate share of fees and costs deducted, will be enforced as agreed upon by the parties. However, on the balance of the settlement proceeds subject to Surety's right of subrogation ($147,481.35), Surety is obligated to pay the sum of $51,845.25 as its proportionate share of attorney fees and costs incurred by Claimant in pursuit of the third party recovery.

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

IT IS SO ORDERED.

DATED this _31st_____ day of ___January_____, 2012.

INDUSTRIAL COMMISSION

_/s/_____
Thomas E. Limbaugh, Chairman

_/s/_____
Thomas P. Baskin, Commissioner

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

ATTEST:

_/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _31st__ day of __January_____, 2012 a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon:

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KRISTINA WILSON
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mw _/s/_____