BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHAEL P. VAWTER, Claimant, v. UNITED PARCEL SERVICE, INC., Employer, and LIBERTY INSURANCE CORPORATION, Surety, and STATE OF IDAHO, INDUSTRIAL SPECIAL INDEMNITY FUND, Defendants.	**IC 2010-000114** **ORDER ON RECONSIDERATION** **Filed December 10, 2012**

On or about October 17, 2012, Defendant Employer, United Parcel Service, Inc., and its Surety, filed a timely motion for reconsideration under Idaho Code § 72-718 from the Commission's September 28, 2012 Findings of Fact, Conclusions of Law, and Order. Generally, Employer argues that in its September 28, 2012 Decision, the Commission erred as follows:

1. The Commission erroneously applied the doctrine of quasi-estoppel to estop Employer from asserting that Claimant suffered permanent physical impairment (PPI) as a consequence of the 1990 low back injury;

2. The Commission erred in failing to apply the doctrine of res judicata to prevent Claimant from relitigating entitlement to medical bills incurred prior to the September 28, 2010 hearing;

3. The Commission erred in making an award of attorney fees to Claimant under Idaho Code § 72-804.

Under Idaho Code § 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. J.R.P. 3(f) states that a motion to reconsider "shall be supported by a brief filed with the motion." Generally, greater leniency is afforded to *pro se* claimants. However, "it is axiomatic that a claimant must present to the Commission new reasons factually and legally to support a hearing on her Motion for Rehearing/Reconsideration rather than rehashing evidence previously presented." *Curtis v. M.H. King Co.*, 142 Idaho 383, 388, 128 P.3d 920 (2005). On reconsideration, the Commission will examine the evidence in the case, and determine whether the evidence presented supports the legal conclusions. The Commission is not compelled to make findings on the facts of the case during a reconsideration. *Davison v. H.H. Keim Co., Ltd.*, 110 Idaho 758, 718 P.2d 1196. 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 Idaho Code § 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)).

A motion for reconsideration must be properly supported by a recitation of the factual findings and/or legal conclusions with which the moving party takes issue. However, the Commission is not inclined to re-weigh evidence and arguments during reconsideration simply because the case was not resolved in a party's favor.

I. Application of the doctrine of quasi-estoppel.

In this case, the evidence establishes that on or about October 22, 1990, Claimant suffered a work related injury to his low back while employed by Employer. In April 1991, Claimant was evaluated by Richard Knoebel, M.D., an evaluating physician retained by Employer and its then Surety, Liberty Northwest Insurance. On or about April 2, 1991, and following his examination of Claimant, Dr. Knoebel opined that Claimant was capable of returning to work without restriction, and without any PPI referable to the 1990 accident. Contemporaneous with these findings, Employer's surety issued a "notice" of "Change of Benefit or Status" in which it advised Claimant of a change in the status of his claim as follows: "Per Dr. Knoebel's report, you were released to return to work effective April 2, 1991. You were determined to be medically stationery without any impairment." (*See* D. Ex. 10, p. 32). The records of the Industrial Commission reflect that Employer did not pay any impairment to Claimant as a consequence of the 1990 accident.

In connection with the prosecution of his claim, Claimant has argued that Dr. Knoebel got it right in 1991, and that no part of Claimant's current low back impairment is referable to the 1990 accident. Proving that all of his low back impairment is referable to the subject December 18, 2009 accident is more important to Claimant in a less than total case, than it is in the event the Commission finds Claimant to be totally and permanently disabled. In the former case, Claimant will receive no compensation for a pre-existing impairment, while in the latter case the ISIF may bear some responsibility based on Claimant's pre-existing condition. Of course, the Commission has found Claimant to be totally and permanently disabled, but Claimant had no assurance of this finding at the time of the hearing and therefore made it a central point of his prosecution of the case to discredit Employer's current position that Dr. Knoebel got it wrong

back in 1991, and that Dr. Frizzell correctly opined that, as a consequence of the 1990 accident, Claimant should have been given a 7% PPI rating.

In this, as in all cases, it is Claimant who bears the burden to prove the extent of his disability referable to the subject accident. In connection with the instant matter, this burden necessarily requires of Claimant that he put on proof, as part of his prima facie case, that the December 18, 2009 accident is, by itself, responsible for causing Claimant's current disability. Claimant has attempted to do this by arguing that the April 1991 opinion of Dr. Knoebel establishes that Claimant's current condition is caused by the subject accident alone, and is not the result of the combined effects of a pre-existing condition and the subject accident.

Employer, in pursuit of Idaho Code § 72-406 or § 72-332 apportionment, has argued that the opinion of Dr. Frizzell should carry more weight, thus affording Employer the opportunity to assign some portion of the blame for Claimant's disability to a preexisting condition.

Finally, the ISIF, whose liability only exists if it can be demonstrated that Claimant suffered from a preexisting permanent physical impairment, has sided with Claimant in arguing that Dr. Knoebel got it exactly right back in 1991 when he found that Claimant was not entitled to an impairment rating from the 1990 accident. Absent identification of a preexisting permanent physical impairment, the ISIF cannot be held liable under Idaho Code § 72-332.

The point of synopsizing the positions of the parties is to illustrate that the fight over whether the opinion of Dr. Frizzell should prevail over the opinion of Dr. Knoebel is a dispute of central importance to the outcome of this matter. One need only review the deposition of Dr. Frizzell, or the many letters between Dr. Frizzell and counsel for Claimant and Employer to understand that the parties grasp the importance of obtaining a favorable opinion on the issue of apportionment.

In connection with pursuing their respective positions, both Claimant and the ISIF were struck by the irony of Employer's current insistence that some part of Claimant's impairment should be assigned to the 1990 accident, while it was content, back in 1991, to accept the benefit of Dr. Knoebel's finding that Claimant suffered no PPI as a consequence of the 1990 accident. Both parties argued that Employer should not be heard to now assert a position inconsistent with the position it took in 1990. Claimant has articulated this position by arguing that the doctrine of quasi-estoppel should apply to prevent Employer from taking an inconsistent position. Although the ISIF did not argue the doctrine of quasi-estoppel, it did argue that Employer should not be heard to now assert a position in this matter that is inconsistent with its former treatment of the 1990 claim and its adoption of Dr. Knoebel's opinion at that time. (*See* ISIF Post-Hearing Brief, p. 3).

In support of its argument that the Commission erred in applying the doctrine of quasi-estoppel to the facts of this case, Employer first alleges that the doctrine of quasi-estoppel is an affirmative defense, and since it was not raised as an issue by either Claimant or the ISIF, it is not appropriately before the Commission at this time. Employer asserts that under Idaho Code § 72-713, it was entitled to at least ten days' notice of the quasi-estoppel issue, and without such prior notice, the issue is not properly before the Commission.

Although quasi-estoppel is typically viewed as an affirmative defense (*See Thomas v. Arkoosh Produce, Inc.*, 137 Idaho 352, 48 P.3d 1241 (2002)), it is less clear that it should be so treated in the context of the instant matter, at least as respects Claimant's assertion of the doctrine. Remember, it is Claimant who bears the burden of proving that his disability is referable to the subject accident. In so doing, he has argued, as part of his case in chief, that Employer should not now be heard to take a position inconsistent with that which it took back in

1991. One of the noticed issues is whether, and to what extent, Claimant is entitled to PPI benefits, and it was in connection with his pursuit of PPI benefits that Claimant articulated his position that Employer should not be allowed to have it both ways. Viewed in the context of Claimant's burden of proof, his reliance on the doctrine of quasi-estoppel seems to be less an affirmative defense, and more an argument made in support of proving his prima facie case. Although it is true that Claimant did not raise quasi-estoppel except in his post-hearing brief, we do not believe that this articulation of one of the arguments that he relies upon to prove his prima facie case cannot be considered by the Commission in the absence of it having been noticed as a specific issue.

Moreover, although both Claimant and the ISIF argued in their post-hearing briefs that Employer should not be allowed to take a different position in this action concerning Claimant's preexisting impairment than it did in connection with the 1990 accident, Employer's post-hearing brief devotes not one sentence to treatment of the doctrine of quasi-estoppel, or to the ISIF's challenge to Employer's inconsistent position. From the Employer's failure to protest, the Commission concluded that Employer gave its implied consent to the Commissions' consideration of these arguments. To the extent necessary, the Commission will treat these arguments as though they were raised in the issues noticed for hearing (*See* IRCP 15(b); *Murphy v. Browning Freight*, 1986 IIC 0664 (1986)).

Finally, we find it difficult to believe that Employer could be surprised or prejudiced by the arguments of the opposition concerning the allegation that Employer is currently taking a position on Claimant's preexisting PPI inconsistent with one it benefitted from in 1991. Again, the extent and degree of Claimant's PPI has long been recognized by the parties as one of the central issues in this case; Claimant argues that his current 19% permanent physical impairment

is entirely referable to the subject accident, while Employer argues that Claimant's current impairment must be apportioned between the subject accident and a preexisting condition. The arguments of Claimant and the ISIF that Employer should be estopped from asserting a position inconsistent with one it previously took is well within the parameters of this central dispute.

The Commission rejects the argument that it was inappropriate for it to consider quasi-estoppel in connection with determining whether some portion of Claimant's current physical impairment should be deemed to have predated the subject accident.

Employer also argues that its actions in connection with the 1990 work accident do not amount to its having taken a "previous position" on the issue of Claimant's permanent physical impairment following the 1990 work accident. The argument is that in keeping with established practices, Employer ordered a closing exam with Dr. Knoebel, who expressed his views on Claimant's limitations and impairment. Dr. Knoebel's opinion was not challenged by Claimant, and with nothing to controvert that opinion, Employer simply acceded to it. From this, we are urged to conclude that there was no "position" taken by Employer in connection with the 1990 accident. We continue to reject this assertion for reasons set forth in our original opinion. Dr. Knoebel was the physician chosen by Employer to render an opinion on Claimant's limitations and PPI following the 1990 work accident. Dr. Knoebel rendered an opinion favorable to the interests of Employer when he proposed that Claimant had not suffered any PPI as a consequence of the 1990 accident, and could be released to return to work without limitation. Employer adopted Dr. Knoebel's opinion and issued the April 2, 1991 "notice" of "Change of Benefit or Status", a document whose very title establishes that Surety adopted Dr. Knoebel's opinion, and notified Claimant that it was changing Claimant's benefit status based on that opinion. As noted in our previous decision, records of the Industrial Commission reflect

that Employer did not pay to Claimant any permanent physical impairment referable to the 1990 accident. We believe that the foregoing non-disputed facts establish that Employer did take a position on Claimant's permanent physical impairment when it made the judgment to adopt the opinion of Dr. Knoebel in support of its determination that Claimant was not entitled to an impairment rating for the effects of the 1990 low back injury.

Further, it is clear that the current position advocated by Employer is inconsistent with the opinion it took in 1991 in connection with the 1990 accident. Employer appears to argue that the position it took in 1991 in connection with Dr. Knoebel's opinion on Claimant's PPI rating is not inconsistent with the position it currently asserts, because the 7% PPI rating given by Dr. Frizzell for Claimant's preexisting condition, was intended by Dr. Frizzell to address conditions that developed after Dr. Knoebel's 1991 rating, but before the subject accident. (*See* Brief in Support of Defendants' (Employer) Motion for Reconsideration, at p. 3). In other words, even though Dr. Knoebel did not find it appropriate to give Claimant an impairment rating in 1991, Claimant's low back could have continued to deteriorate between the date of Dr. Knoebel's rating and the date of the subject accident, such that as of the date of the subject accident, Claimant did have a preexisting condition which warranted the imposition of an impairment rating, Dr. Knoebel's much earlier opinion notwithstanding. However, the record does not support such a conclusion, however plausible. The record unambiguously establishes that it is Dr. Frizzell's opinion that the 7% impairment rating he would award to Claimant for a preexisting condition is for the 1990 low back injury. The record makes it abundantly clear that while Dr. Knoebel would not give Claimant an impairment rating for the effects of the 1990 accident, Dr. Frizzell would give Claimant a 7% PPI rating for that same accident. In turn, Employer's position in 1991 that Claimant suffered no impairment referable to the 1990 accident

is inconsistent with its reliance on Dr. Frizzell's current opinion that Claimant suffered a 7% impairment rating referable to the 1990 accident.

It was in Employer's interest to minimize its exposure for the payment of PPI/PPD in connection with the 1990 accident. It obtained a favorable opinion on this issue after it retained the services of Dr. Knoebel in 1991. In reliance on Dr. Knoebel's opinion, Employer took the position that it was not liable for the payment of further benefits, including PPI/PPD. Eventually, the period of limitation ran, and there the matter sat for many years until the occurrence of the subject accident made it beneficial to Employer to argue that the 1990 accident had, in fact, produced a significant PPI. We believe this is exactly the type of inconsistent position that the doctrine of quasi-estoppel is intended to address.

Employer's final argument against the application of the doctrine to these facts is that although Claimant was employed by Employer at the time of both the 1990 and 2009 accidents, different sureties were on the risk for the payment of workers' compensation benefits at the time of those accidents. We fail to see why this fact should affect the application of the doctrine vis-à-vis Claimant and Employer.

Under Idaho Code § 72-102(13)(a) "Employer" is defined as follows:

> "Employer" means any person who has expressly or impliedly hired or contracted the services of another. It includes contractors and subcontractors. It includes the owner or lessee of premises, or other person who is virtually the proprietor or operator of the business there carried on, but who, by reason of there being an independent contractor or for any other reason, is not the direct employer of the workers there employed. <u>If the employer is secured, it means his surety so far as applicable</u>. (Emphasis added).

Idaho Code § 72-307 provides:

> Knowledge of employer to affect surety. Every such policy, contract or bond shall contain a provision that, as between the employee and the surety, the notice to or knowledge of the occurrence of accident causing an injury or manifestation of an occupational disease on the part of the employer shall be deemed notice or

> knowledge, as the case may be, on the part of the surety, that the jurisdiction of the employer shall, for the purpose of this law, be the jurisdiction of the surety, and that the surety shall in all things be bound by and subject to the orders, findings, decisions, or awards of the commission rendered against the employer for the payment of compensation. (Emphasis added).

From these statutory provisions, we conclude that an order which binds the Employer necessarily binds Surety, notwithstanding that the surety at the time of 2009 accident was a different surety than the one with whom Employer insured its workers' compensation risk in 1990. The statutes referenced above do not express any support for the proposition that Employer's current surety should not be impacted by the strategies employed by Employer in connection with the 1990 accident. Employer should not be allowed to avoid the consequences of the inconsistent position it has taken simply because it has changed sureties.

The Commission continues to abide, in all respects, by its treatment of the application of the doctrine of quasi-estoppel to the facts of this case.

II. Is the Commission's Decision of September 28, 2010, res judicata of Claimant's claim for additional medical bills incurred between the date of injury and the September 28, 2010 hearing?

The March 7, 2012 Notice of Hearing specifies that the following issue, among others, would be heard by the Industrial Commission:

> Whether Claimant is entitled to past-denied medical care benefits, or whether the issue of Claimant's entitlement to such benefits is precluded under the doctrine of *res judicata*;

Generally speaking, the term of "res judicata" is broad enough to incorporate two separate concepts; issue preclusion (collateral estoppel) and claim preclusion (true res judicata). *Rodriguez v. Department of Correction*, 136 Idaho 90, 29 P.3d 401 (2001); *Wernecke v. St. Maries Joint School Dist. #401*, 147 Idaho 277, 207 P.3d 1008 (2009). From this, it is clear that by raising the issue of res judicata, Employer said enough to put Claimant on notice that Employer intended to defend the claim for additional medical benefits either under the doctrine

of issue preclusion, claim preclusion, or both. However, from its post-hearing brief, the Commission concluded, perhaps erroneously, that Employer only relied on the doctrine of claim preclusion in urging the Commission to reject Claimant's claim for additional benefits incurred between the date of accident and the date of the first hearing:

> In Idaho, the doctrine of res judicata means that in an action between the same parties upon the same claim or demand, the former adjudication concludes the parties and privies not only as to every matter offered and received to sustain or defeat the claim, but also every matter which might and should have been litigated in the first suit.
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> Employer's Post-Hearing Brief, p. 25.

Although this is a correct statement of the doctrine of claim preclusion in the civil arena, it incorrectly states the doctrine of claim preclusion as it applies to decisions of the Industrial Commission. Per Idaho Code § 72-718, a decision of the Industrial Commission is res judicata only as to matters actually adjudicated. *Woodvine v. Triangle Dairy, Inc.*, 106 Idaho 716, 682 P.2d 1263 (1984); *Sund v. Gambrel*, 127 Idaho 3, 896 P.2d 329 (1995). The Commission treated Employer's argument concerning res judicata as though claim preclusion was the only res judicata theory advanced. We find no reason to depart from our treatment of the issue of claim preclusion on reconsideration.

However, Employer urges the Commission to consider the application of issue preclusion (collateral estoppel) to the facts of this case, and we deem it appropriate to do so in view of our belief that by raising the doctrine of res judicata, Employer raised the issue of collateral estoppel as well.

In order for collateral estoppel to apply in this matter, Employer must satisfy five elements:

1) The party against whom the earlier decision as asserted had a full and fair opportunity to litigate the issue decided in the earlier case;

2) The issue decided in the prior litigation was identical to the issue presented in the present action;

3) The issue sought to be precluded was actually decided in the prior litigation;

4) There was a final judgment on merits in the prior litigation;

5) The party against whom the issue is asserted was a party or in privity with a party to the litigation.

(*See Rodriguez v. Department of Correction, supra*; *Ticor Title Company v. Stanion*, 144 Idaho 119, 157 P.3d 613 (2007)).

To determine whether Employer has met each of these five elements, it is first necessary to understand the precise issue which was before the Commission at the time of the September 28, 2010 hearing. In the July 20, 2010 Notice of Hearing issued preparatory to the September 28, 2010 hearing, the relevant issue is defined as follows:

> Whether Claimant is entitled to reasonable and necessary medical care as provided for by Idaho Code § 72-432, and the extent thereof.

The stated issue actually encompasses two questions: Is Claimant entitled to reasonable and necessary medical care, and if so, what particular medical care is he entitled to?

At hearing, Claimant put on proof of medical bills incurred to the date of hearing in the amount of $149,033.68. However, in his post-hearing brief, he cautioned that this figure might not include <u>all</u> of the medical bills actually incurred by Claimant through the September 28, 2010 date of hearing. Evidently, Claimant had some concern that there were medical bills unaccounted for in his tally as of the date of hearing:

> The $149,033.68 in denied past medical expenses incurred by the Claimant and adjudicated at the 9.28.10 Hearing may not represent 100% of all past medical expenses incurred by the Claimant from the date of his 12.18.09 industrial accident to the date when the Industrial Commission enters its final and appealable order finding this claim compensable. However, the Claimant is entitled to an Order from the Industrial Commission which sets forth the sum certain of $149,033.68 in past medical expense that were presented to the Industrial Commission as Claimant's Hearing Exhibit No. 7 and adjudicated at the 9.28.10 Hearing so that the Claimant can obtain an enforceable judgment pursuant to Idaho Code § 72-735 upon which interest may be calculated pursuant to Idaho Code § 72-734.
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> Claimant's Nov. 19, 2010 Opening Brief, p. 25.

Even so, Claimant's specific prayer for relief was that the Commission enter an order holding Employer liable for the full invoiced amount of the medical bills he had incurred, in the sum of $149,033.68. In its May 17, 2011 decision, the Commission made the following findings concerning Claimant's entitlement to medical benefits:

> Idaho Code § 72-432(1) obligates an employer to provide an injured employee reasonable medical care as may be required by his or her physician immediately following an injury and for a reasonable time thereafter. If the employer fails to provide the same, the injured worker may do so at the expense of employer.
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> Claimant has incurred medical expenses totaling $149,033.68. *See* Claimant's Exhibit 7. *Neel v. Western Construction*, 147 Idaho 146, 206 P.3d 852 (2009), is premised on the assumption that an injured worker who contracts for medical care outside the workers' compensation system has, of may have, exposure to pay the full invoiced amount of medical bills incurred in connection with his treatment. Here, there is no evidence that Claimant is obligated to pay anything other than the full invoiced amount. Therefore, as in *Neel*, we find Claimant is entitled to payment of the full invoiced amount of $149,033.68.
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> . . . .
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> Claimant is awarded medical benefits in the amount of $149,033.68.
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> Vawter May 17, 2011 Decision, pp. 19-20, 21.

As noted by Employer, in pursuing his claim for medical benefits Claimant could have simply requested that the Commission enter an order holding Employer responsible for all of the

accident-related medical bills incurred by Claimant to the date of hearing. Instead, Claimant asked the Commission to make an award in a specific dollar amount, even though Claimant evidently had some concern that his tally might not have captured every medical bill. Therefore, on the issue of the extent of Claimant's entitlement to payment of medical bills, the Commission did as Claimant asked and issued an order for a sum certain of $149,033.68.

It is clear that Claimant was afforded a full and fair opportunity to litigate the issue of the extent of his entitlement to medical benefits as of the date of the September 28, 2010 hearing. Claimant could have been more diligent in satisfying himself that his tally had captured all of the bills in question, or he could have couched his demand differently such as to obviate the current predicament. That he chose to proceed as he did does nothing to denigrate the Commission's conclusion that he was afforded a full and fair opportunity to litigate his entitlement to medical benefits at the time of the original hearing.

It is also clear that the issue decided in connection with the September 28, 2010 hearing is identical to the issue which Claimant asks the Commission to entertain in the instant matter. Here, as in the initial proceeding, Claimant asks the Commission to order the payment of medical bills incurred by Claimant between the date of injury and the date of the September 28, 2010 hearing.

Likewise, it is clear that the issue sought to be precluded was actually decided in the prior litigation. In the prior hearing, the Industrial Commission actually did decide the issue of the extent of Claimant's entitlement to medical benefits. It is true that Claimant has since discovered additional medical bills, but is equally clear that the issue which the Commission decided was not limited only to those medical bills of which Claimant was aware as of the date of hearing; the issue was the extent of Claimant's entitlement to medical benefits.

We believe it equally clear that the Commission's May 17, 2011 decision on this matter constitutes a "final judgment" for purposes of the application of the rule. Under Idaho Code § 72-718, a decision of the Commission is final and conclusive as to all matters adjudicated by the Commission, upon the filing of the decision in the office of the Commission. Notwithstanding that the Idaho Supreme Court does not treat the May 27, 2011 decision as "final" for purposes of appeal, it is clear that from the workers' compensation statutory scheme, the May 17, 2011 decision became final when it was filed with the Industrial Commission. Neither the Commission nor the parties are empowered to ignore or amend such a final decision, absent special circumstances. (*See* Idaho Code § 72-719).

Finally, it is clear that the party against whom the doctrine of issue preclusion is sought to be applied in the instant proceeding is the same party involved in connection with the September 28, 2010 hearing.

Accordingly, though we continue to adhere to our decision that the doctrine of claim preclusion (pure res judicata) would not prohibit Claimant from advancing claims for additional medical bills incurred between the date of accident and the date of September 28, 2010 hearing, we believe that the doctrine of issue preclusion (collateral estoppel) does bar relitigation of the issue of extent of Claimant's entitlement to medical benefits under the peculiar facts of this case. In addressing the extent of his entitlement to medical benefits, Claimant couched his demand in a specific dollar amount and the Commission resolved the issue of the extent of Claimant's entitlement to medical benefits by ordering the payment of the amount he requested. As respects the additional medical bills Claimant has since discovered, and which were incurred between the date of injury and to the date of September 28, 2010 hearing, Claimant's demand for payment of the same addresses the identical issue that was the subject of the original hearing. The doctrine

of issue preclusion (collateral estoppel) applies to bar relitigation of that issue. Therefore, Claimant is barred from raising the issue of his entitlement to additional medical, travel, per diem and related Idaho Code § 72-432 expenses incurred between the date of injury and the date of the September 28, 2010 hearing.

The Commission specifically concludes that as respects additional Idaho Code § 72-432 expenses incurred subsequent to the September 28, 2010 hearing, the doctrine of collateral estoppel does not apply to bar litigation of the issue of Claimant's entitlement to recover those expenses. The extent of the medical benefits to which Claimant is entitled for care rendered subsequent to September 28, 2010, could not have been determined at the September 28, 2010 hearing. The issue of the extent of Claimant's entitlement to those benefits is a different issue than the one litigated at the time of the September 28, 2010 hearing.

III. Is Claimant entitled to an award of attorney fees?

Employer takes issue with the Commission's decision to award attorney fees to Claimant as a result of Employer's refusal to pay to Claimant certain workers' compensation benefits for which demand was made subsequent to the January 30, 2012 denial of the motion for appeal by permission by the Idaho Supreme Court. We have considered Employer's arguments, and find reason to modify our decision to award attorney's fees to Claimant. The Commission's analysis of Claimant's request for attorney's fees was in part premised on its understanding that Employer contended that the doctrine of res judicata only applied to bar Claimant's request for additional medical benefits incurred prior to the September 28, 2010 hearing. However, careful review of Employer's post-hearing brief demonstrates that Employer actually argued that the doctrine of res judicata barred Claimant from making claim for additional past and future medical benefits. (*See* Employer's post-hearing brief at 24-25). This argument is developed in considerably more

detail in Employer's brief in support of its motion for reconsideration. Accordingly, it is clear that with respect to Idaho Code § 72-432 expenses incurred subsequent to September 28, 2010, Employer did dispute Claimant's entitlement to the same based on its res judicata defense. Although we have ruled that Claimant's entitlement to Idaho Code § 72-432 benefits incurred subsequent to September 28, 2010 is not barred by the doctrine of collateral estoppel, we cannot say that Employer pursued this defense unreasonably such as to entitle Claimant to an award of Idaho Code § 72-804 attorney fees.

However, for Employer's post January 30, 2012 refusal to pay the 12% PPI award made by Dr. Frizzell, the Commission continues to abide by its decision that Claimant is entitled to an award of attorney's fees under Idaho Code § 72-804.

CONCLUSIONS OF LAW AND ORDER

Based on the foregoing, the Commission amends Paragraphs 5, 7, and 8 of the September 28, 2012 Conclusions of Law and Order to read as follows:

5. Except as qualified herein, Employer/Surety is liable for the payment of 100% of the invoiced amount of all medical bills referenced herein which were incurred by Claimant in connection with the subject accident prior to the Commission's May 17, 2011 decision, with credit for amounts previously paid. With respect to those bills totaling $24,627.80, and itemized at C.5.17.12 Ex. 14, Claimant is <u>not</u> entitled to recover payment for those services rendered from the date of the accident through September 27, 2010.

7. Except as qualified herein, Employer/Surety is liable for the payment of mileage, per diem and lodging expenses identified at C.5.17.12 Ex. 16. Claimant is not entitled to the payment of mileage, per diem and lodging expenses incurred from the date of the subject accident, through September 27, 2010;

8. Claimant is entitled to an award of attorney's fees under Idaho Code Section 72-804 for Employer's/Surety's unreasonable denial of PPI benefits subsequent to January 30, 2012. Claimant shall file within twenty (20) days an affidavit and/or brief in support of his request for attorney's fees, with appropriate elaboration on *Hogaboom v. Economy Mattress,*107 Idaho 13 (1984);

In all other respects, the Commission continues to abide by its original decision.

IT IS SO ORDERED.

DATED this 10th___ day of ____December_____, 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 _10th__ day of __December_____, 2012 a true and correct copy of the **ORDER ON RECONSIDERATION** was served by regular United States mail upon each of the following:

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