BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MICHAEL DARLINGTON, Respondent/Claimant, v. JMF CO, INC. dba JACK BUELL TRUCKING, Employer, and ASSOCIATED LOGGERS EXCHANGE, Surety, Petitioners/Defendants.	**IC 2021-013500** **ORDER GRANTING PETITION FOR DECLARATORY RULING** FILED APR 22 2024 INDUSTRIAL COMMISSION

This matter is before the Idaho Industrial Commission ("Commission") upon Petitioners' *JRP Rule 15 Petition to Recover Subrogation Right*, filed on January 18, 2024 ("petition"). The petition was accompanied by a memorandum in support of the petition and a Declaration of Matthew O. Pappas with attached exhibits A through G.[1] Respondent filed his response on February 1, 2024, accompanied by a Declaration of Erin C. Dyer with attached exhibits 1 through 8. Petitioners filed their reply on February 12, 2024, accompanied by: (1) second Declaration of Matthew O. Pappas with attached exhibits A through E; and (2) Declaration of Emma Wilson with attached exhibits A through I.

[1] Matthew O. Pappas ("Pappas") filed two declarations pertinent to this petition. The first was filed contemporaneously with the Petitioners' petition on January 18, 2024, with Exhibits A-G attached and will be cited to herein as "1st Pappas Declaration 01/18/24." The second declaration was filed contemporaneously with the Petitioners' reply on February 12, 2024, with Exhibits A-E attached and will be cited to herein as "2nd Pappas Declaration 02/12/24."

Petitioners are: (1) the Employer (JMF Co., Inc., d/b/a Jack Buell Trucking); and (2) the Surety (Associated Loggers Exchange, hereinafter "Surety" or "ALE") in Commission case no. 2021-013500. Petitioners are represented by Matthew O. Pappas. At the time the parties filed the settlement agreement with the Commission pursuant to Idaho Code § 72-404 (hereinafter "settlement agreement" or "lump sum settlement (LSS)", Employer/Surety was represented by Emma Wilson. Respondent is Michael Darlington, the Claimant in the above-entitled case. At the time the parties filed the settlement agreement, Claimant represented himself in a *pro se* capacity. In Claimant's action against the third-party tortfeasor and in the pleadings pertinent to this petition for declaratory ruling, Claimant/Respondent is represented by Erin C. Dyer.

For the reasons discussed below we find that: (1) the Commission has jurisdiction over the issues presented in the petition; (2) the settlement agreement and Order of Approval and Discharge in the underlying worker's compensation case was not obtained via fraud and should not be set aside; (3) Petitioners' actions did not constitute an acceptance of Respondent's offer; (4) Petitioners are not estopped from further relief via the doctrines of equitable estoppel or quasi-estoppel; (5) Petitioners are entitled to recover their claimed full subrogation interest in the amount of payments made totaling $164,824.87, minus the proportionate share of the costs and attorney's fees per Idaho Code § 72-223(4); and (6) sanctions should not be imposed against either the Petitioners or Respondent.

ISSUES

1. Whether the Commission has jurisdiction over the issues presented in Petitioners' petition.
2. Whether the settlement agreement and Order of Approval and Discharge in the underlying worker's compensation case should be set aside on the basis of fraud.
3. Whether there is an actual controversy in this matter, and if Petitioners' actions (or lack thereof) constitute an acceptance of Respondent's offer of $54,490.44.

4. Whether Petitioners are estopped from further relief via the doctrines of equitable estoppel or quasi-estoppel.

5. Whether Petitioners are entitled to recover their claimed full subrogation amount – based on payments made totaling $164,824.87 – from Respondent's settlement with the third-party tortfeasor.

6. Whether sanctions should be imposed against either the Petitioners or Respondent.

ARGUMENTS OF THE PARTIES

Petitioners seek a declaratory ruling with regard to Claimant's requirement to pay subrogation pursuant to Idaho Code § 72-223. Petitioners preserved their right to subrogation in the worker's compensation settlement agreement with Claimant. Claimant subsequently settled his personal injury claim against the third-party tortfeasor and received an award as a result. Petitioners have paid Claimant all medical expenses and worker's compensation benefits due and owing related to Claimant's industrial injury and now seek reimbursement of their subrogation amount in full, $164,824.87, subject to an offset against that amount for the proportionate share of attorney's fees pursuant to Idaho Code § 72-223(4).

Respondent argues that the Commission should deny the petition for declaratory ruling because the Commission lacks jurisdiction over the matter. The worker's compensation settlement agreement was approved by the Commission pursuant to Idaho Code § 72-404 in August 2022. The Commission's Order of Approval and Discharge dismissed all claims with prejudice. Under Idaho Code § 72-718, this Order became final, and no appeal was taken. Therefore, the Commission cannot now retain jurisdiction to determine Petitioners' claimed subrogation interest and to determine the specific amounts of the subrogation interest. If the Commission does have jurisdiction, then the Commission should set aside the portion of the worker's compensation settlement agreement reserving Petitioners' right to subrogation because such provision was

obtained as the result of fraud. The initial settlement agreement signed by Claimant, who was representing himself in a *pro se* capacity at the time, did not contain a provision reserving the right to subrogation. Surety subsequently altered the settlement agreement to include a provision reserving the right to subrogation and submitted the altered settlement agreement with Claimant's signature from the original agreement without Claimant's knowledge. The Commission failed to hold a hearing or otherwise ascertain if Claimant understood the terms of the settlement agreement. If the Commission determines that the settlement agreement is valid, then they should determine that, by its actions (or lack thereof), Surety has accepted the Respondent's offer of $54,490.44 to settle Surety's claimed subrogation interest. On December 21, 2023, Respondent sent Surety a check in the amount of $54,490.44 for "full and final satisfaction of ALE's subrogation interest in this matter … [w]e trust that with this payment this matter will be resolved." ALE never responded to this correspondence, never contacted Respondent's counsel about the check, and has never returned the check. Respondent believed ALE had accepted the terms of that offer and with the payment of $54,490.44, the matter was resolved. Alternatively, Petitioners are estopped, via equitable estoppel and/or quasi estoppel, from further relief. To the extent ALE is entitled to any subrogation payment, it should be limited to $45,056.20, any amount in excess of that is prohibited by statute and worker's compensation law. ALE should be ordered to return the overpayment of $9,434.24 to Respondent (the difference between $45,056.20 and Respondent's offer of $54,490.44). Finally, Respondent requests the imposition of sanctions against ALE and counsel pursuant to JRP 16 for bringing this Petition and for attorney's fees and costs incurred by Respondent's counsel to respond to the Petition.

In reply, Petitioners argue that the Idaho Supreme Court has consistently affirmed the Commission's exclusive jurisdiction over worker's compensation matters and subrogation rights.

Surety denies the allegations of fraud. Claimant was made aware of the modification of the settlement agreement to include the provision of the reservation of the subrogation interest, he understood what the provision meant, and agreed to its inclusion. Petitioners' non-response to Respondent's offered payment of $54,490.44 does not constitute acceptance of the offer under either the principles of contract law or the statutory provisions governing subrogation rights. Respondent's assertions of equitable estoppel and quasi estoppel are without merit. Respondent's argument that ALE's subrogation interest should be limited to $45,056.20 is too narrow and not consistent with principles of worker's compensation law and subrogation. Certain administrative expenses, such as those for an independent medical examination ("IME") or a functional capacity evaluation ("FCE") should be included in Petitioners' subrogation interest. Petitioners object that they should be subject to sanction and instead ask that sanctions be imposed on Respondent.

FACTS

1. On April 29, 2021, Claimant – a truck driver for Employer – was involved in a motor vehicle accident while driving southbound on U.S. Highway 95 near Moscow, Idaho. 1st Pappas Declaration 01/18/24, ¶3, Ex. A. The driver of the other vehicle involved in the accident, Nikolay Krulikovskiy, was cited for failure to yield right of way under Idaho Code § 49-642. *Id.*

2. Claimant was injured in the motor vehicle accident and required medical treatment. Surety began to pay Claimant's medical expenses and worker's compensation benefits. 1st Pappas Declaration 01/18/24, ¶4, Ex. B.

3. Claimant retained Craig Swapp & Associates to represent him in his personal injury claim against the third-party tortfeasor, Mr. Krulikovskiy. Dyer Declaration, ¶3. Ms. Dyer has represented Claimant in that matter since approximately September 1, 2022. Prior to that, Claimant was represented by another attorney in that office, Dylan Orton. *Id.* Ms. Dyer's office provided

notice of representation to Surety on March 18, 2022, informing Surety that they represented Claimant in his personal injury claim against the third-party tortfeasor. *Id.* at ¶4. Claimant represented himself, in a *pro se* capacity, in the worker's compensation matter. Dyer Declaration, Ex. 6.[2]

4. By August 1, 2022, Surety had paid medical benefits and worker's compensation benefits to Claimant in the amount of $97,403.81. 1st Pappas Declaration 01/18/24, ¶5. Surety provided Ms. Dyer's office a copy of a ledger outlining these payments (totaling $97,403.81) on August 1, 2022. Dyer Declaration, ¶4, Ex. 1.

5. Surety retained Emma Wilson to handle the defense and settlement of the worker's compensation claim involving Claimant. Wilson Declaration, ¶2. On August 5, 2022, Ms. Wilson prepared the settlement documents pertinent to Claimant's claim. *Id.* at ¶4. Ms. Wilson sent the documents to Wendy Jordan, an adjuster for Surety, for her review, and she approved it. *Id.* at ¶4, Ex. B. The initial draft of the settlement agreement did not expressly address Surety's right of subrogation. *Id.*

6. On August 9, 2022, Ms. Wilson emailed the settlement documents to Claimant for his review and approval. Wilson Declaration, ¶5, Ex. C.[3] On August 16, 2022, Claimant signed the settlement agreement and emailed Ms. Wilson's office a copy of the signed settlement agreement page. *Id.* at ¶6, Ex. D. Later that same day, Ms. Wilson's office emailed the settlement agreement to the Commission for the Commission's review and approval. *Id.* at ¶7, Ex. D.

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[2] The Declaration of Michael Darlington in Support of Respondent's Opposition to Petitioners' JRP Rule 15 Petition is attached as Exhibit 6 to the Declaration of Erin C. Dyer.

[3] Ms. Wilson's letter to Claimant stated that: "[i]f this [proposed settlement] meets with your approval, please sign on page 7 and return **just that signed page to our office** using the enclosed postage-paid envelope. Alternatively, you may email a copy to admin@bvwcomplaw.com" Wilson Declaration, Ex. C, p. 1 (emphasis added).

7. Angie Howe, a benefits analyst with the Commission, reviewed the documents to assist the Commissioners in their determination of whether the proposed settlement was in the parties' best interest pursuant to Idaho Code § 72-404(3).[4] *See* 2nd Pappas Declaration 02/12/24, Ex. E pp. 1-6. On August 18, 2022, Ms. Howe interviewed Claimant over the telephone to inquire about his understanding of the proposed settlement. *Id.* at Ex. E pp. 5-6. Ms. Howe's notes of that interview state as follows: "He [Claimant] is working with a third-party attorney re: the auto claim and he would like to have that attorney take a look at this settlement agreement and discuss subro [sic] repercussions if he moves forward with this settlement. Analyst will place settlement on hold while he has this discussion and will not move the settlement forward until Mr. Darlington calls his third-party attorney to discuss." *Id.* at Ex. E p. 6.

8. On August 18, 2022, Claimant contacted Ms. Wilson after his interview with Ms. Howe. Claimant explained that he had discussed subrogation issues with the Commission, and expressed concerns that subrogation was not addressed in the settlement agreement. Wilson Declaration, ¶8.

9. Ms. Wilson then spoke with Ms. Jordan, who confirmed that Surety wanted to preserve their subrogation rights in the settlement documents. Wilson Declaration, ¶¶9,10. On August 23, 2022, Ms. Wilson updated the settlement agreement documents to include language that the Defendants retained their right to subrogation. Wilson Declaration, ¶11.

10. The updated settlement agreement stated, in pertinent part, that "...the parties agree to finally settle and dispose of all claims under the Idaho Workers' Compensation Law on account of an accident and injury occurring on April 29, 2021, **excluding Defendants' right to**

[4] Most proposed settlement agreements do not require Commission approval, however, under subsection (3) of Idaho Code §72-404, the Commission retains authority to determine whether a proposed settlement agreement is "in the best interest of the parties" when a claimant is representing themself in a *pro se* capacity, as was the case here.

subrogation pursuant to Idaho Code § 72-223, which is not foreclosed by this agreement." 1st Pappas Declaration 01/18/24, Ex. D, p. 1 (emphasis added). The agreement further stated that "Defendants specifically retain their right to subrogation pursuant to Idaho Code § 72-223." (*Id.* at Ex. D, p. 4, Sec. VIII) and "Defendants retain their right to subrogation pursuant to Idaho Code § 72-223." *Id.* at Ex. D, p. 5, Sec. X. Finally, the settlement agreement requested that the Commission enter an order "declaring that this agreement is a full and complete resolution of the rights and responsibilities of the respective parties under the Workers' Compensation Law of the State of Idaho and regarding the industrial accident and injury or occupational disease that is the subject of this agreement, excluding Defendants' right to subrogation pursuant to Idaho Code § 72-223, and that all claims and proceedings pertaining thereto now pending before the Industrial Commission be dismissed with prejudice." *Id.* at Ex. D, p. 6, Sec. XIII(2).

11. On August 23, 2022, Ms. Wilson spoke with Claimant over the telephone about the updated settlement agreement documents and emailed a copy of them to Claimant. Wilson Declaration, ¶11. Ms. Wilson informed Claimant that he could either provide a new signature page for the updated agreement or reuse his previous signature page that he had already submitted to the Commission. *Id.* at ¶11. Ms. Wilson's email to Claimant stated as follows: "Here is a copy of the revised LSS for your review. If you're able to print and sign the signature page and send us a picture, that would be great. Otherwise, if you let me know that the agreement is OK to submit to the Commission, I will have the Commission replace the signature page with the one they have already." *Id.* at Ex. G, p. 1. Claimant responded to the email that same day and wrote: "That's fine with me thanks." *Id.* at Ex. G, p. 3. Later that same day, Ms. Wilson contacted Ms. Howe to inform her that they would submit the updated settlement agreement documents and Ms. Wilson's paralegal did so, stating: "Attached is the revised LSS pleading without new signatures as you

have those from the prior one submitted on 8/16/2022. Attorney Wilson left you a voicemail regarding the same." *Id.* at Ex. G, p. 4.

12. On August 25, 2022, Ms. Howe spoke with Claimant regarding the updated settlement documents. Ms. Howe's contemporaneous notes of that conversation state as follows: "UPDATE: Defense has submitted updated settlement docs retaining subrogation rights. Spoke with Mr. Darlington re: updated documents. He expressed understanding that based on the update, the surety will be able to ask for repayment of benefits paid through workers' compensation claim out of any third party settlement. He would like to proceed with the settlement." 2nd Pappas Declaration, Ex. E, pp. 1, 6.

13. The Commission reviewed the settlement agreement and approved the same on August 29, 2022. The parties agreed that Defendants would pay Claimant a lump sum in the amount of $60,000 ($10,000 allocated to future medical benefits, and $50,000 allocated to consideration for PPD and all other issues resolved in the LSS). The ledger[5] attached to the settlement agreement, dated August 2, 2022, indicated that Surety had paid Claimant's medical and indemnity benefits in the amount of $104,538.51.[6] 2nd Pappas Declaration 02/12/24, Ex. E, pp. 22-26. The Order of Approval and Discharge pertaining to the settlement agreement stated that: "All proceedings and claims now pending before the Industrial Commission are dismissed with prejudice" but also provided that "[t]his Order shall permanently resolve all matters recited in the agreement and all issues arising from Claimant's claim, excluding Defendants' right to subrogation pursuant to Idaho Code § 72-223. Upon Defendants' payment of the consideration, all

[5] Idaho Code §72-404(5) requires that "[a]ll agreements filed with the commission pursuant to this section shall include, at a minimum, a detailed ledger of all benefits paid or disputed and all terms agreed upon by the parties."
[6] The August 2, 2022, ledger attached to the approved settlement agreement included all the payments from the August 1, 2022, ledger ($97,403.81) plus an August 2, 2022, payment noted as "PPI BENEFITS – FINAL" of $7,134.70 ($97,403.81 + $7,134.70 = $104,538.51).

claims related to the alleged industrial injuries or occupational diseases shall be extinguished except Defendants' right to subrogation pursuant to Idaho Code § 72-223." 2nd Pappas Declaration 02/12/24, Ex. E, p. 115.

14. On September 15, 2022, Ms. Jordan contacted Ms. Dyer's office, who was representing Claimant in his personal injury claim against the third-party tortfeasor, to inquire for an update on third-party settlement negotiations and to discuss Surety's intention to recover its subrogation interest. Dyer Declaration, ¶¶5,6. Ms. Dyer informed Ms. Jordan that a suit had not yet been filed, but they had issued a demand on August 31, 2022, and that they had ample time to file suit before the statute of limitations lapsed in April of 2023. *Id.* at ¶6. The conversation did not go well. Ms. Jordan stated that she would refer the matter to an attorney. *Id.* Ms. Dyer memorialized her conversation with Ms. Jordan and sent Ms. Jordan a copy of this summary and to serve as a notice to cease and desist from Surety filing suit against the third-party. *Id.* at Ex. 2.

15. Surety retained Matthew O. Pappas to handle its subrogation interest in this matter. On October 7, 2022, Mr. Pappas sent a letter to Ms. Dyer informing her of Surety's intent to recover its subrogation interest from Claimant's personal injury claim against the third-party tortfeasor. 1st Pappas Declaration 01/18/24, Ex. G. Mr. Pappas also provided Ms. Dyer a copy of the workers' compensation settlement agreement and Order of Approval and Discharge. *Id.*

16. On November 7, 2022, Ms. Dyer filed a lawsuit on Claimant's behalf in Latah County District Court, Case No. CV29-22-0857 against the third-party tortfeasors. Dyer Declaration, ¶8.

17. With no response from Ms. Dyer to his initial letter, Mr. Pappas sent Ms. Dyer a follow-up letter on November 10, 2022, requesting a status update on the personal injury claim against the third-party tortfeasor and if the claim had been settled. 1st Pappas Declaration 01/18/24

at Ex. G. On that same day, Ms. Dyer responded and notified Mr. Pappas that a suit against the third-party had been filed, but that no settlement had yet been reached. *Id.* at Ex. G.

18. On January 31, 2023, Mr. Pappas sent Ms. Dyer a letter inquiring to see if there were any updates on the third-party litigation and requested a copy of the complaint that was filed. *Id.* at Ex. G. Ms. Dyer forwarded Mr. Pappas a copy of the complaint. Dyer Declaration, ¶9. In February 2023, the Latah County District Court set the third-party litigation for trial in February of 2024 and issued a scheduling order, which ordered the parties to mediate by October 13, 2023. Dyer Declaration, ¶8.

19. On May 31, 2023, Mr. Pappas again sent a letter to Ms. Dyer inquiring about the third-party litigation. 1st Pappas Declaration 01/18/24, Ex. G. Mr. Pappas indicated that he looked at the court schedule and anticipated that settlement discussions would occur in late summer or early fall. *Id.* Mr. Pappas requested that Ms. Dyer reach out to him if she needed any additional information from Surety to assist in settlement negotiations. *Id.* The record does not reveal if Ms. Dyer responded to this letter.

20. The mediation in the third-party litigation between Claimant and the third-party tortfeasor occurred on November 29, 2023. Dyer Declaration, ¶12. The record establishes that Ms. Dyer did not provide Surety prior notice of the mediation. Ms. Dyer participated in the mediation with the belief that Surety's claimed subrogation interest was only $97,403.81, based on the ledger that Surety provided to Ms. Dyer's office on August 1, 2022. Dyer Declaration, ¶12-14.

21. On December 13, 2023, Ms. Dyer sent a letter to Mr. Pappas informing him that mediation in the third-party litigation had occurred, and that the parties settled for $350,000. 2nd Pappas Declaration 02/12/24, Ex. C, pp. 2-3. Ms. Dyer calculated Surety's subrogation interest based on the ledger Surety provided Ms. Dyer's office on August 1, 2022. *See id.*

22. This letter initiated a flurry of correspondence between Mr. Pappas and Ms. Dyer. *See generally* 1st Pappas Declaration 01/18/24, Ex. G; 2nd Pappas Declaration 02/12/24, Ex. D. Mr. Pappas responded on December 14, 2023, stating that Ms. Dyer's calculation of the subrogation interest was based on an outdated ledger. Mr. Pappas provided Ms. Dyer an updated ledger of payments made in the matter, asserting a subrogation interest in the amount of payments Surety made totaling $164,824.87.[7] 2nd Pappas Declaration 02/12/24, Ex. D, p. 3-7. Ms. Dyer objected to the updated amount and Surety's entitlement to such an amount.

23. On December 21, 2023, Ms. Dyer sent a letter to Mr. Pappas outlining her objections to Surety's claimed subrogation interest, expressed concern that the initial settlement agreement documents sent to Claimant by Ms. Wilson did not expressly contain provisions retaining Surety's right to subrogation while the documents ultimately approved by the Commission did contain such provisions, asserted that Claimant was unaware that the settlement agreement documents had been so revised, and offered to settle Surety's subrogation interest in this matter with an enclosed check in the amount of $54,490.44. Dyer Declaration, ¶20, Ex. 7-8.

24. Surety did not respond to Ms. Dyer's letter of December 21, 2023, nor did they return the check. Dyer Declaration, ¶21. Rather, Surety filed the instant petition.

DISCUSSION

25. Pursuant to the Commission's Judicial Rules of Practice and Procedure under the Idaho Workers' Compensation Law, effective September 6, 2023, ("JRP") Rule 15, a party may

[7] Mr. Pappas initially sent Ms. Dyer a ledger in the amount of $167,532.97, but then a few minutes later sent another ledger with the corrected amount of $164,824.87. *See* Dyer Declaration, ¶11. The latter is the Surety's asserted subrogation interest. The updated ledger included all payments from the August 2, 2022, ledger ($104,538.51) plus the lump-sum payment from the settlement agreement ($60,000.00) and two additional medical payments noted as ST MARIES FAMILY MEDICINE from 4/30/21 totaling $164.00 and BENEWAH COMMUNITY HOSPITAL from 4/4/22 to 4/26/22 totaling $122.36. These two payments were apparently left off the August 2, 2022, ledger and subsequently added to the ledger on October 19, 2022, and August 24, 2022, respectively. ($104,538.51 + $60,000.00 + $164.00 + $122.36 = $164,824.87).

request a declaratory judgment to resolve a dispute with a written petition when there is "an actual controversy over the construction, validity or applicability of a statute, rule, or order." JRP 15(C). The following requirements must be met:

1. The petitioner must expressly seek a declaratory ruling and must identify the statute, rule, or order on which a ruling is requested and state the issue or issues to be decided;

2. The petitioner must allege that an actual controversy exists over the construction, validity or applicability of the statute, rule, or order and must state with specificity the nature of the controversy;

3. The petitioner must have an interest which is directly affected by the statute, rule, or order in which a ruling is requested and must plainly state that interest in the petition; and

4. The petition shall be accompanied by a memorandum setting forth all relevant facts and law in support thereof.

JRP 15(C). The Commission "may hold a hearing on the petition, issue a written ruling providing guidance on the controversy or decline to make a ruling when it determines that there is no controversy or that the issue at hand is better suited through resolution in some other venue, or by some other administrative means." *Miller v. Yellowstone Plastics, Inc.*, IC 2019-024650 (Idaho Ind. Comm. October 7, 2022).

26. Here, Petitioners have expressly sought a declaratory ruling and identified the relevant statutes. The issue is whether Petitioners are entitled to their claimed subrogation interest under Idaho Code § 72-223. There is an actual controversy between the parties over the applicability of the statute and the Petitioner has an interest which is directly affected by the statute. For the reasons set forth below, we conclude that this is the proper subject of a petition for declaratory relief, and we believe it is appropriate to take up the issues raised in this matter.

27. **Statutory Right of Subrogation.** The Idaho Worker's Compensation Laws provide the exclusive remedy for an employee's injuries sustained as a result of a work accident.

However, this exclusivity is subject to the provisions of Idaho Code § 72-223, which specifies that an injured worker may receive workers' compensation benefits and thereafter bring a negligence action against a third-party tortfeasor who is responsible for the worker's injuries. Under this statute and the relevant case law, the Idaho Supreme Court has:

> ...established a system of apportioning the employee's damages between the employer and the third party. The focus of this Court in apportionment is two-fold: (1) to achieve an equitable distribution of liability for the employee's injuries as between the employer and the third party, based on the facts of each case, and (2) to prevent the overcompensation of an employee, *i.e.*, to prevent the employee from retaining both the workmen's compensation benefits and the full tort recovery.

Schneider v. Farmers Merchant, Inc., 106 Idaho 241, 243, 678 P.2d 33, 35 (1983). The Court's system of apportionment has its foundation in Idaho Code § 72-223(3). *Id.*

28. Idaho Code § 72-223 creates Petitioners' subrogation right. Under Idaho Code § 72-223, an employer/surety that has paid benefits to/for an injured employee has the right to recover those monies from any third-party settlement or award granted to the injured worker. The statute states, in pertinent part:

> (3) 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.
>
> (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.

Idaho Code § 72-223. Under the statute, an employer/surety has a right of subrogation in the proceeds of an injured worker's recovery from a third-party tortfeasor, but under subsection (4), that right is subject to a reduction of the proportionate share of the costs and attorney's fees incurred by the injured worker in obtaining its recovery from a third-party tortfeasor.[8] *See also*, *Cameron v. Minidoka County Highway Dist.*, 125 Idaho 801, 803, 874 P.2d 1108, 1110 (1994) (holding that the logic and fairness of such reduction is "obvious" because "[t]he employer should have to pay for the litigation expenses incurred in obtaining the third party recovery to the extent that the third party recovery benefits the employer.")

29. In *Izaguirre v. R&L Carriers Shared Services, LLC*, 155 Idaho 229, 308 P.3d 929 (2013), an injured worker attempted to argue that an employer's/surety's subrogation right should extend only to damages that workers' compensation typically insures, and not to damages particular to a third-party action, such as pain and suffering. The Court rejected that argument and held that an employer's/surety's subrogation right extends to the entire proceeds of an injured worker's recovery against a third-party tortfeasor. *Id.* at 233-36, 308 P.3d 933-36. Likewise, in *Struhs v. Protection Technologies, Inc.*, 133 Idaho 715, 992 P.2d 164 (1999), an injured worker inserted a provision in his third-party settlement that purported to characterize the recovery as "general damages" in an attempt to bar the employer from recovering its subrogated interest. The Court rejected the injured worker's argument and held that:

[8] The conditions of the sub-subsections of Idaho Code § 72-223(4)(a) – (c) are not present in this case. Although Ms. Dyer's letter of November 13, 2023 (attached to 2nd Pappas Declaration 02/12/24, Ex. C) indicates that the third-party was planning to present a defense of comparative negligence at trial, there is no indication, and the Respondent does not argue, that Claimant alleged or asserted a position in the third-party claim that was adverse to Employer.

> 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. Therefore, we hold that an employee and third party's unilateral actions cannot restrict an employer's subrogation rights.

Struhs, 133 Idaho at 721, 992 P.2d at 170 (internal citations omitted).

30. It is clear that Petitioners have a right of subrogation in the proceeds of Claimant's third-party settlement with the third-party tortfeasor. Claimant was injured in a motor vehicle accident with a third-party while driving truck for Employer. Surety accepted Claimant's workers compensation claim and paid Claimant benefits accordingly. Employer/Surety and Claimant, acting in a *pro se* capacity, then settled Claimant's workers compensation claim. Claimant, represented by counsel, then filed a personal injury suit against the third-party tortfeasor. That suit eventually settled via mediation. Surety has a right of subrogation in the proceeds of that third-party settlement. Indeed, Claimant's counsel acknowledges as much in her letter of December 13, 2023, that notified Surety that the third-party personal injury claim had been settled through mediation. *See* 2nd Pappas Declaration 02/12/24, Ex. C, p. 2 (stating "[p]ursuant to Idaho Code § 72-233(3) [sic], ALE (Surety) is entitled to subrogation for compensation recovered.") In the flurry of correspondence between Claimant's counsel and Surety's counsel in the month leading up to the filing of the instant petition, the crux of the parties' dispute centered on the exact amount of Surety's subrogation interest (Claimant's counsel insisted that Surety's interest should be calculated from payments totaling $97,403.81[9] based on the August 1, 2022, ledger; and Surety's

[9] To be more precise, Claimant's counsel argued in the December 13, 2023, letter that the claimed amount of $97,403.81 should have been further reduced by the cost of Dr. Greendyke's IME ($1,200) and the cost of the Functional Capacity Exam ($804.90), thereby calculating Surety's subrogation interest based on payments totaling $95,398.91 ($97,403.81 - $1,200 - $804.90 = $95,398.91). *See* 2nd Pappas Declaration 02/12/24, Ex. C.

counsel insisted that the actual subrogated interest should be calculated from payments totaling $164,824.87). Before the Commission can determine the amount of Surety's subrogation interest, we must first address a number of arguments raised by Respondent in their opposition to the petition.

31. **Jurisdiction.** First, Respondent argues that the Commission should decline to make a ruling because the Commission "lacks jurisdiction over the issue or issues presented." JRP 15(F)(4)(a). Claimant, who represented himself in a *pro se* capacity at the time, settled his worker's compensation claim against Petitioners in August of 2022. The Order of Approval and Discharge, signed by the Commissioners on August 29, 2022, stated that "[a]ll proceedings and claims now pending before the Industrial Commission are dismissed with prejudice." A filed settlement agreement "shall for all purposes constitute an adjudication of the claims resolved in the settlement agreement." Idaho Code § 72-404(5). Within seven days of its filing, the Commission must "issue a notice of dismissal with prejudice." Idaho Code § 72-404(6). A lump sum settlement agreement constitutes a final decision of the Commission which is subject to a motion for reconsideration or rehearing under the provisions of Idaho Code § 72-718. *Davidson v. H.H. Keim Co.*, 110 Idaho 758, 718 P.2d 1220 (1986). Respondent argues that when no timely reconsideration or appeal of the Order of Approval and Discharge was made, the Order became final and the Commission cannot now retain jurisdiction over this matter in general or to specifically determine the amounts of Petitioners' claimed subrogation interest.

32. For the following reasons, the Commission has jurisdiction over this matter.

33. Respondent's argument is not persuasive. Idaho Code § 72-707 vests the Commission with exclusive jurisdiction over all questions arising under worker's compensation law. Whether an employer/surety is "entitled to subrogation pursuant to [Idaho Code] § 72-223(3)

is a question arising under the worker's compensation law which is within the exclusive jurisdiction of the Industrial Commission." *Idaho State Ins. Fund By and Through Forney v. Turner*, 130 Idaho 190, 191, 938 P.2d 1228, 1229 (1997); *see also Van Tine v. Idaho State Ins. Fund*, 126 Idaho 688, 690, 889 P.2d 717, 719 (1994). Furthermore, the Order expressly and clearly retained jurisdiction over matters pertaining to Surety's right to subrogation under Idaho Code § 72-223.

34. It is true that the Order of Approval and Discharge of August 29, 2022, is a final order under Idaho Code § 72-718. Although the Order approved the settlement agreement and stated that "[a]ll proceedings and claims now pending before the Industrial Commission are dismissed with prejudice," the Order also made it clear that Petitioners reserved their right of subrogation. For example, the Order states that it:

> shall permanently resolve all matters recited in the agreement and all issues arising from Claimant's claim, **excluding Defendants' right to subrogation pursuant to Idaho Code § 72-223.** Upon Defendants' payment of the consideration, all claims related to the alleged industrial injuries or occupational diseases shall be extinguished **except Defendants' right to subrogation pursuant to Idaho Code § 72-223.**

2nd Pappas Declaration 02/12/24, Ex. E, p. 115.

35. **Fraud.** Alternatively, Respondent argues that the portions of the settlement agreement and the Order of Approval and Discharge that preserve Surety's right to subrogate should be set aside, because such portions were produced as the result of fraud and are not valid.

36. Pursuant to Idaho Code § 72-718, when no timely motion for reconsideration is made, a decision such as the Order of Approval and Discharge is final and conclusive as to all matters adjudicated "in the absence of fraud." Thus, upon a sufficient showing of fraud that would affect the finality of the Commission's decision, a final order of the Commission may be reopened or set aside. *See Harmon v. Lute's Const. Co., Inc.*, 112 Idaho 291, 293, 732 P.2d 260, 262 (1986)

(holding that "once a lump sum compensation agreement is approved by the Commission, that agreement becomes an award and is final and may not be reopened or set aside absent allegations and proof of fraud.")

37. In order to establish actionable fraud, the party alleging fraud must "prove the following elements by clear and convincing evidence: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) his intent that it should be acted on by the person and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) his reliance on the truth; (8) his right to rely thereon; and (9) his consequent and proximate injury." *Harmon*, 112 Idaho at 293, 732 P.2d at 262. Additionally:

> The party alleging fraud must support the existence of each of the elements of the cause of action for fraud by pleading with particularity the factual circumstances constituting fraud. I.R.C.P. 9(b); *Theriault v. A.H. Robins*, 108 Idaho 303, 307, 698 P.2d 365, 369 (1985); *Galaxy Outdoor Advertising v. Idaho Transp. Dep't*, 109 Idaho 692, 710 P.2d 602 (1985); *see Witt v. Jones*, 111 Idaho 165, 722 P.2d 474 (1986). Furthermore, the party alleging an action for fraud has the burden of proving all these elements at trial by clear and convincing evidence. *Faw v. Greenwood*, 101 Idaho 387, 613 P.2d 1338 (1980); *Smith v. King*, 100 Idaho 331, 597 P.2d 217 (1979); *Gneiting v. Clement*, 96 Idaho 348, 528 P.2d 1283 (1974).

G&M Farms v. Funk Irr. Co., 119 Idaho 514, 518, 808 P.2d 851, 855 (1991).

38. As stated previously, Claimant represented himself in a *pro se* capacity at the time he entered into the settlement agreement with Employer/Surety on the worker's compensation claim. Respondent's argument is that Claimant reviewed and signed the initial settlement agreement, which did not expressly reserve Surety's right of subrogation. But then, Respondent argues, the Employer/Surety submitted to the Commission a modified document that did expressly reserve Surety's right of subrogation and affixed Claimant's signature (from the original document) to the modified document without Claimant's knowledge. In his Declaration (attached as Exhibit 6 to Ms. Dyer's Declaration) Claimant declares that: "I was never presented with a

revised copy of these documents for my review and signature prior to entry." Dyer Declaration, Ex. 6, ¶6. Respondent argues that Claimant's original signature (on page 7) and a duplicate page 7 in the documents submitted to the Commission is additional proof that Surety altered the settlement documents to include a provision reserving Surety's right of subrogation. Respondent then argues that the Commission failed to conduct a hearing or a pro se colloquy to ensure that Claimant understood the terms of the agreement, to determine if he was aware of the modifications to the agreement, and if he agreed to them.

39. Respondent fails to establish a prima facie case of fraud. Respondent's allegations and Claimant's Declaration are insufficient to support the existence of each element necessary to establish fraud with particularity as required by *Harmon* and *G&M Farms*. Claimant declared that he was never presented with a revised copy of the settlement documents. At first blush, Claimant's declaration infers that the Surety withheld a material term in the LSS and declined to provide him a copy of the LSS with the addition; Claimant's statement could also be interpreted to mean that he did not receive a physical copy of the revised LSS. The Commission should not have to infer that the elements of fraud exist when these serious allegations must be plead with particularity. The Declaration of Ms. Wilson, the attached e-mails, and the contemporaneous notes of the Commission's Benefits Analyst Ms. Howe establish that the Claimant was aware of the modifications to the settlement agreement regarding Surety's right of subrogation, and that he agreed to them.

40. Although the Commission did not hold a hearing to ascertain Claimant's understanding of the settlement and the statute does not require one, the record establishes that there was a colloquy between Claimant and Commission staff specifically regarding Surety's subrogation right. Ms. Howe spoke with Claimant over the phone on August 18, 2022, after the

initial settlement agreement had been submitted, as is common practice when the Commission handles a settlement agreement with a pro se claimant. Because of that conversation, the settlement was placed on hold so Claimant could discuss with his third-party attorney the subrogation repercussions if he went forward with the settlement. Ms. Wilson spoke with Ms. Jordan to confirm that the Surety wished to add a provision in the settlement agreement that would preserve Surety's subrogation right. Ms. Wilson then spoke with Claimant regarding the same and emailed him updated settlement documents that contained the provision preserving Surety's subrogation right. Ms. Wilson instructed Claimant that if he agreed, he could either submit a new signature page or use the signature page he had already submitted. Claimant emailed Ms. Wilson back expressing his agreement to the updated settlement documents. Therefore, Claimant's original signature page was used with the updated documents (hence, the duplicate page 7). Ms. Howe then spoke with Claimant regarding the updated settlement documents on August 25, 2022. Claimant expressed his understanding that based on the update, Surety would be able to seek repayment of worker's compensation benefits out of any third-party settlement. Claimant expressed his desire to proceed with the settlement.

41. For the reasons outlined above, Respondent has failed to prove that the approved settlement agreement and the Order of Approval and Discharge was obtained via fraud. The record establishes that Claimant understood the terms of the settlement agreement, that he was aware of modifications to the agreement to include Surety's preservation of its subrogation right, and he agreed to the terms of the settlement agreement. The settlement agreement and the order approving the same will not be set aside.

42. **Actual Controversy.** Furthermore, Respondent argues that the Commission should decline to issue a declaratory ruling under JRP 15(F)(4)(b) because there is no actual controversy.

On December 21, 2023, in an attempt to resolve the matter, Respondent sent Surety a letter with an enclosed check in the amount of $54,490.44. Surety did not respond to Respondent's letter and did not return the check. Respondent asserts that Surety's silence and inaction constitutes an acceptance of the offer. Therefore, the argument goes, Petitioners have accepted the $54,490.44 check in full and final satisfaction of their claimed subrogation interest and there is no longer a controversy between the parties.

43. Respondent rightly cites to the general rule of law that "silence and inaction, or mere silence or failure to reject an offer when it is made, does not constitute an acceptance of the offer." *State v. Peterson*, 148 Idaho 593, 596, 226 P.3d 535, 538 (2010). Under this general rule, Petitioners' conduct with respect to the Respondent's offer does not constitute acceptance of that offer. Respondent further cites to exceptions to that general rule found in the Restatement (Second) of Contracts §69 and outlined in the Idaho Court of Appeals case *Vogt v. Madden*, 110 Idaho 6, 713 P.2d 442 (Idaho Ct. App. 1985). A party may have a duty to speak or to reject an offer under one of the following circumstances:

> 1. Where because of prior dealings it is reasonable that the offeree should notify the offeror if the offeree does not intend to accept.
>
> 2. Where an offeree takes the benefit of offered services with reasonable opportunity to reject them and reason to believe the offeror thought the offer was accepted.
>
> 3. Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.

Vogt, 110 Idaho at 8, 713 P.2d at 444.[10] Respondent argues that each one of these three circumstances is present in this case. Respondent argues that, based upon prior dealings, it was

[10] The quoted language was from a jury instruction in the underlying case of *Vogt*. The *Vogt* court noted that the instruction was a "slightly modified version of the RESTATEMENT (SECOND) OF CONTRACTS § 69 (1981). The RESTATEMENT explains that silence by an offeree ordinarily does not operate as an acceptance of an offer. The

reasonable for Surety to notify Respondent that they did not intend to accept the offer. Respondent further argues that Surety has taken a benefit of the offered services by not returning the check and that Respondent believed that the offer had been accepted and was surprised by Surety's filing of the instant petition. Respondent further argues that the language used in their offer (namely, the closing sentence of "[w]e trust that with this payment this matter will be resolved") gave Surety reason to understand that assent may be manifested by silence or inaction.

44. Respondent's argument is not persuasive. First, Petitioners' right of subrogation derives from statute and not from any contractual agreements. Even though a surety and a claimant *could* agree on a waiver of the surety's statutory right through the lump sum settlement agreement, the Commission will not assume a waiver exists unless the same is expressly stated. The *Struhs* court made it clear that an employer's/surety's subrogation right is a creature of statute and cannot be restricted by an injured worker's and third party's unilateral actions, and as such, the Commission will not unilaterally impose the waiver of an employer's/surety's subrogation right. *Struhs*, 133 Idaho at 721, 992 P.2d at 170.

45. Second, we do not find that any of exceptions outlined in *Vogt* apply. Respondent has failed to cite to any prior dealings between the parties that would establish that Surety "silently accepted" previous offers to make it reasonable to believe that Surety had a duty to expressly reject the offer. Furthermore, it does not appear that Surety has taken a benefit of the offered services. Although Surety has not returned the check, there is no indication that Surety cashed the check. Finally, we do not conclude that Surety "remained silent" in a way to intend that it had accepted the offer. When Respondent first notified Surety on December 13, 2023, that it had settled the

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exceptional cases where silence is acceptance fall into two main classes: those where the offeree silently takes offered benefits, and those where one party relies on the other party's manifestation of intention that silence may operate as acceptance." *Vogt*, 110 Idaho at 8, 713 P.2d at 444 (internal citations omitted).

third-party claim through mediation and calculated Surety's subrogation interest from the August 1, 2022, ledger, it became immediately apparent that the parties disputed Surety's subrogation amount. The very next day, Surety responded that Respondent's calculation was incorrect and that Surety's subrogated interest should be calculated based on payments Surety made totaling $164,824.87. The parties vehemently disputed the amount in back-and-forth emails. Approximately a week later, on December 21, 2023, Respondent sent Surety a letter with an unsolicited check offering to settle the dispute with a check for $54,490.44. Surety did not respond to the offer nor did they return the check. Instead, less than a month later, Surety filed the instant petition. Under these circumstances, we cannot conclude that Surety's actions constitute an acceptance of Respondent's offer. The Commission concludes that there is an actual controversy and will not decline to make a ruling under JRP 15(F)(4)(b).

46. **Equitable estoppel.** Respondent argues that Petitioners are equitably estopped from further relief. Equitable estoppel is "based on the concept that it would be inequitable to allow a person to induce reliance by taking a certain position and, thereafter, take an inconsistent position when it becomes advantageous to do so." *Regjovich v. First Western Investments, Inc.*, 134 Idaho 154, 158, 997 P.2d 615, 619 (2000) (citing *Gafford v. State*, 127 Idaho 472, 903 P.2d 61 (1995)). The elements of equitable estoppel are:

> (1) a false representation or concealment of a material fact with actual or constructive knowledge of the truth, (2) the party asserting estoppel did not know or could not discover the truth, (3) the false representation or concealment was made with the intent that it be relied upon, and (4) the person to whom the representation was made or from whom the facts were concealed, relied and acted upon the representation or concealment to his [or her] prejudice.

Regjovich, 134 Idaho at 158, 997 P.2d at 619 (brackets in original). The Court continued to state that "[a]ll factors of equitable estoppel are of equal importance, and there can be no estoppel absent any of the elements. Idaho courts have long determined that one may not assert estoppel based

upon another's misrepresentation if the one claiming estoppel had readily accessible means to discover the truth." *Id.* (internal citations omitted).

47. Respondent argues that each element of equitable estoppel is present here. Respondent argues that because Surety never provided Respondent with an updated ledger prior to mediation, Claimant detrimentally relied on the outdated figure ($97,403.81 – from the August 1, 2022, ledger) as Surety's asserted subrogated interest to negotiate its claim against the third-party. Essentially, Respondent argues that it was incumbent upon Surety to provide an updated ledger prior to the mediation.

48. Respondent fails to make a *prima facie* case of equitable estoppel. Although Respondent argues that Surety withheld information and failed to "directly" and "clearly" convey a subrogation claim in any amount greater than $97,403.81, Respondent falls short of establishing that Surety made a false representation or concealment of its subrogation claim. Indeed, Mr. Pappas reached out to Respondent's counsel a number of times shortly after the worker's compensation case settled to assert their subrogation right and request information regarding mediation in the third-party claim. Although Surety did not send Respondent an updated ledger between August 1, 2022, and the mediation, Surety was not notified of the mediation prior to it occurring. Respondent's counsel only provided Surety notice of the mediation once it had concluded. On this record, there is insufficient evidence to establish that Surety made a false representation or concealment regarding its subrogation claim. Furthermore, Respondent's counsel had readily accessible means to discover the more accurate amount of Surety's subrogated interest. The settlement agreement filed with the Commission indicated that the claim settled in the amount of $60,000, and the ledger attached thereto noted that Surety had paid medical and indemnity benefits in the amount of $104,538.51. 2nd Pappas Declaration 02/12/24, Ex. E, p. 26. In

conclusion, Respondent has not established that all elements of equitable estoppel are met. Petitioners are not equitably estopped from further relief.

49. **Quasi-estoppel.** Respondent also argues that Petitioners are barred from further relief under the doctrine of quasi-estoppel. Quasi-estoppel "prevents a party from reaping an unconscionable advantage, or from imposing an unconscionable disadvantage upon another, by changing positions. Quasi-estoppel, unlike equitable estoppel, does not require misrepresentation by one party or actual reliance by the other." *Garner v. Bartschi*, 139 Idaho 430, 437, 80 P.3d 1031, 1038 (2003) (internal citations omitted). The doctrine of quasi-estoppel applies when: (1) the offending party took a different position than his or her original position, and (2) either (a) the offending party gained an advantage or caused a disadvantage to the other party; (b) the other party was induced to change positions; or (c) it would be unconscionable to permit the offending party to maintain an inconsistent position from one he or she has already derived a benefit or acquiesced in. *Vawter v. UPS*, 155 Idaho 903, 910-11, 318 P.3d 893, 900-01 (2014).

50. *Vawter* was a three-party case between the employer (UPS), ISIF, and the claimant. The claimant was an employee of UPS and had previously suffered an injury in UPS's employ in 1990 and then a subsequent injury in 2009. UPS had asserted in the claimant's 1990 case that the claimant suffered no impairment related to that injury. In the 2009 case, UPS argued that claimant had suffered impairment in the 1990 injury such as to implicate ISIF liability. The Commission held that UPS was quasi-estopped from asserting that the 1990 injury caused impairment as it was inconsistent with its previous position in 1990 and would be unconscionable to allow UPS to maintain that inconsistent position to the detriment of ISIF. *Vawter v. UPS*, IIC 2010-000114 (Idaho Ind. Comm. Sept. 28, 2012).[11]

[11] The Idaho Supreme Court affirmed the Commission's finding on this issue. The Court rejected UPS's argument regarding notice of the issue and held that UPS had sufficient notice of the quasi-estoppel issue and that because UPS

51. Respondent argues that Surety must be estopped from further recovery because it had previously taken a position that its subrogation interest was only $97,403.81. The Commission is not persuaded by Respondent's argument. The Commission finds that Surety's position throughout the matter has been consistent; it has sought its subrogation interest pursuant to Idaho Code § 72-223, subject only to a reduction of a proportionate share of the costs and attorney's fees incurred by the employee in obtaining its third-party recovery. Surety merely updated its ledger to reflect a more accurate amount and extent of its subrogation right. Surety's submission of a ledger of August 1, 2022, to Respondent showing that Surety paid worker's compensation benefits in the amount of $97,403.81 and its later submission of a ledger to Respondent showing that Surety paid worker's compensation benefits in the amount of $164,824.87 does not constitute an "inconsistent" position that would invoke the quasi-estoppel doctrine; this update was largely necessitated by the additional consideration paid to the Claimant via the LSS. Again, Petitioners made Respondent aware of its subrogation claim through multiple correspondences in the months leading up to the mediation between Claimant and the third-party. In conclusion, Respondent has not established the elements of quasi-estoppel. Petitioners are not estopped from further relief through the doctrine of quasi-estoppel.

52. **Amount of Surety's subrogation interest.** Under Idaho Code § 72-223(3), an employer/surety who has paid worker's compensation benefits, shall be subrogated to the rights of the employee, to "recover against such third party to the extent of the **employer's compensation liability**." (emphasis added). Under Idaho Code § 72-102(6), "'Compensation' used collectively means any or all of the income benefits and the medical and related benefits and medical services." "Income benefits" means "payments provided for or made under the provisions of this law to the

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had failed to address the quasi-estoppel issue in briefing, they could not now do so on appeal. *Vawter*, 155 Idaho at 911-12, 318 P.3d at 901-02.

injured employee disabled by an injury or occupational disease, or his dependents in the case of death, excluding medical and related benefits." Idaho Code § 72-102(15). "Medical and related benefits" means "payments provided for or made for medical, hospital, and burial and other services as provided in this law other than income benefits." Idaho Code § 72-102(19). Finally, "medical services" means "medical, surgical, dental or other attendance or treatment, nurse and hospital service, medicines, apparatus, appliances, prostheses, and related services, facilities and supplies." Idaho Code § 72-102(20).

53. In calculating the amount of an employer's/surety's subrogation interest, it is important to bear in mind the principles underlying the purpose of subrogation. The Idaho Supreme Court has stated that the two purposes of subrogation under Idaho Code § 72-223 are "to achieve 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." *Struhs*, 133 Idaho at 719, 992 P.2d at 168. As such, the Idaho Supreme Court has "consistently recognized an employer's subrogation rights where the employer voluntarily paid benefits." *Id.* Such recognition serves the statute's purpose that employers should be reimbursed for worker's compensation benefits they have paid when a third-party tortfeasor is at fault for the employee's injuries.

54. Respondent acknowledges, *in arguendo*, that Surety would be entitled to subrogate its costs for Claimant's medical benefits and total temporary disability (TTD) benefits. However, Respondent argues that Surety is not entitled to subrogate for permanent partial impairment (PPI) payments, because such payments do not constitute "compensation" as defined by Idaho Code. In other words, Respondent argues that PPI is neither an "income benefit" nor "medical and related benefits" nor a "medical service," and therefore is not a payment that could be subrogated under

Idaho Code § 72-223. Respondent's argument that PPI is not an "income benefit" is rejected and is not supported by case law. The Idaho Supreme Court has ruled that monies received by the claimant for PPI are part of his final award for permanent partial disability (PPD), and thus an award of income benefits based on disability. *Oliveros v. Rule Steel Tanks, Inc.*, 165 Idaho 53, 59-60, 438 P.3d 291. 297-98 (2019). Therefore, Surety's payments for PPI are an "income benefit" and constitute "compensation" under Idaho Code §§ 72-102(6) and 72-223. Surety is entitled to subrogate the payments made to Claimant for PPI and recover them from the proceeds of Claimant's settlement with the third-party tortfeasor.

55. Respondent also argues that Surety is not entitled to subrogate its costs for the independent medical exam (IME) and the functional capacity evaluation (FCE). Respondent argues that those costs are administrative costs and therefore do not constitute "medical and related benefits" nor a "medical service." We do not adopt such a narrow definition of "compensation" as Respondent endorses. Surety had accepted Claimant's workers compensation claim and began paying medical and income benefits. Eventually, Claimant's treating physician determined that Claimant had reached maximum medical improvement (MMI). At that point, Surety voluntarily hired Dr. Greendyke to conduct an IME and determine Claimant's permanent impairment and permanent restrictions as a result of the work injury. That IME gave Surety the necessary information it needed to conduct mediation and ultimate settlement of Claimant's worker's compensation claim. Although the IME does not create a physician/patient relationship, it is related to medical purposes and is a medical exam. Similarly, the FCE helped Surety assess and administer Claimant's claim, in that it provided an understanding of what Claimant's restrictions were going forward. Under these circumstances, we construe these administrative costs as "medical and

related benefits" and are therefore "compensation" that Surety may recover as part of its subrogation pursuant to Idaho Code § 72-223.

56. Respondent argues that Surety is not entitled to subrogate the lump-sum of $60,000 it paid Claimant to settle the worker's compensation claim. Respondent argues that the allocated $10,000 for future medical treatment is not legitimate because Claimant's treating physician and Dr. Greendyke declared Claimant at MMI and did not recommend any further medical treatment at the time the case settled. Furthermore, Respondent argues that the remaining $50,000 was not attributable to any particular loss and should not be included in Surety's subrogated interest. Respondent's arguments are not persuasive. First, although no further medical treatment related to Claimant's work injuries was recommended at the time of settlement, Idaho Code § 72-432 provides that an employer/surety shall provide for an injured worker's medical services related to the work accident for the time immediately after an injury and for "a reasonable time thereafter." Even though no further medical treatment was recommended at the time, it is possible that future medical treatment related to Claimant's work accident could have arisen in the future and Employer/Surety may have been responsible for that treatment under Idaho Code § 72-432. In this case, the settlement agreement closed out medicals and settled Claimant's claim for any future medical benefits resulting from his work accident by paying a lump sum of $10,000. This is clearly within the ambit of "medical and related benefits" and accordingly, Surety has a right of subrogation to recover the amount paid for future medical benefits. Second, the settlement expressly allocated the remaining $50,000 for "consideration for PPD and all other issues resolved in the LSS." The settlement agreement outlined that Claimant contended that he could not return to his time-of-injury job and asserted his entitlement to permanent disability in excess of his PPI.

The lump-sum payment of $50,000 represented the resolution of Claimant's PPD claim. Therefore, these are "income benefits" that support subrogation under Idaho Code § 72-223.

57. Finally, Surety's most recently updated ledger added two prior medical expenses that were not included in the ledger attached to the worker's compensation settlement agreement – (1) an April 30, 2021, visit to St. Maries Family Medicine totaling $164.00 and (2) a visit to Benewah Community Hospital for Physical Therapy from April 4 – April 26, 2022, totaling $122.36. 1st Pappas Declaration 01/18/24, Ex. B.[12] Respondent argues that Surety cannot recover these costs in subrogation because they were not accounted for in the ledger attached to the settlement agreement and that Surety did not preserve the ability to claim payments following the filing of the settlement agreement. Again, Surety's entitlement to subrogation is a statutory right. It applies to Surety's compensation liability. Surety paid for these medical services as part of Claimant's worker's compensation claim, and they have a subrogation right to recover for those payments. Furthermore, the settlement agreement expressly and clearly preserved Surety's subrogation right.

58. In conclusion, Surety has shown that it is entitled to calculate its subrogation right based on the worker's compensation benefits it paid in the amount of $164,824.87 (income and medical benefits paid prior to settlement of $104,824.87[13] + the $60,000.00 lump sum settlement). Accordingly, under Idaho Code § 72-223(4), Surety's subrogation interest is deducted by a proportionate share of the costs and attorney's fees incurred by Claimant in obtaining his third-

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[12] The ledger indicates that these medical charges were added to the ledger on 10/19/2022 and 8/24/2022 respectively.
[13] This number includes the $97,403.81 from the August 1, 2022, ledger + an 8/2/2022 PPI payment of $7,134.70 (that was included on the ledger attached to the settlement agreement) + the two additional payments for medical services of $164.00 and $122.36 referenced in ¶57 above = $104,824.87.

party recovery. This yields a lien balance of $93,473.20.[14] *See* 1st Pappas Declaration 01/18/24, ¶8. Surety has a right to recover $93,473.20 from the proceeds of Claimant's third-party settlement.

59. **Sanctions.** Both parties request that the Commission impose sanctions on the opposing party. First, the Commission finds no basis to grant Respondent's request to impose sanctions on Petitioners in this matter. Petitioners' request for sanctions against Respondent merits closer scrutiny.

60. In its reply brief, Petitioners seek sanctions in the form of application of Idaho Code § 72-223(4)(b). That subsection allows the Commission to determine a "reasonable fee, if any, for services rendered to the employer" to be reduced from an employer's/surety's subrogated interest if the employee "alleges or asserts a position in the third party claim adverse to the employer." Petitioners argue that Respondent's counsel's failure to involve or inform Surety in the mediation of the third-party claim was a position adverse to the employer. Therefore, Petitioners argue, their subrogated interest should be reduced, if at all, by some other method than the statute's default reduction by a proportionate share of the costs and attorney's fees incurred by the employee in obtaining the recovery from the third-party. Petitioners' argument is not persuasive. A "position in the third party claim adverse to the employer" refers to a legal position a party may allege or assert, such as an employer's contributory or comparative negligence, not necessarily because Claimant's counsel did not respond to Surety's letters or failed to notify Surety of the mediation. *See Struhs*, 133 Idaho at 721, 992 P.2d at 170 (As a matter of first impression, the Court held that an employee and third party's unilateral actions cannot restrict an employer's subrogation rights.

[14] Using the formula Respondent used in its December 13, 2023, letter, Surety's subrogated interest is calculated as follows: payments made totaling $164,824.87 divided by $350,000.00 settlement with third-party tortfeasor = .47 property share. That property share multiplied by Claimant's legal fees and costs totaling $151,512.84 = $71,351.67 represents Surety's share of legal fees/costs. Finally, subtracting Surety's share of legal fees/costs from Surety's payments made yields: $164,824.87 - $71,351.67 = $93,473.20.

The Court recognized that other jurisdictions reached a similar result; it observed that "[i]n Minnesota, an employee may settle a tort claim with the third party without the employer's consent, but such a settlement cannot affect the employer's subrogation rights.") Furthermore, Petitioners' argument in the reply brief runs somewhat counter to the arguments made in their initial memorandum in support of the petition. *See* Memo. in support of JRP 15 Petition, pp. 8-9 (Petitioners argued that Idaho Code § 72-223(4)(b) should not apply because there was no indication of comparative negligence against the employer. Surety was not aware of the mediation and thus, was not aware of the claims, strategies, or other positions that Claimant may have made that was adverse to the employer). Although it may not have been prudent for Respondent's counsel to fail to notify Surety prior to the mediation, we do not conclude that Respondent "alleged or asserted a position in the third party claim adverse to the employer" that would warrant sanctions by applying Idaho Code § 72-223(4)(b).

61. Alternatively, Petitioners request sanctions against Respondent for a violation under the rules of procedure. Petitioners suggest that Respondent's claim of fraud was so baseless and egregious that such claim may warrant sanctions under Idaho Rules of Civil Procedure (I.R.C.P.) 11(b). The Idaho Rules of Civil Procedure do not expressly apply to the Industrial Commission, which has promulgated and adopted its own rules and regulations involving judicial matters such as the instant petition. JRP 16 provides that "the Commission retains power to impose appropriate sanctions for any violation or abuse of its rules or procedures." JRP 3(E) – which is similar to I.R.C.P. 11(b) – states, in pertinent part, that "[t]he signature of any party to an action, or the party's attorney, shall constitute a certification that said party, or the party's attorney, has read the pleading, motion, or other paper; that to the best of his or her knowledge, information,

and belief after reasonable inquiry that there are sufficient grounds to support it, and that it is not submitted for delay or any other improper purpose." JRP 3(E).

62. In the response to the petition, Respondent alleged that the settlement agreement's inclusion of a provision preserving Surety's subrogation rights was produced via fraud. This allegation implicated fraud not only by Surety's counsel at the time, Ms. Wilson, but also by the Commission and its staff. Respondent based their allegation on the Declaration of Claimant, who declared that he was "never presented with a revised copy of these documents [settlement agreement and Order of Approval and Discharge] for my review and signature prior to entry." Dyer Declaration, Ex. 6. Despite Claimant's declaration, the documents provided by Ms. Wilson, her declaration, and the contemporaneous notes by Commission staff clearly established that the Claimant agreed to said revised settlement documents. Furthermore, Respondent's counsel's response failed to analyze each element of fraud necessary to prove a *prima facie* case. However, it appears that Respondent's counsel relied on the declaration of her client to support the allegation, and it is not clear to the Commission that Ms. Dyer's response runs afoul of JRP 3(E). This is a close call, but ultimately, we do not conclude that Respondent's allegation of fraud in its response to the petition warrants sanctions. Respondent's counsel is strongly cautioned that, in general, a party's allegation of fraud needs to be strongly supported, plead with particularity, and more thoroughly analyzed in briefing than it was here.

CONCLUSIONS

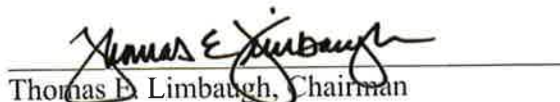
For the foregoing reasons, the Commission concludes the following:

1. The Commission has jurisdiction over the issues presented in Petitioner's petition.

2. Respondent has failed to prove that the settlement agreement and Order of Approval and Discharge in the underlying worker's compensation case was obtained via fraud. The settlement agreement and the Order of Approval and Discharge will not be set aside.
3. There is an actual controversy in this matter, and Petitioner's alleged silence and inaction does not constitute an acceptance of Respondent's offer of $54,490.44.
4. Petitioners are not estopped from further relief via equitable estoppel or quasi-estoppel.
5. Petitioners are entitled to recover their full subrogation amount from Respondent's settlement with the third-party tortfeasor. Petitioners' subrogation right is to be calculated from payments made in the worker's compensation case totaling $164,824.87, minus only the proportionate legal fees and costs, as per Idaho Code § 72-223(4). Therefore, Petitioners' lien balance stands at $93,473.20. Petitioners have a right to recover $93,473.20 from the proceeds of Respondent's settlement with the third-party tortfeasor.
6. Sanctions will not be imposed against Petitioners or Respondent.
7. Pursuant to JRP 15(F)(3) and Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this _19th______ day of __April______________, 2024.

INDUSTRIAL COMMISSION


Thomas E. Limbaugh, Chairman

Claire Sharp, Commissioner

Aaron White, Commissioner

ATTEST:

Kamerron Slay

Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _22nd______ day of _April___________, 2024, a true and correct copy of the foregoing **ORDER GRANTING PETITION FOR DECLARATORY RULING** was served by regular United States mail and Electronic mail upon each of the following:

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