

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOHNNIE D. DICKINSON,

Claimant,

v.

ADAMS COUNTY,

Employer,

and

STATE INSURANCE FUND,

Surety,

Defendants.

IC 2013-028122

**FINDINGS OF FACT,
CONCLUSIONS OF LAW
AND ORDER**

Filed March 21, 2017

This matter comes before the Commission for decision on the stipulated facts and supporting exhibits jointly filed by the parties on or about October 3, 2016. Appearing for Claimant is Bradford S. Eidam, Esq. Appearing for Defendants is Susan R. Veltman, Esq. The Commission has received and considered briefing by the parties, and the matter is now ready for decision. The following facts appear from the stipulation, supporting exhibits and briefs of the parties.

FINDINGS OF FACT

1. Claimant sustained a work related accident/injury on October 22, 2013. At the time of injury his average weekly wage was \$381.75. The claim was accepted and benefit payments were initiated, to include medical and temporary total disability benefits. Claimant's average weekly wage yielded temporary total disability benefits payable at 45% of the state average weekly wage.

2. Claimant reached maximum medical improvement on November 11, 2014. On that date Claimant was also given a 26% whole person impairment rating, calculated at \$370.70 per week for 130 weeks, or \$48,191.00. By letter dated December 18, 2014, Surety notified Claimant that temporary total disability benefits would be curtailed, and the payment of permanent physical impairment benefits (hereinafter referred to as “impairment”) initiated effective December 12, 2014.

3. From December 1, 2014 through December 31, 2015 Defendants paid impairment benefits in the amount of \$20,940.14.

4. By letter dated January 27, 2016, Surety advised Claimant of a further change in benefit status. Surety advised Claimant that it had decided to accept that Claimant is totally and permanently disabled, retroactive to December 13, 2014. It issued a check to Claimant in the amount of \$17,002.35 to cover total and permanent disability benefits for the period December 13, 2014 through December 31, 2015 and advised Claimant that for 2016, he would continue to receive TTD benefits, starting at \$1,413.68 per month for 2016. Finally, the January 27, 2016 letter notified Claimant that Surety waived any claim for setoff or reimbursement for impairment benefits paid from December 13, 2014 through December 31, 2015.

5. Of the 26% impairment rating given by Dr. Cox, \$27,250.86 remains unpaid. After agreeing to accept Claimant’s status as a totally and permanently disabled worker, and after initiating the payment of total and permanent disability benefits retroactive to December 13, 2014, Defendants refused to pay the unpaid balance of the impairment rating.

ISSUE

6. Defendants do not seek credit for, or reimbursement of, impairment payments made to date in the amount of \$20,949.14. The issue before the Commission is whether

Defendants are nevertheless obligated to pay to Claimant the sum of \$27,250.86, representing the balance arguably owed on the 26% impairment rating.

CONTENTIONS OF THE PARTIES

7. Claimant argues that resolution of this issue is controlled by *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014). *Corgatelli* establishes that a surety is not entitled to a credit for impairment paid against a subsequent award of total and permanent disability, since disability and impairment represent different types of benefits to which an injured worker is entitled. Claimant argues that from this it also follows that if impairment and disability are separate and distinct forms of compensation, Claimant ought to be entitled to the balance of his impairment rating, quite apart from the fact that he is receiving compensation for total and permanent disability.

8. In response, Defendants argue that Claimant's entitlement to total and permanent disability benefits is calculated pursuant to the provisions of Idaho Code § 72-408. That section specifies that in cases of total and permanent disability, after an injured worker reaches medical stability, benefits continue at the TTD rate for life. Idaho Code § 72-408 defines the entirety of a totally and permanently disabled worker's entitlement to income benefits, and the statutory scheme makes no provision for the payment of impairment to a worker so situated.

9. In the alternative, Claimant argues if Defendants' interpretation is adopted by the Commission, then that interpretation can only apply on the effective date of an order of the Industrial Commission awarding Claimant total and permanent disability status. Claimant argues that neither Defendants unilaterally, nor the parties by way of stipulation can establish Claimant's total and permanent disability without the blessing of the Industrial Commission per Idaho Code § 72-707.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER- 3

DISCUSSION

10. Claimant argues that *Corgatelli, supra*, controls the resolution of the narrow issue before the Commission. However, as developed *infra*, the recent case of *Mayer v. TPC Holdings, Inc.*, 160 Idaho 223, 370 P.3d 738 (2016) casts some doubt on the ongoing validity of *Corgatelli's* central underpinning, i.e. impairment and disability represent different classes of benefits, each calculated in a different fashion, and each separately payable. Because the parties recognize the importance of *Corgatelli* to the resolution of this matter a closer examination of that case is indicated.

11. Citing *Seiniger Law Offices, P.A. v. State of Idaho ex rel. Industrial Comm'n*, 154 Idaho 461, 299 P.3d 773 (2013), the *Corgatelli* Court first differentiated between the types of benefits payable in Idaho workers' compensation cases:

In worker's compensation cases, the claimant's recovery is typically categorized into types of benefits, such as medical expenses, temporary disability, permanent impairment, and permanent disability (disability in excess of impairment). Because those benefits are determined separately, the claimant's recovery for each type of benefit is an identifiable sum of money.

The Court then further delineated "impairment" and "disability" benefits payable under the Act:

One type of benefit provides compensation to an employee for a permanent impairment. "Permanent impairment" is any anatomic or functional abnormality or loss after maximal medical rehabilitation has been achieved and which abnormality or loss, medically, is considered stable or nonprogressive at the time of evaluation." I.C. § 72-422. The employee receives a rating for the permanent impairment set in terms of a percentage of the whole man, and then the employee's compensation is calculated pursuant to the statutory guidelines. I.C. §§ 72-424, -426 to -429. These benefits are paid at a percentage of the state average weekly wage. I.C. §§ 72-428 to -429.

Another type of benefits compensates the employee for a permanent disability. Permanent disability results "when the actual or presumed ability to engage in gainful activity is reduced or absent because of permanent impairment and no fundamental or marked change in the future can be reasonably expected." I.C. § 72-423. "Income benefits for total and partial disability during the period of recovery, and thereafter in cases of total and permanent disability, shall be paid to

the disabled employee subject to deduction on account of waiting period and subject to the maximum and minimum limits set forth in section 72-409, Idaho Code.” I.C. § 72-408.

12. Therefore, impairment and disability are separately calculated and paid classes of benefits. However, there are at least two observations that might be made about the assertions above quoted. First, as developed *infra*, Idaho Code §§ 72-428 -429 do not provide for the payment of impairment. Very plainly, those statutes provide for the payment of disability only. See *Mayer, supra*. Second, Idaho Code §§ 72-408 -409 provide for the payment of only one kind of permanent disability, i.e. total and permanent disability. Those workers who have suffered permanent disability less-than-total are compensated pursuant to the provisions of Idaho Code §§ 72-428-429.12.

13. In *Corgatelli*, the Commission relied on the provisions of Idaho Code § 72-425 to conclude that against its ultimate responsibility for the payment of total and permanent disability calculated per *Carey*, employer was entitled to a credit for impairment previously paid. The Court rejected this argument, noting that Idaho Code § 72-425 has nothing to do with the calculation of benefits payable to the injured worker. The Court held that claimant’s benefits were properly calculated under Idaho Code § 72-408, and that section made no provision for the type of credit given by the Industrial Commission.

This Court finds that there is no statutory basis for the Commission to award Steel West a credit for permanent physical impairment benefits previously paid to Corgatelli. Idaho Code section 72-408, which awards the employee income benefits for permanent disability, only offers a deduction “on account of waiting period.”

...

Thus, the current version of Idaho Code section 72-408, which provides for the employee such as Corgatelli to receive total and permanent disability benefits, includes no deduction or credit for previously paid permanent impairment benefits in its award of disability benefits.

14. The *Corgatelli* Court made a point of distinguishing between impairment and disability. The Court concluded that there is nothing in the provisions of Idaho Code § 72-408 which anticipates reducing the benefits payable to an injured worker under that section by the impairment ratings previously paid by employer. Claimant argues that since impairment and disability pass in space, it follows that Claimant is entitled to the entirety of his impairment rating in addition to total and permanent disability from the date of medical stability forward. Claimant's argument presupposes that the Act endorses the payment of impairment separate and distinct from the payment of disability.

15. Idaho Code § 72-408 provides, in pertinent part:

Income benefits for total and partial disability during the period of recovery, and thereafter in cases of total and permanent disability, shall be paid to the disabled employee subject to deduction on account of waiting period and subject to the maximum and minimum limits set forth in section 72-409, Idaho Code, as follows:

(1) For a period not to exceed a period of fifty-two (52) weeks, an amount equal to sixty-seven percent (67%) of his average weekly wage and thereafter an amount equal to sixty-seven per cent (67%) of the currently applicable average weekly state wage.

Pursuant to this section, and subject to a number of modifiers expressed in Idaho Code § 72-409, for the first 52 weeks of total disability Claimant's benefits are calculated at 67% of his average weekly wage, and thereafter in an amount equal to 67% of the currently-applicable average weekly state wage. Therefore, the benefits payable to a totally and permanently disabled employee will vary from year to year depending on increases or decreases in the average weekly state wage. The other notable difference between the calculation of total and permanent disability benefits and less than total and permanent disability under Idaho Code §§ 72-428 -429, is that total and permanent disability benefits are payable for the life of the injured worker. Finally, Idaho Code § 72-408 is the only statutory provision which deals with the calculation of

total and permanent disability benefits for an injured worker. By judicial construction, a special rule exists to calculate an employer's responsibility for the payment of total and permanent disability benefits in a case involving the ISIF. (See *Carey v. Clearwater County Road Dep't*, 107 Idaho 109, 686 P.2d 54 (1984)). However, the ISIF is not involved in this case, and only Idaho Code § 72-408 describes the benefits to which Claimant is entitled. Those benefits do not include payment of impairment described at Idaho Code § 72-422 and Idaho Code § 72-423, and the Act does not contain any other provision making impairment separately payable for one who is totally and permanent disabled.

16. Even though the payment of an "impairment award" to a totally and permanently disabled worker is nowhere endorsed by statute, impairment is nevertheless intrinsic to the evaluation of disability, for there can be no disability without impairment. *Selzer v. Ross Point Baptist Camp*, 2013 IIC 0015; *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 769 P.2d 1122 (1989). There is no reason to think that this rule does not apply with equal validity in both total and less-than-total cases. Absent a finding of impairment, i.e. anatomic injury, the issue of disability is not reached. Even so, the fact that impairment must exist in order for disability to be proved does not support a conclusion that a mechanism exists to pay an "impairment award." The case of *Mayer v. TPC Holdings, Inc.*, *supra*, succinctly illustrates this point.

17. In *Mayer* the Court made it clear that while practitioners and the Commission may have a tradition of referring to the payment of an "impairment award," the Act only supports the payment of disability. In *Mayer* it was suggested by Employer that Idaho Code § 72-428 deals only with the calculation of impairment benefits, notwithstanding that the statute specifies that it is to be utilized in calculating disability less than total. The *Mayer* Court rejected this argument,

ruling that Idaho Code § 72-428 unambiguously describes the method of calculating disability as distinct from impairment, even though the statute appears, at first blush, to parse types of bodily injury in a fashion typically associated with the calculation of impairment. An attentive reading of Idaho Code § 72-428 reveals that the only benefit that is payable under that section is disability, even though disability must be calculated “against” the list of enumerated physical impairments. Therefore, although it might appear that it is an impairment for anatomic injury that is being paid under Idaho Code § 72-428, the statute actually anticipates the payment of disability measured against the yardstick of scheduled anatomic injuries. While impairment and disability remain discreet concepts, impairment is simply a component of a disability rating, even though the disability payable may be greater than the measure of impairment, based on consideration of nonmedical factors.

18. In this regard, the *Mayer* Court stated:

TPC attempts to make much of the fact that Idaho Section 72-428 uses the term “permanent disability” to describe awards specified under section 72-428’s “scheduled permanent impairments.” This interchange of terms, TPC argues, makes the use of the term “permanent disability” ambiguous in section 72-431. However, the forerunner of Idaho Code section 72-428 was enacted in 1917, and since that time the Idaho Code has always referred to a disability award, not an impairment award. Although the term “impairment award” has crept into the vernacular of the workmen’s compensation bar, Idaho’s Workmen’s Compensation Law only provides for an award of income benefits based on disability, not impairment. *Fowler v. City of Rexburg*, 116 Idaho 1, 3 n.5, 773 P.2d 269, 271 n.5 (1988) (“Income benefits payable under the Workmen’s Compensation Law, with the exception of retraining benefits, I.C. § 72-450, are based upon disability, either temporary or permanent, but not merely impairment.”) A “permanent impairment” as the definitions themselves make clear, is simply a component of a “permanent disability.” I.C. §§ 72-422, -423. Thus, any final award made under Idaho’s Workmen’s Compensation Law is properly referred to as a disability award. *Fowler*, 116 Idaho at 3 n.5, 773 P.2d at 271 n.5 (“While in some cases the non-medical factors will not increase the permanent disability rating over the amount of the permanent impairment rating, the ultimate award of income benefits is based upon the permanent disability rating over the amount of the permanent impairment rating, the ultimate award of income benefits is based upon the permanent disability rating, not merely the

impairment rating.”) *see also Woodvine v. Triangle Diary*, 106 Idaho 716, 722, 682 P.2d 1263, 1269 (1984). (emphasis supplied)

As we pointed out in the recent case of *Lableu v. Challenger Companies*, 2016 IIC 0055 (2016), the treatment given to impairment in *Mayer* is consistent with the statutory scheme and prior case law.

19. Therefore an “impairment award,” characterized as such, is not a benefit payable under the Act. Impairment is only payable as a component of disability less-than-total under I.C. § 72-428, and not at all in the case of total and permanent disability under I.C. § 72-408. While the *Corgatelli* Court decried the payment of PPI as an illegal “credit” against a subsequent disability award, this objection evaporates once it is recognized that impairment is a component part of disability; that impairment is disability.

20. *Corgatelli* refused to allow surety to credit the payment of impairment against a subsequent award of total and permanent disability, since impairment and disability describe two separate classes of benefits. *Mayer* recognizes that the payment of impairment is the payment of disability. The cases are difficult to reconcile. Since *Mayer* is the Court’s most recent pronouncement we accept its guidance to the extent it conflicts with *Corgatelli*.¹

21. As applied to these facts, a finding that Claimant suffered impairment, in this case, 26% of the whole person, is integral to the conclusion that he is totally and permanently disabled, and entitled to benefits under Idaho Code § 72-408. This is not to say that Claimant is

¹ On February 24th 2017, the Court issued its opinion in *Davis v. Hammack Management Inc.*, (2017 Opinion No. 16) a case which cited the relevant holding of *Corgatelli* with approval. The decision reiterated, but did not revisit, the holding of *Corgatelli*. Regarding *Corgatelli*, the *Davis* Court said: “In *Corgatelli*, the Court observed: ‘Examining worker’s compensation law as a whole... this Court finds that there is no statutory basis for the Commission to award [the employer] a credit for permanent physical impairment benefits previously paid to *Corgatelli*.’ *Id.* at 292, 335 P.3d at 1155.” Therefore, *Corgatelli* was cited purely for the proposition that the statutory scheme supports no credit for impairment previously paid. *Davis* does not squarely address the issue before the Commission in this case: Where total and permanent disability is payable to Claimant, does the Act support a separate award of impairment? Finally, *Davis* does not address whether it is possible to reconcile *Corgatelli* with *Mayer*.

entitled to the payment of both the impairment rating and total and permanent disability benefits. His impairment rating is subsumed within his entitlement to lifetime total and permanent disability under Idaho Code § 72-408. A separate entitlement to the payment of the impairment rating does not exist in statute. Any payments of impairment made prior to the assessment of Claimant's disability are merely advances made towards Claimant's disability.² Although this issue is not before us, the \$20,940.14 previously paid is properly viewed as the payment of disability, and these payments should be recognized as partial payment of the total and permanent disability subsequently conceded by Defendants. The remaining balance of \$27,250.86 "owed" on the 26% rating is not separately owed at all. Rather, it is a miscible component of Claimant's total and permanent disability, for which no authority exists to require separate payment in addition to the payment of total and permanent disability under I.C. § 72-408.

22. To summarize, per *Mayer*, an "impairment award," characterized as such, is not payable as a separate benefit under the Act. Only disability is payable, total or less-than-total. However, an injured worker must suffer impairment in order to implicate entitlement to disability. In a less-than-total case, Claimant's impairment, i.e. his anatomic injury, may represent his entire disability or only a part of his disability. Regardless, for purposes of calculating benefits payable to Claimant, impairment is only relevant because it is disability. In the total case, while impairment must still exist in order to support a finding of total and

² It might be argued, pursuant to I.C. § 72-316, that even if impairment is a component of disability, those payments should only be recouped at the end of the obligation to pay total and permanent disability. Since that obligation ends at death, and since foreknowledge of death is generally denied, it is impossible to shorten the period of payment before that period comes to an unforeseen end. Therefore, if I.C. § 72-316 is applicable, the payment of impairment could never be recouped in a case of total and permanent disability payable under I.C. § 72-408. However I.C. § 72-316 is inapplicable since it applies to payments which "were not due and payable when made." Here, *Mayer* specifies that impairment is simply part of disability. Therefore the payment of impairment following medical stability is a payment that is due when made.

permanent disability, the payment of impairment, as a separate benefit, is not recognized by the Act.

23. The conclusion we have reached in this case is consistent with what we have done in the past. Historically, the Commission has endorsed the practice of crediting Employer with impairment paid during the pendency of the determination of the employer's ultimate responsibility to pay total and permanent disability benefits. This practice has conferred several benefits on the workers' compensation system and the parties to a case. What usually happens is exactly what happened in this case: Claimant suffers a severe injury, but at the point he reaches medical stability, it is yet unclear whether his eventual status will be one of total and permanent disability. Following medical stability, claimant may need to try his hand at work, or vocational experts may need to weigh in, before a determination can be made as to the extent and degree of claimant's disability. The Commission may eventually be asked to determine whether claimant is totally and permanently disabled. During this period of uncertainty, defendants typically commence the payment of any impairment rating, a rating which usually coincides with the pronouncement of medical stability. This allows claimant's income stream to continue more or less unbroken after the date of medical stability, and affords the parties some breathing room to figure out what to do with the case. Defendants have historically made such payments without concern, since they knew that such payments would be credited against their eventual obligation to pay disability. The conclusion we reach today will allow this practice to continue.

24. To do as Claimant urges would discourage making impairment payments during the pendency of a determination of total and permanent disability. As we have held, per *Mayer*, an "impairment award" is not a benefit separately payable from disability. However if surety is unable to apply impairment as an advance against disability, then sureties will not be

incentivized to make such payments following claimant's date of medical stability in any case where the prospect of total and permanent disability abides pursuant to I.C. § 72-408. In any such case, the injured worker's income stream will likely come to an end at the date of medical stability. Similarly, surety may be unwilling to simply initiate the payment of total and permanent disability benefits on the date of medical stability; surety may not believe they are owed and the payment of the same may appear to be a concession that claimant is totally and permanently disabled.

CONCLUSIONS OF LAW

1. Based on the foregoing, we conclude that Defendants have no legal obligation to pay the unpaid balance of the 26% PPI rating.
2. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this 21st day of March, 2017.

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 21st day of March, 2017, a true and correct copy of **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** were served by regular United States Mail upon each of the following:

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_____/s/_____