

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

ROBERT TONSMEIRE,

Claimant,

v.

IDAHO RIVER ADVENTURES, INC.,

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,

Defendants.

**IC 2013-029557**

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

Filed May 5, 2017

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**INTRODUCTION**

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Brian Harper, who conducted a hearing in Boise, Idaho, on November 30, 2016. Claimant represented himself *pro se*. Jon Bauman, of Boise, represented Idaho River Adventures, Inc. (Employer), and Idaho State Insurance Fund (Surety), Defendants. Oral and documentary evidence was admitted. Post-hearing briefs were submitted. The matter came under advisement on March 21, 2017. The undersigned Commissioners have chosen not to adopt the Referee's recommendation and hereby issue their own findings of fact, conclusions of law and order.

**ISSUES**

The issues to be decided are:

1. Whether Claimant has complied with the notice limitations set forth in Idaho Code § 72-701 through Idaho Code § 72-704, and whether these limitations are

**FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 1**

tolled pursuant to Idaho Code § 72-604;

2. Determination of Claimant's average weekly wage (AWW);
3. Whether and to what extent Claimant is entitled to the following benefits:
  - a. Medical care;
  - b. Temporary partial and/or temporary total disability benefits (TPD/TTD); and
  - c. Permanent partial impairment (PPI); and
4. Whether Defendants are entitled to credit/reimbursement for overpayment of benefits to Claimant.<sup>1</sup>

### **CONTENTIONS OF THE PARTIES**

Claimant asserts that on July 18, 2013, he sustained injury to his left big toe while acting within the course and scope of his river-guiding duties for Employer. Claimant timely gave notice to Employer of the injury. There was a several-month delay by Employer in notifying Surety, and in Surety processing the claim. Claimant had to continue to work that summer in spite of the painful injury, but eventually underwent

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<sup>1</sup> As Defendants correctly note in their briefing, "additional issues specified by Claimant are not appropriate for adjudication either because they are irrelevant, moot, subsumed within the issues noticed by the Commission, or lie outside of the Commission's jurisdiction." Defendants' briefing, footnote 3, p. 12. Those requested "issues" specified by Claimant include (with Commission's reason for not adjudicating them): 1. Was Claimant a resident of Idaho and a licensed river guide at the time of injury? Not contested by any party. 2. Did Employer post an Idaho Code § 72-312 notice? Irrelevant to these proceedings. 3. Did Employer "knowingly side step his responsibility and liability" by not reporting the accident to Surety, "other members of his organization and board members of [Employer]...putting [Claimant] at risk of possible bone infection and other such calamity which might result from the situation which was not tended to in a professional manner even after doctors on the trip expressed concern for [Claimant]" and should there be a "penalty" for such behavior? Irrelevant to these proceedings and beyond the scope of jurisdiction. 4. Did Employer and Surety violate relevant statutes by failing to timely report the accident, and process the claim, respectively? Irrelevant to these proceedings. 5. Did Surety authorize surgery "some 5 months after the injury"? Not in dispute. 6. "As we live in a cause and effect world, was the surgery performed necessary had the claim been filed in a timely matter (manner)"? Irrelevant to these proceedings. 7. Was the claim ever unreasonably denied? Since Idaho Code § 72-804 is not in play, not relevant. 8. Can the incident "result in [Employer's] ability to employ in the State of Idaho? Claimant apparently wants to curtail Employer's ability to operate in Idaho as a penalty. Irrelevant to these proceedings and outside the scope of this Commission's jurisdiction. 9. Can Claimant request a review by the Board of Examiners? Irrelevant to these proceedings and beyond scope of authority to order such review, even if the Commission knew which Board of Examiners Claimant was referencing. 10. Did Employer Dustin Aherin break his ankle after Claimant's injury and was he covered by worker's compensation insurance such that he recovered benefits for his injury? Irrelevant. The other issues raised by Claimant are discussed and decided herein.

surgery to remedy his condition. No TTDs were paid to Claimant during his post-surgical period of recovery, and he is entitled to compensation, including TTDs, with interest accruing at 10% annually, and repayment of interest he paid on “payday” loans he took out prior to and after his surgery.<sup>2</sup>

Defendants argue Claimant suffered a work-related injury to his big toe, for which all medical bills have been paid. Claimant mistakenly received nearly \$14,000 in TTD benefits during 2013, to which he was not entitled. Surety is permitted to take a credit for TTD benefits due and owing after Claimant’s 2014 toe surgery, and further should recover from Claimant the remaining balance of the overpayment after all credits are deducted from the overpayment.

### **EVIDENCE CONSIDERED**

The record in this matter consists of the following:

1. Claimant’s testimony, taken at hearing;
2. Employer’s representative Dustin Aherin’s testimony, taken at hearing;
3. Surety’s representative Lisa Kearns’ testimony, taken at hearing;
4. Claimant’s Exhibit (CE) A, admitted at hearing; and
5. Defendants’ Exhibits (DE) 1 through 8, admitted at hearing.

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<sup>2</sup> This is a highly-sanitized version of Claimant’s arguments, since most of his complaints are irrelevant to a workers’ compensation proceeding. Even those which are true – such as the Employer’s and Surety’s delay in accepting and processing the claim, which delay conceivably necessitated surgery which might not otherwise have been required – do not translate into damages awardable in this forum, where Claimant proceeded *pro se*. Other arguments are either fanciful or clearly outside of the realm of workers’ compensation proceedings. For example, claims of Employer and Surety negligence, reckless and/or criminal behavior, Referee bias and “unprofessional skill level” for not ruling on Claimant’s negligence arguments, and unprofessional, ignorant behavior by the Referee and Defendants’ attorney for not admitting a newspaper article about him into evidence, which would “prove” his professional experience and skill level, are not genuine and material issues for resolution herein. Finally Claimant’s “warning” to Surety that if his claim is not paid in full “all involved will be summoned to higher Courts where a review of their actions will be taken in from the Board of Examiners, damages and charges brought against them in the Idaho Supreme Court for criminal and reckless behavior in the public eye and also in the U.S. Federal District Court System to shut [Surety] down for all time” (Claimant’s brief, p. 7) warrants no further comment.

## **FINDINGS OF FACT**

### ***Work and Medical History - 2013***

1. Claimant is an experienced river guide. He has worked for various entities over the years, and in the summer of 2013, he let it be known to various river companies that he was available as needed to guide on a fill-in basis. He was hired by Employer to guide a six-day river rafting trip in July, 2013.

2. On his last evening on the river, July 18, 2013, Claimant injured his left big toe when he struck it on a rock. Dustin Aherin, who had hired Claimant, and was the owner-operator of Employer, witnessed the accident, and assisted with first aid for Claimant's injury immediately after it happened. Claimant testified that when he inquired regarding workers' compensation coverage, Mr. Aherin stated he was unsure of coverage, and would get back to Claimant later.

3. Claimant presented to Steele Memorial Medical Center (Steele) in Salmon on the evening he returned to civilization, July 19, 2013, but was not officially seen by a physician due to Claimant's uncertainty regarding workers' compensation coverage and his lack of funds to pay for the visit on his own. However, he was seen informally in the waiting room, and no records for that visit were generated.

4. Claimant also received a prescription for penicillin from one of the physicians who had been on the river trip with Claimant. That prescription was delivered to a pharmacy in Salmon on Friday, July 19. Mr. Aherin agreed to forward the prescription to Claimant, who was leaving for another river guiding trip with a different employer the

following day. However, the pharmacy was closed the next day, Saturday, and Mr. Aherin was unable to pick up the medication. As such, the penicillin was never sent to Claimant.<sup>3</sup>

5. After the one trip he made for Employer, Claimant worked for a different employer as a river guide for several more trips during the 2013 rafting season. He testified that he had to keep guiding, in spite of the pain of his broken toe, due to his financial position.

6. Claimant's left big toe continued to bother him throughout the summer and into the fall of 2013. He sought sporadic medical care, including antibiotics from Salmon River Clinic on July 26 and August 8, 2013, x-rays at Steele on August 30, 2013, and examination by Clinton Clark, DPM, at St. Luke's Health System in October. Dr. Clark reviewed the prior x-rays, noted an intra-articular fracture of Claimant's hallux interphalangeal joint with a laterally subluxed hallux (his big toe was crooked and overlapping his second toe), with no pain and slight swelling. Claimant's concern on this visit was the fact he had no health insurance but wanted to know what it would cost to surgically straighten his toe.

7. Perhaps due to lack of insurance at that time, Claimant was not seen again by Dr. Clark. His next medical visit was with Kerry Anderson, DPM, at Idaho Foot & Ankle Associates in the Boise area on October 29, 2013. By then, he had contacted Employer inquiring about the availability of workers' compensation insurance for his injury, as discussed below. Other than taking additional x-rays, the medical records are not clear on what treatment, if any, Dr. Kerry suggested, although it may have been a fusion surgery.

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<sup>3</sup> While Claimant takes umbrage at the fact the prescription was not delivered to him, that fact has no bearing on his claim for benefits, as he did not pay for the prescription. The failure to take the medicine did not lead to any medical treatment for which Surety has failed to pay. To the extent it matters, Employer's excuse, that the pharmacy was closed, and by the time it re-opened on Monday, Claimant's location on the Salmon River was unknown, and perhaps beyond any location for air delivery, is reasonable.

8. In late November, Claimant was back at St. Luke's Podiatry Clinic. On that visit he was treated by Scott Gravier, DPM. Claimant was contemporaneously working on obtaining workers' compensation coverage. He desired surgery to correct his malformed toe. Dr. Gravier offered two surgical options; first he could fuse the joint, which Claimant did not want. Second, the doctor could attempt a reduction of the fracture fragments with internal fixation of the toe in a correct anatomical position. Claimant chose this option. Surety had yet to accept the claim, but Claimant was instructed by Dr. Gravier to contact him when the insurance issue was squared away.

### ***Workers' Compensation Issues - 2013***

9. Employer initially failed to file a Form 1 notice of injury when the accident happened.

10. Claimant testified that he repeatedly spoke with Employer regarding workers' compensation insurance throughout the remainder of the summer of 2013, but was given no substantive information. Employer testified that the first contact Claimant made with Employer regarding workers' compensation coverage came in October. Either way, it is beyond dispute that in October, 2013, Employer was, or became, aware that Claimant was still having issues with his left big toe, and needed further treatment.

11. Employer contacted Surety in October, 2013, and was instructed to fill out and send Surety an incident report.<sup>4</sup> Employer complied. Surety eventually accepted the claim in late 2013.

12. Next, because Claimant had only worked for Employer for a few days prior to his injury, Surety asked for 13-week wage information for guides in Employer's

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<sup>4</sup> Employer testified that this was the first workers' compensation claim made against it, and was unfamiliar with the need to notify the surety, and timeframes for doing so.

business. *See* Idaho Code § 72-419(4). Employer used 13-week wage/days worked information for a full-time river guide in its employ, even though Claimant was not a full-time employee, but rather was a temporary, substitute worker, hired for a few days only, at the rate of \$140 per day. Employer calculated that the top-end range for one of its full-time guides for the peak 13-week period would be 43 days of work at \$140 per day worked, or \$6,020. That information was sent to Surety.

13. Instead of treating Claimant as a seasonal worker, Surety used the “best 13 weeks” method of calculating AWW for Claimant. However, instead of dividing the “best 13 weeks” wage figure by thirteen weeks (91 days), Surety divided the 13 week wage figure of \$6,020 by actual days worked, 43, and multiplied that figure by seven to give an AWW of \$980. Had Surety divided the \$6,020 by thirteen, as the statute contemplates, ( $\$6,020/13$ ) the AWW would have been \$463.08.

14. Idaho Code § 72-408(1) provides for TTD benefits of 67% of the employee’s average weekly wage, subject to a maximum payment or cap equal to 90% of the average state wage for the year in question, as set out in Idaho Code § 72-409.<sup>5</sup> The cap in 2013 was \$606.60. Since 67% of the Surety’s miscalculated AWW for Claimant came to \$656.60, ( $\$980 \times .67 = \$656.60$ ), which figure exceeded the statutory cap, Surety concluded Claimant’s proper TTD benefits should be in the sum of the statutory cap of \$606.60.

15. Compounding its error, Surety failed to ascertain whether Claimant had been taken off work by any doctor as a result of the injury. Instead, it incorrectly assumed

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<sup>5</sup> There are time restrictions on this payment amount, which are not applicable herein. There is also a minimum payment floor equal to 15% of the average state wage, applied to very low-end wage earners in lieu of using 67% of the worker’s actual AWW, as discussed in greater detail below.

Claimant had been unable to work since the date of his industrial injury, when in reality, Claimant continued his guiding work through September 11, 2013.

16. As the result of Surety's compounded errors, Claimant received two checks for TTD benefits in December, 2013, totalling \$13,778.49. These benefits were paid for the period July 26, 2013 through December 31, 2013. DE 4, p. 123.

***Work and Medical History - 2014***

17. After Surety accepted the claim, Claimant arranged for surgery with Dr. Graviet. Surgery took place on January 10, 2014. Defendants paid for the surgery, and in fact, have paid for all of Claimant's medical expenses associated with this industrial accident.

18. Post-surgery, Dr. Graviet took Claimant off work. On March 10, 2014, Claimant was released for light-duty work, and he was determined to be medically stable and released to full-duty work without restrictions as of May 1, 2014. Dr. Graviet found Claimant had suffered no PPI from the toe injury.

19. In October, 2014, Claimant returned to Dr. Graviet. Claimant reported no pain and indicated he was able to work as a river guide throughout the summer of 2014, where he "did fine." DE 2, p. 120. The doctor noted slightly diminished big toe function and some residual deformity, but neither of those conditions limited Claimant's ability to do his work. Claimant's hearing testimony was consistent with these findings.

***Workers' Compensation Issues – 2014***

20. Although Surety paid all of Claimant's medical charges associated with this claim, the same cannot be said for Claimant's TTD benefits. By its own admission, Surety refused to pay TTD benefits to Claimant during his post-surgical recovery period in 2014.

21. Surety reasoned that because it paid Claimant unwarranted TTD benefits in excess of \$13,700 in 2013 (due to its unilateral mistakes), it could simply take a credit for TTD payments it admittedly owed Claimant in 2014 from the TTD payments it erroneously paid him previously. In addition, Surety now seeks to recover from Claimant the balance of the \$13,778.49 paid to him in 2013, after the credit for unpaid TTD benefits rightfully owed Claimant in 2014 is applied. Surety has calculated the TTD benefits Claimant should have received in 2014 at \$5,097.13. Therefore, Surety claims it is currently owed from Claimant the sum of \$8,681.36, calculated as follows;  $\$13,778.49 - \$5,097.13 = \$8,681.36$ .

### **DISCUSSION AND FURTHER FINDINGS**

Several of the issues noticed for hearing may be dispatched summarily. Those include notice, medical care payments, and PPI. The remaining three inter-related issues – determination of Claimant’s right to additional TTD benefits, Claimant’s AWW, and Defendants’ right to a credit or reimbursement of overpayment of benefits – will be discussed in greater detail thereafter.

#### ***Notice***

22. Claimant provided adequate notice of his injury, as Employer knew of the injury when it happened, having witnessed it. Likewise, Claimant timely made a claim for benefits. Defendants concede there is no notice defense available to it. Claimant has proven he complied with the notice and claim requirements of Idaho Code §§ 72-701 through 704.

#### ***Medical Care Benefits***

23. Claimant acknowledged at hearing that Surety has paid all medical care expenses he incurred in connection with this claim. There is no medical evidence in the record suggesting Claimant needs, or is entitled to, additional medical care for his previously-injured toe. Claimant

has failed to prove the right to past unpaid or future medical care benefits for his injury in question.<sup>6</sup>

***Permanent Partial Impairment (PPI) Benefits***

24. Claimant acknowledged at hearing, consistent with the record, that Dr. Gravier determined Claimant suffered no PPI as a result of the injury. Nothing in the record refutes that uncontested evidence. To the extent Claimant argues Defendants should have provided him with an impairment rating, such argument is incorrect. Defendants are not required to prove any element of Claimant's case for him; rather, Claimant has the burden of proving, by a preponderance of the evidence, all the facts essential to recovery. *Evans v. Hara's, Inc.*, 123 Idaho 473, 479, 849 P.2d 934, 940 (1993). That burden extends to proving a permanent impairment. See *e.g. Sharp v. Sunshine Precious Metals, Inc.*, 1997 IIC 1043 (Nov. 14, 1997). Claimant has failed to prove a right to PPI benefits.

***Temporary Total Disability (TTD) Benefits***

25. Although the parties dispute Claimant's entitlement to TTD benefits from July 18, 2013 through January 9, 2014, they agree that Claimant is entitled to TTD benefits from January 10, 2014 (the date of surgery) through April 30, 2014. Defendants take the position that their obligation to pay TTD benefits following the surgery is satisfied by their overpayment of TTD benefits prior to the date of surgery.

26. Although not specifically using the term, Defendants' arguments imply that it would be inequitable to not allow a credit for the TTD payments made in 2013 against

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<sup>6</sup> Claimant argues Defendants should have told him he needed physical therapy on his toe, but there is nothing in the record even remotely implying that any physician suggested the need for physical therapy for Claimant's toe post-surgery. While Claimant is transfixed on the idea of physical therapy, such a modality is not always indicated in connection with an injury, and without medical evidence on point, there is simply nothing in the record supporting the notion that Claimant needed, or should have had, physical therapy after his toe surgery. It is not up to the Defendants to prescribe treatment; that is within the purview of the treating physician.

the weekly TTD benefits to which Claimant was entitled after his 2014 surgery. Having read and re-read their brief, there is no escaping the fact the Defendants are asking for equitable relief from their unilateral mistake.

27. As a general rule the Commission is not vested with “equitable relief” authority. A unanimous Supreme Court recently noted in *Deon v. H&J, Inc., d/b/a Best Western Coeur D’Alene Inn & Conf. Center, et.al.*, 157 Idaho 665, 339 P.3d 550 (2014), *fn* 2, “the Commission derives its authority solely from statutory law and does not have the ability to operate in the equitable realm.”<sup>7</sup>

28. In arguing for a credit and reimbursement for imprudently-made TTD payments, Defendants cite to no statutory or case authority to justify their position. Indeed, they spend considerable time constructing an argument against application of the one statute, Idaho Code § 72-316, which might be applicable to this situation. Idaho Code § 72-316 provides in pertinent part;

Any payments made by the employer or his insurer to a workman injured..., during the period of disability, ...which under the provisions of this law, were not due and payable when made, may, subject to the approval of the commission, be deducted from the amount yet owing and to be paid as income benefits... .

29. The evidence establishes that the State Insurance Fund did not seek prior approval of the Commission before determining to apply the TTD overpayment to its obligation to pay TTD benefits following Claimant’s surgery. (Transcript 156/25-157/3). Prior decisions of the Commission make it clear that in order to apply an overpayment as a credit against an amount yet due and owing, surety must seek the Commission’s prior approval. *Melendez v. Con Agra*

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<sup>7</sup> But see *Brooks v. Standard Fire Ins. Co.*, 117 Idaho 1066, 793 P.2d 1238 (1990). (Commission equitably apportioning contribution among competing sureties upheld.)

*Foods/Lamb Weston*, 2015 IIC 0038 (2015). However, Defendants argue that Idaho Code § 72-316 is not applicable to these facts since that statute only applies where the overpayments were made “during the period of disability”. Defendants argue that the overpayments in question were not made during a period in which Claimant was disabled, and therefore, the fact that Defendants unilaterally decided to apply the overpayment as a credit to TTDs actually owed is not problematic.

30. Idaho Code § 72-408 authorizes the payment of income benefits for “disability” during a period of recovery. Here, it is not seriously contended that Claimant was not in a period of recovery between the date of his accident and the date on which he was declared medically stable following his foot surgery. It is, however, argued that Claimant did not suffer a disability during his period of recovery until the date of surgery. Disability in this regard, is a term of art, and is defined at Idaho Code § 72-102(11) as follows:

“Disability,” for purposes of determining total or partial temporary disability income benefits, means a decrease in wage-earning capacity due to injury or occupational disease, as such capacity is affected by the medical factor of physical impairment, and by pertinent nonmedical factors as provided in section 72-430, Idaho Code.

Claimant has not suffered a “disability” during his period of recovery unless he has suffered a decrease in wage earning capacity due to the injury in question. Claimant cannot demonstrate a decrease in wage earning capacity absent some proof that the accident has resulted in the imposition of limitations/restrictions which impact his ability to engage in gainful activity.

31. Here, we surmise that there is evidence to support the conclusion that certain restrictions were recommended for Claimant following the accident. One or more of the paying guests on the trip during which Claimant was injured was a physician. (Transcript 35/3-5). One of these physicians, Timothy R. Moreno, M.D., examined Claimant’s toe on the evening of July

19, 2013, following the conclusion of the river trip. It was Moreno who wrote a prescription for antibiotics. Moreno also advised Claimant to “stay off the foot until healed.” [sic] DE 2, p 97 . Dr. Moreno’s advice reasonably constitutes a medical recommendation that Claimant limit his activities, including remunerative activities, while in his period of recovery. However, the record fails to demonstrate that Claimant followed this advice. Indeed, what evidence there is demonstrates that Claimant took on another week long guiding assignment on July 20, and other guiding assignments, as he normally would, for the rest of the floating season, without regard to his foot injury. (Transcript 48/19-49/1). The record reflects that Claimant’s floating season came to an end on or about September 11, 2013, when he completed his last trip of the season for Adventure Sun Valley. DE 7 and 8. Therefore, we agree with Defendants’ assertion that Claimant has failed to demonstrate that the payments made for the period July 18, 2013 through September 11, 2013 were made during a period of disability as contemplated by Idaho Code § 72-316. Despite having been given the medical recommendation to stay off his foot until it healed, Claimant did not abide by this restriction, and continued to work as he normally would during floating season. Claimant is not entitled to the TTD benefits he received for the period July 18, 2013 through September 11, 2013 because he did not suffer from a “disability” as that term is defined at Idaho Code § 72-102(11).

32. There is no reason to believe, however, that Dr. Moreno’s restriction was not also in effect between September 12, 2013 and the date of surgery. There is no evidence that Claimant was engaged in gainful activity between September 12, 2013 and his date of surgery, and from Dr. Moreno’s letter, we conclude that Claimant was disabled during this time period. Per *Malueg v. Pierson Enterprises*, 111 Idaho 789, 727 P.2d 1217 (1986), once Claimant demonstrates, as he has, that he is in a period of recovery, he is entitled to TTD benefits unless,

and until, there is evidence that he has been released to light-duty work and that his former employer has made work available to him or that there is employment available to him in the general labor market which Claimant has an opportunity to compete for, and which is consistent with his limitations/restrictions. None of these considerations obtain in the instant matter, and we conclude that Claimant is entitled to TTD benefits, at the appropriate rate, from September 12, 2013 through April 30, 2014, his date of medical stability.

33. For the period September 12, 2013 through January 9, 2014, we believe that Idaho Code § 72-316 is applicable because, as we have discussed above, Claimant must be considered “disabled” during that time period. As developed below, the payments made by Defendants during this time frame were made at an inflated rate, such that Claimant did receive an overpayment of TTD benefits for the period in question. This would ordinarily implicate Defendants’ rights under Idaho Code § 72-316 but for the fact that Defendants unilaterally determined to apply such TTD overpayment to Defendants’ acknowledged obligation to pay TTD benefits following Claimant’s surgery. As developed above, the Commission’s prior approval is required, and therefore Defendants are not entitled to apply any overpayment of TTD benefits during the period September 12, 2013 through January 9, 2014 to any subsequent obligation to pay TTD benefits.

34. As respects the period July 18, 2013 through September 11, 2013, while Idaho Code § 72-316 is not applicable to this time frame, that conclusion gets Defendants no closer to their ultimate goal of applying the overpayment of TTD benefits during the period July 18, 2013 through September 11, 2013 to their established TTD obligation following Claimant’s date of surgery. Defendants assume that since Idaho Code § 72-316 does not apply to benefits paid between July 18, 2013 and September 11, 2013 it must be lawful for them to apply the

overpayment to their obligation to pay TTD benefits without the need to obtain the Commission's prior approval. The recent case of *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014) makes it clear that absent statutory authority, the right to apply an overpayment as a credit to a subsequent obligation does not exist. We are assured that this right exists, but we are not referred to any statutory authority which supports a right to apply an erroneously made payment as a credit against a subsequent obligation to pay benefits. Having persuasively argued that Idaho Code § 72-316 does not apply to the facts of this case, Defendants must point the Commission to other statutory authority supporting their designs on applying the overpayment as a credit under the peculiar facts of this case. Defendants have not referred the Commission to such authority, and a review of the Act does not reveal to the Commission that such authority exists.

35. Implied in Defendants' briefing is the notion that allowing the credit is just the right thing to do. While at some level the argument might make sense, without statutory or case authority to guide the Commission, it appears there is no remedy available to Defendants for their mistake. Certainly, this is not a case where a legally-sophisticated claimant, who knew or should have known of Surety's unilateral mistake, stayed silent while knowingly accepting payments to which he was not entitled. To the contrary, Claimant herein still believes he is entitled to the TTD payments made in 2013, even after all the evidence to the contrary has been produced. The only legally-sophisticated party herein is Surety.

36. Defendants have failed to prove a right to a credit under the Idaho Workers' Compensation Act for their misguided payment of TTD benefits to Claimant in 2013.

***Average Weekly Wage (AWW) Calculation***

37. We have concluded that Claimant is entitled to TTD benefits from September 12, 2013 through April 30, 2014. The next step is to determine the proper dollar value of Claimant's weekly TTD benefits for his period of recovery in 2013 and 2014. In order to make that calculation, it is first necessary to calculate Claimant's AWW. Idaho Code provides 11 categories of work situations used to figure AWW. It is necessary to decide the most appropriate category in order to properly compute Claimant's true AWW.

38. In calculating Claimant's TTD benefits for his period of recovery in 2014, Surety used the AWW calculation procedure outlined in Idaho Code § 72-419(4)(a) and (b), which applies to an employee with a fixed daily wage, such as Claimant, who was paid a fixed daily wage of \$140 when working for Employer. To determine AWW using the provisions of Idaho Code § 72-419(4)(a), one divides by 13 the employee's highest wages earned with Employer in the first, second, third, and fourth 13 consecutive week period during the 52 weeks immediately preceding the accident in question. However, as outlined in Idaho Code § 72-419(4)(b), when the employee has worked for less than 12 weeks immediately preceding the accident, the calculation outlined above is made using the amount of wages the employee *would have made* had he been employed for the full 13 weeks immediately prior to the accident, assuming such work was available. Because Claimant had only worked for Employer for six days when he was injured, Surety sought information from Employer regarding wages for its river guides in the four preceding 13 week periods, and used the wages most advantageous for Claimant, which was \$6,020. In 2014, Surety calculated Claimant's AWW by dividing \$6,020 by 13, as required by the statute. Surety determined that Claimant's AWW under the provisions of Idaho Code § 72-419(4) was \$463.08. His weekly TTD benefit based off such AWW would be 67% of his AWW of \$463.08, or \$310.26 for his 2014 period of recovery.

39. If Idaho Code § 72-419(4) is the proper statute under which to calculate Claimant's AWW, then Surety's computations are correct, and figuring Claimant's TTD would simply require one to determine the number of days Claimant was in a period of recovery to figure his total TTD benefits due and owing. However, the Commission is under no obligation to simply assume the correct statute was utilized by Surety when figuring Claimant's AWW.

40. In fact, Claimant was a seasonal employee. Surety acknowledged this at hearing, but testified that if it used the seasonal employee computation, Claimant might not receive as much TTD benefits. It chose to utilize Idaho Code § 72-419(4) when calculating Claimant's AWW, as it would result in a larger benefit to Claimant.

41. The question for resolution is whether this Commission should defer to a clearly-incorrect AWW computation when it benefits the Claimant to do so, or whether it should apply the correct computation even though in so doing it works to Claimant's relative detriment.

42. Given the fact that calculation of AWW was a listed issue for resolution, and both parties acknowledge that Claimant was in fact a seasonal worker, it seems more appropriate to calculate Claimant's AWW as a seasonal worker, as provided for in Idaho Code § 72-419(6). In so doing, the Commission notes this is a situation less like *Deon v. H&J, Inc., d/b/a Best Western Coeur D'Alene Inn & Conf. Center, supra*, "this Court takes a dim view of fact-finding tribunals raising defenses or theories *sua sponte*" *Id.* at 671, 339 P.3d at 556, and more akin to *Green v. Green*, 160 Idaho 275, 371 P.3d 329 (2016), wherein using the proper methodology does "not raise a new theory or defense." *Id.* at 282, 371 P.3d at 336.

43. The parties in their briefing did not argue for or against any particular methodology for determining AWW, although Defendants did note at several points that a seasonal employee computation for AWW was available.

44. Calculating Claimant's AWW under the clearly-appropriate seasonal worker standard does not raise a new theory or defense. Finally, to ignore reality and resort to a legal fiction simply because doing so benefits a particular claimant is not a proper exercise of discretion, nor does it promote justice in the long run.

45. Idaho Code § 72-419(6) specifically applies to calculating AWW for seasonal workers. Therein it states;

In seasonal occupations that do not customarily operate throughout the entire year, the average weekly wage shall be taken to be one-fiftieth (1/50) of the total wages which the employee has earned from all occupations during the twelve (12) calendar months immediately preceding the time of the accident... .

As noted above, Claimant acknowledged he was a seasonal worker in the river guiding business, which is a seasonal industry in Idaho. His AWW is properly determined by application of Idaho Code § 72-419(6).

46. Claimant failed to produce evidence of his total income earned in the 52 weeks immediately preceding his accident, (other than the six days he spent working for Employer), and has not filed tax returns since at least 2012. Surety testified it requested such information but no such records were produced. Claimant did not testify as to his employment for the year immediately preceding the accident. Instead, he doggedly relied on records from work done in years *subsequent* to the accident, specifically 2014 and 2015. In his post-hearing briefing Claimant stated that he “has provided adequate documentation of his hourly wage in the record of \$25/hr., complimentary to his wage while on the river of some \$1000/week...”. Claimant's Brief, p. 6. While that is true, he did not produce any evidence as to how many hours he worked at the rate of \$25/hr. in the 12 months prior to his accident, nor how many weeks he was “on the river” during that timeframe. Without that

vital information, it is not possible to fully and accurately compute his total earnings for such timeframe.<sup>8</sup>

47. Defendants produced a letter from Brad Frei, owner and operator of Adventure Sun Valley, a river running outfitter who hired Claimant as an occasional river guide. In the letter, Mr. Frei stated that he “generally gave [Claimant] a couple of trips a year” in years prior to 2013. DE 8, p. 142. While there is no way to quantify “a couple” it surely would include at least two. In 2013, Mr. Frei hired Claimant for four trips, all after his industrial accident.

48. Mr. Frei indicated in an e-mail produced by Claimant as an exhibit that he paid Claimant at the rate of \$1,000 per each six-day trip.

49. Deducing from the scant evidence in the record, Claimant can establish income of roughly \$3,000 during the 52 weeks immediately preceding his accident, comprised of two guiding trips made for Adventure Sun Valley and the one trip for Employer herein. Even if, as required by Idaho Code § 72-419, tips, food and lodging expenses are included when calculating AWW (Claimant testified that while on the river he did not have food or lodging expenses, as that was provided as part of his employment, and that he received tips), and a generous additional \$1,000 is included as income for Claimant (although there was no evidence as to the value of such incidentals adduced at hearing), his total income supported by the record for the 12 months immediately preceding his accident is \$4,000. While

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<sup>8</sup> While not a part of the record, and not relied upon by this Commission when deciding the issue, it is worth noting that the Referee on more than one occasion informed Claimant of his obligation to produce such documents, or he would have a hard time proving his case on this point. Claimant pointed to his post-accident receipts from 2014 and 2015 as evidence. The Referee informed Claimant prior to hearing that such documents were not relevant to proving AWW under Idaho Code § 72-419(6). The Referee even read the statute verbatim to Claimant, wherein Claimant responded that he had not filed taxes for several years and thus did not have that information readily available to him. Claimant was informed that he should try as best he could to reconstruct his earnings, even if he could only approximate them. Claimant indicated he understood his obligation, but nevertheless failed to make any effort to establish his income for the 12 months immediately preceding his accident.

undoubtedly Claimant had actual income in excess of this amount, he willfully failed to produce any evidence to support his actual income during such timeframe.

50. Reviewing the record as a whole, the totality of the evidence supports a finding that Claimant's proven AWW for the time of the accident, as calculated using Idaho Code § 72-419(6) for seasonal employees, is \$80, calculated as follows; \$4,000 total income divided by 50 weeks equals \$80.

***Temporary Total Disability (TTD) Calculation***

51. Once Claimant's AWW is computed, his rate of TTD benefits can be calculated. Idaho Code §§ 72-408 and 409 establish the procedure for determining the rate at which TTD benefits are paid, based upon Claimant's AWW, subject to minimum and maximum dollar amounts.

52. Pursuant to Idaho Code § 72-409, for the first 52 weeks of disability, if 90% of Claimant's average weekly wage is less than 15% of the currently applicable average weekly state wage, Claimant shall receive no less than 15% of the currently applicable average weekly state wage. These constraints apply in this case, so for 2013 Claimant's TTD rate is \$101.10/week and for 2014, \$102.60/week.

53. Claimant has proven a right to TTD benefits at the weekly rate of \$101.10/week for the period of his temporary disability from September 12, 2013 through December 31, 2013, and at the rate of \$102.60/week for the period of January 1, 2014 through April 30, 2014.

***Defendants' Reimbursement Rights***

54. For the reasons Defendants are not entitled to a credit for erroneously-made TTD payments, they are likewise not entitled to be reimbursed by Claimant for such overpayment. There is simply no statutory provision within the Idaho Workers'

Compensation Act for such remedy. Defendants have failed to prove a statutory right to seek reimbursement of the TTD benefit payments made to Claimant in 2013.

55. For the period September 12, 2013 through December 31, 2013 Claimant has been paid all TTD benefits to which he is entitled under this decision, and then some. The practical result of our analysis is that Claimant is entitled to additional payment of TTD benefits at \$102.60/week for the period of January 1, 2014 through April 30, 2014, but nothing more in the way of income benefits.

### ***Interest on Benefits and Payday Loans***

56. While not specifically listed as an issue, the question of whether Claimant can obtain interest (he seeks interest at 10% per year) on the benefits awarded herein can arguably be contained in issue 3b. Interest on awards is not statutorily addressed in the Idaho Workers' Compensation Act. That omission is critical to Claimant's claim, the same as it is to Defendants' claim of credit and reimbursement of overpayment. Without statutory authority in the Act, this Commission has no authority to grant interest on benefits awarded. The same is true for the more-tenuous claim to a right to recover interest on pay day loans Claimant argued were necessary as a result of his injury, and were incurred both before and after his surgery.

### **CONCLUSIONS OF LAW AND ORDER**

1. Claimant has proven he complied with the notice requirements of Idaho Code §§ 72-701 through 704.
2. Claimant has failed to prove he is entitled to benefits for past unpaid or future medical care related to his industrial accident in question.

3. Claimant has failed to prove he is entitled to PPI benefits for his industrial injury.

4. Claimant is properly classified as a seasonal worker for the purpose of determining his AWW.

5. Claimant's AWW is properly calculated at the rate of \$80 under the formula for determining AWW for a seasonal employee pursuant to Idaho Code § 72-419(6).

6. Claimant has proven he is entitled to recover TTD benefits at the rate of \$101.10/week from September 12, 2013 through December 31, 2013 and at the rate of \$102.60/week from January 1, 2014 through April 30, 2014. Defendants have previously satisfied their obligation to pay 2013 benefits.

7. Defendants have failed to prove they are entitled to a credit under the Idaho Workers' Compensation Act for overpayment of TTD benefits to Claimant in 2013.

8. Defendants have failed to prove they are entitled to reimbursement of the TTD benefit payments made to Claimant in 2013, or any portion thereof.

9. Claimant has failed to prove he is entitled to interest on the benefits awarded herein.

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

DATED this 5th day of May, 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 5th day of May, 2017, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

ROBERT TONSMEIRE  
PO BOX 5121  
KETCHUM ID 83340

JON M BAUMAN  
ELAM & BURKE  
PO BOX 1539  
BOISE ID 83701-1539

\_\_\_\_\_/s/\_\_\_\_\_