BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

DIANA L. WALKER, Claimant, v. CLEAR SPRINGS FOODS, INC., Employer, and LIBERTY NORTHWEST INSURANCE CORPORATION, Surety, Defendants.	**IC 2004-515150** **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER AND CONCURRING OPINION** **Filed July 30, 2018**

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Michael E. Powers. A hearing was scheduled for October 17, 2017. Pursuant to a stipulation of the parties, the Referee vacated the hearing and ordered that the issues would be submitted upon the record in lieu of a hearing. L. Clyel Berry of Twin Falls represented Claimant, Diana L. Walker. Matthew J. Vook represented Employer, Clear Springs Foods, Inc., and Surety, Liberty Northwest Insurance Corporation. The parties submitted exhibits and briefs. The matter came under advisement on December 22, 2017. The Commission has carefully reviewed the recommendation of the Referee and has decided to issue its own decision to give different treatment to the calculation of Claimant's average weekly wage, and to the question of the finality of the December 9, 2017 decision.

ISSUES

The issues to be decided, according to the Notice of Hearing dated September 7, 2017, are as follows:

1. The correct determination of Claimant's average weekly wage (AWW);

2. Whether Claimant is medically stable, and if so, the date thereof;

3. Whether Claimant is entitled to temporary partial and/or temporary total disability (TPD/TTD) benefits, and the extent thereof;

4. The appropriate TPD benefit rate pursuant to Idaho Code § 72-408(1).

5. The effect of the Idaho Supreme Court decision in *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014), as to whether and to what extent Defendants may be entitled to a credit and/or offset for payments made as and for permanent partial impairment benefits as against Defendants' obligations for Claimant's total and permanent disability benefits; and

6. Whether Claimant is entitled to attorney fees due to Employer/Surety's unreasonable denial of compensation as provided for by Idaho Code § 72-804.

PRIOR PROCEEDINGS

On May 25, 2004, Claimant sustained a lumbar injury in an industrial accident while working as a quality assurance technician for Employer, a fish processor. She filed a complaint on May 12, 2005. Following a hearing on January 25, 2007, the Commission issued a decision on October 25, 2007, which held as follows: 1.) Claimant suffered a personal injury arising out of and in the course of her employment as a result of the accident of May 25, 2004; 2.) Claimant's injury was work-related and not the result of a preexisting or subsequent injury or disease; 3.) Claimant was entitled to necessary and reasonable medical care to treat her lumbar

injury pursuant to Idaho Code § 72-432; 4.) Claimant was entitled to TPD/TTD benefits for various periods of recovery, including recoveries from three lumbar surgeries, between July 4, 2004 and May 24, 2006; 5.) Claimant was entitled to a whole person 13% permanent partial impairment (PPI); 6.) Claimant was entitled to a 50% permanent partial disability (PPD), inclusive of impairment; 7.) Apportionment for a preexisting condition pursuant to Idaho Code § 72-406 was not appropriate; and 8.) Claimant was not entitled to recover attorney fees pursuant to Idaho Code § 72-804.

On May 19, 2009, Claimant applied to the Commission pursuant to Idaho Code § 72-719 for review of its prior decision on the grounds of a change in the nature or extent of her injury and disablement. Following extensive pre-hearing procedures, a hearing took place on September 11, 2015. On December 9, 2016, the Commission ordered as follows: 1.) Claimant suffered a change of condition since the October 25, 2007 decision and was entitled to relief pursuant to Idaho Code § 72-719; 2.) There were reasonable grounds for Claimant to change her treating physician; 3.) Claimant was entitled to a 33% whole person PPI award, inclusive of the 13% previously paid; 4.) Defendants were entitled to a credit for any PPI previously paid; and 5.) Claimant was totally and permanently disabled as an odd-lot worker.

On January 30, 2017, Defendants filed a petition for a declaratory ruling pursuant to JRP § 15. Defendants asked the Commission to identify the date upon which Claimant reached maximum medical improvement (MMI) from the industrial accident and thus entitled to the commencement of total and permanent disability benefits pursuant to Idaho Code § 72-408. Defendants urged the Commission to find that Claimant reached MMI on July 15, 2015, the date her physician found her entitled to a 33% PPI rating. In response to the petition, Claimant agreed that the Commission's decision of December 9, 2016 did not identify a date of medical stability.

She contended that she reached medical stability at an earlier date in 2013 or 2014. Claimant also asked the Commission to determine her AWW and to apply *Corgatelli v. Steel West, Inc*., 157 Idaho 287, 335 P.3d 1150 (2014), to deny Defendants credit for PPI paid against the award of total and permanent disability.

By an Order dated April 25, 2017, the Commission denied the petition for the reason that the Commission's prior decision was not ambiguous and did not rule on the matters for which the parties sought declaratory relief. The Commission concluded that a hearing would be the proper forum to resolve issues of Claimant's medical stability and average weekly wage. With regard to the issue of *Corgatelli*, 157 Idaho 287, 335 P.3d 1150, the Commission noted in pertinent part as follows:

> [S]ince the Commission found Respondent [Claimant] to be entitled to <u>both</u> PPI and disability, the Order is consistent with *Corgatelli*. However, as we recently held in *Dickinson*, *supra*, a totally and permanently disabled worker is <u>only</u> entitled to the payment of disability benefits calculated pursuant to Idaho Code § 72-408. The statutory scheme does not endorse the separate payment of PPI to one who is totally and permanently disabled even though the worker must have PPI in order to qualify for total and permanent disability. We now believe that our Order in *Walker* is erroneous as a matter of law. However, if so, the proper avenue of attack was via a motion for reconsideration under Idaho Code § 72-718, or an appeal to the Supreme Court. We do not believe that the final Order of the Commission can or should be re-visited at this juncture via a motion for declaratory ruling, and we decline to do so.

Order on Petition for Declaratory Relief (April 25, 2017) (IC 15000115) at 5-6.

On May 10, 2017, the parties requested calendaring for a hearing, which the Referee set for October 17, 2017. Pursuant to stipulation of the parties, on October 13, 2017, the Referee vacated the hearing and ordered the matter to be submitted on exhibits and briefs. The matter is now ripe for adjudication.

CONTENTIONS OF THE PARTIES

Claimant contends that she reached MMI on either December 9, 2014, the date that R. Tyler Frizzell, M.D., Defendants' IME physician, determined that she was medically stable, or in or about December 2013, as opined by Richard Hammond, M.D. She further alleges that she became entitled to total and permanent disability benefits as of the date that she reached MMI. Claimant argues that pursuant to *Corgatelli*, Defendants are not allowed to credit any amount of PPI already paid against their obligation to pay disability benefits. Claimant asks the Commission to calculate her AWW to include her hourly rate of pay ($10.24) at an average work week schedule of 45.79 hours, together with the reasonable market value/cost to Employer of contributions to her 401(k) plan and similar accounts, as well as Employer paid contributions towards her health insurance. She values the cost of these added benefits at $156.65 per week, by which, she argues, her AWW must be augmented. Finally, Claimant contends that she is entitled to an award of attorney fees pursuant to Idaho Code § 72-804 because Defendants had taken unwarranted positions on these various issues that resulted in an unreasonable denial of benefits to Claimant.

Defendants argue that fringe benefits are not considered wages that are legally counted to determine Claimant's AWW. Contrary to their earlier position stated in the Petition for Declaratory Relief, they concede that the date of medical stability was December 8, 2014, nevertheless they argue that date of MMI is "largely irrelevant." They further argue that simultaneous payment of both PPI and total and permanent disability benefits are legally inconsistent and the Commission should correct the "unfairness" of its previous indemnity decision, which required them to pay "133% of disability," and thus allow Defendants a credit of PPI paid against Claimant's total and permanent disability benefits. Finally, Defendants argue

that they have not adjusted the claim unreasonably; therefore there is no basis for an award of attorney fees.

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. Claimant's Exhibits 1 through 8, filed October 17, 2017; and

2. Defendants' Exhibits A through E, filed October 16, 2017.

No party objected to admission of any of these exhibits, therefore the same are hereby admitted to the record.

FINDINGS OF FACT

1. **AWW**. At the time of her injury on May 25, 2004, Claimant worked for Employer on average approximately 45 hours per week. Findings of Fact, Conclusions of Law and Recommendation, 2007 IC 0783.6 ¶ 19 (October 25, 2007). Her hourly wage rate at the time of injury was $10.24. Ex. 5:112.

2. Claimant's Second Supplemental Interrogatory No. 8: asked Defendants to set forth with particularity, the following:

> For each of the four (4) consecutive thirteen (13) week periods during/within the fifty-two (52) weeks immediately preceding Claimant's May 25, 2004 industrial accident and injury, wages paid by Defendant-Employer to Claimant (not including over-time or premium paid), pursuant to I.C. § 72-419(4)(a).

Ex. 5:103-104. The interrogatory further requested that Defendants state whether the computation of Claimant's AWW included the reasonable market value of Employer's contributions to Claimant's 401(k) plan and/or retirement account, and health insurance plan. *Id*. at 104.

3. Defendants answered Supplemental Interrogatory No. 8 by directing Claimant's attention "to the personnel file previously produced April 16, 2015. See additional information from the employer regarding wages paid during the period in question." With regard to whether Defendants had included the reasonable market value of contributions to Claimant's 401(k) plan, retirement account, or health insurance plan in the calculation of the AWW, Defendants answered "no." Ex. 5:104. Attached to the discovery response was a copy of the Workers Compensation First Report of Injury or Illness for Claimant's industrial accident, which listed her wage rate at $10.24 per hour for a five day work week. *Id*. at 112. Also attached was an email from Berni Seever, Technical Claims Specialist II with Surety, dated June 6, 2017 addressed to Defendants' counsel, with the subject line "Walker." It stated as follows:

> AWW 468.84
> TTD Rate: 314.13
> Daily Rate: 44.88
>
> Wage information taken from the NOI. Hourly rate x hours worked per week x 67% since she had been employed with Clear Springs since 04/16/1980. No wage statements were requested.

Id. at 113. Further attached was an internal personnel document of Employer showing a transfer of Claimant to another department effective April 12, 2004, with a "new wage $10.24." *Id*. at 114. Gross pay records for Claimant for the work weeks of January 9, 2004 through June 11, 2004, a total of 12 weeks, were also included. *Id*. at 118-119.

4. In a letter to Claimant's counsel dated July 6, 2017, Defendants' counsel stated in pertinent part as follows:

> With regard to your question of what is "NOI," that stands for "notice of injury." Notice of injury documents were included in your original exhibits submitted as part of the 2007 hearing. Ex. 14 pages 7 through 9. Copy's [sic] are included as part of this mailing. Those documents indicate that Claimant was paid $10.24 per hour at the time of injury. Although page 7 indicates weekly wage was $409.60 as

> you know the average weekly wage was actually set at $468.84. Also enclosed are wage documents from the 2004 year. Also enclosed are pages 9 and 10 from the original decision in 2007 indicating that claimant was averaging between 44 and 45 hours per week at the time of the injury. I would note that based on the $10.24 percent [sic] per hour figure that the average weekly wage that was established back in 2004, on this claim, actually was based on 45.78 hours per week. The employee who established the original average weekly wage left the employe [sic] of the surety long ago. Obviously the information that the employee had when he determined that claimant was averaging 45.78 hours per week was consistent with your clients [sic] testimony in the 2007 hearing where she apparently testified that she averaged between 44 and 45 hours per week.

Ex. 5:123. Attached to the letter were time card summaries for Claimant for the calendar year 2004 showing daily hours worked between January 5, 2004 and December 31, 2004, but no wage rates. *Id*. at 133-184.

5. The record does not contain information concerning the gross wages that Employer paid Claimant for the 52 weeks immediately preceding the accident.

6. In or about 2005, Employer paid for the following benefits for Claimant: medical insurance premium, $487.74 monthly; 401(k) employer contribution, $630.30 annually; ESOP (employee stock ownership plan), $1662.48 annually. Ex. A. The average weekly value of these benefits over and above the $468.84 conceded is $156.65.

7. **MMI**. R. Tyler Frizzell, M.D., a neurosurgeon, performed an independent medical examination (IME) of Claimant on December 8, 2014 at the request of Surety. Dr. Frizzell had previously examined Claimant on June 17, 2013 for evaluation of whether a spinal cord stimulator was appropriate. Claimant subsequently had the spinal cord stimulator implanted. Her last surgery was an L5-S1 anterior fusion with discectomy in 2012. Dr. Verst continued to follow Claimant for pain management. No further surgeries were recommended or planned. Claimant no longer had physical therapy but performed home exercises. Dr. Frizzell reviewed relevant medical records, including imaging and surgery reports between 2004 and

2014. He also performed a physical examination. Dr. Frizzell concluded that Claimant's current pain management treatment by Dr. Verst was reasonable and necessary. He found that Claimant's condition had not objectively improved in the year since his last examination in 2013. Dr. Frizzell concluded that Claimant had reached MMI as of December 9, 2014. Ex. 7:208-218.

8. On May 18, 2017, counsel for Claimant wrote to Richard J. Hammond, M.D., a neurologist.[1] The letter asked Dr. Hammond to express an opinion as to when Claimant should be considered to have reached MMI. Ex. 7:205-207. Dr. Hammond replied to counsel by letter dated August 29, 2017, in which he stated: "This letter is in regards to the date of maximum medical improvement (MMI) for Mrs. Walker. As per Dr. Frizzell's December 10, 2014 note she is at MMI on that date but is unchanged per the previous years [sic] exam. For that reason I would put her at MMI as of December 2013." *Id*. at 204.

9. **Benefits Paid**. Following the October 25, 2007 decision, Defendants paid the 13% PPI rating awarded by the Commission in the amount of $19,090.50. Disability over impairment in the amount of $54,334.50 was paid. Following the filing of the petition for change in condition, Defendants paid Claimant total temporary disability (TTD) benefits through December 8, 2014 at the weekly rate of $307.80. Ex. C:6. Beginning on December 9, 2014, Defendants commenced paying Claimant additional permanent partial impairment (PPI) benefits at the weekly rate of $293.70. *Id*. at 5. Payment of these benefits continued through December 17, 2015, totalling $ 15,272.40. Additional PPI benefits were paid on December 3, 2015 in the amount of $881.10, January 1, 2016 in the amount of $4,405.50, and December 9, 2016 in the amount of $8,811.00. Total PPI benefits paid following December 8, 2014 is $29,370.00,

[1] Dr. Hammond had previously treated Claimant and had determined that she had a 33% PPI which formed the basis of the Commission's December 9, 2016 decision in this matter. Although he assigned physical restrictions to Claimant first in 2010 and revised them on December 14, 2015, at which time he provided his impairment rating, Dr. Hammond did not opine regarding MMI at that time.

representing the entirety of the PPI rating referable to Claimant's change in condition, 20% PPI over and above the 13% previously paid. Defendants paid total and permanent disability benefits commencing February 11, 2016 through at least June 21, 2017 at what Defendants contend is the correct TTD rate calculated pursuant to Idaho Code § 72-408 and Idaho Code § 72-409. Through June 21, 2017 total and permanent disability benefits paid equaled $31,312.42. Payment of total and permanent disability has continued since then at the appropriate annual rate.

DISCUSSION AND FURTHER FINDINGS

10. The provisions of the Idaho Workers' Compensation Law should be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990) (retraining benefits statute liberally construed to permit payment of travel-related retraining expenses rather than requiring claimant to pay them from his subsistence-level temporary disability benefits). Facts, however, need not be construed liberally in favor of the worker when evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992) (substantial evidence supported Commission's finding that the industrial accidents did not cause claimant's breathing problems, where medical evidence was conflicting).

11. **AWW**. Claimant argues that the reasonable value of certain fringe benefits paid by Employer to or on behalf of Claimant at the time of her industrial injury must be included in calculating Claimant's average weekly wage (AWW). Employer calculated Claimant's AWW as follows: Claimant was paid $10.24 per hour as of the date of injury, and she worked, according to Employer, 45.78 hours per week. While this yields an AWW of $468.79 per week, Employer actually acceded to an AWW of $468.84 per week. (See Claimant's Exhibit 5, at p.123). The parties do not appear to be in disagreement concerning this calculation. (See Claimant's Opening Brief, at p. 9-10). The parties are also in essential agreement concerning the dollar value

of other benefits paid to Claimant, or on her behalf, in connection with her employment; Employer paid Claimant's non-occupational health insurance premiums in the amount of $5,853 annually and 401k contributions in the amount of $630.36 annually. Finally, Employer's contributions to Claimant's ESOP/Retirement program totaled $1,662.48 annually. These benefits total to payments of $8,145.78 per annum, or $156.65 per week. It is Claimant's contention that these "fringe" benefits should be included in the calculation of her AWW (468.84 + 156.65). Defendants contend that these fringe benefits should not be included in the calculation of Claimant's AWW.

12. The starting point for analysis are the provisions of Idaho Code § 72-419(4)(a). For injured workers paid by the hour, the AWW is to be calculated as follows:

> If at such time the wages are fixed by the day, hour or by the output of the employee, the average weekly wage shall be the wage most favorable to the employee computed by dividing by thirteen (13) his wages (not including overtime or premium pay) earned in the employ of the employer in the first, second, third or fourth period of thirteen (13) consecutive calendar weeks in the fifty-two (52) weeks immediately preceding the time of accident or manifestation of the disease.

From the facts of record, it does not appear that Defendants followed the direction of this section in calculating Claimant's AWW; the record does not reflect that Defendants collected four quarters of pre-injury wages and divided the quarter in which Claimant had the highest earnings by 13 in order to come up with Claimant's AWW. Rather, it simply appears that Defendants utilized Claimant's wage at the time of injury to calculate her AWW assuming a 45.78 hour work week. However, since the parties do not dispute this part of the AWW calculation, we will not disturb it.

13. Idaho Code § 72-419(4)(a) specifies that Claimant's AWW shall not be calculated by the inclusion of "overtime" or "premium pay." Idaho Code § 72-102(33) also contains some direction as to what must be included in Claimant's "wages." That section provides:

> "Wages" and "wage-earning capacity" prior to the injury or disablement from occupational disease mean the employee's money payments for services as calculated under section 72-419, Idaho Code, and shall additionally include the reasonable market value of board, rent, housing, lodging, fuel, and other advantages which can be estimated in money which the employee receives from the employer as part of his remuneration, and gratuities received in the course of employment from others than the employer. "Wages" shall not include sums which the employer has paid to the employee to cover any special expenses entailed on him by the nature of his employment.

Therefore, wages do not include overtime and premium pay. Wages do include: (1) money payments for services rendered; (2) the reasonable value of board, rent, housing, lodging, fuel, and other "advantages" which can be estimated in money which the employer receives from his employer; and (3) gratuities.

14. Finally, IDAPA 17.02.04.191 contains the following additional guidance relating to the calculation of an injured worker's AWW:

> **01. Amounts Paid over Base Rate**. Sums paid by an employer to an employee, over and above the base rate of compensation agreed upon by the employer and the employee in a contract of hire, which are contingent and dependent upon the employee's increased physical exertion and/or efficiency shall be included in computing the employee's average weekly wage pursuant to Section 72-419(4)(a), Idaho Code. Said sums shall not be considered premium pay.
> **02. Fringe Benefits**. Also, in computing the average weekly wage, it shall be presumed that wages shall include, but shall not be limited to, cost of living increases, vacation pay, holiday pay, and sick leave.
> **03. Premium Pay**. Further, in computing the average weekly wage, it shall be presumed that premium pay shall include, but shall not be limited to, shift differential pay, and overtime pay.
> **04. Examples Not Exclusive**. The above-listed examples shall not be taken as exclusive in computing the average weekly wage.

Pursuant to IDAPA 17.02.04.191.02, certain "fringe" benefits such as cost of living increases, sick pay, vacation pay, and holiday pay are to be included in calculating Claimant's AWW. The examples listed are not exclusive.

15. Claimant urges the Commission to conclude that retirement plan contributions and health insurance premiums paid by Employer should likewise be included in the calculation of Claimant's wage. We first acknowledge that an employer's promise to contribute to an employee's retirement plan and to pay health insurance premiums is an "advantage" to the employee which can be "estimated in money." (See Idaho Code § 72-102(33)). Indeed, employer provided non-occupational health insurance is sometimes the most important advantage provided an employee. However, an employer's payment of such benefits is dissimilar from employer's agreement to provide room and board, fuel, cost of living increases, vacation pay, holiday pay, and sick leave. First, the latter type of benefit is paid directly to claimant. On the other hand, retirement program contributions and health insurance premiums are paid to some other entity on behalf of claimant, and are not available to claimant for his immediate use and enjoyment. Therefore, on this basis, it might be said that such benefits do not constitute "wages" since they are not benefits "which the employee receives from the employer as part of his remuneration." (See Idaho Code § 72-102(33)). While employer retirement contributions and employer-provided health insurance are inarguably an advantage to an employee, those benefits, unlike hourly wages, room and board, fuel, vacation pay, sick pay, and holiday pay and the like, are not payable to the employee and cannot be cashed in by that employee at will. Retirement contributions may not vest for a period of years. An employee who does not require medical services may not benefit at all from employer-provided health insurance. These observations reinforce our belief that the statutory language requiring a

demonstration that the benefit is paid by the employer to the employee before that benefit can be considered "wages" is not mere surplusage.

16. The value of board, rent, housing, lodging, and fuel referenced in Idaho Code § 72-102(33) and the cost of living increases, vacation pay, holiday pay and sick leave referenced at IDAPA 17.02.04.191.02 are components of the employee's base wage. Sick pay allows an employee to continue to earn his usual pay during workdays lost to sickness. Similarly, holiday pay and vacation pay allow a worker to receive his usual wage during periods of time he is on vacation or taking an employer-recognized holiday. These benefits do not materially increase the employee's wage, but rather prevent it from being decreased. The payment of rent or the provision of board, housing, lodging, or fuel are all things that an employee depends on to keep body and soul together. These payments are to be distinguished from other benefits which are of more hypothetical value to the injured worker, and have little, if anything, to do with what he requires to support himself on a day-to-day basis.

17. We also take notice that employer-provided benefits such as food, lodging, fuel, hourly wage, vacation pay, holiday pay, and sick pay must be included by the employee in computing his or her gross income for purposes of federal and state income tax. However, employer-paid health insurance premiums and employer contributions to retirement plans are not reportable as income to the employee in the year the contributions are made.

18. Were the Commission to go down the path urged by Claimant, there might be no defense to also including in the calculation of an employee's AWW, the employer's social security contributions, unemployment compensation premiums, and worker's compensation premiums. These also seem to be "advantages" to the employee "which can be estimated in money."

19. There is another reason to be skeptical of the assertion that employer contributions to a retirement program or employer payment of non-occupational health insurance premiums should be included in the calculation of the injured worker's AWW. The injured worker's AWW is relevant only to calculating the indemnity benefits to which such worker is entitled during the first 52 weeks of temporary disability. Thereafter, temporary disability benefits are calculated based on a percentage of the currently-applicable average weekly state wage (AWSW). See Idaho Code § 72-408(2). As with the calculation of the injured worker's personal AWW, there are specific rules for calculating the AWSW. In this regard, Idaho Code § 72-409(2) provides:

> For the purpose of this law the average weekly wage in the state shall be determined by the commission as follows: on or before June 1 of each year, the total wages reported on contribution reports to the department of employment for the preceding calendar year shall be divided by the average monthly number of insured workers determined by dividing the total insured workers reported for the preceding year by twelve (12). The average annual wage thus obtained shall be divided by fifty-two (52) and the average weekly state wage thus determined rounded to the nearest dollar. The average weekly state wage as so determined shall be applicable for the calendar year commencing January 1 following the June 1 determination.

Therefore, the starting point for performing this calculation is to identify the total "wages" reported to the Department of Labor on "contribution reports" for the preceding calendar year. In calculating the AWSW, what constitutes the "wages" to be gathered and counted is defined at Idaho Code § 72-1328. While Idaho Code § 72-102(33) and Idaho Code § 72-419(4)(c) do not treat the specific benefits at issue in this case, Idaho Code § 72-1328 specifies that employer contributions to retirement programs and employer payment of non-occupational health insurance premiums are <u>not</u> included in the wages to be considered in calculating the annual AWSW. The statutes differ in other ways as well. For example, Idaho Code § 72-419(4)(a)

specifically excludes premium and overtime pay from the calculation of an individual's AWW. No such exception for premium and overtime pay is contained in Idaho Code § 72-1328. Even so, we find that Idaho Code § 72-1328 may have some relevance to the particular inquiry before us. We can think of no good reason why the components of the weekly wage that defines an injured worker's entitlement to benefits during the first 52 weeks of disability should differ significantly from the components of the weekly wage used to calculate Claimant's entitlement to benefits thereafter. Where Idaho Code § 72-102(33) and Idaho Code § 72-419(4)(a) do not treat the issue, the provision for the exclusion of retirement and health insurance benefits as "wages" in Idaho Code § 72-1328 suggests that they should also be excluded from consideration in defining the AWW of an individual.

20. A construction of Idaho Code § 72-419(4)(a) and Idaho Code § 72-102(33) which includes the more indirect benefits of employment, such as the payment of health insurance premiums and retirement plan contributions, would undermine the goal of prompt payment of benefits established at Idaho Code § 72-304, since the wage calculation process, now relatively simple and well understood, would become much more complicated, require additional resources from employers and sureties, and require more Commission intervention to unravel disputes.

21. Finally, while adopting Claimant's position would have the laudable result of increasing indemnity benefits payable to injured workers, it might also have some less desirable consequences. In this case, including the value of retirement contributions and health insurance premiums would increase Claimant's AWW by almost one-third. Let us assume, for the sake of discussion, that this would be typical of the impact on the workforce at large. Such an increase in the AWW and AWSW would eventually cause the rates assigned to, and premium paid by, insured employers to increase, with unknown impacts on industry. Further, increasing indemnity

benefits might increase pressure on the Commission to raise the compensation payable to medical providers, who already get the biggest slice of the worker's compensation dollar. Other unforeseen impacts could be imagined.

22. These concerns, and others, were carefully considered and addressed in *Schipani v. School District No. 193*, 1992 IIC 1127 (September 29, 1992), a case which addressed exactly the same issue which we presently consider. In *Schipani*, it was noted that the majority of jurisdictions with a statutory scheme similar to Idaho's have declined to expand the concept of AWW to include fringe benefits such those at issue in this case. We believe *Schipani* is well reasoned, and it has guided the Commission on this issue since 1992. We see no reason to depart from that guidance at this juncture. An employer's payment of health insurance premium and retirement program contributions are not monies received by the employee from the employer and should not be included in the calculation of Claimant's AWW. We conclude that Claimant's AWW is $468.84.

23. **MMI**. Idaho Code § 72-408 provides in pertinent part that temporary disability income benefits shall be paid during a "period of recovery." The Idaho Workers' Compensation Law does not define the period of recovery, nevertheless the Idaho Supreme Court has held that the period of recovery ends when a worker is medically stable, or has reached MMI. *Hernandez v. Phillips*, 141 Idaho 779, 781, 118 P.3d 111, 113 (2005) (where medical evidence was conflicting regarding when claimant reached MMI, referee's findings would not be reversed). A worker reaches MMI or medical stability "as long as no further medical improvement is expected with time or treatment." Following the date of medical stability, the payment of temporary disability benefits ceases. Following medical stability, an employer must compensate claimant

for any permanent disability suffered as a result of the compensable condition. *Shubert v. Macy's West, Inc*., 158 Idaho 92, 102, 343 P.3d 1099, 1109 (2015).

24. Reversing their position in their Petition for Declaratory Relief, in which they argued that the Commission should determine that Claimant was at MMI as of July 15, 2015, the date upon which Dr. Hammond determined that she was entitled to a 33% PPI rating, *see*, Order on Petition for Declaratory Relief at 1, Defendants now concede that the correct date of Claimant's medical stability is December 9, 2014, the date upon which Dr. Frizzell, Defendants' IME physician, determined that she had reached MMI. *See*, Defendant Employer/Surety's Responsive Brief at 22.

25. Claimant does not make a clear or coherent argument regarding MMI in her briefing. She suggests that she reached MMI either as early as December 2013, as opined by Dr. Hammond, or as late as December 8, 2014. *See*, Claimant's Opening Brief at 6-7.

26. The opinion of Dr. Frizzell that Claimant reached MMI as of December 9, 2014 is entitled to more weight than Dr. Hammond's vague statement that she probably reached MMI sometime in December 2013. Defendants are correct in observing that Dr. Hammond's analysis is an incorrect retrospective application of the concept of medical stability. The purpose is to determine whether Claimant requires further medical treatment. Dr. Frizzell's opinion did that; Dr. Hammond's opinion, however, looked backwards and speculated that it was likely that she was stable a year earlier, because nothing had changed during that year. Furthermore, Dr. Hammond's analysis does not state a specific date of medical stability and is unhelpful to the Commission.

27. Claimant reached MMI as of December 9, 2014.

28. **Entitlement to TTD/TPD Benefits**. As noted above, Claimant was entitled to receive TTD/TPD benefits during her various periods of recovery pursuant to Idaho Code § 72-408. The evidence shows that the Defendants paid TTD/TPD benefits during her periods of recovery, including through December 9, 2014. There is no assertion that Claimant is entitled to additional periods of temporary disability.

29. **Finality, *Corgatelli*, and *Dickinson*.** Following the October 25, 2007 decision of the Commission, Claimant filed a timely Petition for Change in Condition, which resulted in the reopening of the case to test the proposition that Claimant's accident-caused condition had worsened. In the December 9, 2016 decision, the Commission found that Claimant was entitled to both total and permanent disability benefits and an additional 20% PPI rating. Neither a timely motion for reconsideration, nor an appeal, was filed following the December 9, 2016 decision. Rather, on January 30, 2017, Defendants filed their Petition for Declaratory Ruling pursuant to J.R.P. 15.

30. In our April 25, 2017 decision denying the petition for declaratory relief, we treated the question of whether the Commission erred in finding Claimant entitled to both an additional 20% PPI rating and total and permanent disability. This conclusion, though consistent with *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014) is inconsistent with *Dickinson v. Adams County*, 2017 IIC 0007 (March 21, 2017), in which the Commission ruled that *Corgatelli* is called into question by the subsequent Idaho Supreme Court case *Mayer v. TPC*

Holdings, Inc., 160 Idaho 223, 370 P.3d 738 (2016), rehearing denied May 9, 2016.[2] Even so, we concluded that the December 9, 2016 decision of the Commission was "final" pursuant to Idaho Code § 72-718, in the absence of a timely motion for reconsideration. Therefore, we were obligated to continue to abide by that decision, notwithstanding that it is at odds with *Mayer* and *Dickinson*.

31. Defendants now argue that the Commission is mistaken about the finality of the December 9, 2016 Order because the instant proceeding demonstrates that the December 9, 2016 decision was manifestly not final, owing to the existence of the unresolved issues we treat in this decision. It is argued that the December 9, 2016 decision cannot be "final" because we have before us for consideration in this proceeding two additional issues relevant to Claimant's entitlement to worker's compensation benefits; the calculation of Claimant's AWW, and the identification of her date of medical stability. Neither of these issues were addressed in the December 9, 2016 decision, yet both are critical to determining the amount and start date of Claimant's payment for total and permanent disability.

32. The Court's current treatment of the issue of finality plainly instructs us to conclude that the December 9, 2016 decision is not "final" because it did not resolve all of the issues in the case. Since that decision is not final, *Vawter v. United Parcel Service, Inc.*, 155 Idaho 903, 318 P.3d 893 (2013) establishes that it must be treated akin to an "interlocutory" order, subject to review and revision by the Commission at any time. Commenting on *Vawter*, in

[2] In *Dickinson, supra*, the Commission also recognized that the rule of *Corgatelli* was followed in *Davis v. Hammack Management*, 161 Idaho 791, 391 P.3d 1261 (2017), a case decided after *Mayer, supra*. However, as we pointed out in *Dickinson*, the rule of *Corgatelli* received no further treatment or illumination in *Davis* and provided no insight into how *Corgatelli* might be recognized with what seems to be an entirely different point of view expressed in *Mayer*. For these reasons, we did not find *Davis* instructive on the question of the continued validity of *Corgatelli* in light of *Mayer*. See also *Oliveros v. Rule Steel Tanks, Inc.*, 2008 IIC 024772 (January 15, 2018).

Green v. Green, 160 Idaho 275, 280 n.2, 371 P.3d 329, 334 n.2 (2016), the Court summarized its view on what constitutes a "final" decision of the Commission:

> We wish to note the apparent divergence between this Court and the Commission's understanding of the operation of Idaho Code § 72-718. The Commission expressed concern about a perceived discrepancy between a sentence in a recent decision from this Court and the statute. In *Vawter v. United Parcel Serv., Inc.*, 155 Idaho 903, 913, 318 P.3d 893, 903 (2014), this Court characterized a Commission order as "an interlocutory order that was *subject to modification until such time as a final, appealable order was entered.*" The Commission appears to believe this statement is at odds with Idaho Code section 72–718, which provides that a "decision of the commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated," subject to the parties' right to seek reconsideration within twenty days. The Commission stated: "It is difficult to square *Vawter* with the unambiguous provisions of Idaho Code § 72–718."
>
> The Commission appears to have adopted the position that parties may not seek reconsideration of interlocutory rulings more than twenty days after they are made. The view we expressed in *Vawter* is based upon the final sentence of Idaho Code section 72–718, which provides that "[f]inal decisions may be appealed to the Supreme Court as provided by section 72–724, Idaho Code." Our view is that a decision is not final, and thus appealable, until all issues are resolved between all parties. Thus, in order to permit appeals of certain interlocutory decisions of the Commission, we have adopted I.A.R. 11(d)(2), authorizing expedited appeals from compensability determinations. The statement in *Vawter* to which the Commission has appeared to take exception is simply corollary to our view of what constitutes a final decision. (emphasis in original)

33. So, <u>any</u> decision made by the Commission which does not dispose of a case in its entirety can be revisited by the parties or the Commission, until all issues in the case are resolved. It is our conviction that this is an incorrect interpretation of Idaho Code § 72-718. It is a longstanding principle of statutory construction that the words of a statute be given their plain and ordinary meaning in order to give effect to the intent of the legislature. In *Melton v. Alt*, 163 Idaho 158, 408 P.3d 913 (2018), the Court cited with approval the following language from *State v. Dunlap*, 155 Idaho 345, 313 P.3d 1 (2013):

> Interpretation of a statute begins with an examination of the statute's literal words.

> Where the language of a statute is plain and unambiguous, courts give effect to the statute as written, without engaging in statutory construction. Only where the language is ambiguous will this Court look to rules of construction for guidance and consider the reasonableness of proposed interpretations. The objective of statutory interpretation is to derive the intent of the legislative body that adopted the act. Statutory interpretation begins with the literal language of the statute. Provisions should not be read in isolation, but must be interpreted in the context of the entire document. The statute should be considered as a whole, and words should be given their plain, usual, and ordinary meanings. It should be noted that the Court must give effect to all the words and provisions of the statute so that none will be void, superfluous, or redundant. When the statutory language is unambiguous, the clearly expressed intent of the legislative body must be given effect, and the Court need not consider rules of statutory construction.

The language of the statute is ambiguous only where reasonable minds might differ or be uncertain as to the meaning of the statute. *City of Idaho Falls v. H-K Contractors, Inc.*, 163 Idaho 579, 416 P.3d 951 (2018).

Idaho Code § 72-218 provides:

> Finality of commission's decision. – A decision of the commission, in the absence of fraud, shall be final and conclusive as to all matters adjudicated by the commission upon filing the decision in the office of the commission; provided, within twenty (20) days from the date of filing the decision any party may move for reconsideration its decision on its own initiative, and in any such events the decision shall be final upon denial of a motion for rehearing or reconsideration or the filing of the decision on rehearing and reconsideration. Final decisions may be appealed to the Supreme Court as provided by section 72-724, Idaho Code.

Therefore, unless a timely motion for reconsideration is filed within a time certain, a "decision" of the Commission is "final and conclusive as to all matters adjudicated" upon the filing of the decision in the offices of the commission. Such final decisions may be appealed pursuant to Idaho Code § 72-724. To deconstruct the statute, it is first necessary to understand what is meant by the term "decision." The term has been variously defined as follows:

> A judicial or agency determination after consideration of the facts and the law; esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case.

Black's Law Dictionary 436 (8th Ed 2004).

> b: a determination arrived at after consideration: conclusion.
> made the decision to attend graduate school
> 2: a report of a conclusion
> a 5-page decision
> a Supreme Court decision.

Merriam-Webster, 299 (10th Ed 1993) available at www.merriam-webster.com/dictionary/decision.

> 1. The passing of judgment on an issue under consideration. 2. The act of reaching a conclusion or making up one's mind. 3. A conclusion or judgment reached or pronounced; verdict.

American Heritage Dictionary 342 (1973). From these definitions we can discern nothing which would support a conclusion that a "decision" is only a determination which resolves all issues in a particular case. Here, on September 11, 2015, the referee assigned to this case took testimony on the following issues:

> 1. Whether Richard Hammond, MN.D., should be designated as Claimant's treating physician;
>
> 2. Whether Claimant is entitled to additional permanent partial impairment (PPI);
>
> 3. Whether Claimant has experienced a change in her condition since the Commission's October 25, 2017 decision such that a manifest injustice will result without further deliberation;[3] and
>
> 4. Whether Claimant is entitled to further permanent partial disability (PPD) including whether she is now an odd-lot worker.

34. Certain exhibits were admitted by the parties and certain post-hearing depositions were taken. The parties submitted briefing and on July 22, 2016, the matter came under advisement. The referee drafted proposed findings of fact, conclusions of law and

[3] On or about May 19, 2009, Claimant filed her application to reopen this matter under Idaho Code § 72-719 to address a change in the nature of Claimant's injury. On June 4, 2009, the Commission found Claimant's Idaho Code § 72-719 motion timely filed. At the 2015 hearing, counsel for Defendants indicated that he did not believe that "manifest injustice" was an issue, and the Referee proceeded accordingly.

recommendation for consideration by the Industrial Commission. The Commission adopted the proposed decision by Order dated December 9, 2016. It is hard to argue that the December 9, 2016 Order does not represent a "decision" of the Commission on the issues noticed for hearing, using the plain, usual, and ordinary meaning of the term. It is equally clear, however, that the December 9, 2016 decision does not resolve all issues in the case. It is only by defining "decision" to mean only an order of the Commission which resolves not less than all issues in a case could the Court's position, as stated in *Vawter* and *Green*, be supported. However, there is nothing in the plain language of Idaho Code § 72-718 which supports the Court's view. *Vawter*, *supra*, and *Green*, *supra*, engraft an interpretation to Idaho Code § 72-718 not found in statute. Having determined that the December 9, 2016 Order represents a "decision" of the Commission, the statute must again be turned to for direction as to when, or whether, such a decision becomes "final." Idaho Code § 72-718 defines both a unique concept of finality and when decisions become final. Decisions of the Commission are final only as to matters actually adjudicated and such decisions become final upon the filing of the decision in the offices of the Commission. There is an important caveat to this definition of finality; within twenty (20) days following the date of filing, any party, or even the Commission on its own motion, may move to rehear or reconsider the decision. In this case, no such motion was made within the time required. Therefore, by operation of the plain language of the statute, the December 9, 2016 decision of the Commission is final. Per Idaho Code § 72-718 the Commission no longer retains the ability to revisit its decision of December 9, 2016, which is now final and conclusive as to the matters adjudicated. Again, only by defining "decision" to mean an order of the Commission which resolves not less than all issues in a case could Idaho Code § 72-718 be construed in a way that would make it possible to ignore the finality provisions of the statute to revisit the December 9,

2016 decision. As noted, we see no opportunity for this type of construction in the provisions of Idaho Code § 72-718. The December 9, 2016 Order adopting the recommendations of the referee must be seen for what it actually is; a decision of the Commission.

35. We are unable to revisit that decision, notwithstanding that it is contrary to the rule we announced in *Dickinson*, supra. Defendants are obligated to pay the 20% PPI rating and commence the payment of total and permanent disability benefits per Idaho Code § 72-408, commencing December 9, 2014.

36. **Attorney Fees**. Claimant has requested attorney's fees pursuant to Idaho Code § 72-804, which reads as follows:

> If the commission or any court before whom any proceedings are brought under this law determines that the employer or his surety contested a claim for compensation made by an injured employee or dependent of a deceased employee without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer shall pay reasonable attorney fees in addition to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission.

37. The decision that grounds exist for awarding attorney fees is a factual determination that rests with the Commission. *Troutner v. Traffic Control Company*, 97 Idaho 525, 528, 547 P.2d 1130, 1133 (1976) (surety did not unreasonably delay determination of employee's claim, thus was not liable for attorney fees).

38. There is insufficient evidence to show that Defendants unreasonably adjusted this claim, either by unreasonably delaying the payment of compensation when due or contesting the claim in an unreasonable or frivolous manner.

39. Claimant is not entitled to recover attorney fees pursuant to Idaho Code § 72-804.

CONCLUSIONS OF LAW AND ORDER

1. Claimant's AWW does not include the reasonable market value of Employer's contributions to health insurance, 401(k), or retirement plans.

2. Claimant's AWW is $468.84.

3. Claimant reached MMI on December 9, 2014.

4. Claimant is not entitled to an award of attorney fees pursuant to Idaho Code § 72-804.

5. The December 9, 2016 decision is final and not subject to revision. Claimant is entitled to the payment of total and permanent disability commencing December 9, 2014, calculated pursuant to Idaho Code § 72-408. Claimant is also entitled to the payment of impairment of 20%.

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

DATED this ___30th___ day of _____July_____, 2018.

INDUSTRIAL COMMISSION

____/s/_____
Thomas P. Baskin, Commissioner

____/s/_____
Aaron White, Commissioner

ATTEST:

___/s/_____
Assistant Commission Secretary

Commissioner Limbaugh, concurring.

In December 2016, Commissioners Maynard and Baskin approved the Referee's recommendation in this case which found Claimant had a change of condition since the October 25, 2007 Decision; designated Dr. Richard Hammond as Claimant's treating physician; granted Claimant 33% whole person PPI with a credit to Defendants; and found Claimant totally and permanently disabled as an odd-lot worker. I declined to sign this previous decision, because I disagreed that Claimant had proven her entitlement to total and permanent disability benefits.

While I am sympathetic to Defendants' request to revisit the December 2016 Decision and possibly reevaluate Claimant's entitlement to total and permanent disability benefits or apply the Supreme Court's decision of *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014) to deny Petitioners credit for PPI paid against the award of total and permanent disability, the Commission entered its order on December 9, 2016, and considered those issues. Legal error does not render a Commission order void by default. These errors must be addressed through a timely motion for reconsideration or appeal to the Idaho Supreme Court. That did not occur in this case. Neither party filed a motion for reconsideration or requested a permissive appeal. Defendants have not shown that this matter warrants an exception to the finality of the December 9, 2016 decision, such that the Commission should perpetually revisit matters previously considered.

I concur with the majority's analysis of Claimant's average weekly wage (AWW) and reasoning that the employer's retirement contributions and health insurance premiums should not be included in the AWW calculation. These indemnity benefits are not designed to be a 100% complete replacement of the claimant's wages. Not only is Claimant's request unprecedented,

but there is no Legislative mandate to upend the traditional conventions for calculating the AWW in this manner.

DATED this __30th__ day of ____July_____, 2018.

INDUSTRIAL COMMISSION

____/s/_____
Thomas E. Limbaugh, Chairman

ATTEST:

____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the ___30th___ day of ___July____, 2018, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER AND CONCURRING OPINION** was served by regular United States Mail upon each of the following:

L CLYEL BERRY
PO BOX 83
TWIN FALLS ID 83303-0083

DAVID M FARNEY
PO BOX 6358
BOISE ID 83707-6358el

_____/s/_____