

**ORDER OF APPROVAL AND DISCHARGE
UPON SETTLEMENT PAYMENT**

The foregoing Stipulation and Agreement having duly and regularly come before this Commission, and it appearing that the interests of justice and the Claimant are and will be served by approving said Agreement and granting the Order of Discharge as prayed for,

NOW, THEREFORE, said foregoing Stipulation and Agreement shall be, and the same is, hereby APPROVED, and further,

Said Petition shall be and hereby is GRANTED, and the above-entitled proceedings are DISMISSED WITH PREJUDICE.

DATED this 10th day of June, 2021.

INDUSTRIAL COMMISSION



Chairman



Member

Member



ATTEST:


Assistant Secretary

For the following reasons, I respectfully dissent.

I decline to support the proposed Lump Sum Settlement. *Wernecke v. St Maries Joint School Dist. No. 401*, 147 Idaho 277, 207 P.3d 1008 (2009) makes it clear that the Industrial Commission does not have jurisdiction to consider a proposal to settle an injured worker's present and future claims against the ISIF unless, and until, the Commission is satisfied that all elements of ISIF liability are shown to exist. Proof of ISIF liability can be established at hearing on the merits, or upon stipulation of the parties. Most parties seem to understand the Court's unambiguous direction, and now clothe ISIF settlements with language acknowledging the liability of the ISIF. So, the proposed settlements we are typically called upon to approve contain the parties' stipulation that claimant is totally and permanently disabled, and that claimant's total and permanent disability is caused by the subject work accident in combination with certain pre-existing impairments, such that ISIF liability is conceded. Yet, if ISIF liability is conceded, what is there to settle? Why aren't benefits simply paid as required by Idaho Code § 72-408, as apportioned under *Carey v. Clearwater County Road Dept.*, 107 Idaho 109, 686 P.2d 54 (1984)? Said differently, could it ever be in the best interest of claimant to take less than statutory benefits where it is acknowledged that ISIF is liable?

However, I believe there are circumstances that justify resolution for other than statutory benefits. First, with respect to apportionment, the ISIF and claimant can concede ISIF responsibility for total and permanent disability, yet still have disputes about how that disability should be apportioned between ISIF and Employer. It frequently happens that there are disputes about the values to be assigned to pre-existing and accident caused impairments which can yield significant variations in the starting date of ISIF liability and the length of time ISIF will pay the difference between the 55% ASW rate and the 67% ASW rate. Such a dispute does not affect the

basis of the Commission's jurisdiction over such settlements and can justify a compromise of ISIF's liability.

Even more important is the fact that total and permanent disability benefits are payable only for the life of claimant. Such benefits are not heritable. *See* Idaho Code § 72-431. A totally and permanently disabled worker may rightly be concerned about the welfare of his immediate family should he die prematurely. The total and permanent disability benefits that he and his family depend on for support end with claimant's death. Therefore, it may make good sense, or at least bring peace of mind, to resolve an entitlement to statutory total and permanent disability benefits for a sum certain, even though that sum may be significantly less than the monies that would be paid claimant should he live to his life expectancy.

I am less impressed with the other explanation the Commission is frequently offered in support of settlement for less than statutory benefits. Schemes to avoid offset of Social Security Disability benefits by decreasing the amount payable in total and permanent disability are certainly to the benefit of ISIF, but not necessarily to claimant. Why does it advantage claimant to make SSD pay more than it otherwise would, and ISIF less, when the net to claimant is the same? It must be recalled that in reviewing a settlement, Idaho Code § 72-404 charges the Commission to be satisfied that the settlement is in the best interest of the "parties". More importantly, I question whether it is appropriate for the ISIF to avoid its statutory obligation to pay disability benefits by shifting it to some other taxpayer supported entity.

This brings me to the facts of this case, as stipulated by the parties. To assume jurisdiction of this settlement the Commission must find that Claimant is totally and permanently disabled and that ISIF is liable for some portion of that total and permanent disability. We are authorized to accept the parties' stipulation on these jurisdictional facts. However, to do more than pay lip

service to *Wernecke*, the Commission must be made to understand why, if Claimant is entitled to lifetime benefits under Idaho Code § 72-408, that is not what he is getting. We must be satisfied that notwithstanding the inclusion of the magic words in the settlement, the parties are not simply trying to resolve a threshold dispute as to whether the elements of ISIF liability actually exist. Such settlements are allowed (indeed, welcomed) between claimants and employers, but are expressly prohibited between claimants and ISIF.

The Parties' stipulation identifies certain pre-existing impairments, which can be converted to whole person ratings, as follows:

- 4% for right upper extremity injuries
- 12% for low back injury
- 4% for left knee injury

The accident-related impairment is 4%. Pre-existing and accident caused impairments total 24%, leaving an additional 76% disability to apportion between ISIF and Employer/Surety per *Carey*. At the end of the day, Employer/Surety is responsible for 85 weeks of PPD benefits at \$378.95/week. The medical records attached to the LSS reflect a date of medical stability of November 13, 2018. Therefore, surety would be responsible for payment of PPD benefits from November 13, 2018 to June 30, 2020 at \$378.95/week. During this period, ISIF would be responsible for paying the difference between \$378.95 and the applicable 67% rate payable per Idaho Code § 72-408. I estimate this to be approximately \$13,150.00, payable by ISIF through June 30, 2020.

Thereafter, ISIF pays 100% of Claimant's entitlement to Idaho Code § 72-408 benefits. For the balance of 2020, (approximately 26 weeks) this would be \$14,197, at \$546.05/week. For 2021, ISIF liability would be approximately \$12,411, to May 31, 2021, at \$564.14 per week. ISIF

would owe past due benefits totaling \$39,758 (\$13,500 + \$14,197 + \$12,411), from November 13, 2018 to May 31, 2021.

Of course, with changes in the average state wage, benefits are likely to go up every year. Assuming a 2% increase in the 2022 ASW, Claimant would be entitled to \$29,921.00, or \$2493/month. These benefits, as increased by annual changes in the ASW, are payable until death.

Against this background of statutory benefits payable under Idaho Code § 72-408, ISIF and Claimant propose to resolve this case by a lump payment of \$24,000 and \$2000/month thereafter, with no annual escalator and no guarantee beyond life of Claimant. Why should he accept this? Social security offset is not a particular issue, as Claimant is 63. None of the payments that are proposed are guaranteed beyond the initial \$24,000, but Claimant is entitled to a lump payment of \$39,758 if he accepts statutory benefits. It is proposed that Claimant will receive \$2000/month for life, but as early as 2022 he will be entitled to at least \$2493/month if he accepts statutory benefits. There are no apparent disputes about apportionment per the stipulation of the parties.

Claimant's counsel urges the Commission to approve the settlement because Claimant is in dire financial straits. If ISIF is liable, as the parties have stipulated, then this hardship is best addressed by accepting statutory benefits. The Commission can only exercise jurisdiction over this proposed settlement if it is convinced that the elements of ISIF liability exist, and yet if that is our starting point, it is hard to understand why the proposed settlement is in the best interest of the parties. The money offered bears no relation to what Claimant is entitled to by statute.

In this and similar cases, it seems that even though the proposed lump sum settlement contains the parties' stipulation that the ISIF is liable, that liability is actually disputed, and the settlement represents the parties' compromise of that issue. At a JRP 18(D) hearing held some

years ago I asked counsel for ISIF what would happen if the Commission declined to approve a settlement similar to the one before us today. Since that proposed settlement contained the parties' stipulation that ISIF liability was proven, would the ISIF begin the payment of statutory benefits following our denial? There was silence, some stuttering, but no answer in the affirmative. In this case, too, some of the comments offered by Claimant's counsel in support of the settlement reflect that there is some concern that Claimant may not be able to prove ISIF liability. So, stipulations to the contrary notwithstanding, it is clear to me that for many of the settlements we are asked to approve, ISIF liability is actually disputed. The Commission has no jurisdiction to consider such settlements, and for this reason I decline to approve the one before us. If ISIF liability actually existed in this case, it would be reflected in a settlement amount commensurate with statutory benefits payable under Idaho Code § 72-408.

Having reached this conclusion, I also believe that *Wernecke* is worth revisiting. It is hard to think of an interest that is served by altogether denying the ISIF the right to resolve claims against it for both present and future injuries on a disputed basis. Competently represented claimants, like the Claimant in the instant matter, can be fully advised of the pros and cons of settling their once-in-a-lifetime claim against the ISIF, and act in accordance with what they perceive to be in their best interests, knowing that they get only one shot against the ISIF. The mental strain of trying a case against the ISIF, the costs of doing so, the length of time it will take to obtain a decision and the possibility that the Commission will rule in favor of the ISIF, are all good reasons to resolve a claim short of hearing, yet *Wernecke* prohibits consideration of these factors when entertaining a settlement. The recent case of *Stanley v. ISIF*, 481 P.3d 731, 736 (2021) acknowledged that the historic purpose of the ISIF was to encourage the hiring of handicapped workers, but also noted that the ISIF has "evolved" from an entity created to offset the costs of

employers, into an entity that injured employees potentially have an independent claim against. If so, I suggest that it is time to recognize that ISIF should be allowed to resolve claims against it on a disputed basis.

A handwritten signature in black ink, appearing to read "Thomas Baskin". The signature is written in a cursive style with a horizontal line underneath it.

Thomas P. Baskin, Commissioner