BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

BRYAN OLIVEROS, Claimant, v. RULE STEEL TANKS, INC., Employer, and ADVANTAGE WORKERS COMPENSTATION INSURANCE CO., Surety, Defendants.	**IC 2008-024772** **ORDER ON CLAIMANT'S MOTION FOR RECONSIDERATION** **Filed 1/5/18**

On or about September 14, 2017, Claimant filed his timely Motion for Reconsideration of the Commission's August 25, 2017 Order adopting the Findings of Fact and Conclusions of Law authored by Referee Harper. Claimant filed a contemporaneous brief in support of his motion as required by JRP Rule 3(G). In his supporting brief, Claimant argues that the Commission erred in declining to award Claimant disability in excess of his 32% PPI rating. First, the Commission erroneously concluded that because Claimant had designs upon pursuing higher education even before the work accident, there was insufficient proof that the education he pursued following the work accident was necessitated by that accident. Further, since the vocational evidence established that Claimant's post-accident education was responsible for significantly reducing his disability, it was error for the Commission to decline to award Claimant reimbursement for the expenses associated with those educational endeavors. Finally, the Commission's finding that Claimant's post-injury education diminished his disability was inconsistent with the

Commission's observation that since Claimant was able to work in the fast food industry both before and after the subject accident this augured against a finding that he suffered accident-produced disability.

The other major basis for Claimant's Motion for Reconsideration is his assertion that the Commission erred in not granting Claimant disability in the amount of 25% of the whole person, over and above the 32% PPI rating previously paid. Per *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014) disability and impairment are separate classes of benefits, and are therefore separately payable. In treating impairment as a component of disability, the Commission denied Claimant the separate awards of impairment and disability envisioned by *Corgatelli* and the subsequent case of *Davis v. Hammack Management, Inc.*, 161 Idaho 791, 391 P.3d 1261 (2017).

Defendants responded on September 21, 2017. Defendants argue that while the Commission's decision that Claimant is not entitled to payments above and beyond the 32% impairment rating previously paid as disability is potentially at odds with both *Corgatelli* and *Davis*, it is entirely consistent with *Mayer v. TPC Holdings, Inc.*, 160 Idaho 223, 370 P.3d 738 (2016), and the recent Commission decision *Dickinson v. Adams County*, 2017 IIC 0007 (2017), discussing the conflicting holdings of *Corgatelli* and *Mayer*. As to Claimant's other arguments, Defendants assert that the Commission did not err in recognizing that Claimant's post-accident educational activities improved his access to the labor market; the Commission's decision does not penalize Claimant for advancing his own interests.

Claimant filed a timely Motion for Reconsideration pursuant to Idaho Code § 72-718. Pursuant to that section, the Commission may rehear or reconsider its decision based on the arguments of the parties. A motion for reconsideration must be properly supported by a

recitation of the factual findings and/or legal conclusions with which the moving party takes issue. However, the Commission is not ordinarily inclined to re-weigh evidence and arguments simply because a case was not resolved in the moving party's favor.

In this matter, it was the principal thrust of Claimant's claim that he suffered significant disability as a consequence of the permanent limitations / restrictions stemming from the July 30, 2008 accident involving his right hand. Claimant acknowledged that his post-accident educational and employment-related activities significantly improved his access to the labor market following the accident. He argued that Employer should be required to reimburse Claimant for the expenses associated with his education pursuant to Idaho Code § 72-450, or, failing that, his disability should be evaluated without taking into consideration the education he pursued, at his own expense, following the subject accident. In other words, Employer should not be allowed to avoid reimbursing Claimant for the expenses associated with his education while, at the same time, enjoying the benefits of Claimant's admirable impetus to pull himself up by his own boot straps, thus improving his employment opportunities.

The Commission first determined that Claimant did not qualify for retraining benefits pursuant to Idaho Code § 72-450. In order to qualify for benefits under that section, it must be demonstrated that the injured worker is "in need of retraining in another field, skill or vocation in order to restore his earning capacity. . ." As developed in the original decision, this language implies that at the time of injury a claimant had an established field, skill or vocation from which he was precluded as a consequence of the accident. Claimant did not require retraining in order to "restore" his time-of-injury earning capacity because the accident did not leave him unable to exploit any previously held skill or vocation. Claimant could not be said to be in need of retraining in some other field when the evidence failed to demonstrate an initial or established

field in which he was no longer able to compete because of his injuries. In other words, the statute, on its face, does not anticipate the type of educational training that is at issue here. Claimant did not pursue a course of retraining, but he assuredly pursued a course of training by acting upon his desire to pursue education secondary to his high school graduation. We decline to characterize Claimant's designs upon obtaining an education as the retraining anticipated by Idaho Code § 72-450.

Claimant's fallback position is that if Defendants cannot be required to pay retraining benefits pursuant to Idaho Code § 72-450, they should not reap the fruits of Claimant's pursuit of further education. Essentially, Claimant would have us evaluate his disability as though he had done nothing to help himself following the accident.

Such cases come before us infrequently, but they do arise. Such individuals, because of bad advice, or by dint of their own reasoning, conclude that the greater their disablement, the greater will be their award of disability under the workers' compensation system. Although workers' compensation, as envisioned, is intended to assist injured workers in their recovery and return to work, there is no denying that for a small handful of workers, the Act creates a perverse incentive for a poor outcome following a work injury; the Act pays benefits for those who are yet disabled, notwithstanding their having reached maximum medical improvement. When these cases arise, they are always somewhat disheartening, as they represent a failure of some sort along the way.

On the other hand, this case represents the most hopeful outcome of a work injury. What Claimant did is what everyone should do. Paradoxically, this means he is not as disabled as he would otherwise have been, and will not recover an award to compensate him for disability over and above disability caused by impairment, since he has none. This is what is supposed to

happen, and we commend Claimant for his drive, and for getting on with his life. We appreciate that Claimant may feel he is being penalized for doing the right thing. However, in the long run, the course he chose will serve him much better than the modest disability award he might have realized, had he sat on his hands and done nothing to improve his situation after reaching MMI. Claimant's laudable perseverance does not mean, however, that Defendants must assume financial responsibility for all that Claimant has done on his own behalf in order to take advantage of the facts that exist as of the date of hearing. We find no basis to measure Claimant's disability on some date other than the date of hearing. Nor do we accept Claimant's argument that because evaluation as of that date happens to inure to the advantage of Defendants, they must either pay for Claimant's education or forego reliance on the facts of this case as they have developed though the date of hearing. Nothing in the statutory scheme or case law forces this choice on Defendants. We are satisfied that the evidence demonstrates that the subject accident did not materially change Claimant's designs upon pursuing education after high school. This he did, and those facts must be taken into account when evaluating Claimant's disability.

Claimant also argues that the Commission erred in acknowledging that Claimant suffered disability of 25% of the whole person as a consequence of the subject accident, yet concluding that no further award of disability was payable, since Claimant has already received payment of a 32% disability rating based on impairment. Per Claimant, the Commission's decision is at odds with the explicit direction of the Court in *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 333 P.3d 115 (2014) and, more recently, *Davis v. Hammock Management,* 161 Idaho 791, 391 P.3d 1261 (2017). In response, Defendants point out that the Commission has addressed this precise issue in the recent case of *Dickinson v. Adams County*, 2017 IIC 0007 (2017). In *Dickinson*, the

Commission noted that *Corgatelli* recognizes that PPI and PPD are entirely different classes of workers' compensation benefits, and that nothing in the statutory scheme recognizes that an employer is allowed to credit the payment of a PPI rating against a subsequent obligation to pay disability. Claimant argues that the rule of *Corgatelli* requires surety to pay both the 32% PPI rating and the 25% disability award. We recognize that *Corgatelli* supports this proposition. However, as we explained in *Dickinson*, *Corgatelli* cannot be reconciled with certain language appearing in the subsequent case of *Mayer v. TPC Holdings, Inc.*, 160 Idaho 223, 370 P.3d 738 (2016). *Mayer* contains the following footnote by Justice Burdick, the author of the majority opinion.

> TPC attempts to make much of the fact that Idaho Code section 72–428 uses the term "permanent disability" to describe awards specified under section 72–428's "scheduled permanent impairments." This interchange of terms, TPC argues, makes the use of the term "permanent disability" ambiguous in section 72–431. However, the forerunner of Idaho Code section 72–428 was enacted in 1917, and since that time the Idaho Code has always referred to a disability award, not an impairment award. Although the term "impairment award" has crept into the vernacular of the workmen's compensation bar, Idaho's Workmen's Compensation Law only provides for an award of income benefits based on disability, not impairment. *Fowler v. City of Rexburg*, 116 Idaho 1, 3 n. 5, 773 P.2d 269, 271 n. 5 (1988) ("Income benefits payable under the Workmen's Compensation Law, with the exception of retraining benefits, I.C. § 72–450, are based upon disability, either temporary or permanent, but not merely impairment."). A "permanent impairment" as the definitions themselves make clear, is simply a component of a "permanent disability." I.C. §§ 72–422, –423. Thus, any final award made under Idaho's Workmen's Compensation Law is properly referred to as a disability award. *Fowler*, 116 Idaho at 3 n. 5, 773 P.2d at 271 n. 5 ("While in some cases the non-medical factors will not increase the permanent disability rating over the amount of the permanent impairment rating, the ultimate award of income benefits is based upon the permanent disability rating, not merely the impairment rating."); see also *Woodvine v. Triangle Dairy*, 106 Idaho 716, 722, 682 P.2d 1263, 1269 (1984).

Id. at FN 1. (Emphasis supplied).

As we explained in *Dickinson*, once it is recognized that impairment is a component part of disability, then the objections raised by the *Corgatelli* Court to the payment of PPI as a credit against a subsequent award of disability tend to evaporate. Further, as developed in *Dickinson*, while certain portions of the statutory scheme do appear to create a distinction between impairment and disability, impairment is only payable as disability pursuant to the provisions of Idaho Code § 72-428 and Idaho Code § 72-429. There is no separate statutory mechanism authorizing the payment of impairment as something other than disability. We find no reason to depart from the analysis developed in *Dickinson*, and conclude the *Mayer* represents the current state of the law on this issue. Of course, *Davis* was decided subsequent to *Mayer*, and as Claimant has noted, *Davis* cites *Corgatelli* with approval on the question of whether or not PPI can be applied as a credit against an award of disability.

A review of *Davis* reveals that it is less about parsing *Corgatelli*, and more about considering the application of *Wernecke v. St. Maries Joint School Dist*., 147 Idaho 277, 207 P.3d 1008 (2009). *Davis* involved the Commission's approval of a lump sum settlement which recognized employer's right to a credit in the amount of a previously paid PPI award, to be applied against its obligation to pay permanent partial disability calculated under Idaho Code § 72-428. Two months after the Commission's approval of the *Davis* lump sum, the Court issued *Corgatelli*. The *Davis* Court noted that *Corgatelli* establishes that Idaho law does not endorse the application of the payment of PPI as a credit against a subsequent disability award. However, the issue before the Court in *Davis* was whether the Commission had jurisdiction to approve a settlement which violated the Act. The answer, made clear by *Wernecke*, is no. While *Corgatelli* was the basis for the finding that the Commission acted outside the bounds of its jurisdiction, *Corgatelli* was not, itself, the subject of further discussion by the Court; the

rationale of that decision received no further treatment or illumination, and *Davis*, except in recognizing the rule of *Corgatelli*, leaves us no closer to understanding how *Corgatelli* might be reconciled with what seems to be an entirely different point of view expressed in *Mayer*. For these reasons, we do not find *Davis* instructive on the questions which are the subject of our analysis in *Dickinson*.

It is more frequently the case that impairment, though a component of a disability award, does not represent the full extent of Claimant's disability, once account is taken of the various non-medical factors referenced at Idaho Code § 72-430. Here, however, Claimant's impairment paid as disability is found to more than adequately compensate him for whatever disability he has suffered as a consequence of the subject accident. It would, indeed, award Claimant a windfall to require the payment of an additional 25%, over and above the 32% disability award that has already been paid, since that 32% rating represents impairment paid as disability, and Claimant has failed to demonstrate that he has suffered disability in excess of his impairment.

For the foregoing reasons, we deny Claimant's Motion for Reconsideration.

DATED this __5th__ day of ___January____, 2018.

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 __January__, 2018, a true and correct copy of the foregoing **ORDER ON CLAIMANT'S MOTION FOR RECONSIDERATION** was served by regular United States Mail upon each of the following:

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