BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MARK B. HUTCHINS, Petitioner, v. FINKE LOGGING, Employer, and ASSOCIATED LOGGERS EXCHANGE, Surety, Respondents.	**IC 2015-012656** **ORDER ON DECLARATORY RELIEF** **Filed January 25, 2019**

On or about February 7, 2017, Claimant Mark B. Hutchins, ("Petitioner" herein), filed his Motion to Strike and/or Motion to Dismiss the Complaint filed by Employer/Surety ("Respondents" herein). Petitioner requested that the Commission consider his motion and supporting brief as a request for declaratory ruling pursuant to JRP 15 in the event that the Commission declined to strike/dismiss Respondents' Complaint. As developed *infra*, the Referee assigned to the case declined to dismiss/strike the Complaint filed by Respondents, and accordingly, the matter is before the Commission on Claimant's Petition for Declaratory Relief pursuant to Rule 15, JRP.

The dispute which Petitioner seeks to resolve is whether Idaho law allows Respondents to pursue their own Complaint to resolve Petitioner's entitlement to disability payable under the workers' compensation laws of this state. Petitioner argues that Respondents are barred from pursuing their Complaint under Idaho Code § 72-706 and JRP 3. In response, Respondents assert that any party to a controversy arising under these laws may file a complaint. Respondents argue

that Petitioner has failed to articulate an actual controversy over the "construction, validity or applicability of a statute, rule or order" such as to invoke the Commission's jurisdiction under JRP 15. Further, Respondents allege that Petitioner has not complied with the specific provisions of JRP 15, which require the filing of a contemporaneous memorandum in support of the petition for relief. (See JRP 15(C)(4)). In reply, Petitioner argues that his petition does present an actual controversy over the construction of Idaho Code § 72-706 and JRP 3. Petitioner also asserts that he satisfied the provisions of JRP 15(c)(4) with the filing of his original February 9, 2017 Objection, Motion to Strike and/or Motion to Dismiss, in which he raised JRP 15 as an alternate means to obtain the relief he sought.

FACTS

1. On or about May 14, 2015, Petitioner suffered a compensable accident/injury. Medical benefits and income benefits owed during Petitioner's recovery were paid. However, the permanent impact of the accident on Petitioner's ability to engage in gainful activity may be disputed by the parties. Petitioner may or may not contend that he is totally and permanently disabled.

2. In September of 2016, Petitioner was assigned a 56% whole person impairment rating for the subject injury. This rating is payable over a period of 280 weeks (500 x 56%) from September of 2016 through early 2022 at $378.95 per week, totaling $106,106.00.[1] Respondents are in the process of paying this rating.

3. On or about January 27, 2017, Respondents filed their Complaint with the Commission, acknowledging the subject accident, as well as Petitioner's entitlement to medical

[1] While Respondents acknowledge responsibility for the payment of PPI benefits starting September, 2016 for a period of 280 weeks, Petitioner suggests that the PPI award will be paid out by mid-May of 2019, a period of substantially less than 280 weeks. The Commission is unable to unravel this inconsistency, but for purposes of the instant matter, we assume that Petitioner is entitled to a 56% PPI rating payable commencing September, 2016.

and TTD benefits during his period of recovery. PPI benefits valued at $4,547.40 had been paid as of the date of filing. The Complaint described issues for resolution as follows:

> This is an accepted claim for which benefits have been paid as accrued. Respondents are paying PPI and want to proceed to hearing ASAP to determine the extent of Claimant's permanent disability. Claimant has declined to file a complaint and IIC instructed Respondents to file a complaint so that a hearing may be requested.

4. On or about February 7, 2017, Petitioner filed his Objection, Motion to Strike and/or Motion to Dismiss Respondents' Complaint. Respondents responded on February 10, 2017, and Petitioner filed his reply on or about February 21, 2017. No action was taken on Petitioner's motion until November 6, 2018 when, by Order of that date, the Referee denied Petitioner's motion, reasoning that nothing in the statutory or regulatory scheme could be said to prevent an aggrieved Defendant from filing a complaint for relief with the Commission. Following this Order, Petitioner requested that the Commission entertain essentially the same arguments in support of a Petition for Declaratory Relief under JRP 15.

ISSUE

Does the statutory/regulatory scheme authorize Respondents to file a complaint for the purpose of assessing Petitioner's disability sooner, rather than later, in order to attenuate a perceived risk of double payment contemplated by *Corgatelli v. Steel West, Inc.*, 157 Idaho 287, 335 P.3d 1150 (2014)?

DISCUSSION

We must first consider whether Petitioner's February 9, 2017 Motion to Strike and/or Motion to Dismiss articulates a basis upon which relief may be granted pursuant to JRP 15. Pursuant to that rule, Petitioner may file a request for declaratory ruling when he has an "actual controversy over the construction, validity or applicability of a statute, rule or order." The main

thrust of Petitioner's motion is that neither Idaho Code § 72-706 nor JRP 3 contemplate the filing of a complaint by any entity other than an injured worker. Accordingly, we conclude that Petitioner has identified a statute or rule on which a ruling is requested with sufficient specificity. Pursuant to JRP 15(C)(2) Petitioner must also demonstrate that an actual controversy exists over the construction of the statute or rule in question. We believe that this requirement, too, is satisfied by the pleadings before us. Respondents assert that any party to a controversy arising under these laws may file a complaint; Petitioner takes the position that only injured workers may file a complaint with the Commission.

Pursuant to JRP 15(C)(3), Petitioner must also have an interest that is directly affected by the statute or rule in question and "must plainly state" that interest in the petition. The Commission questions whether Petitioner "plainly" identified his interest in this dispute, at least in his original filing. To be sure, Petitioner identified a number of reasons why the complaint cannot proceed, but his purpose in preventing determination of his disability sooner, rather than later, seems intentionally obscured in his original filing.

It is unusual that Respondents are the party seeking determination of the disability payable to Petitioner, while it is Petitioner who resists this effort. Employers are typically in no rush to have this determination made, and it is the injured worker who is ordinarily desirous of obtaining a prompt assessment of his disability. Why are the interests of the parties aligned so differently in this case? Respondents seek determination of Petitioner's disability sooner, rather than later, because of the rule announced in *Corgatelli*:

> In September 2016, Claimant was assigned a 56% whole person permanent partial impairment (PPI) rating for his 2015 injury, which is equivalent to $106,106.00. This is presently being paid. Defendants do not concede, however, that Claimant is entitled to PPI benefits if he is totally and permanently disabled. See Idaho Code §§ 72-428,-429. Pursuant to the Supreme Court's decision in *Corgatelli v. Steel West, Inc*. 157 Idaho 287, 335 P.3d 1150 (2014), if Claimant is found totally

> and permanently disabled there is no mechanism in Idaho Worker's Compensation Law for Defendants to take a credit for PPI benefits paid. *Id.* This would result in significant overpayment of benefits to Claimant.
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> …
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> For Defendants to be precluded from seeking a determination on disability or to be sanctioned for doing so, when they may be paying benefits to Claimant he is not entitled to without the ability to suspend benefits absent the risk of attorney fees, and without a mechanism to recover overpayment, is inequitable and prejudicial.
>
> …
>
> Claimant should not be allowed to delay a hearing and manipulate his disability determination while receiving benefits he may not be entitled to. In the event the Commission strikes the complaint, Defendants request an order permitting suspension of PPI payments until Claimant's disability has been determined. If Claimant is found totally and permanently disabled, he would not be entitled to the PPI payments presently being paid, resulting in a significant windfall and overpayment of benefits that Defendants will be unable to take a credit for.

Respondent's February 10, 2017 Response, pp. 1-2, 5, 8. In his February 21, 2017 reply, Petitioner acknowledged that the application of *Corgatelli*, *supra*, to the facts of this case is, indeed, the reason why it is more beneficial to him to postpone the determination of disability rather than address that matter as soon as it might be addressed following the Petitioner's September, 2016 date of medical stability. (See Petitioner's Reply Brief at p. 2). Having reviewed the briefs of the parties and Referee Taylor's Order Denying the Motion to Strike/Dismiss, we perceive that this is Petitioner's principal interest in disputing the Complaint filed by Respondents.

Finally, IRCP 15(c)(4) anticipates that a petition for relief must be supported by a memorandum setting forth relevant facts and law in support of the petition. Here, no separate JRP 15 petition was filed, nor was a memorandum in support thereof. However, we believe that the intent of the rule has been satisfied by the Motion to Strike and/or Motion to Dismiss, which articulates all of the bases upon which Petitioner relies in support of his motion for relief under

JRP 15. As well, Respondents have had a full and fair opportunity to respond to the arguments raised by Petitioner.

For these reasons we conclude that it is appropriate to consider Petitioner's claim for relief under JRP 15 at this time.

As noted, we conclude that the real reason for Petitioner's objection to the Complaint lies in the advantage he hopes to obtain by pushing the determination of his disability as far downstream as possible—certainly until after all scheduled PPI benefits have been paid. We must determine not only whether Respondents are entitled to file a complaint, but also whether their purpose in doing so is vitiated by our decision in *Dickinson v. Adams County*, 2017 IIC 007 (March 2017), a decision that had not been issued as of the date of the Complaint. For the reasons set forth below, we conclude that there is no reason a complaint may not be initiated by a party with business before the Industrial Commission who wishes to invoke the jurisdiction of the Commission to resolve a dispute. However, we also conclude that the purpose for which the complaint was brought is mooted by our decision in *Dickinson*, and that no other purpose would be served by prosecuting the issue of disability before Petitioner is inclined to do so.

I.

While we believe that Petitioner's real antipathy towards the filing of the Complaint is based on his desire to leverage the rule of *Corgatelli* in his favor, the numerous objections he has raised to whether a party other than an injured worker may file a complaint seeking redress before the Industrial Commission warrant further comment. Petitioner would have the Commission conclude that the injured worker, and only the injured worker, is favored with the right to file a complaint with the Industrial Commission. The Commission rejects this narrow interpretation of the workers' compensation laws.

Pursuant to Idaho Code § 72-201, "all phases" of the premises are withdrawn from private controversy, leaving workers' compensation as the exclusive remedy for workplace injuries. Pursuant to Idaho Code § 72-707 "all questions" arising under the workers' compensation laws are to be determined by the Industrial Commission. It should be obvious that in connection with an alleged workplace injury it is not only the injured worker who may have a justiciable issue requiring decision by the Industrial Commission.

In *Brooks v. Associated Foods*, 1988 IIC 0515 (1988), claimant injured his right wrist under circumstances which implicated the liability of two workers' compensation sureties. One of those sureties, Fireman's Fund, filed an "Application for Hearing," i.e., a Complaint, with the Industrial Commission, seeking a determination of whether it, or the Aetna Casualty and Surety Company, had actual responsibility for the payment of workers' compensation benefits to claimant. The Commission's decision in that case was reviewed by the Idaho Supreme Court in *Brooks v. Standard Fire Ins. Co.*, 117 Idaho 1066, 793 P.2d 1238 (1990). On appeal, Aetna argued that the Industrial Commission did not have jurisdiction over the claim of Fireman's Fund seeking reimbursement for benefits paid by Fireman's Fund to the injured worker. The Court recognized that the claim of Fireman's Fund was a claim arising under the workers' compensation laws, and that it was the responsibility of the Industrial Commission to decide the issues presented by the complaint. Implicit in the Court's treatment of the jurisdiction question was its recognition that Fireman's Fund had the right to file a complaint seeking redress before the Commission.

In *Basin Land Irrigation Co. v. Hat Butte Canal Co.*, 114 Idaho 121, 754 P.2d 434 (1988) Brinkley worked as a ditch rider for both the Hat Butte Canal Company (Hat Butte) and Basin Land Irrigation Company (Basin Land). In September of 1984, Brinkley was involved in an

automobile accident while pursuing his work. The other vehicle involved in the accident was operated by Harold Breach, one of the principals of Basin Land Irrigation. Brinkley filed a notice of injury and claim for benefits identifying Hat Butte as his employer. Brinkley later filed a civil complaint against Breach. In June of 1985, Basin Land filed a complaint with the Industrial Commission seeking a determination of Brinkley's employment status at the time of the accident, i.e., was Brinkley performing the work of Hat Butte, or the work of Basin Land? If the latter, then Brinkley's civil action against Basin Land and Breach would be foreclosed by the exclusive remedy of workers' compensation. The Commission ruled that Brinkley had failed to meet his burden that the accident was clearly identifiable with Hat Butte, as opposed to Basin Land. Therefore, Basin Land was entitled to use the Workers' Compensation Act as a shield to foreclose the civil action brought by claimant against it and its employee, Harold Breach.

On appeal, the Idaho Supreme Court noted that in the usual case, it is the injured worker who is the claimant in a proceeding before the Industrial Commission. However, the Court did not challenge the proposition that the employer, too, may be a claimant in a particular case.

The error committed by the Commission related to its treatment of who bore the burden of proof in establishing the nature of the employment relationship between Basin Land and Brinkley. The Court noted that a claimant in a workers' compensation proceeding typically bears the burden of proving the elements of his claim. The Court ruled that there was nothing improper in Basin Land's pursuit of a ruling that Brinkley was its employee. However, the Commission erred in placing on Brinkley the burden of establishing that he was not an employee of Basin Land at the time of the accident. Rather, as the complaining party, the burden of proving the affirmative relief sought should have been placed on Basin Land. Since it was Basin Land who was attempting to use the Workers' Compensation Act as a shield, and because that protection

could only obtain if Basin Land was found to be the employer of Brinkley, Basin Land had the burden of proving entitlement to the affirmative relief it sought.

From the foregoing, it is clear that there is nothing in the provisions of the Act, or in the Court's interpretation of the same, that would foreclose an employer from seeking relief via a complaint. While the Commission's procedures obviously contemplate the usual case of the injured worker as claimant, the Commission has jurisdiction to entertain a complaint from any party who has a dispute over which the Industrial Commission may exercise jurisdiction. This is clearly contemplated by JRP 1:

> These rules shall be cited at the Judicial Rules of Practice and Procedure Under the Idaho Workers' Compensation Law, or abbreviated at JRP, and shall apply in all disputed cases coming under the Commission's jurisdiction. Any party to a controversy may apply to the Commission for relief, and the Commission shall make such order, ruling or award as it determines is reasonable and just. . . . .

Employers, as well as injured workers, may have justiciable disputes, and both may seek relief from the Commission.

While we appreciate that JRP 3 specifies that the "application for hearing" referenced at Idaho Code § 72-706 shall be called a "complaint" and shall be in the form prescribed by the Commission in Appendix I to the JRPs, this does nothing to denigrate the recognition that employers, too, may file complaints with the Commission, though obviously not in the form supplied by the Commission. Idaho Code § 72-706 does not specify that only a claimant may file an application for hearing; it merely specifies that claimants who do file an application for hearing must do so within a time certain, depending on the circumstances of a particular case. Idaho Code § 72-706 defines periods of limitation, not the universe of who may file a complaint before the Commission.

We are unpersuaded by Petitioner's arguments in this vein, and conclude that there is nothing to prohibit the filing of a complaint by any party to a controversy over which the Commission has jurisdiction. Petitioner does, however, raise an issue relating to the burden of proof in such cases that is worthy of further discussion. In *Basin Land*, *supra*, the Court made it clear that since it was Basin Land that was seeking a ruling on an issue that would absolve it of civil liability, it was Basin Land who bore the burden of proof on that issue. Here, if Respondents are allowed to file a complaint, would Respondents have the burden of proving that Petitioner has suffered no disability over impairment? We believe that Basin Land is distinguishable from the instant matter. Here, Respondents are not asking the Commission to determine that Petitioner does not have disability referable to the subject accident. Rather, Respondents are simply asking that the determination of Petitioner's disability be undertaken sooner rather than later. It is the timing of the determination that constitutes the request for "affirmative relief" in this matter. Therefore, on the Respondent's Complaint, it would still be Petitioner who bears the burden of proving all aspects of his claim for disability.

Having determined that Respondents are not foreclosed from seeking relief from the Commission in a form of a "complaint," we turn next to the question of whether expediting the determination of disability is otherwise sanctioned or necessitated by Idaho law.

II.

As noted, the positions the parties have staked out on this issue appear to derive from their interpretation of *Corgatelli v. Steel West, supra*. In *Corgatelli*, against employer's obligation to pay a finite award for its share of total and permanent disability owed per the *Carey* rule, the Idaho Supreme Court ruled that employer was not entitled to credit for PPI previously paid. The rationale for the Court's decision lay in its observation that "impairment" represents a

different class of benefits than "disability." Because they are different, and because there is no statutory authority establishing that the payment of impairment should be credited against a surety's obligation to pay a subsequent award of total and permanent disability, the employer was required to pay the impairment award twice, once after it was issued by the treating physician, and again as part of the *Carey* evaluation.[2]

In *Dickinson v. Adams County, supra*, the Commission deemed *Corgatelli* to have been implicitly overruled by certain language in *Mayer v. TPC Holdings, Inc.*, 160 Idaho 223, 370 P.3d 738 (2016), which recognized that "disability" is a unity of anatomic impairment payable as disability and non-medical factors which may increase disability from anatomic impairment. In some instances, a claimant's disability may not exceed the measure of his anatomic injury. In others, consideration of relevant non-medical factors may warrant paying additional disability in excess of impairment. Regardless, the only thing that is paid is "disability," not impairment or impairment plus disability. Students of the statutory scheme will search in vain for any provision that authorizes the payment of PPI as a benefit separate from disability.

However, as developed above, the parties evidently harbor some fear or expectation that the Court will shrug-off the observations made in *Mayer* in favor of reiterating its adherence to the rule of *Corgatelli*.[3] In anticipation of this possibility, Respondents wish to have the issue of disability decided as soon as possible because they believe that if Petitioner is adjudged totally

[2] Corgatelli was found to be totally and permanently disabled by the Commission. The Commission further found that responsibility for total and permanent disability should be shared between the employer and the ISIF. An evaluating physician awarded claimant a 15% impairment rating, 10% of which was attributable to the work accident, and 5% of which was attributable to a pre-existing condition. Prior to hearing, employer paid the 10% impairment rating. Claimant's residual disability subject to apportionment under *Carey* was 85% (100 - 15). Per *Carey*, employer's responsibility for Claimant's residual disability was calculated as follows: 10/15 x 85 = 56.66%. Therefore, employer's total liability under *Carey* was 56.66% plus 10%, or 66.66% (300 weeks). On appeal, the Court refused to allow employer credit for the 10% impairment previously paid. Employer was required to pay that impairment again as part of the *Carey* evaluation.

[3] In *Oliveros v. Rule Steel Tanks, Inc*., the Commission, again relying on *Mayer, supra*, concluded that permanent impairment is not separately payable under Idaho's Workers' Compensation Laws, but is only payable as a component of disability less than total under I.C. §72-428. That case is now on appeal to the Idaho Supreme Court; the parties had oral arguments in January of 2019.

and permanently disabled before the 280 weeks of scheduled PPI benefits are fully paid, they will be relieved of the obligation of paying the balance yet owed on that PPI rating as of the date of hearing.

However, if the parties are indeed correct that *Corgatelli* will be reaffirmed, the Commission sees nothing in the language of that case which suggests that if Petitioner is adjudged to be totally and permanently disabled as of some date prior to the completion of the payment of the PPI rating, Respondents will be relieved of the obligation to pay the entire PPI award. The *Corgatelli* Court's underlying recognition that impairment and disability represent separate classes of benefits seems to support, rather than denigrate, the notion that Respondents will be obligated to commence payment of disability, while also completing payment of the PPI award, regardless of when the assessment of Petitioner's disability is completed.

Of course, speculation about what *Corgatelli* does or does not portend for Respondents' obligation to pay 280 weeks of PPI benefits is really beside the point since the Commission has determined that *Corgatelli* is implicitly overruled by *Mayer*. Per *Dickinson*, *supra*, Respondents are entitled to apply PPI paid prior to hearing to their ultimate obligation to pay total or less-than-total permanent disability.

Unless the Commission's interpretation of *Mayer* is overruled, it matters not whether Petitioner's disability is determined before or after the payment of the 56% impairment rating is completed. Respondents will be entitled to apply whatever payments have been made to whatever obligation they may have to pay disability to Petitioner.

Because *Dickinson* represents the applicable law on this issue, Respondents' stated purpose for seeking an immediate determination of Petitioner's disability is without a basis in the law, at least as long as the Commission's interpretation of *Mayer* holds. While the Commission

recognizes that the lay-of-the-land may change depending on the Court's treatment of this issue in *Oliveros,* we decline to entertain prosecution of the complaint based on speculation of what may or may not happen vis-à-vis the rule of *Corgatelli*. *Dickinson* is the current law on this issue.

Therefore, while the Commission concludes that the statutory and regulatory scheme does recognize the ability of Respondents to seek redress by the filing of a complaint, we conclude that the Respondents' stated purpose for seeking an early determination of Petitioner's disability is based on a hypothetical concern which is not consistent with Idaho law on this issue. Again, per *Dickinson*, Respondents will be entitled to credit PPI payments made to any subsequent obligation to pay permanent disability total or less-than-total. After *Dickinson*, Respondents' concerns are moot, thus obviating any needed to pursue determination of disability at this time. As we pointed out in *Dickinson*, while it would be preferable, for the benefit of the injured worker, to adjudicate the issue of disability before the payment of the impairment rating is completed, we defer to Petitioner as to whether he wishes to run the risk of a gap in payment between the date of the completion of the payment of PPI and the Commission's determination of his disability.

While the Commission will not proceed with the Complaint for the purpose stated by Respondents, if Respondents have another purpose, such as actually asserting a position on disability, it may be appropriate for the Commission to revisit whether the Complaint should be dismissed. This may, as well, require revisiting the issue of burden of proof. If Respondents do have some other purpose for filing the Complaint, they shall advise the Commission within twenty (20) days of the particulars of the relief they seek.

ORDER

Based on the foregoing, IT IS HEREBY ORDERED that Idaho Code § 72-706 does not grant Petitioner the exclusive right to file a complaint.

However, the Complaint is nevertheless dismissed, premised as it is on concerns about what might happen versus what is. Should Respondents' fears come to fruition they may refile their Complaint. If Respondents have another purpose for proceeding with the Complaint, Respondents shall the notify the Commission with twenty (20) days of this order.

DATED this __25th__ day of __January__, 2019.

INDUSTRIAL COMMISSION

_/s/_____
Thomas P. Baskin, Chairman

_/s/_____
Aaron White, Commissioner

_/s/_____
Thomas E. Limbaugh, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __25th___ day of __January__, 2019 a true and correct copy of the foregoing **ORDER ON DECLARATORY RELIEF** was served by regular United States Mail upon each of the following persons:

SUSAN R VELTMAN
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BOISE ID 83702

MICHAEL T KESSINGER
PO BOX 287
LEWISTON ID 83501

_____/s/_____