BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LAUREL KULM, Claimant, v. MERCY MEDICAL CENTER, Employer, and INDUSTRIAL CLAIMS MANAGEMENT, Surety, Defendants.	)	**IC 2006-012770** **FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATING TO COUNSEL'S REQUEST FOR APPROVAL OF ATTORNEY'S FEES** filed May 20, 2010

This matter came before the Commission at the request of Seiniger Law Offices (hereinafter, Counsel) following an informal determination by Commission staff on the issue of attorney's fees payable to Counsel from the proceeds of a lump sum settlement agreement. Hearing was held on November 23, 2009, at which time the Industrial Commission entertained argument from Claimant's Counsel and counsel for Defendants in support of Counsel's claim for attorney's fees. As well, the Commission received and considered the affidavits of Counsel and Claimant, and the various attachments thereto, offered in support of Counsel's claim for attorney's fees. Finally, the Commission has reviewed and considered Counsel's closing brief, filed with the Commission January 20, 2010.

Per the October 13, 2009 Notice of Hearing, the following issue is before the Commission for determination:

> "The extent and degree of claimant's attorney's entitlement to an attorney fee on funds paid to claimant subsequent to her attorney's retention, including, *inter alia*,

whether those funds constitute "available funds" subject to a "charging lien" under the applicable regulation."

I.

FINDINGS OF FACT

1. At all times relevant hereto Claimant, Laurel Kulm, was an employee of Mercy Medical Center, Employer herein.

2. Mercy Medical Center insured its workers' compensation obligations under a policy issued by Indemnity Insurance Company of North America (hereinafter, Surety). Industrial Claims and Management was the third party administrator for Surety in the state of Idaho.

3. On or about November 2, 2006, Claimant suffered an industrial accident arising out of and in the course of her employment with Employer.

4. As a consequence of the subject accident, Claimant contended that she suffered injuries to her low back and lower extremities.

5. Medical evidence established that Claimant suffered from pre-existing low back problems for which she had received chiropractic treatment. Claimant's pre-injury medical history was also significant for bilateral meniscus tears and repairs in the summer of 2006.

6. Although Claimant's knee discomfort largely returned to its pre-injury level, her low back complaints persisted. An April 5, 2007 MRI demonstrated the presence of a moderate sized disc herniation at L3-L4, with possible mass effect on the descending right L4 nerve root.

7. Following her review of the April 5, 2007 MRI, Nancy Greenwald M.D., proposed that in order to ascertain whether Claimant's low back injury was causally related to the subject accident, it would be prudent to review all of Claimant's past chiropractic records.

8. Concerned that she was getting the "runaround", from the workers' compensation adjuster assigned to her case, and because she had been told that her injury might not be covered due to the possibility that her condition was related to a pre-existing degenerative condition, Claimant decided to retain the services of Seiniger Law Offices, P.A., to represent her interests in her workers' compensation claim.

9. On or about June 1, 2007, Claimant executed a contingent fee agreement with Seiniger Law Offices, P.A., which provided, *inter alia*:

> "2) For their representation of Client, Attorneys will be paid a fee which will be in lien upon the cause of action and will be equal to a portion of all amounts recovered by way of settlement, or award including attorney fees, and including sums recovered in satisfaction thereof from any third party. That portion will be as follows:
>
> > i) Twenty-five percent (**25%**) of all amounts obtained for Client after execution of this agreement if the case is settled **before a hearing.** If Client is receiving temporary disability benefits at the time of the execution of this agreement, Attorney will not take a percentage of that benefit until such time as the surety discontinues or threatens to discontinue payment of said benefit; if Client has received an impairment rating which has been admitted and is being paid, Attorney will not take a percentage of the balance of the impairment rating unless it is later disputed.
> >
> > ii) Thirty percent (**30%**) of such amounts **after a hearing** and the claim is resolved without the filing of an appeal by either party;
> >
> > iii) Forty percent (**40%**) of such amounts if the claim is resolved **after an appeal** has been filed by either party;
>
> **Attorney will take a percentage of any benefits obtained by Client with respect to permanent partial impairment if a rating is given after the parties execute this agreement.** In the event that there are attorney fees awarded against the defendant(s) by the commission Attorney shall be entitled to be paid those attorney fees or the percentage calculated above, whichever is greater."

10. At the instance of Counsel, Claimant was evaluated by Richard Radnovich, D.O. In his report of June 7, 2007, he diagnosed Claimant as suffering from lumbar spondylosis with

right–sided L3-L4 disc protrusion, and lumbar and radicular pain secondary to that protrusion. Importantly, he also proposed that Claimant's condition was, more likely to not, related to the industrial accident of November 2, 2006. Although Dr. Radnovich noted that Claimant was still receiving medical treatment for her condition, including occasional epidural steroid injections, he nevertheless proposed that Claimant was entitled to a 12% whole person PPI rating under the applicable edition of the AMA Guides to the Evaluation of Permanent Impairment.

11. By letter dated June 6, 2007, Dr. Greenwald reported that she had had the opportunity to review and consider Claimant's pre-injury and chiropractic records. Following her review of those documents, Dr. Greenwald concluded Claimant's low back condition was either related to the industrial accident, or to a near fall Claimant suffered following a physical therapy visit prescribed for Claimant as a result of the subject accident.

12. On August 2, 2007, Claimant was seen for the first time by Beth Rogers, M.D. Dr. Rogers proposed that Claimant's lumbar spine radiculopathy was causally related to the November 2, 2006 accident. With respect to Claimant's bilateral knee complaints, Dr. Rogers proposed that Claimant was close to her baseline pre-injury condition. Dr. Rogers recommended a right L4 transforaminal epidural steroid injection for treatment of the right L4 radiculopathy. She felt that Claimant might require a brief course of directed physical therapy following the injection. In the interim, she gave Claimant modified duty restrictions, with no repetitive bending, no rapid walking, and no lifting greater than 15 to 20 pounds.

13. Claimant was seen by Dr. Rogers on November 7, 2007. On the occasion of that visit, Dr. Rogers noted that Claimant's right leg pain and overall back pain was much improved. Dr. Rogers concluded that Claimant's L3-L4 disc protrusion with right L4 radiculopathy had resolved with non-operative treatment. Dr. Rogers proposed that Claimant was medically

stable, and entitled to a 5% permanent partial impairment (PPI) rating per the applicable edition of the AMA Guides to the Evaluation of Permanent Impairment. Dr. Rogers gave Claimant permanent work restrictions to avoid lifting more than 50 pounds.

14. Following Dr. Rogers visit with Claimant of November 7, 2007, but before the execution of the April 28, 2009 Lump Sum Settlement Agreement, Surety paid to Claimant, and her attorney, a 5% PPI rating, i.e. 25 weeks at $310.75 per week or $7,768.75.

15. Claimant's Counsel took a 25% fee on the PPI rating, or $1,942.19, and disbursed the balance of the rating to Claimant.

16. In support of Claimant's claim for disability in excess of the physical impairment, Counsel engaged the services of Mary Barros-Bailey, a private vocational rehabilitation counselor. In her report of August 22, 2008, Ms. Barros-Bailey proposed that Claimant had sustained permanent partial disability (PPD) in the range of 7 to 10% of the whole person, inclusive of impairment. This opinion was rendered under the assumption that the 50 pound lifting restriction imposed by Dr. Rogers was Claimant's only extant physical limitation/restriction.

17. In a report dated October 10, 2008, Ms. Barros-Bailey issued a revised disability evaluation based on additional information provided by Dr. Radnovich concerning Claimant's permanent limitations/restrictions. Based on the limitations/restrictions recommended by Dr. Radnovich, Ms. Barros-Bailey proposed that Claimant had suffered a permanent partial disability (PPD) in the range of 22% of the whole person, inclusive of impairment.

18. Subsequent to the preparation of Ms. Barros- Bailey's report of October 10, 2008, but before the execution of the subject Lump Sum Settlement Agreement, Surety voluntarily paid disability benefits to Claimant and her attorney, in the amount of $5,438.13.

19. Prior to the execution of the Lump Sum Settlement Agreement, Claimant's Counsel took a 25% attorney fee against PPD benefits of $5,438.13, or $1,359.53, and disbursed the balance of the PPD award to Claimant.

20. Total attorney fees taken prior to the Lump Sum Settlement Agreement equaled $3,301.72. Total costs taken prior to the execution of the Lump Sum Settlement Agreement equaled $1,394.37.

21. At some point prior to June 26, 2009, the parties agreed to resolve remaining extant issues by way of Lump Sum Settlement Agreement. Pursuant to the terms of the Lump Sum Settlement Agreement filed with the Industrial Commission on June 26, 2009, Claimant agreed to resolve all remaining issues for the additional sum of $13,000.

22. The Lump Sum Settlement Agreement further provided that Claimant would pay her attorney a 25% fee on the additional monies paid pursuant to the Lump Sum Settlement Agreement ($13,000 x 25% = $3,250).

23. Contemporaneous with the preparation of the proposed Lump Sum Settlement Agreement, Counsel submitted his Form 1022, Report of Expenses and Statement of Claimant's Counsel, filed with the Commission on or about May 5, 2009. That document reflects that Counsel took fees against the benefits paid prior to the execution of the Lump Sum Settlement Agreement in the amount of $3,301.72. However, the Form 1022 report does not contain an itemization of the type of benefits against which Counsel asserted an attorney fee claim prior to the execution of the Lump Sum Settlement Agreement.

24. In the Form 1022 Report, Counsel also stated, *inter alia*: "Before Counsel was retained, Defendants denied, discontinued, or disputed Claimant's right to additional medical benefits and treatment, time loss benefits, and impairment compensation, and disability beyond

impairment, and retraining and attorney fees. Subsequent to retaining Counsel, Claimant received additional medical treatment and time loss benefits and impairment compensation and disability beyond impairment compensation."

25. The proposed Lump Sum Settlement Agreement, supported by Counsel's Form 1022, was submitted to the Industrial Commission, Benefits Department, for review and evaluation. Thereafter, Counsel also submitted a Memorandum of Law in Support of Form 1022, filed with the Commission on July 24, 2009, along with the supporting affidavit of Andrew Marsh, also filed with the Commission on July 24, 2009.

26. The supporting affidavit of Andrew Marsh contains itemization information that was absent from the Form 1022. Specifically, the affidavit reflects that attorney fees taken on benefits paid prior to the execution of the Lump Sum Settlement Agreement were calculated as follows:

a. PPI benefits of $7,768.75 times 25% equals $1,942.19

b. PPD benefits of $5,438.13 times 25% equals $1,359.53

c. Total attorney's fees taken prior to Lump Sum Settlement $3,301.72

27. By letter dated August 12, 2009, Counsel provided the Benefits Department with Claimant's "Workman's Compensation Summary", a document prepared at or around the time Claimant first retained the services of Seiniger Law Offices, P.A., which document purports to synopsize some of the concerns that led Claimant to believe she would benefit from the assistance of Counsel.

28. By letter dated September 3, 2009, Scott McDougall, Manager of the Industrial Commission Claims and Benefits Department, advised Counsel that Commission staff had made an initial determination that the settlement was in the best interest of the parties, except for that

portion of the agreement which memorialized attorney's fees taken on benefits paid prior to the execution of the Lump Sum Settlement Agreement. In this regard, the letter states:

> "The Industrial Commission (Commission) is in receipt of the proposed settlement agreement referenced above. In our review of the proposed settlement, the Commission has also considered your letters and attachments of May 5, July 24, and August 12 regarding your representation of the claimant and your proposed fees. The Commission staff has made an initial determination that the settlement is in the best interests of the parties, except for the portion of the requested fees related to benefits in excess of the $12,223.13 Lump Sum Consideration, which have not been found to be reasonable per IDAPA 17.02.08.033.
>
> Please be aware that this is an initial determination, and, in accordance with IDAPA 17.02.08.033.03, you may request a hearing on the matter within 14 days. Also in accordance with this rule, the Commission will shortly be issuing a partial order releasing available funds, and fees which have been determined to be reasonable."

29. On or about September 4, 2009, the Industrial Commission entered its Order Partially Approving the Lump Sum Settlement Agreement. Adopting staff's recommendation, the Commission stated, *inter alia*;

> "It is further ordered that the Commission approves the request for attorney fees and costs as those services related to the lump sum consideration. The total lump sum consideration amount is $12,223.13. Fees from that amount have been requested at 25%, which is reasonable. Fees and costs amount to $3,055.78 and $10.00 respectively, for a total of $3,065.78. However, Attorney has previously withheld $3,301.72 as fees, un-itemized as to the specific benefits obtained other than "Benefits, paid prior to Lump Sum.." Such fees have not been substantiated to the Commission as reasonable in accordance with IDAPA 17.20.08.033. Thus, no fee proceeds from the settlement shall be made payable to Attorney. Surety will release to Attorney $10.00 for costs. Further, inasmuch as the fees previously taken exceed by $245.94 those fees found reasonable, Claimant's attorney shall reimburse the trust account for this claimant the amount of $245.94.
>
> It is further ordered that the Surety release to Attorney the sum of $3,250.00, which is the balance of the amount of proceeds of the Lump Sum Agreement requested for unsubstantiated attorney fees. This amount shall be held in trust by Attorney pending further order of the Commission."

30. Claimant filed a Motion to Reconsider the Industrial Commission's Partial Order, as well as a Request for Hearing on the Partial Order pursuant to IDAPA 17.02.08.033.03.b.

31. A telephone conference was held between the parties on October 6, 2009, at which time various motions filed to that date by Claimant were discussed, and the issues to be heard at the November 23, 2009 hearing were identified.

II.

COUNSEL'S CONTENTIONS

In addition to the issues identified in the October 13, 2009 Notice of Hearing, Counsel has identified a number of additional issues, as set forth in his November 22, 2009 Statement of Issues for Attorney Fee Hearing, filed with the Commission on November 23, 2009, the day of hearing. In addition to the issue of whether or not Counsel has met his burden of proving entitlement to attorney's fees on monies paid prior to the execution of the Lump Sum Settlement Agreement, Counsel raises a number of constitutional challenges to the current attorney fee regulations. Counsel also challenges the manner in which staff made its initial determination, as set forth in Mr. McDougall's letter of September 3, 2009. Counsel asserts, *inter alia*, that staff improperly failed to articulate the basis for its determination that the requested fee was not reasonable. Finally, Counsel raises a number of policy considerations arguing against Commission rules which limit fees from workers' compensation benefits.

As developed below, the Industrial Commission declined to approve the requested attorney's fees on sums paid prior to the execution of the Lump Sum Settlement Agreement because Counsel failed to adduce evidence tending to demonstrate that the requested fees were reasonable under the applicable regulation. Specifically, the Industrial Commission declined to

approve the fees in question because Counsel failed to demonstrate that the fund against which fees had previously been taken constituted "available funds" against which a "charging lien" could be asserted. Central to this question is the issue of whether or not Counsel was "primarily or substantially" responsible for securing the fund from which he subsequently took a fee.

Although the question of whether or not Counsel's efforts were "primarily or substantially" responsible for securing the fee from which he hopes to be paid was the basis of the Commission's decision, Counsel has elected to concede that his services were not "primarily or substantially" responsible for securing the PPI award from which he previously took a fee:

> "For purposes of these proceedings only, and without waiving the right to raise the constitutionality of the applicable IDAPA attorneys fees rules on appeal, Seiniger Law Officers stipulates that its attorneys were not 'primarily or substantially' responsible for securing the PPI benefit involved—whatever 'primarily or substantially' may mean in the context of defining 'available funds' as those terms are used in the relevant IDAPA rules."
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> Claimant's Counsel's Opening Brief, p. 4.

Rather, Counsel contends that he is entitled to an award of attorney's fees consistent with the terms of the Contingent Fee Agreement executed by Claimant, the regulatory scheme notwithstanding.

Even though Counsel has chosen, for purposes of the instant proceeding, to concede that his services were neither primarily nor substantially responsible for securing the PPI award from which he has taken his fee, the Commission feels constrained to address this issue, inasmuch as it is the Commission's interpretation of those regulations which informed its decision to deny the fees in question. As well, we will attempt to address the other challenges made by Counsel to the Commission's process for reviewing attorney's fee issues on lump sum settlement agreements.

III.

CONSTITUTIONAL CHALLENGES

Although Counsel initially posits that the Industrial Commission does not have jurisdiction to consider constitutional challenges to the provisions of the Workers' Compensation Act, or regulations implementing the same, he has nevertheless devoted considerable energy to discussing the constitutional issues relating to the Commission's actions in the matter, as well as the alleged unconstitutionality of the current regulations relating to the payment of attorney's fees on lump sum settlement agreements. Counsel argues that even though the Industrial Commission does not have jurisdiction to consider constitutional challenges to its statutes or regulations, it is nevertheless bound to apply and follow Supreme Court decisions treating constitutional issues that may arise in the application of the Workers' Compensation Laws. Counsel asserts that in adopting the current provisions of IDAPA 17.02.08.033 *et. seq*., and in applying those regulations to the facts of the instant matter, the Commission has erroneously concluded that *Curr v. Curr*, 124 Idaho 686, 864 P.2d 132 (1993) has been overruled by *Rhodes v. Industrial Commission*, 125 Idaho139, 868 P.2d 467 (1993*), Mancilla v. Greg*, 131 Idaho 685, 963 P.2d 368 (1998) and *Johnson v. Boise Cascade Corporation*, 134 Idaho 350, 2 P.3d 735 (2000). According to Counsel, that the Industrial Commission does not have jurisdiction to consider constitutional challenges to its statute, in no way abrogates its responsibility to apply the direction contained in *Curr* v. *Curr*, *supra.*

The Commission agrees that *Curr* v. *Curr*, *supra*, gave direction to the Commission concerning the constitutionality of the process utilized by the Commission, at that time, to approve attorney's fees on lump sum settlement agreements. That case makes it clear that the Industrial Commission may not, *sua sponte*, modify attorney fee agreements without first

enacting guidelines upon which the Commission will base fee modifications, and without providing counsel an opportunity for a meaningful hearing before the Commission makes a decision to modify the agreement. Notably, *Curr* does not endorse an outright prohibition of Commission modification of attorney fee agreements. Instead, the case makes it clear that such modifications can only be undertaken in the context of an appropriately adopted regulation which affords proper notice to counsel and an opportunity to be heard.

Curr was decided in 1991. To comply with *Curr*, and after an extensive public process, the Commission adopted formal regulations treating claimant's attorneys' fees pursuant to Idaho Code § 72-508. Those regulations were to take effect on December 1, 1992. However, in the interim, members of the Claimant's bar sought a writ of prohibition restraining the Industrial Commission from implementing the provisions of the former IDAPA 17.01.01.803.d, a true and correct copy of which is attached hereto as Appendix A. That challenge was treated in *Rhodes v. Industrial Commission*, 125 Idaho 139, 868 P.2d 467 (1993).

Although Counsel acknowledges that the *Rhodes* Court determined that the 25% cap on attorney's fees passed constitutional muster, he argues that the decision should be limited to that particular finding, and that nothing in the decision supports the conclusion that the Court found all of the <u>other</u> provisions of the regulation to be constitutional. Specifically, Counsel argues that the *Rhodes* Court's narrow holding that the 25% cap is constitutional lends no support to the proposition that the current regulation treating "available funds" is constitutional.

In response to this argument, it is first notable that nothing in the majority opinion suggests that the Court's finding concerning the constitutionality of the regulation was limited only to that portion of the regulation treating the 25% cap on attorneys' fees. The petitioner's brief in that case makes it clear that the writ of prohibition was sought against the <u>entirety</u> of

IDAPA 17.01.01.0803.d. *See*, Petitioner's Brief in Support of Alternative Writ of Prohibition and Peremptory Writ of Prohibition, p. 2. Indeed, in the subsequent case of *Mancilla v. Greg*, 131 Idaho 685, 963 P.2d 368 (1998) the Court commenced its discussion of the current IDAPA 17.02.08.033, *et seq*, by noting that the constitutionality of the prior attorney fee regulation had been upheld in *Rhodes*, on the basis that the regulation was a reasonable interpretation of the power vested in the Commission pursuant to the provisions of Idaho Code § 72-803. Nothing in *Mancilla* suggests that it was only a small portion of the regulation that was subjected to constitutional scrutiny in *Rhodes*.

Second, even if it be assumed that the *Rhodes* majority intended to address only that portion of the regulation which capped attorney's fees at 25%, it seems clear that in considering this issue, the Court necessarily considered the nature of the fund subject to the 25% cap. In support of his argument, Counsel quotes the regulation interpreted by the *Rhodes* Court as follows:

> "4. Maximum attorney fee to be charged by a claimant's counsel.
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> . . . [A]ny contingent fee agreement between counsel and a claimant in a workers' compensation case shall provide that the amount of attorney fees will not exceed 25% . . . [or] after hearing, . . . up to 30%. Rhodes at 143.
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> Claimant's Counsel's Opening Brief, p. 8.

Without Counsel's redactions, the language of the former IDAPA 17.01.01.803.d (4) actually reads as follows:

> "**Maximum attorney fee to be charged by a claimant's counsel.** After the effective date of this regulation, any contingent fee agreement between counsel and a claimant in a workers' compensation case shall provide that the <u>amount of attorney fees will not exceed 25% of any new money received by the claimant</u>, whether such new money is acquired pursuant to a Lump Sum Settlement Agreement, other Agreement, Mediation, or an Award of the Commission.

a. Provided, however, that after hearing by the Commission and upon its own motion, the Commission may award attorney fees up to 30% of new money awarded.

b. In cases where a claimant is deemed totally and permanently disabled, attorney fees may be deducted from no more than 500 weeks of workers' compensation benefits.

(Emphasis added).

The portion of the regulation arguably at issue in *Rhodes* did not simply cap attorney's fees at 25%. Rather, the provisions of paragraph 4 capped attorney's fees at 25% of "new money". New money is defined at the former IDAPA 17.01.01.803.d (3) as follows:

> "'New money' as used herein shall refer to monetary benefits to the claimant that counsel is responsible for securing through legal services rendered in connections with the client's workers' compensation claim."

Accordingly, in considering the constitutionality of the cap on attorney's fees, the Supreme Court had before it, and necessarily considered, the constitutionality of a regulation which capped attorney's fees at 25% of "new money." The "new money" provision of the former regulation is the direct antecedent of that portion of the current regulation which caps attorney fees at 25% of "available funds." From the *Rhodes* decision, the Industrial Commission can discern nothing in the language of that case that would suggest that the former provision limiting an award of attorney's fees to 25% of "new money" did not pass constitutional muster. There is nothing in *Rhodes* that argues against a conclusion that the successor language to the "new money" provision of the former regulation is anything but constitutional.

Finally, even if it be assumed that the majority in *Rhodes* only intended to narrowly address the constitutionality of a 25% cap (not a 25% cap on "new money"), it would seem that the constitutional analysis applied to that portion of the regulation would also apply to the balance of the regulation. In *Rhodes*, *supra*, the Court applied a rational basis test to assess

whether the regulation bore a rational relationship to a legitimate legislative purpose. The Court found that there was a rational relationship between the legitimate legislative purpose to foster sure and certain relief for injured workers and the attorney fee regulation. The limit imposed by the regulation furthers the purpose by making the cost of attorneys paid from new money less burdensome. The Court also concluded that the regulation satisfied due process analysis for the same reason.

Assuming, *arguendo*, that the Court's analysis was limited to consideration of whether a 25% cap is constitutional, the application of the rational basis test to the balance of the statute would seem to yield the same conclusion that the Court reached concerning the 25% cap. Therefore, nothing in *Rhodes* seems to suggest that the Court found, or would find, that only certain of the provisions of the former IDAPA 17.01.01.803.d are constitutional.

Contrary to the assertions made by Counsel, the Commission has not determined that *Curr v. Curr*, *supra*, has been overruled by *Rhodes*, *Mancilla* and/or *Johnson*. Rather, it appears that after *Curr*, the Industrial Commission followed the direction of the Supreme Court, and adopted a regulatory scheme pursuant to Idaho Code § 72-508 that addressed the shortcomings noted in *Curr*. Moreover, it is apparent that in considering the regulation adopted by the Commission in 1992, the *Rhodes* Court found either the entire regulation, or, at the very least, that portion of the former regulation that is the direct antecedent to the provisions of the current regulation which are at the heart of the instant dispute, to be constitutional.

IV.

APPLICATION OF THE PROVISIONS OF IDAPA 17.02.08.033 TO THE FACTS OF THIS CASE

With an effective date of July 1, 1994, the Industrial Commission adopted the current IDAPA 17.02.08.033 *et seq,* pursuant to the provisions of Idaho Code § 72-508. A true and correct copy of that regulation is attached hereto as Appendix B. The current regulation preserves the notion of a 25% cap on attorney's fees, but instead of applying that cap to "new money", the current regulation allows attorneys to take a 25% fee on "available funds". Per IDAPA 17.02.08.033(a) "available funds" is defined as follows:

> "Available funds" means a sum of money to which a charging lien may attach. It shall not include any compensation paid or not disputed to be owed prior to claimant's agreement to retain the attorney.

Therefore, available funds do not include (a) compensation paid to Claimant prior to the retention of Counsel or (b) compensation which is not disputed to be owed prior to the retention of Counsel. Counsel acknowledges that the definition of available funds unambiguously specifies that money paid to claimant prior to the retention of Counsel does not constitute available funds. Therefore, Temporary Total Disability (TTD) or PPI benefits paid to an injured worker before he or she retains an attorney can never constitute available funds which might later form the basis of an award of attorney's fees. However, Counsel argues that what constitutes compensation "not disputed to be owed" prior to the retention of counsel is ambiguous. In his brief, Counsel identifies a number of meanings that may be ascribed to the regulatory language. However, we think that what is clearly intended by this portion of the definition of available funds is that if the evidence establishes that employer/surety acknowledged responsibility for a particular benefit payable under the Workers' Compensation

Laws prior to the retention of Counsel, these benefits do not constitute available funds for purposes of regulation. For example, let us assume that prior to the retention of Counsel, surety acknowledged responsibility for the payment of TTD benefits during claimant's period of recovery. Those payments would not constitute "available funds" even though their payment continued after the retention of Counsel. However, if, subsequent to the retention of counsel, a dispute arose concerning claimant's ongoing entitlement to TTD benefits, such that surety denied responsibility for further payment, any funds eventually paid as a result of counsel's efforts to reinstate TTD benefits would constitute available funds. We think that the language of this portion of the regulation is clear, and provides a well understood rule that an attorney is not entitled to assert a claim against benefits, responsibility for which was acknowledged by surety prior to the retention of counsel.

The definition of available funds, however, does not address that class of benefits, the entitlement to which does not arise until after the retention of counsel. These benefits do not constitute compensation "not disputed to be owed" prior to the retention of counsel. For example, let us assume that at the time of counsel's retention on an accepted claim, claimant was still in the period of recovery, and was receiving TTD benefits. Let us further assume that at some point in time after counsel's retention, claimant's treating physician declared claimant to be medically stable and awarded claimant an impairment rating. Finally, let us assume that this impairment rating was promptly paid by surety, without dispute. In this hypothetical, the PPI award, though not disputed by surety, was also not disputed to be owed <u>prior to</u> the retention of counsel. Since the entitlement to the PPI award was not ascertained until after counsel's retention, it would be impossible for surety to acknowledge responsibility for the payment of this benefit prior to the retention of counsel. Technically, then, such a fund of money constitutes

"available funds" for purposes of the regulation. Indeed, it is exactly this scenario, or one of many permutations thereof, which forms the basis of attorney fee disputes in most settled cases, as in the instant matter.

Although this interpretation of "available funds" seems to be mandated by the provisions of IDAPA 17.02.08.033.01(a), it is worth noting that certain language in *Mancilla v. Greg*, 131 Idaho 685, 963 P.2d 368 (1998) suggests that the Idaho Supreme Court may read the regulation more narrowly. As discussed in more detail below, in *Mancilla*, a non-disputed impairment rating was generated by claimant's treating physician after claimant retained the services of attorney Pena. The Industrial Commission declined to approve an award of attorney's fees on the PPI rating, concluding that Pena's services were not "primarily or substantially" responsible for obtaining the PPI award. The Court affirmed the Commission's decision in this regard, ruling that there was substantial and competent evidence supporting the Commission's conclusion that Pena's efforts were not "primarily or substantially" responsible for securing the fund from which he hoped to be paid. However, the Court also noted that because Pena conceded that the PPI rating was not disputed, this concession, too, supported the conclusion that the rating could not constitute "available funds". In this regard, the Court stated:

> "This testimony is also significant because it supports a conclusion that however the PPI rating came into existence, the rating and amount of the award were never disputed. According to IDAPA 17.02.08.033.01.a and 01.e, "undisputed funds cannot be used to satisfy claims for attorney's fees."

Therefore, the Court's opinion suggests that even if claimant's entitlement to non-disputed funds arose after the retention of counsel, such funds cannot constitute "available funds" for purposes of the attorney fee calculation. The quoted portion of the decision is not critical to the affirmation of the Commission ruling, since the Court clearly held that there was substantial and competent evidence supporting the Commission conclusion that counsel's efforts

were not primarily or substantially responsible for securing the fund from which he had previously taken a fee.

Whether the quoted language is dicta may not be of any particular significance in light of the further restrictions on attorney's fees created by the definition of "charging lien". The term "charging lien" is defined at IDAPA 17.02.08.033.01.c as follows:

> "Charging lien" means a lien, against a claimant's right to any compensation under the Workers' Compensation laws, which may be asserted by an attorney who is able to demonstrate that:
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> i. There are compensation benefits available for distribution on equitable principles;
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> ii. The services of the attorney operated primarily or substantially to secure the fund out of which the attorney seeks to be paid;
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> iii. It was agreed that counsel anticipated payment from compensation funds rather than from the client;
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> iv. The claim is limited to costs, fees, or other disbursements incurred in the case through which the fund was raised; and
>
> v. There are equitable considerations that necessitate the recognition and application of the charging lien.

Although IDAPA 17.02.08.033.01.a, specifies that a charging lien may attach to "available funds", it is apparent from a review of the definition of "charging lien" that that term further constrains the available funds that may be subject to a claim of attorney's fees. Importantly, a charging lien can only attach to available funds where it is demonstrated that the services of the attorney operated "primarily or substantially" to secure the fund out of which the attorney seeks to be paid. (*See*, IDAPA 17.02.08.033.01.c.ii.) This is but one of five requirements that must be satisfied before a charging lien can be said to exist against "available funds". As important is the fact that these requirements are <u>not</u> in the disjunctive. Per the

language of the regulation, all of these requirements must be satisfied before a charging lien can be said to exist.

This construction of the regulation finds support in two subsequent Idaho Supreme Court decisions. *See*, *Mancilla v. Greg*, 131 Idaho 685, 963 P.2d 368 (1998) and *Johnson v. Boise Cascade Corporation*, 134 Idaho 350, 2 P.3d 735 (2000).

In *Mancilla*, Mancilla suffered an amputation injury to his right thumb on October 12, 1993. In December of 1993, Mancilla was released by Dr. Rockwell to return to work at his pre-injury job. Following his release to return to work, surety terminated Mancilla's TTD benefits. On February 24, 1994, Mancilla entered into a contingency fee agreement with Pena. Shortly thereafter, Pena contacted Dr. Rockwell to express his concern about Mancilla's ongoing difficulties. Thereafter, Dr. Rockwell examined Mancilla again, and reversed his previous decision to release Mancilla to unrestricted work activities. On April 5, 1994, Dr. Rockwell awarded claimant an 11% PPI rating for his injuries. Surety did not dispute the rating and paid it. Pena took a 25% attorney fee against the $11,632.00 PPI award. Thereafter, Pena and surety came to an agreement concerning the resolution of the balance of the issues involved in claimant's case. The parties executed a lump sum settlement agreement, which memorialized the past payment of the PPI award and other benefits, and proposed the payment of an additional $12,125.00 to claimant to resolve the matter. The lump sum settlement agreement was submitted to the Commission for approval pursuant to Idaho Code § 72-404. The Commission questioned whether Pena was primarily or substantially responsible for securing the PPI award. After a hearing on the issue, the Commission issued an order denying Pena a fee from the PPI award. Pena appealed.

In discussing the current statutory scheme, the Court stated:

> "The authority granted to the Commission under Section 72-803, to "approve" attorney fees, does not conflict with the judicial penumbra. The regulation under challenge, promulgated to foster ease, utility, and predictability in the application of Idaho Code § 72-803, in turn does not overstep the legislative bounds of Idaho Code § 72-803, read in *pari materia* with the entire Workers' Compensation Act. *See, Heese v. A&T Trucking*, 102 Idaho 598, 600, 635 P.2d 962, 964 (1981) (various provisions of Workers' Compensation Act must be read in *pari materia*). The regulation is not a fee schedule. It is a framework establishing uniform grounds for fee approval. The language of Idaho Code § 72-803 contemplates that the Commission will monitor the appropriateness of fees on behalf of claimants, and therefore the regulation provides a reasonable interpretation of the power vested by Idaho Code § 72-803.
>
> In this case, the operative word in Idaho Code § 72-803 is "approve." Rhodes argues that the word "approve" means simply that, ***to approve***. It does not mean to "regulate." Given the broad empowerment provided by Idaho Code § 72-508, coupled with the purpose underlying the Workers' Compensation Act., i.e., to provide "sure and certain relief for injured workmen and their families," Idaho Code § 72-201, we cannot agree with Rhodes' contention. The absence of the word "regulate" in Idaho Code § 72-803 is not legally significant and does not exact a reading that the legislature intended to confine the Commission's regulatory authority. "The Workers' Compensation law is to be liberally construed with a view to effect its objects and promote justice." *Mayo v. Safeway Stores*, 93 Idaho 161, 166, 457 P.2d 400, 405 (1969). Accordingly, we hold that the word "approve" is sufficient to establish the proper delegation of the power to regulate attorney fees."
>
> (footnotes omitted).

In considering whether to uphold the Commission decision that Pena failed to adduce evidence and that his efforts had "primarily or substantially" secured the PPI award, the Court found it significant that the evidence demonstrated that it was Dr. Rockwell who initiated the determination of claimant's PPI award and that Pena simply agreed that the impairment rating was fair. The decision also addresses one of the points raised by Counsel in the instant matter. Counsel asserts that staff's initial determination places him in the difficult position of being required to prove a negative. He argues that it is impossible for him to show what might have happened (or what might not have happened) had he not become involved in the case, and that, therefore, a presumption should exist that he is entitled to an award of fees on any non-disputed

monies paid to Claimant following the retention of Counsel. After all, who is to say that the Surety's decision to pay an impairment rating is not the result of Surety's conclusion that it would be pointless to decline to pay the rating since Claimant has retained an attorney who would assuredly take surety to task for its recalcitrant behavior? Pena made the same argument in *Mancilla*:

> Further evidence that Pena did not primarily and substantially secure the PPI benefits is his testimony that it was "possible" his client would have received no more benefits had Pena not become involved:
>
> *. . . I submit to you the possibility that Mr. Mancilla, had I not been able to see him, would be in Mexico right now and would have never received one more penny other than the first few weeks of total temporary disability payments.*
>
> Here, Pena seems to suggest that because neither he nor the Commission can predict what may have happened had Pena not become involved in the case, the Commission should allow fees from all benefits, including the PPI, which were awarded after he was retained. The Commission found this argument to be speculative at best, and that an award of attorney fees upon such conjecture would be inconsistent with the requisites of attorney charging liens pursuant to the Commission's rule. IDAPA 17.02.08.033."
>
> 131 Idaho 685.

Therefore, Pena was unable to prove that his efforts were primarily or substantially responsible for securing the PPI award simply by speculating that surety might not have been inclined to pay the award absent his appearance as counsel in the matter. Recognizing that it is Counsel who bears the burden of proving, by a preponderance of the evidence, the assertion of a charging lien, there is nothing untoward about the Commission's rejection of such speculation.

In truth, however, *Mancilla* could be seen as a close case. Although it is difficult, at this remove, to appreciate what the subtle factual nuances of that case might have been, it seems arguable that the case could have gone a different way. It will be recalled that prior to Pena's retention, Dr. Rockwell had released claimant to return to work without limitation. Claimant

attempted to return to work, but found that he continued to experience discomfort in his hand. He was, in fact, unable to perform his job duties, and was discharged by his employer. As well, TTD benefits were curtailed. This evidently proved too much for Mr. Mancilla, who decided to leave Idaho and return to Mexico. There, the matter would surely have ended, but for the intervention of a friend who persuaded Mancilla to retain Pena. It was Pena who contacted Dr. Rockwell and persuaded him to see claimant again. It was as a result of that visit that Dr. Rockwell gave claimant an impairment rating. Could it not be argued that Pena's intervention was responsible, in some sense, for the acquisition of the 11% PPI rating? The real question, of course, is whether it could be said that Pena's actions were "primarily or substantially" responsible for Dr. Rockwell's generation of an impairment rating. On the facts before it, the Commission found that Pena did not meet his burden of proof. However, neither the Commission's nor the Court's decision provides practitioners with much guidance on the standard that must be satisfied before one can be said to have "primarily or substantially" secured the funds from which a fee may be paid.

In *Johnson v. Boise Cascade Corporation*, *supra*, Johnson suffered a partial left foot amputation in the course of his employment. He had two surgeries on his foot before he retained the services of Pena on July 28, 1995. Thereafter, on August 7, 1995 and August 19, 1995, claimant had additional surgeries, eventually resulting in the amputation of his left leg below the knee. Boise Cascade, a self-insured employer, accepted responsibility for the payment of medical and other benefits associated with surgeries one and two. However, the company denied responsibility for the payment of medical and other benefits associated with surgeries three and four.

In November of 1995, Pena met with representatives of the company and demanded payment for the medical bills associated with the third and fourth surgeries. In turn, Boise Cascade retained outside counsel, who reviewed the file. Very shortly thereafter, the company acknowledged responsibility for the payment of the medical expenses associated with surgeries three and four. Time passed, and in February of 1996, claimant's treating physician pronounced claimant medically stable, and gave him a 28% whole person rating for his work related injuries. Thereafter, the parties entered into a lump sum settlement agreement, under the terms of which the parties agreed that claimant would receive $75,000 to resolve all outstanding issues, inclusive of the $30,877 PPI award. Pena asserted a 25% fee against the $75,000 settlement. The Industrial Commission declined to approve the fee on that portion of the award representing claimant's PPI award. As in the instant matter, the Commission entered a partial order approving the lump sum settlement agreement amount, but requiring surety to retain the disputed fee pending further proceedings concerning Pena's entitlement to fees on the PPI award. At a subsequent hearing, the Commission determined that Pena had failed to demonstrate his efforts were primarily or substantially responsible for his client's receipt of the PPI award.

In support of his position, Pena argued that Boise Cascade initially refused responsibility for the entire PPI award, and it was only through Pena's efforts that the company eventually agreed to pay the full award. However, the only evidence before the Commission was that Pena was, perhaps, responsible for obtaining the company's agreement to pay for the third and fourth surgeries. The Court seemed reluctant to acknowledge even this contribution, noting that it seemed likely that it was Boise Cascade's counsel that had advised the company to pay for the procedures, not Pena. The Court concluded that, on balance, the testimony was only sufficient to

support the conclusion that any work Pena did was directed only to encouraging Boise Cascade to accept responsibility for the medical bills.

However, after noting that the third and fourth surgeries did not increase claimant's impairment rating, the Court offered the following comment:

> "While Pena may have contributed in some part to Boise Cascade's decision to acknowledge responsibility for impairment resulting from the third and fourth surgeries, the impairment rating was not increased as a result. We therefore hold that substantial and competent evidence supports the Commission's determination that Pena was not primarily or substantially responsible for securing Johnson's PPI award."

Let it be supposed that the third and fourth surgeries <u>had</u> resulted in additional impairment. Were this the case, would the fact that Pena contributed "in some part" to the company's decision to acknowledge responsibility for impairment resulting from the third and fourth surgeries have been sufficient to satisfy Pena's burden of proof? In other words, is the burden to show that counsel's efforts were primarily or substantially responsible for securing the fund from which he hopes to be paid satisfied by a showing that some, but not all, of the responsibility for securing the funds is attributable to his efforts? *Johnson*, like *Mancilla* before it, provides little guidance on what, precisely, is meant by the term "primarily or substantially".

As discussed above, an attorney's charging lien can only attach to available funds. However, a charging lien can only attach where attorney is able to demonstrate, *inter alia*, that:

> "ii. The services of the attorney operated primarily or substantially to secure the fund out of which the attorney seeks to be paid;"

At issue is the meaning of the language "primarily or substantially". In particular, it is important to understand what it is an attorney must do in order to meet his burden of demonstrating that his or her efforts were "primarily or substantially" responsible for securing the fund out of which attorney hopes to be paid. In order to understand what is meant by the

language in question, the Commission must engage in statutory interpretation, the objective of which is to derive the intent of the legislative body that adopted the regulation. *See, Callies v. O'Neil*, 147 Idaho 841, 216 P.3d 130 (2009); *Farber v. Idaho State Insurance Fund*, 147 Idaho 307, 208 P.3d 289 (2009). Thus, statutory interpretation begins with the literal language of the statute. The provisions of the statute 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. Importantly, in interpreting the statute, the Commission must give effect to all words and provisions of the statutes so that none will be void, superfluous or redundant. *Ameritel Inns, Inc. v. Pocatello Chubbuck Auditorium District*, 146 Idaho 202, 192 P.3d 1026 (2008). In construing the statute, words and phrases are assumed to have been used in their popular sense if they have not acquired a technical meaning. *Meader v. Unemployment Compensation Division of Industrial Accident Board*, 64 Idaho 716, 136 P.2d 984 (1943).

As to the term "substantially", it has been defined as follows: "essentially; without material qualifications; in the main; in substance; materially; in a substantial manner", Black's Law Dictionary 1428 (6th Edition 1990). *See also, State of Idaho v. Christian F. Schmoll*, 144 Idaho 800, 172 P.3d 555 (2007). The term can also, however, mean "considerable in amount, value or the like; large", Webster's New International Dictionary 2514 (2nd Edition 1945). However, the meaning of "substantially" most naturally conveyed by the phrase "substantially to secure the fund…" is not "secured to a high degree", but rather "secured in substance, or in the main" that is, secured to a degree that would satisfy a reasonable person. *Pierce v. Underwood*, 457 U.S. 552, 108 S.Ct. 2541 (1988).

There is somewhat more difficulty in ascertaining what definition of "primarily" was intended, as that term is used in the applicable regulation. The term "primarily" has two potentially applicable definitions. On the one hand, it is defined to mean "essentially; mostly; chiefly; principally", *See*, Dictionary.com Unabridged Based on the Random House Dictionary (Random House, Inc., 2010); The American Heritage Dictionary of the English Language, (Houghton Mifflin Company 4th ed. 2009), as in "They live primarily from farming". On the other hand, primarily is also defined as meaning "in the first instance; at first; originally." *Ibid*. If primarily means "essentially; mostly; chiefly; or principally", its meaning is very similar to the definition of "substantially", as used in the regulation. In this usage, however, "primarily" may implicate a higher standard, or constitute a more difficult burden of proof. If this definition of "primarily" is utilized, then the term "primarily or substantially" as used in the regulation is problematic. If "primarily" is but a stronger version of "substantially", and if an attorney can satisfy his burden by demonstrating that he either primarily or substantially secured the fund from which he hopes to be paid, then the term "primarily" is superfluous; if an attorney can satisfy his burden of proof by demonstrating that he secured the fund from which he hopes to be paid "in the main", or "essentially", then the higher standard of "chiefly" or "principally" securing the fund is rendered meaningless. Any time an attorney's efforts were sufficient to demonstrate that he had substantially secured the fund from which he hoped to be paid, then the term "primarily" becomes mere surplusage, if one assumes that "primarily" is but a stronger version of "substantially".

However, if "primarily" is interpreted to mean "at first; originally; initially", then it is possible to give the disjunctive statement "primarily or substantially" some meaning, since interpreting primarily in this fashion gives the term a meaning that is different from, or in

addition to, the definition that we have attached to "substantially". For example, it is possible that an attorney could undertake some action in a particular case that might be deemed to be responsible for initiating or originating the fund from which he hopes to be paid, without being able to satisfy his burden of showing that his efforts were "in the main" responsible for obtaining the fund from which he hopes to be paid. Granted, there is a great deal of overlap between these concepts, and a venn diagram of the definitions we have adopted for "primarily" and "substantially" would show that "primarily" is a sizable subset of "substantially", and vice versa.

In summary, in order to meet his burden of proving that his efforts were "primarily or substantially" responsible for securing the fund from which he hopes to be paid, Counsel bears the burden of proving, by a preponderance of the evidence, that he originally, or initially, took action that secured the fund, <u>or</u> that his efforts essentially, or in the main were responsible for securing the fund, i.e. that his efforts were such that a reasonable person would conclude that he was responsible for securing the fund from which he hopes to be paid.

A few examples may help illustrate the Commission's interpretation of the regulatory language:

1. Claimant suffers an industrial injury, and the claim is accepted by surety. Attorney is retained at some point after surety has accepted responsibility for the claim. It is clear from the nature of claimant's injuries that she will be entitled to an impairment rating of some type. Immediately after being retained, counsel writes a letter to claimant's treating physician, requesting of the doctor that he generate an impairment rating for claimant as soon as claimant reaches a point of medical stability. Some months later, when claimant does reach a point of medical stability, and thus becomes ratable, physician remembers counsel's letter, and generates a letter to counsel in which he gives claimant her impairment rating. Attorney may be

primarily responsible for securing the impairment rating, since it was his letter that originated, or initiated the rating. However, it is important to note that in order to meet his burden of proof, counsel would need to demonstrate that there existed some nexus between his letter to the physician and the physician's action. In other words, counsel would need to demonstrate that the physician acted because of counsel's letter. On the other hand, attorney's actions probably would not be sufficient to demonstrate that his actions "substantially" secured the PPI award, since attorney's efforts were not, in the main, or essentially, responsible for obtaining the PPI award. There was no dispute that claimant had suffered a significant injury, and there was no dispute that she was going to be entitled to some type of an impairment rating. There was no evidence that surety contested the rating eventually given by the treating physician.

2. Claimant retains counsel following an industrial injury, which has been accepted by surety. Again, claimant's injuries are of a type which will probably entitle her to an impairment rating of some type at the end of the day. Claimant reaches a point of medical stability, and surety arranges for an independent medical evaluation (IME) for the purpose of assessing claimant's permanent physical impairment. The exam is set to take place in three months. Claimant's counsel arranges for his own independent medical evaluation, which he is able to secure within the month. The physician he has chosen evaluates the claimant, and renders an impairment rating. Surety agrees to pay the rating, reserving the right to curtail periodic payments depending on what is shown at the time of surety's scheduled exam. That evaluation takes place two months later, and results in the surety's physician coming up with the same rating that was given by counsel's physician. Attorney asserts that he is "primarily or substantially" responsible for securing the PPI award and proposes to take a fee on the same. Counsel cannot satisfy the "substantially" leg of the analysis since claimant was clearly entitled

to a rating, and since counsel's efforts did not result in any increase in the rating awarded by surety's IME physician. In connection with whether a reasonable person would conclude that counsel's efforts were responsible for securing the PPI award, the most important fact may be that in this hypothetical, surety had already taken reasonable steps to secure claimant's impairment rating independent of anything counsel did. However, could it be argued that counsel was "primarily" responsible for securing the rating? Counsel did schedule an earlier IME and, as a result, managed to obtain PPI payments for claimant sooner than she would otherwise have received them. However, the benefit secured by counsel's efforts is disproportionate to the 25% fee he proposed to take on the entire PPI award. Perhaps counsel is entitled to a 25% fee on these PPI payments he managed to obtain for claimant sooner than she would otherwise have obtained them.

3. Claimant retains counsel following a denial of the claim by surety. Surety takes the position that claimant did not suffer a compensable accident. Following his retention, counsel investigates the claim, interviews witnesses, and is able to identify a co-worker who will confirm the occurrence of an untoward mishap/event. He presents this information to surety, who reverses its denial, and accepts responsibility for the claim. Thereafter, TTD and medical benefits are paid. After claimant reaches a point of medical stability, surety arranges for claimant to be rated, and immediately pays the impairment rating. Finally, the parties reach agreement concerning a lump sum settlement agreement to resolve the remaining issues. Counsel asserts a 25% fee against all benefits paid to, or on behalf of, claimant, following the surety's agreement to reverse the denial. Fees are payable to attorney either on the theory that he originated or initiated the payment of benefits or that he was essentially, or in the main,

responsible for securing the benefit. A reasonable person would conclude that it was as a result of attorney's efforts in persuading surety to overturn its denial that claimant received benefits.

4. Claimant suffers a compensable injury that is accepted without question by surety. TTD and medical benefits are being paid to claimant. However, because claimant knows nothing about the workers' compensation system, and is skeptical of anything surety says or does, she retains counsel. In due course, claimant reaches a point of medical stability and surety immediately requests that treating physician issue an impairment rating. The physician does so, and surety immediately pays the rating. Attorney attempts to assert a fee against the PPI rating, arguing that had he not become involved in the case, there is no guaranty that surety would have continued to act promptly and appropriately in connection with the handling of the claim. Attorney asserts that the fact of attorney representation caused surety to "toe the line" rather than drag its feet. Attorney is not entitled to a fee on the PPI award. Attorney bears the burden of proving by a preponderance of the evidence that his efforts were primarily or substantially responsible for securing the fund from which he hopes to be paid. That burden is not met by engaging in speculation as to what might have happened absent attorney involvement. As in *Mancilla*, s*upra,* to approve an award on the basis of this argument would require the Commission to engage in pure speculation. Having failed to make some affirmative showing of the existence of a nexus between his efforts and the creation of the fund in question, attorney has failed to meet his burden of proof.

5. Building on the preceding hypothetical, let it be supposed that instead of soliciting an opinion on claimant's impairment from her treating physician, surety arranged for claimant to be rated by an independent medical examiner (IME). This particular examiner is well known to the claimant's bar and might charitably be described as having a defense bias. Prior to the

scheduled IME counsel spends several hours preparing claimant. Since counsel has made a study of this particular defense physician, he knows all the ways that the physician will lay certain traps for claimant as a way of marshalling facts that will allow him to assert that claimant's subjective complaints are not credible. Counsel warns claimant about the importance of being forthright and deliberate in describing the nature and extent of her pre-existing symptoms. He counsels her about Waddell's signs and tells her how to avoid inconsistencies on exam. He counsels claimant that she should count on being observed both before and after the exam, either by physician, or by an investigator hired by surety. The IME is performed, and claimant is given an impairment rating consistent with her injuries. Absent from the final report is any suggestion by the treating physician that claimant was attempting to maximize her complaints. Is counsel entitled to assert a fee against the PPI award? This is a close case. On these facts, it is difficult to imagine how counsel could meet his burden of proving that his efforts were "primarily" responsible for securing the PPI award. The independent medical evaluation was scheduled by surety, and was going to take place independent of counsel's efforts. Counsel could not be said to have originated or initiated the PPI award. However, it would seem to be a much closer question as to whether or not counsel's efforts were essentially, or in the main, responsible for securing an appropriate PPI award for claimant. To some extent, it is speculative to propose that absent counsel's efforts, the rating that would have been returned by the IME physician would have been lower, or given with significant caveats. Certainly, to allow fees from the entire PPI rating is to speculate that the rating from the IME physician would have been zero absent claimant's preparation. However, upon a rigorous enough showing of counsel's familiarity with the IME physician in question, and a showing that the outcome of the IME would likely have been different without counsel's intervention, it could be argued that a

reasonable person would conclude that counsel's efforts were substantially responsible for securing some portion of the award. Again, this is somewhat of a close call, and would require of counsel a significant showing.

Of course, these are but a few of myriad scenarios that might arise, although they are representative of scenarios that frequently come before the Commission. It goes (almost) without saying that every claim for an attorney's fee will be judged on its own peculiar facts.

Turning to the facts of the instant matter, the Commission appreciates that Counsel has conceded that his efforts were neither primarily, nor substantially, responsible for securing the fund from which he expects to be paid. Counsel has, instead, challenged the applicable regulation on constitutional grounds. However, since the Commission has not concluded that the current regulation is contrary to the court's ruling in *Curr*, we deem it appropriate to consider whether Counsel's actions were primarily or substantially responsible for securing the fund from which he hopes to be paid.

First, a few comments on the Commission's procedure in this matter are appropriate. Contemporaneous with Counsel's submission of the executed Lump Sum Settlement Agreement for review and approval, he submitted his Form 1022, which contain Counsel's recitation of the facts and circumstances underlying his claimed entitlement to an attorney charging lien, all as required by IDAPA 17.02.08.033.02. Following receipt of the proposed Lump Sum Settlement Agreement, and supporting documents, pursuant to IDAPA 17.02.08.033.03 staff designated by the Commission attempted to determine the reasonableness of the requested fee. Of particular concern, was one of the averments in Counsel's Form 1022. At paragraph 9 of that document, Counsel stated:

> "Before Counsel was retained, defendants denied, discontinued, or disputed claimant's right to additional medical benefits and treatment, time loss benefits,

> and impairment compensation, and disability beyond impairments, and retraining and attorney's fees. Subsequent to retaining Counsel, claimant received additional medical treatment and time loss benefits and impairment compensation and disability beyond impairment compensation."

The clear import of the quoted language is that prior to the retention of Counsel, Surety disputed Claimant's entitlement to PPI benefits, and that as a result of Counsel's actions following retention, additional PPI benefits were obtained. In making its informal determination, staff attempted to ascertain the factual basis of this averment. Counsel was unable to provide the requested information, and by a letter dated September 3, 2009, staff issued its informal determination as required by IDAPA 17.02.08.033.03.a.[1] That section specifies:

> "Upon receipt of the affidavit or memorandum, the Commission will designate staff members to determine reasonableness of the fee. The Commission staff will notify counsel in writing of the staff's informal determination, which shall state the reasons for the determination that the requested fee is not reasonable. Omission of any information required by Subsection 033.02 may constitute grounds for an informal determination that the fee requested is not reasonable."

As Counsel has noted, the regulation specifies that in notifying Counsel of staff's informal determination, staff <u>shall</u> state the reasons for the determination that the requested fee is "not reasonable." However, the obligation to notify Counsel of the basis for the determination presupposes that staff is able to make an affirmative pronouncement, on the facts before it, that the requested fee is not reasonable. Here, no such determination was made because insufficient facts were adduced in the course of staff's investigation that would allow it to say, one way or another, whether the requested fee was not reasonable. Instead, staff advised Counsel as follows:

> "In our review of the proposed settlement, the Commission has also considered your letters and attachments of May 5, July 24 and August 12 regarding your

[1] Interestingly, in a companion case, treating a similar demand for approval of a requested fee, Counsel offered a Form 1022 that contained language identical to that quoted above. At hearing on the motion to approve the requested fee in that case, Counsel acknowledged that the quoted paragraph is "boilerplate" and goes into <u>all</u> of his Form 1022 recitations even where, in a particular case, surety had not denied or disputed Claimant's entitled to a PPI rating prior to Counsel's retention. This may explain why staff was unable to obtain a satisfactory explanation for the averments made in the quoted paragraph.

> representation of the Claimant and your proposed fees. The Commission staff has made an initial determination that the settlement is in the best interest of the parties, except for the portion of the requested fees related to benefits in excess of the $12,223.13 lump sum consideration, which have not been found to be reasonable per IDAPA 17.02.08.033."

In essence, staff's September 9, 2009 informal determination advises Counsel that due to incomplete information, staff was unable to conclude that the requested fee was reasonable.

That the September 3, 2009 letter should be construed in this fashion is further supported by the Partial Order issued by the Industrial Commission on September 4, 2009. That Order, rather than referencing any affirmative finding by staff that the requested fee was not reasonable, simply references the fact that "such fees have not been substantiated to the Commission as reasonable in accordance with IDAPA 17.02.08.033."

In addition, Counsel argues that absent a specific articulation of the facts and circumstances underlying staff's informal determination, Counsel was not on notice of the issues that were of concern to the Commission, and could not, therefore, mount a suitable defense of Counsel's position on the issue of attorney's fees. In essence, Counsel argues that he was denied due process by virtue of staff's failure to articulate the particular reasons for the issuance of the September 3, 2009 letter. Notwithstanding that staff's letter did not constitute a conclusion that Counsel's request for fees was not reasonable; Counsel's argument fails for another reason, as well.

As noted, following the issuance of the September 3, 2009 letter, Counsel requested a hearing on the matter before the Commission, as provided at IDAPA 17.02.08.033.03.b. Thereafter, the Commission held a status conference with the parties on October 6, 2009, at which time the parties agreed to set the matter for hearing before the Commission on November 23, 2009. Importantly, on the occasion of the October 6, 2009 telephone conference, the parties

discussed the specific issues to be addressed at the November 23, 2009 hearing. Those issues are articulated in the Notice of Hearing filed October 13, 2009. Accordingly, Counsel had ample notice of the Commission's specific concerns, i.e. whether there was sufficient evidence showing that Counsel was "primarily or substantially" responsible for securing the fund from which he hoped to be paid.

At hearing, most of the discussion and argument was devoted to underlying constitutional issues which we have previously addressed. Precious few insights were provided on the question of whether or not Counsel's efforts were primarily or substantially responsible for securing the fund from which he hoped to be paid. However, one serious failing of staff was identified and corrected at hearing. Concerning attorney's fees taken by Counsel prior to the execution of the Lump Sum Settlement Agreement, the Commission noted, in its Partial Order of September 4, 2009, that these fees were "un-itemized" as to the specific benefits obtained other than "benefits paid prior to the Lump Sum…". In fact, Counsel's July 24, 2009 affidavit, a document which was purportedly reviewed by staff prior to the issuance of the informal determination, does itemize the sources of the $3,301.72 in attorney's fees taken prior to the execution of the Lump Sum Settlement Agreement. In this regard, the affidavit of Counsel provides:

> "The benefits paid prior to Lump Sum Settlement Agreement (listed in my form 1022) include PPI benefits of $7,768.75, on which attorneys fees of $1,942.19 were paid, and PPD benefits of $5,438.13, on which attorneys fees of $1,395.53 were paid (see demand letters to the surety dated 9/18/08 and 9/28/08, attached hereto as Exhibit E and F respectively.)"
>
> Affidavit of Andrew C. March in Support of Memorandum of Law, p. 3.

Therefore, fees in the amount of $1,942.19 were taken from the PPI award, and fees in the amount of $1,359.53 were taken on PPD benefits which were paid prior to the execution of the Lump Sum Settlement Agreement.

Concerning the 25% fee assessed by Counsel on the PPD payments made prior to the execution of the Lump Sum Settlement Agreement, the Commission now finds that those benefits were, assuredly, secured both primarily and substantially as a result of the efforts of Counsel. Following the pronouncement of medical stability, Counsel engaged the services of Mary Barros-Bailey, a vocational rehabilitation consultant, for the purpose of assessing the extent and degree to which Claimant had suffered disability in excess of physical impairment, based on her permanent limitations/restrictions and other relevant non-medical factors. Ms. Barros-Bailey eventually generated a report in which she concluded that Claimant had suffered disability in the range of 22% of the whole person, inclusive of her permanent partial impairment. As noted, Surety began to pay a disability rating, without protest, prior to the execution of the Lump Sum Settlement Agreement. Because Counsel's efforts in retaining Ms. Barros-Bailey were initially, in the main and reasonably responsible for the generation of the PPD dollars from which he hoped to be paid, the Commission finds that the requested fees were primarily or substantially secured through the efforts of Counsel.

With respect to the 25% fee of $1,942.19 taken on the PPI award previously paid, the Commission is unable to conclude that Counsel's efforts were "primarily or substantially" responsible for securing the PPI award.

As noted, on or about April 26, 2007, Dr. Greenwald reviewed the April 5, 2007 MRI, and proposed that in order to understand whether Claimant's disc herniation was causally related to the subject accident, further review of pre-injury chiropractic and other records was indicated. On May 30, 2007, Claimant retained Counsel. Among her reasons for retaining Counsel was her concern that she was getting the runaround from Surety. Shortly after he was retained, Counsel arranged for Claimant to undergo a medical evaluation by Richard Radnovich, D.O. Dr.

Radnovich saw Claimant on June 7, 2007, and proposed that Claimant was entitled to a 12% PPI rating. Also on June 6, 2007, Dr. Greenwald concluded that Claimant's low back problems were, indeed, related to the subject accident, following her review of pre-injury chiropractic records.

Although Dr. Radnovich had pronounced Claimant medically stable, Claimant continued to treat, and Surety continued to pay for treatment, including, *inter alia*, a transforaminal epidural steroid injection. Surety did not accept Dr. Radnovich's impairment rating and declined to pay the same. However, on November 7, 2007, Beth Rogers, M.D., one of Claimant's treating physicians, pronounced Claimant medically stable and awarded her a 5% PPI rating. Surety promptly initiated payment of this rating, but did not agree to pay the average of the 5% and 11% ratings per the usual convention in such cases.

Against this background, we must ascertain whether Counsel's efforts were "primarily or substantially" responsible for securing the PPI award.

As to the first prong of the test, it does not appear that there is sufficient evidence to support a conclusion that Counsel originated or initiated the creation of the PPI award. Although it might be argued that it was the action of Counsel in obtaining the Radnovich rating that spurred Surety to obtain a rating from Dr. Rogers, it seems just as likely that Dr. Radnovich's report had nothing to do with the timing of Surety's actions in obtaining a rating from Dr. Rogers. As noted, Claimant continued to treat subsequent to the preparation of Dr. Radnovich's rating, and even underwent an additional transforaminal epidural steroid injection before Dr. Rogers felt that Claimant was a candidate for an impairment rating. Indeed, it might well be argued that Dr. Rogers' rating came in lower than the rating issued by Dr. Radnovich because Claimant was in need of further medical treatment at the time Dr. Radnovich evaluated her. At

any rate, to propose that it was the preparation of Dr. Radnovich's rating that produced the Rogers' impairment rating would require the Commission to veer into the realm of speculation that was found offensive in *Mancilla, supra.* On the whole, the evidence fails to satisfy Counsel's burden of showing that the PPI award was secured primarily through his efforts.

Likewise, there is no preponderance of the evidence establishing that Counsel's actions essentially, in the main, or reasonably, could be said to have secured the payment of the PPI award. There is no way to establish a nexus between Counsel's actions and the creation of the PPI award that does not require speculation. The Commission does not believe that a reasonable person would conclude that Counsel's efforts were responsible for securing that award.

For the foregoing reasons, the Industrial Commission approves the prior fee taken in the amount of $1,359.53 on the PPD award, but declines to approve the $1,942.19 fee previously taken on the PPI award.

V.

COUNSEL'S DEPOSITION NOTICES, SUBPOENAS, AND PUBLIC INFORMATION REQUESTS

Counsel argues that he was deprived of a meaningful hearing before the Commissioners. After learning of the staff's informal determination, Counsel attempted to depose Commission employees, and submitted a plethora of public records requests. Counsel also expressed surprise that he was not allowed to examine members of the Commission staff at the hearing before the Commission, because he had not received a motion to quash the deposition or notice of any kind that the Commission declined to allow him to depose Commission employees for the hearing on his entitlement to attorney's fees.

Counsel's argument that he was unaware *prior* to the hearing before the Commission that he would not be able to question Commission staff at the hearing before the Commissioners is

disingenuous. On September 18, 2009, Counsel submitted Notices of Deposition *Duces Tecum* of Scott McDougall and Sharon DeLanoy which ordered them to appear on October 14, 2009 for deposition for the following purpose:

> The complete claim file of the Idaho Industrial Commission for the claim of Laurel Kulm, Claimant in the above-captioned matter, including without limitation all documents, notes, records and other evidence of the deliberations regarding, and reasons for, any determination that any attorney fees requested by Claimant's Counsel were not reasonable or not substantiated as reasonable.

No such depositions occurred on October 14, 2009. Further, legal counsel for the agency responded to Counsel's numerous public records requests and Counsel's notices of depositions prior to the hearing. Specifically, on September 29, 2009, legal counsel for the agency informed Counsel that there was no authority for release of the information he was seeking by means of a deposition or subpoena *duces tecum*, and that the Commission considered Counsel's request contrary to the long-standing legal principle that documents which disclose deliberations of a judicial or quasi-judicial body on a decision are privileged and generally not subject to discovery.

Counsel persisted, and drafted four subpoenas that ordered several Commission employees to appear at the attorney fee hearing and testify concerning Counsel's constitutional concerns. Counsel had these subpoena documents delivered to the Industrial Commission on November 5, 2009. Counsel signed the subpoenas himself. Idaho Code § 72-709 states:

> (1) The commission or any member thereof or any hearing officer, examiner or referee appointed by the commission shall have the power to subpoena to subpoena witnesses, administer oaths, take testimony, issue subpoenas duces tecum, and to examine such of the books and records of the parties to a proceeding as relates to the questions in dispute.
>
> (2) The district court shall have the power to enforce by proper proceedings the attendance and testimony of witnesses, and the production and examination of books, papers and records.

Notably, Counsel does not fall under the categories of persons enumerated in Idaho Code § 72-709 who have the authority to issue subpoenas in Commission proceedings. As such, it is unclear why he harbors the expectation that he can draft his own subpoenas and enforce them against the Commission. Counsel's actions in this regard are most unusual among workers' compensation practitioners before the Commission. Allowing recipients of unfavorable outcomes the authority to issue subpoenas *on their own accord* on Commission staff is contrary to Idaho Code § 72-709, and would create many opportunities for mischief. Counsel indicated that Commission employees would be sanctioned for noncompliance with the subpoenas, yet never attempted to collect the penalty from Commission staff. Further, the district court has the power to enforce subpoenas from the Commission. Counsel has always had opportunities for redress in the district court, but he has not pursued them. Counsel did not attempt to enforce the subpoenas from the district court of the 4th Judicial District, Ada County, Boise, Idaho prior to the hearing.

Subsequently, on November 13, 2009, Counsel indicated in a letter that he withdrew the discovery request served on the Commission. In light of this withdrawal, and that fact that the Commission never approved Counsel's notices of subpoenas *duces tecum*, or the subpoenas on four Commission employees to testify at the hearing before the Commission, as the Commission's procedures do not entitle Counsel the right to do so, the Commission considered the matter closed. Instead, Counsel pursued a series of public record requests. Legal counsel for the agency addressed Counsel's public requests. Counsel's brief makes it evident that he was dissatisfied with the outcome of his public records requests. However, Counsel has failed to take the laboring oar to appeal any of the public records determinations made by the Commission in

the district court of the 4th Judicial District, Ada County, Boise, Idaho within the applicable timeframe.

CONCLUSION OF LAW

The Commission is aware of its obligation to abide by decisions of the Idaho Supreme Court which address constitutional issues relating to the administration of the Workers' Compensation Laws. For the reasons stated above, the Commission is of the view that its procedures and its current regulations pass constitutional muster. Nor does the Commission believe that the current regulatory scheme is ambiguous. Applying commonly used definitions of the terms at issue yields an understandable rule to be applied in determining whether attorney's fees are awardable in a given case. Of course, the rule is not perfect, and its application over the years may, indeed, have resulted in a disinclination by members of the bar to practice in this area of the law. As well, the current rule may make it impossible for certain injured workers who desire counsel to find someone who is willing to take their case for the small recompense that the particular facts of that case may offer. Finally, it is undeniable that the current regulation impinges upon the right of an injured worker, and his or her attorney, to make their own agreement as to how counsel should be compensated. All of these concerns, and others that have been expressed, are legitimate and have been considered over the years by both the Industrial Commission and the Idaho Supreme Court. However, at the time the current regulation and its predecessor were adopted, it was felt that overriding policy considerations warranted the adoption of rules limiting attorney's fees chargeable on workers' compensation cases. While it is arguable that some of the provisions of the current regulation would benefits from refinement, at present the regulation is what it is, and in fairness to all, the Commission is bound to apply its plain language.

IT IS SO ORDERED.

DATED this __20th____ day of May, 2010.

INDUSTRIAL COMMISSION

_/s/_____
R.D. Maynard, Chairman

_/s/_____
Thomas E. Limbaugh, Commissioner

_/s/_____
Thomas P. Baskin, Commissioner

ATTEST:

__/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the _20th day of _May_____, 2010 a true and correct copy of **FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATING TO COUNSEL'S REQUEST FOR APPROVAL OF ATTORNEY'S FEES** was served by regular United States Mail upon:

BRECK SEINIGER
942 W MYRTLE ST
BOISE ID 83702

cs-m/cjh __/s/_____

REGULATION GOVERNING ATTORNEY FEES IN WORKERS' COMPENSATION PROCEEDINGS

In order that the Idaho Industrial Commission ("Commission") may properly and fairly discharge its responsibility pursuant to Idaho Code Sections 72-803 and 72-404, the Commission hereby promulgates the following administrative regulation pursuant to Idaho Code Section 72-508.

The Commission substitutes this regulation for the Informal Administrative Rules (IAR) 72-803.1, "Reporting of Attorney Fee and Associated Expenses in Lump Sum Proceedings," and IAR 72-803.2, "Re: Attorney Fees in Workers' Compensation Actions," dated January 9, 1990.

1. Idaho Code Section 72-803 provides:

   "Claims of attorneys and physicians for medical and related services -- Approval. -- Claims of attorneys and claims for medical services and for medicine and related benefits shall be subject to approval by the commission."

2. Idaho Code Section 72-404 provides:

   "Lump sum payments. -- Whenever the commission determines that it is for the best interest of all parties, the liability of the employer for compensation may, on application to the commission by any party interested, be discharged in whole or in part by the payment of one or more lump sums to be determined, with the approval of the commission."

3. **"New Money" defined.** "New money" as used herein shall refer to monetary benefits to the claimant that counsel is responsible for securing through legal services rendered in connection with the client's workers' compensation claim.

4. **Maximum attorney fee to be charged by a claimant's counsel.** After the effective date of this regulation, any contingent fee agreement between counsel and a claimant in a workers' compensation case shall provide that the amount of attorney fees will not exceed 25% of any new money received by the claimant, whether such new money is acquired pursuant to a Lump Sum Settlement Agreement, other Agreement, Mediation, or an Award of the Commission.

   a. Provided, however, that after hearing by the Commission and upon its own motion, the Commission may award attorney fees up to 30% of new money awarded.

   b. In cases where a claimant is deemed totally and permanently disabled, attorney fees may be deducted from no more than 500 weeks of workers' compensation benefits.

Appendix A

5. **Fee agreements between a claimant and counsel shall be in writing.** All fee agreements shall be in writing and shall be signed by the claimant and claimant's counsel. A disclosure statement in substantially the form prescribed in Appendix II of this regulation shall be provided to claimant at the time of signing the fee agreement.

6. **Reporting of all attorney fees and associated expenses in Lump Sum Settlement proceedings.** Attorneys representing *any* party to a Lump Sum Settlement Agreement or other Agreement submitted to the Commission for its approval shall set forth in the Lump Sum Settlement Agreement or other Agreement, or by letter or memorandum accompanying such Agreement, the following:

a. the date upon which counsel became involved in the case;

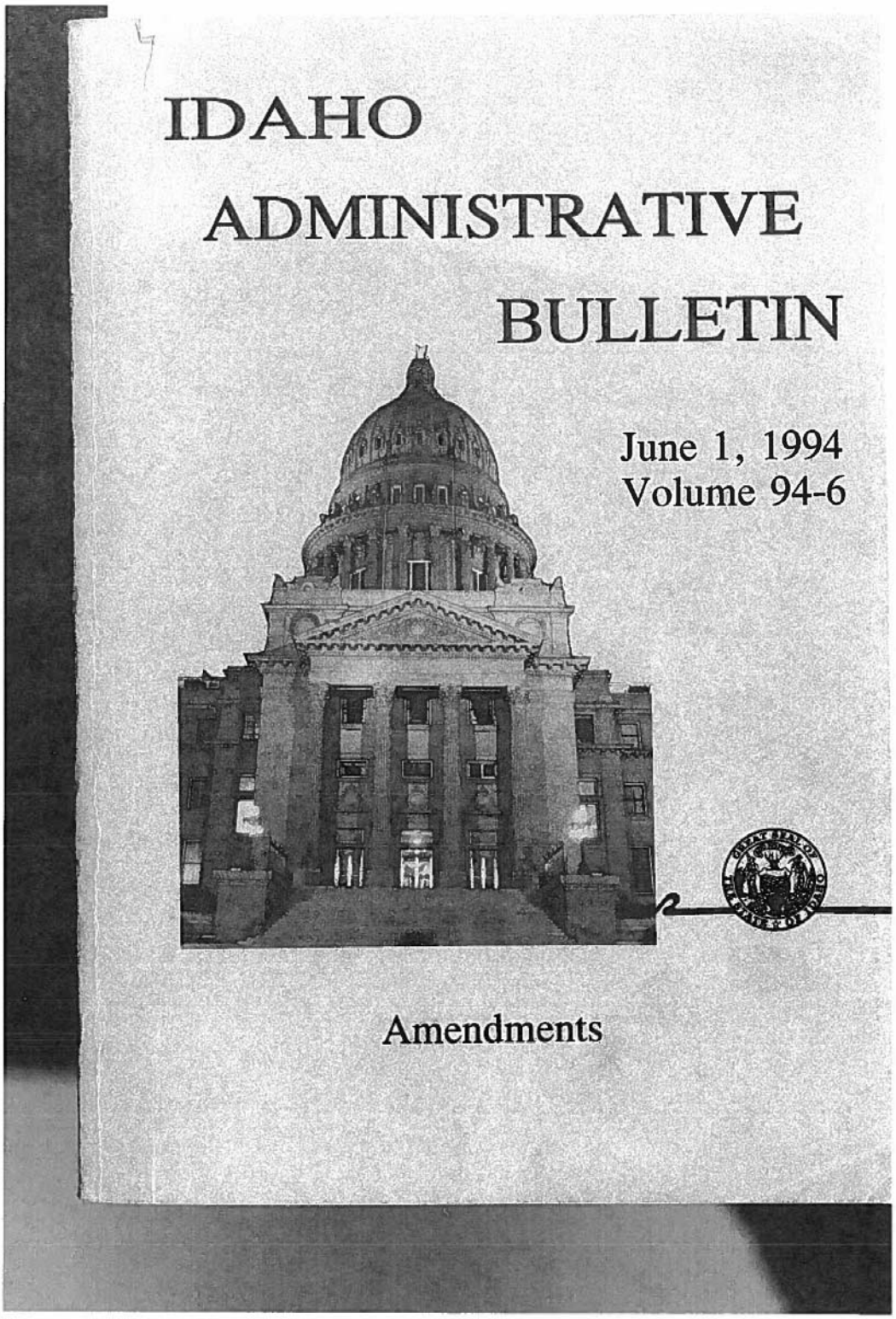
b. the issues then, and subsequently, in controversy;

c. the total amount of benefits which claimant's counsel contends constitute "new money" as defined above and an itemization of those benefits;

d. all information included in and substantially in the format of Appendix I hereto.

7. **Request for Hearing regarding fee disputes between counsel and client.** Where a dispute arises between a counsel and a client regarding the appropriateness of an attorney fee in a workers' compensation proceeding, either the counsel or the client may file with the Commission a Request for Hearing regarding the fee dispute and the Commission, upon receipt of such a Request, shall schedule a hearing on the matter.

8. **Request for Hearing regarding fee dispute between counsel and the Commission.** Where the Commission, upon review of the file and a Lump Sum Settlement Agreement or other Agreement submitted for its approval, concludes that the attorney fee set forth therein exceeds the amount allowed in (2) above, Commission staff shall notify claimant's counsel in writing of the Commission's calculations, and where claimant's counsel disputes the Commission's calculations, claimant's counsel may file with the Commission a Request for Hearing for the purpose of presenting evidence and argument on the matter. Upon receipt of such a Request, the Commission shall schedule a hearing on the matter.


IDAHO
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BULLETIN
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Volume 94-6
Amendments

Appendix B

NOTICE OF PROPOSED RULE

DOCKET NO. 17-0208-9401

INDUSTRIAL COMMISSION

RULES GOVERNING APPROVAL OF ATTORNEY FEES
IN WORKERS' COMPENSATION CASES

ACTION: The action, under Docket No. 17-0208-9401 concerns the adoption of rules governing the approval by the Industrial Commission of attorney fees in workers' compensation cases, IDAPA 17, Title 02, Chapter 08, Rules Governing Approval of Attorney Fees in Workers' Compensation Cases.

AUTHORITY: In compliance with Section 67-5221(1), Idaho Code, notice is hereby given that this agency has proposed rule-making. The action is authorized pursuant to Sections 72-404, 508, 707, 735 and 803, Idaho Code.

PUBLIC HEARING SCHEDULE: Public hearing(s) concerning this rule-making will be held as follows:

Pursuant to Section 67-5222(2), Idaho Code, an opportunity for public hearings will be held if requested in writing by twenty-five (25) person, a political subdivision, or an agency. The request must be made within fourteen (14) days of the date of publication of this notice in the Bulletin, or within fourteen (14) days prior to the end of the comment period, whichever is later.

The hearing site(s) will be accessible to the physically disabled. Interpreters for persons with hearing impairments and brailled or taped information for persons with visual impairments can be provided upon five days' notice. For arrangements contact the undersigned at (208) 334-6000.

DESCRIPTIVE SUMMARY: The following is a statement in nontechnical language of the substance of the rule:

This rule governs the Industrial Commission's approval of a claimant's attorney fees in workers' compensation matters, provides for an attorney's charging lien, and provides a dispute resolution mechanism to resolve disputes related to a claimant's attorney fees in workers' compensation matters.

ASSISTANCE ON TECHNICAL QUESTIONS: For assistance on technical questions concerning this temporary rule, contact Deputy Attorney General E. Scott Harmon, at (208) 334-6000.

Anyone may submit written comments regarding this rule. All written comments and data concerning the rule must be directed to the undersigned and must be postmarked or delivered on or before May 27, 1994.

DATED this 23nd day of March 1994.

E. Scott Harmon, Deputy Attorney General
317 Main Street, Statehouse Mail
Boise, Idaho 83720
Phone: (208) 334-6000
Fax: (208) 334-2321

IDAPA 17.02.08.033

033. RULE GOVERNING APPROVAL OF ATTORNEY FEES IN WORKERS' COMPENSATION CASES ( )

01. Authority and Definitions. Pursuant to Idaho Code Sections 72-404, 72-508, 72-707, 72-735 and 72-803, the Commission promulgates this rule to govern the approval of attorney fees. ( )

a. "Available funds" means a sum of money to which a charging lien may attach. It shall not include any compensation paid or not disputed to be owed prior to claimant's agreement to retain the attorney. ( )

b. "Approval by Commission" means the Commission has approved the attorney fees in conjunction with an award of compensation or a lump sum settlement or otherwise in accordance with this rule upon a proper showing by the attorney seeking to have the fees approved. ( )

c. "Charging lien" means a lien, against a claimant's right to any compensation under the Workers' Compensation laws, which may be asserted by an attorney who is able to demonstrate that: ( )

i. There are compensation benefits available for distribution on equitable principles;

ii. The services of the attorney operated primarily or substantially to secure the fund out of which the attorney seeks to be paid; ( )

iii. It was agreed that counsel anticipated payment from compensation funds rather than from the client; ( )

iv. The claim is limited to costs, fees, or other disbursements incurred in the case through which the fund was raised; and ( )

v. There are equitable considerations that necessitate the recognition and application of the charging lien. ( )

d. "Fee agreement" means a written document evidencing an agreement between a claimant and counsel, in conformity with Rule 1.5, Idaho Rules of Professional Conduct (IRPC). ( )

e. "Reasonable" means that an attorney's fees are consistent with the fee agreement and are to be satisfied from available funds, subject to the element of reasonableness contained in IRPC 1.5. ( )

i. In a case in which no hearing on the merits has been held, 25% of available funds shall be presumed reasonable; or ( )

ii. In a case in which a hearing has been held and briefs submitted (or waived) under Judicial Rules of Practice and Procedure (JRP), Rules X and XI, 30% of available fundsshall be presumed reasonable; or ( )

iii. In any case in which compensation is paid for total permanent disability, 15% of such disability compensation after ten (10) years from date such total permanent disability payments commenced. ( )

02. Statement of charging lien. ( )

a. All requests for approval of fees shall be deemed requests for approval of a charging lien. ( )

b. An attorney representing a claimant in a Workers' Compensation matter shall in any proposed lump sum settlement, or upon request of the Commission, file with the Commission, and serve the claimant with a copy of the fee agreement, and an affidavit or memorandum containing: ( )

i. The date upon which the attorney became involved in the matter. ( )

ii. Any issues which were undisputed at the time the attorney became involved. ( )

iii. The total dollar value of all compensation paid or admitted as owed by employer immediately prior to the attorney's involvement. ( )

iv. Disputed issues that arose subsequent to the date the attorney was hired. ( )

v. Counsel's itemization of compensation that constitutes available funds. ( )

vi. Counsel's itemization of costs and calculation of fees, and ( )

vii. The statement of the attorney identifying with reasonable detail his or her fulfillment of each element of the charging lien. ( )

c. Upon receipt and a determination of compliance with this Regulation by the Commission by reference to its staff, the

Appendix B

Commission may issue an Order Approving Fees without a hearing. ( )

03. Procedure if fees are determined not to be reasonable. ( )

a. Upon receipt of the affidavit or memorandum, the Commission will designate staff members to determine reasonableness of the fee. The Commission staff will notify counsel in writing of the staff's informal determination, which shall state the reasons for the determination that the requested fee is not reasonable. Omission of any information required by Section 02 may constitute grounds for an informal determination that the fee requested is not reasonable. ( )

b. If counsel disagrees with the Commission staff's informal determination, counsel may file, within 14 days of the date of the determination, a Request for Hearing for the purpose of presenting evidence and argument on the matter. Upon receipt of the Request for Hearing, the Commission shall schedule a hearing on the matter. A Request for Hearing shall be treated as a motion under Rule III(e), JRP. ( )

c. The Commission shall order an employer to release any available funds in excess of those subject to the requested charging lien and may order payment of fees subject to the charging lien which have been determined to be reasonable. ( )

d. The proponent of a fee which is greater than the percentage of recovery stated in subsections 01.e. i., ii., or iii. shall have the burden of establishing by clear and convincing evidence entitlement to the greater fee. The attorney shall always bear the burden of proving by a preponderance of the evidence his or her assertion of a charging lien and reasonableness of his or her fee. ( )

04. Disclosure. Upon retention, the attorney shall provide to claimant a copy of a disclosure statement. No fee may be taken from a claimant by an attorney on a contingency fee basis unless the claimant acknowledges receipt of the disclosure by signing it. Upon request by the Commission, an attorney shall provide a copy of the signed disclosure statement to the Commission. The terms of the disclosure may be contained in the fee agreement, so long as it contains the text of the numbered paragraphs 1 and 2 of the disclosure. A copy of the agreement must be given to the client. The disclosure statement shall be in a format substantially similar to the following:

State of Idaho
Industrial Commission

Client's name printed or typed _____
Attorney's name and address _____
printed or typed _____
_____

DISCLOSURE STATEMENT

1. In workers' compensation matters, attorney's fees normally do not exceed 25% of the benefits your attorney obtains for you in a case in which no hearing on the merits has been completed. In a case in which a hearing on the merits has been completed, attorney's fees normally do not exceed 30% of the benefits your attorney obtains for you.

2. Depending upon the circumstances of your case, you and your attorney may agree to a higher or lower percentage which would be subject to Commission approval. Further, if you and your attorney have a dispute regarding attorney fees, either of you may petition the Commission to resolve the dispute.

I certify that I have read and understand this disclosure statement.

Client's Signature _____ Date _____

Attorney's Signature _____ Date _____

05. Effective Dates. Clauses i., ii., and iii. of subsection 01.e. are effective as to fee agreements entered into on and after December 1, 1992. All other provisions shall be effective on and after December 20, 1993. ( )

Appendix B