BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JOHN CHAPMAN, Claimant/Petitioner, v. TRINITY HEALTH CORPORATION, Self-Insured Employer, Defendant/Respondent, and AETNA LIFE INSURANCE, CO., and TRINITY HEALTH WELFARE BENEFIT PLAN, Defendant/Respondent.	**IC 2011-012506** **ORDER ON PETITION FOR DECLARATORY RULING** Filed December 19, 2014

On or about March 21, 2014, John Chapman, Petitioner herein, filed a Petition for declaratory relief pursuant to J.R.P. 15. Petitioner invites the Industrial Commission to determine whether his subrogated non-occupational health insurance provider must pay its proportionate share of costs and attorney's fees incurred by Petitioner in connection with securing an award of medical benefits from the Idaho Industrial Commission.[1] In an amended Petition filed July 12, 2014, Petitioner raised the same issue for determination, but identified additional parties to the controversy, to include the Plan administrator, Aetna Life Insurance Company (Aetna), and Trinity Health Welfare Benefit Plan (the Plan) in addition to Trinity Health Corporation, Petitioner's Employer. All parties identified by Petitioner have appeared, or specially appeared, and have asserted positions adverse to that taken by Petitioner. All parties

[1] Specifically, Petitioner asks that Aetna's right of recovery be reduced by amount of the "attorney's lien" attributable to that portion of the award. As developed *infra*, under IDAPA 17.02.08.033, *et seq*., an attorney's "charging lien" includes both costs and attorney fees incurred in securing the award. Therefore, we believe that Petitioner asks of the Commission that it hold Aetna responsible for the proportionate share of costs and fees incurred by Petitioner in securing the award.

have submitted briefing on the issue raised by Petitioner. Being fully advised in the law and in the premises the Commission issues this decision on the Petition.

FACTS

On or about May 18, 2011, Petitioner suffered a work related injury to his left knee. Petitioner argued that the accident hastened his need for a total knee replacement. Employer argued that the accident caused, at most, a temporary injury which neither caused nor accelerated Petitioner's need for subsequent total knee replacement. Consequently, Defendants denied responsibility for Petitioner's total knee replacement surgery, associated time loss, and PPI benefits. Following Employer's refusal to accept responsibility for treatment under the workers' compensation laws, Petitioner obtained treatment utilizing non-occupational health insurance provided to him as an incident of his employment. Petitioner retained Richard Owen to represent his interests pursuant to an attorney/client contract dated August 4, 2011, under the terms of which Petitioner agreed to pay Mr. Owen a fee of 30% on any amount recovered should it be necessary to take the matter to hearing before the Industrial Commission. (See Exhibit A to the Affidavit of Richard S. Owen). The matter eventually went to hearing before the Commission, and in its June 19, 2013 decision the Commission concluded that Petitioner's need for total knee replacement was related to his industrial accident. The Commission entered an order holding Employer responsible for all medical bills associated with the total knee replacement surgery. Per *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009), all compensable medical expenses incurred between the date of Surety's denial of responsibility and the date the claim is deemed compensable are payable at 100% of the billed amount. The Commission also found Employer to be responsible for the payment of TTD benefits and a 4% PPI rating. No appeal was taken from this decision. As set forth in the affidavit of Petitioner's counsel,

temporary total disability and PPI benefits owed pursuant to the Commission's order total $11,840.26. The billed amount of medical benefits payable pursuant to the Commission decision totals $49,038.70. Defendants eventually issued checks totaling $60,878.96 ($49,038.70 + $11,840.26) in satisfaction of the award made by the Commission. From this amount, Petitioner's attorney took a 30% fee of $18,263.69 ($60,878.96 x 30%) and recovered advanced costs in the amount of $4,255.50. Fees and costs taken by Petitioner's counsel are those anticipated by the fee agreement executed by Petitioner and Mr. Owen and referenced above.

As noted, following Surety's denial of responsibility for the total knee replacement that had been recommended for Petitioner, Petitioner obtained this treatment by utilizing non-occupational health coverage provided as an incident of his employment. More specifically, and as set forth in the affidavit of Jeanette Franck, it appears to be undisputed that Petitioner's non-occupational health insurance coverage is provided by Employer under a self-funded employee welfare benefit plan within the meaning of Section 3(1) of the Employee Retirement Income Security Act of 1974 as amended (ERISA). This Plan, though self-funded by Employer, was administered by Aetna Life Insurance Company (Aetna). The Plan documents contain the following subrogation provisions applicable to workers' compensation:

> The equitable lien also attaches to any right to payment for workers' compensation, whether by judgment, settlement or otherwise, where the Plan has paid expenses otherwise eligible as covered expenses under the Plan prior to a determination that the covered expenses arose out of and in the course of employment. Payment by workers' compensation insurers or programs or the Employer will be deemed to mean that such a determination has been made. This equitable lien shall also attach to the first right of recovery to any money or property that is obtained by anyone (including, but not limited to, the Claimant, the Claimant's attorney, and/or a trust) as a result of an exercise of the Claimant's right of recovery. The Plan shall also be entitled to seek any other equitable remedy against any party possessing or controlling such monies or properties. At the discretion of the Administrator, the Plan may reduce any future benefit payments otherwise available to the Claimant under the Plan by an amount up to the total amount of reimbursable payments made by the Plan that is subject to the

equitable lien. The Plan's provisions regarding subrogation, reimbursement, equitable liens or other equitable remedies are intended to supersede the applicability of the federal common law doctrines commonly referred to as the "make whole" rule and the "common fund" rule.

. . . .

2) **Reimbursement**. The Plan also reserves the right of reimbursement. This means that, to the extent the Plan provides or pays benefits or expenses for Covered Services, you must still repay the Plan from, and the Plan has the right to reimbursement from, any amounts recovered by suit, claim, settlement or otherwise, from any person, entity, organization or insurer, including your own insurer and any under insured or uninsured motorist coverage, for those benefits or expenses (even if the amounts recovered are not designated as payments of medical expenses). The amount of the Plan's reimbursement rights shall equal the full amount you receive up to the total amount paid by the Plan for the benefits or expenses for Covered Services.

The Plan's right of reimbursement applies on a first-dollar basis and shall have priority over your or anyone else's rights until the Plan recovers the total amount the Plan paid for Covered Services. The Plan's right of reimbursement for the total amount the Plan paid for Covered Services is absolute and applies whether or not you receive, or are entitled to receive, a full or partial recovery or whether or not you are "made whole" by reason of any recovery from any other person or entity, and applies to funds paid for any reason, including non-medical or dental charges, attorney fees, or other costs and expenses. This provision is intended to and does reject and supersede the "make whole" rule, which rule might otherwise require that you be "made whole" before the Plan may be entitled to assert its right of reimbursement.

By filing a claim for and/or accepting benefits (whether the payment of such benefits is made to you or made on your behalf of you to any Provider) under this Plan, you are deemed to have consented to the Plan's right of reimbursement and to have agreed to cooperate with the Plan Administrator and Employer in any respect necessary or advisable to make, perfect or prosecute such claim, right or cause of action, and shall enter into a reimbursement agreement with the Plan upon the request of the Plan Administrator or Employer.

3) **Equitable Lien and other Equitable Remedies**. *The Plan shall have an equitable lien against any right you may have to recover all or part of the benefits or expenses got Covered Services paid by the Plan from any party, including an insurer or another group health program, but limited to the total amount paid by the Plan for the benefits or expenses for Covered Services. The equitable lien also attaches any right to payment from workers' compensation, whether by judgment or settlement, where the Plan has paid Covered Expenses prior to a determination that the Covered Expenses arose out of and in the course of employment.* Payment

> by workers' compensation insurers or the Employer will be deemed to mean that such a determination has been made.
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> This equitable lien shall also attach to any money or property that is obtained by anybody (including, but not limited to, you, your attorney, and/or a trust), whether by judgment, settlement or otherwise as a result of an exercise of your rights of recovery for benefits or expenses for Covered Services paid by the Plan, up to the total amount paid by the Plan for the benefits or expenses for Covered Services (sometimes referred to as "proceeds"). The lien may be enforced against any party who possesses proceeds representing an amount paid by the Plan for the benefits or expenses of Covered Services including, but not limited to, you, your representative or agent; third party; third party's insurer, representative, or agent; and/or any other source possessing funds representing an amount paid by the Plan for benefits or expenses for Covered Services. The Plan shall also be entitled to seek any other equitable remedy against any party possessing or controlling such proceeds. At the discretion of the Plan Administrator, the Plan may reduce any future Covered Expenses otherwise available to you under the Plan by an amount up to the total amount paid by the Plan for benefits or expenses for Covered Services that is subject to the equitable lien.
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> *This and any other provisions of the Plan concerning equitable liens and other equitable remedies are intended to meet the standards for enforcement under ERISA that were enunciated in the United States Supreme Court's decisions entitled, Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S., [sic] 204 (1/8/2002); Sereboff v. Mid Atlantic Medical Services, Inc., 126 Sup. Ct. 1869 (2006). The provisions of the Plan concerning subrogation, equitable liens and other equitable remedies are also intended to supersede the applicability of the federal common law doctrine commonly referred to as the "common fund" rule.*
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> By accepting benefits (whether payments of such benefits is made to you or made on behalf of you to any Provider) from the Plan, you agree that if you receives [sic] any payment from any third party as a result of an Injury, Illness, or condition for which benefits are paid by the Plan, you will serve as a constructive trustee over the funds that constitutes such payment. Failure to hold such funds in trust will be deemed a breach of your fiduciary duty to the Plan.

Exhibit A, p. 49; Exhibit B, p. 38.

Prior to the hearing of this matter, Petitioner's counsel contacted Aetna by letter dated February 2, 2012 to advise Aetna of counsel's representation of Petitioner in connection with the subject accident, and requesting an itemization of medical billings processed and paid under the Plan. Petitioner's counsel again contacted Aetna following the Commission's decision to request

updated medical billings. After some additional back and forth, it was eventually determined that invoiced medical bills in the amount of $49,038.70 had been satisfied by the Plan's payment of $37,792.36.

By letter dated October 11, 2013, Mr. Owen advised Aetna of his intention to reimburse the Plan the amount it paid to satisfy the medical bills less the 30% attorney's fee incurred and previously paid by Petitioner in connection with securing recovery of the $37,792.36 owed to Aetna. Therefore, Mr. Owen proposed to satisfy the Plan's claim for reimbursement by the payment of $26,454.65, representing the amount paid by the Plan in satisfaction of Petitioner's medical bills ($37,792.36) less a 30% attorney's fee ($11,337.71). For whatever reason, Mr. Owen did not ask of Aetna that it also pay a proportionate share of the costs incurred in securing the award. This attorney fee he proposed to return to Petitioner, whose total award of $60,878.96 had already been subjected to a 30% attorney fee taken by Petitioner's counsel. (See Exhibit K to the affidavit of Richard Owen). Mr. Owen made a followup inquiry on November 22, 2013, asking Aetna to advise him within five business days of its intentions concerning his proposal. After hearing nothing, by letter dated February 10, 2014, Petitioner's counsel tendered a check to Aetna in the amount of $26,454.65. (See Exhibit M to the affidavit of Richard Owen).

By letter dated March 3, 2014, Petitioner's counsel remitted to Petitioner the sum of $7,872.44, representing "the difference between the full amounts of the medical bills paid by Aetna and 70% of the medicals which I recently sent to them." (See Exhibit N to the affidavit of Richard Owen). The difference between the calculated amount owed to Petitioner ($11,337.71) and the amount paid ($7,872.44) evidently lies in the fact that Mr. Owen had made some earlier remittances to Petitioner. However, it is clear that it was counsel's intention, at the end of the day, to remit to Petitioner the full 30% attorney fee earned by Mr. Owen, and previously paid by

Petitioner, in connection with recovering the Plan's payments of $37,792.36. Finally, on or about March 19, 2014, Aetna replied to Mr. Owen, advising that it would not accede to Mr. Owen's requested fee on the $37,792.36 recovery since the Commission had not approved the fee and since Mr. Owen had previously taken a 30% fee on the entire award of $60,878.96. Evidently, Aetna believed that Mr. Owen intended to take for himself another fee on the amount payable to Aetna, rather than reimburse that fee to Petitioner. At any rate, Aetna demanded payment of the full amount owed, $37,792.36, without reduction for attorney's fees.

ARGUMENTS OF THE PARTIES

Petitioner contends that his attorney is entitled to take a 30% attorney's fee on $60,878.96, the amount payable pursuant to the Commission Decision. As noted above, this sum includes medicals billed in the amount of $49,038.70 and TTD/PPI benefits in the amount of $11,337.71. Cited in support of this assertion is the case of *Edmondson v. St. Alphonsus Reg'l Med. Ctr.*, 130 Idaho 108, 937 P.2d 420 (1997). Petitioner's attorney took these fees and related costs prior to the date of the Petition. In his Petition, Petitioner does not seek ratification of the fees and costs taken by his attorney against the award. Rather, he seeks to hold Aetna responsible for a proportionate share of the attorney's fees and costs incurred in securing the award. Absent such a ruling, Petitioner will bear responsibility for the payment of attorney's fees incurred in connection with the medical costs paid by Aetna, while Aetna will receive 100 cents on the dollar for medical payments it made, without sharing any of the burden of the costs and fees associated with obtaining the recovery. As noted, since Petitioner has already paid to Mr. Owen a 30% fee on the entire $60,878.96 award, Mr. Owen has committed to returning any fee he is allowed to take on the monies payable to Aetna to Petitioner. In this way, each party

with an interest in the award will bear responsibility for the payment of attorney's fees and costs proportionate to such party's recovery.

Trinity Health Corporation, employer herein, objects to the Petition, alleging that the Commission does not have jurisdiction to determine the extent and degree of Aetna's right of subrogation under the Plan documents.

The Plan has joined in Employer's objection to the Petition and additionally argues that Idaho's Workers' Compensation laws are pre-empted by ERISA, and that under ERISA the Plan permissibly authorizes Aetna to recover 100% of its subrogated interest without deduction for attorney's fees incurred in connection with pursuing the award.

Aetna joins in asserting the defenses raised by Employer and Trinity.

ACTUAL CONTROVERSY

Under J.R.P. 15(C), the Petition must identify the statute, rule, regulation or order on which a declaratory ruling is sought, and state the issue or issues to be decided. Having reviewed the Petition and the briefs filed by the parties, it is clear that Petitioner asserts that the provisions of Idaho Code § 72-803 and IDAPA 17.02.08.033, *et seq.*, as interpreted by the Idaho Supreme Court, stand for the proposition that Petitioner's counsel is entitled to assert an attorney's charging lien against that portion of Petitioner's award against which Aetna asserts an equitable lien. It is also clear that Respondents assert a contrary position, arguing that the Commission has no jurisdiction over this matter but that if it does, Idaho law is preempted by ERISA, and that the Plan is entitled to the payment of 100% of the medical bills it paid on Petitioner's behalf, without deduction for attorney's fees incurred by Petitioner in connection with pursuing the award.

As explained below, we believe that the Commission does have jurisdiction to determine how this dispute should be resolved under state law, though not over the issue of federal preemption. Moreover, we believe that the other requirements for a declaratory ruling outlined in J.R.P. 15(C) are satisfied; an actual controversy does exist between the parties over the construction, validity, or applicability of the statutes and regulations in question. Petitioner has an interest which is directly affected by the statute or rule. If Petitioner prevails, then he will not bear the burden of paying 100% of the attorney's fees incurred in connection with obtaining the award. Rather, Respondents will bear a proportionate share of responsibility for the payment of attorney's fees incurred in obtaining the award and Petitioner will enjoy reimbursement of a portion of the costs and attorney's fees he has paid to Petitioner's counsel.

JURISDICTION OF THE COMMISSION

In *Williams v. Blue Cross of Idaho*, 151 Idaho 515, 260 P.3d 1186 (2011), Blue Cross claimed a right to recover from a workers' compensation settlement the amount it had paid to compromise medical bills incurred by claimant following the workers' compensation Surety's denial of responsibility for that care. Before the Court was the question of whether or not the provisions of Idaho Code § 72-802 barred Blue Cross' claim. That statute provides:

> **Compensation not assignable – exempt from execution.**
> - No claims for compensation under this law shall be assignable, and all compensation and claims therefor shall be exempt from all claims of creditors, except the restrictions under this section shall not apply to enforcement of an order of any court for the support of any person by execution, garnishment or wage withholding under chapter 12, title 7, Idaho Code.

The Court upheld the Commission's decision that since Blue Cross' claim was founded on subrogation, it did not amount to the claim of a "creditor", and was therefore not barred by the provisions of Idaho Code § 72-802. In so ruling, the Court first considered the question of whether or not the Commission had jurisdiction to determine Blue Cross' status as a subrogee.

Though noting that the Commission's jurisdiction is ordinarily limited to adjudicating complaints filed by a claimant against an employer/surety, the Court found that the Commission may properly exercise jurisdiction in cases like *Williams* where the Commission is asked to clarify claimant's rights under a lump sum settlement.

Employer argues that the grant of jurisdiction to the Commission endorsed by *Williams*, is limited to those cases in which a claim is made against the proceeds of a lump sum settlement. Because the Commission is required, under Idaho Code § 72-404, to determine that such settlements are "in the best interest of the parties", it must have jurisdiction to clarify a claimant's rights under such a settlement. However, since the instant claim by Aetna is not a claim made against the proceeds of a lump sum settlement, but is, instead, a claim made against an award issued following hearing, the argument is that *Williams* does not give the Commission jurisdiction over this dispute.

We do not believe that *Williams* should be read so narrowly; the Court's determination that the Commission had jurisdiction to consider Blue Cross' claim in *Williams* was not based solely on the Commission's obligation to review lump sum settlement agreements under Idaho Code § 72-404. Rather, the fact that a lump sum settlement was involved in that case was but one factor the Court considered in determining that the Commission had jurisdiction over the case.

In *Williams*, the Court found that the Commission's statutory authority to approve claims for medical services under Idaho Code § 72-803 also supported jurisdiction and reasoned that "if the Commission has legislative authority to resolve disputes between payers and medical providers, there is no ground to conclude that it could not sort out a dispute over lump sum settlement proceeds between a workers' compensation claimant and a payer with a subrogated

claim”. The same reasoning supports a finding of jurisdiction in the instant matter, notwithstanding that there is no lump sum settlement involved.

Moreover, unlike the situation before the Court in *Williams*, the provisions of Idaho Code § 72-803 provide a second reason for the Commission to assume jurisdiction over this dispute. Idaho Code § 72-803 grants to the Commission not only the right to approve claims for medical services, but also the right to approve the claims of attorneys, one of the issues before the Commission here.

Next, the Court noted that its previous decisions gave the Commission exclusive jurisdiction to determine the subrogation rights of the State Insurance Fund under Idaho Code § 72-223. Although the claim in *Williams* involved that of a subrogated third party rather than a subrogated surety, both instances involved the need to clarify a worker’s rights under the workers’ compensation law. This factor is equally implicated in the instant matter, where the central issue is whether the injured worker should be held responsible for the payment of 100% of the cost and attorney’s fees incurred in the procurement of the award, where a portion of the award is payable to satisfy the claim of a third party, a party who has benefited from Petitioner’s prosecution of the workers’ compensation claim.

In *Williams*, the Commission determined that while it did have jurisdiction to address the question of whether Blue Cross had a subrogation interest that was not foreclosed by the provisions of Idaho Code § 72-802, the Commission did not have jurisdiction to adjudicate the extent of Blue Cross’ right of subrogation. The Court overruled this part of the Commission decision and ruled that determining the extent of Blue Cross’ subrogation entitlement was within the Commission’s authority. The court reasoned that requiring the Commission to address this issue would help ensure that the parties will not be subjected to further litigation in other

venues.[2] Based on the reasoning of the Court in *Williams*, it is no stretch to conclude that the statutory scheme imbues the Commission with jurisdiction over the question of whether Aetna should bear responsibility for a proportionate share of the attorney's fees and costs associated with the successful litigation of the claim. Under Idaho Code § 72-707 and Idaho Code § 72-803, we conclude that the Commission has jurisdiction over this question.

THE PARTIES CONCEDE THAT AETNA HAS A RIGHT TO A PORTION OF THE AWARD

It will be recalled that in *Williams*, one of the central issues was whether or not a contractual right of subrogation, like that held by Blue Cross, was barred by the provisions of Idaho Code § 72-802. Both the Commission and the Court concluded that a contractual right to subrogation is to be distinguished from the claim of a creditor, which is barred as against workers' compensation benefits. While the injured worker in *Williams* claimed that Idaho Code § 72-802 completely insulated workers' compensation benefits from the claim of Blue Cross, no such position is asserted in this case. As pointed out by the Plan, there appears to be general agreement among the parties that the Plan is contractually subrogated to Petitioner's award in the amount of medical expenses paid on Petitioner's behalf by the Plan. Though the Plan documents speak in terms of the creation of an "equitable lien" against a workers' compensation award as opposed to a right of subrogation, it appears that the Plan documents create the same type of right in the proceeds of a workers' compensation award as was created in the *Williams* case. Who should bear the burden of recovering the subrogated interest for the third party was not at issue in *Williams*, but it is at issue here. Since the parties appear to be in agreement that the right

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[2] Employer has noted that *Edmonson*, while endorsing the right of an attorney to assert a charging lien against medical bills awarded, leaves open the possibility that an aggrieved creditor could pursue recovery of the balance of the debt owed in some other venue. *Edmonson* involved the claim of a creditor, as opposed to the claim of a subrogee. *Williams* clearly anticipates that the Industrial Commission has the right, if not the obligation, to unwind the rights of a subrogee to the proceeds of a Commission award.

of Aetna to recover the payments it made on behalf of Petitioner should be honored, regardless of whether it is characterized as an equitable lien or as a right of subrogation, we will devote our attention instead to what we perceive to be the central question, whether this right exists without a corresponding responsibility to share in the costs and attorney's fees associated with procuring the award. The Plan documents unambiguously establish that when Petitioner relied on his health insurance to satisfy the medical bills at issue, he acknowledged Aetna's right of subrogation to any workers' compensation award, however characterized, in the amount it paid to satisfy Petitioner's bills, without deduction for attorney's fees and costs associated with securing the workers' compensation award. We are asked to reconcile this agreement with what Petitioner claims is applicable Idaho law.

APPROVAL OF CHARGING LIEN

Pursuant to IDAPA 17.02.08.033, *et seq*., an attorney may assert a "charging lien" against a claimant's right to compensation where the attorney is able to demonstrate that:

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

Such charging liens may be approved by the Commission in connection with an award or lump sum settlement. (See IDAPA 17.02.08.033(b)). An attorney seeking approval of a charging lien shall comply with the provisions of IDAPA 17.02.08.033.02, which provides:

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. Counsel's itemization of medical bills for which claim was made in the underlying action, but which remain unpaid by employer/surety at the time of lump sum settlement, along with counsel's explanation of the treatment to be given such bills/claims following approval of the lump sum settlement.

viii. 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 Rule by the Commission by reference to its staff, the Commission may issue an Order Approving Fees without a hearing.

Ordinarily, the Commission processes requests for approval of attorney's fees as part of the application for approval of a lump sum settlement. However, where, instead of settling by way of lump sum settlement, a case resolves only following litigation of a disputed claim, an attorney representing an injured worker is equally entitled to a fee on an award secured as a result of his efforts. However, except where a dispute arises between claimant and his attorney,

the Commission is almost never involved in approving a fee taken on such an award following a hearing. As in this case, Claimant's counsel simply takes his fee on the award and does not request the Commission's approval of his charging lien.[3] However, as Respondents have noted, Claimant's request that Aetna pay its proportionate share of costs and attorney's fees incurred by Claimant in securing the award must necessarily be based on a finding that Petitioner's counsel is, in fact, entitled to assert a charging lien as anticipated by his retainer agreement with Petitioner.

The agreement between Petitioner and his attorney anticipates that should it become necessary to take the underlying case to hearing in order to secure workers' compensation benefits claimed, Petitioner's attorney is entitled to a 30% fee on sums secured as the result of litigating the case. This is entirely consistent with the provisions of IDAPA 17.02.08.033.01.e.ii. It is also clear that Petitioner's attorney was "primarily or substantially" responsible for securing the fund from which he seeks to be paid; absent counsel's challenge to Employer's denial, no fund would have been generated. Petitioner's attorney has clearly demonstrated that he is primarily or substantially responsible for securing the $60,878.96 award issued by the Commission following hearing. We have also reviewed the itemized costs identified in counsel's letter of August 26, 2013, and find them to be reasonable. (See Exhibit I to the Affidavit of Richard S. Owen).

Of course, the award against which Petitioner's counsel asserts his charging lien includes sums payable to Claimant, as well as sums to which Aetna is subrogated. Does the fact that Aetna has a contractual right of subrogation to a portion of the award have any impact on

[3] IDAPA 17.02.08.033.02(b) requires that an attorney seeking to be paid from the proceeds of a Lump Sum Settlement submit proof supporting a charging lien. There is no similar mandate for attorneys seeking to be paid from the proceeds of a Commission award following hearing. However, the Commission is empowered to request this information in such cases.

counsel's right to assert a charging lien based on the award he secured? We believe that *Edmondson v. St. Alphonsus Reg'l Med. Ctr.*, 130 Idaho 108, 937 P.2d 420 (1997) makes it clear that this question must be answered in the negative.

In that case, claimant was found injured and unresponsive at a construction site. He was immediately transported to St. Alphonsus Regional Medical Center (St. Alphonsus) and incurred medical expenses in the amount of $39,016.96 on an emergent basis before surety could conduct any investigation of the claim. Surety eventually denied responsibility for claimant's injuries, taking the position that the injuries were self-inflicted. Claimant filed a complaint with the Commission which eventually ruled that claimant's injuries were compensable and that he was entitled to the medical care he received at St. Alphonsus. Prior to hearing, counsel for claimant had advised St. Alphonsus of claimant's pending hearing, and even offered to collect the medical expenses incurred by claimant at St. Alphonsus, subject to a 30% contingency fee, plus a pro rata share of the costs incurred in prosecution of the claim. St. Alphonsus declined this offer and filed with the Commission a request that should the case be decided in claimant's favor, surety be ordered to pay St. Alphonsus directly, and without deduction of attorney fees.

Following the Commission's favorable decision on the issue of compensability, St. Alphonsus filed a petition for declaratory relief seeking the direct payment of the medical expenses claimant incurred at St. Alphonsus, without deduction of costs and attorney's fees. St. Alphonsus also asked the Commission to endorse its right to sue the injured worker for medical expenses if St. Alphonsus was found not to be entitled to direct payment by the employer and surety. The Commission ruled that the workers' compensation laws do not require direct payment of medical expenses recovered at hearing to the provider, and further approved a 30% contingent attorney fee for the claimant's attorney as a lien against the award of medical

expenses. The Commission refused to reach the issue of whether St. Alphonsus could sue the injured worker for medical expenses, citing a lack of real controversy.

On appeal, the Court ruled that nothing in the provisions of Idaho Code § 72-432(1) requires direct payment of medical expenses recovered in connection with a denied claim to the provider. The Court also ruled that it was within the Commission's authority to approve a 30% contingent fee on the medical benefits recovered on behalf of St. Alphonsus. Idaho Code § 72-803 gives the Commission authority to approve the claims of attorneys. Pursuant to Idaho Code § 72-508 the Commission adopted rules which allowed the Commission to approve a charging lien for attorneys against a claimant's right to compensation under the workers' compensation law so long as certain requirements are satisfied. *See* IDAPA 17.02.08.033, *et seq*. In *Edmonson*, the Court ruled that the Commission did not err in approving a 30% fee against the St. Alphonsus medical bills recovered since Commission rules authorize a 30% fee in cases where the dispute has gone to hearing, and where it is demonstrated that counsel was primarily or substantially responsible for securing the fund from which fees are sought.

From *Edmondson*, we think it clear that in calculating his charging lien, Petitioner's counsel was entitled to include that portion of the award relating to the payment of medical benefits. Accordingly, we find that counsel is entitled to an attorney's charging lien in the amount of $18,263.69, plus costs in the amount of $4,255.50 against the $60,878.96 award. After the deduction of approved costs and attorney's fees, the amount of the award payable to Claimant is $38,359.77. ($60,878.96 minus $18,263.69 minus $4,255.50).

Next, we must consider how to reconcile counsel's right to the aforementioned charging lien with the provisions of the Plan documents which unambiguously provide that the right of subrogation attaches to any workers' compensation recovery, however characterized, and

without deduction of costs and fees associated with securing the award. Several possible solutions could be entertained.

First, as noted above, following deduction for attorney's fees and costs from the initial award of $60,878.96, $38,359.77 remains. This is enough to satisfy Aetna's claim of $37,792.36. Satisfaction of the right of subrogation from this sum honors the provisions of the Plan, since this is what Petitioner agreed to pay when he sought a way to obtain the medical care he needed outside the workers' compensation system. Also, this solution gives full recognition to the right of Petitioner's attorney to assert a charging lien against the full award, as anticipated by *Edmonson*. The problem with this solution is that while it satisfies the interests of both Petitioner's attorney and Aetna, Petitioner gets the short end of the stick. It is he who must bear responsibility for payment of 100% of the fees and costs associated with securing the award, while Aetna gets to ride on his coattails. In this scenario, portions of the award to Claimant that were intended to compensate him for time loss and permanent physical impairment are disproportionately subjected to the claims of his attorney for payment.

In the alternative, each entity with an interest in the recovery could be required to bear responsibility for its proportionate share of fees and costs associated with securing that portion of the award each expects to receive. In this scenario, Aetna's right of subrogation to $37,792.36 would be reduced by a proportionate share of the costs and attorney's fees incurred by Petitioner in securing the award. Likewise, Petitioner would bear responsibility for the payment of costs and attorney's fees proportionate to that portion of the award he receives. In this way, each party with an interest in the award will fairly bear its share of the costs and fees associated with securing the award. The problem with this scenario is that it is in direct conflict with the Plan documents, and sets up the issue of federal preemption.

The second scenario fails to take into account the fact that for his claim for medical benefits Petitioner recovered the sum of $49,038.70, representing the invoiced amount of the medical bills he incurred for his total knee replacement. However, those bills were satisfied by Aetna's payment of $37,792.36. Under the peculiar facts of this case, the $11,246.34 difference represents a payment to Petitioner that cannot be properly characterized as either an award of indemnity or medical benefits; the Commission award in this case separately addresses Claimant's entitlement to indemnity benefits, and it is difficult to characterize the payment as a medical benefit since it does not represent an amount that is owed to anyone for medical services. What is the purpose of this award to Petitioner, and why does the rule of *Neel v. Western Construction, Inc.*, 147 Idaho 146, 206 P.3d 852 (2009) require this outcome? Does *Neel* support the conclusion that the $11,246.34 at issue in this matter should be treated as a windfall to Claimant, or should those funds be available to satisfy other obligations?

The underlying premise of *Neel* is that where the workers' compensation surety has denied responsibility for the payment of medical benefits, Claimant is in the wilderness: he must go out and strike his own bargain with providers or with his health insurer, and may therefore be liable for payments that may be well in excess of payments authorized under the workers' compensation fee schedule. To make sure that an injured worker in such settings has enough at hand to discharge the obligation he made outside the workers' compensation system, *Neel* specifies that a surety who is subsequently found to be responsible for denied bills shall pay 100% of the invoiced amount of those bills. In this fashion, whatever agreement Claimant made outside the workers' compensation system for the payment of medical bills will likely be covered. Here, Claimant incurred medical expenses in the invoiced amount of $49,038.70, and he secured an award from the Commission in this amount. Although these bills were satisfied

by Aetna's payment of the sum of $37,792.36, we believe that it is appropriate to look to the full medical recovery of $49,038.70 to satisfy both the obligation that Claimant made outside the workers' compensation system, and the expenses he incurred in recovering those medical expenses in proceedings before the Commission. We believe that *Neel* represents the court's attempt to create a fund of sufficient size to cover most of the wide variety of obligations that might be created between an injured worker, his attorney, and some third party outside the workers' compensation system.

The attorney fee allowed by the Commission on $49,038.70 is $14,711.61, leaving $34,327.09 of the award of medical benefits. From this, a proportionate share of the costs incurred ($3,427.81) must be subtracted, leaving the sum of $30,899.28 to satisfy the right of subrogation. We believe that this outcome does honor to both *Edmonson* and *Neel*, balancing the attorney's right to be paid against the subrogated interests of a third party insurer. We conclude that Aetna has the right to receive $30,899.28 under Idaho law.

This outcome is clearly at odds with the Plan documents, which anticipate that Aetna has a right of subrogation in the amount of $37,792.36, which attaches to an award of workers' compensation benefits, however characterized, without deduction for attorney's fees and costs associated with securing the award. Accordingly, it is necessary to understand whether federal law preempts what we have identified as the applicable state law on these issues. However, before addressing this question we must consider whether the Industrial Commission has jurisdiction to make this determination.

THE INDUSTRIAL COMMISSION DOES NOT HAVE JURISDICTION TO DETERMINE WHETHER IDAHO LAW IS PREEMPTED BY ERISA

ERISA is a comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 103

S. Ct. 2890, 77 L.Ed.2d 490 (1983). ERISA was adopted by Congress in 1974 to protect plan participants and beneficiaries from abuses and mismanagement in the administration of employee pension and benefit plans, and to protect administrators from the burden that would be imposed by a patchwork scheme of regulation. To advance the purposes of the statute, Congress included a deliberately expansive preemption provision as set forth in 29 U.S.C. § 1144(a):

> **(a) Supersedure; effective date**
>
> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003 (a) of this title and not exempt under section 1003 (b) of this title. This section shall take effect on January 1, 1975.

A law "relates to" an employee benefit plan in the normal sense of the phrase if it has a connection with or reference to such a plan. *See Shaw v. Delta Airlines, Inc., supra*.

The principle that federal law may prohibit the enforcement of state law is grounded upon the supremacy clause of the United States Constitution, which provides that the laws of the United States, made pursuant to the national Constitution, "shall be the supreme law of the land." U.S. CONSTITUTION, Art. VI. Any state law that conflicts with federal legislation, either directly, or because its enforcement would stand as a barrier to the accomplishment of Congress' full purpose and objectives, is without effect and cannot be enforced. *See Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L.Ed.2d 407 (1992). Therefore, the preemption challenge raised by Respondents is essentially a challenge to the constitutionality of what we have identified as Idaho law.

We believe that Idaho law is clear that the Industrial Commission does not have jurisdiction to determine the constitutionality of what we believe is the applicable state law governing the payment of attorney's fees in this case. Generally, the Idaho Supreme Court has

held that the Industrial Commission does not have jurisdiction to address constitutional challenges, and that the constitutionality of a provision of the Workers' Compensation law may be properly raised for the first time on appeal. *Tupper v. State Farm Ins.*, 131 Idaho 724, 963 P.2d 1161 (1998); *Idaho State Ins. Fund v. Van Tine*, 132 Idaho 902, 980 P.2d 566 (1999). Therefore, while we believe that the Industrial Commission does have jurisdiction to determine what Idaho law is on the issues raised by Petitioner, we do not have jurisdiction to consider the question of whether Idaho law should govern in light of the competing federal scheme, and the plan documents enacted pursuant to that scheme. At least one other jurisdiction has considered this issue and come to the same conclusion. In *Celebrity Custom Builders and CNA v. The Industrial Claim Appeals Office of the State of Colorado*, 916 P.2d 539 (1995), *as modified on denial of reh'g* (Oct. 12, 1995), *cert. denied* (Apr. 2, 1996), Colorado Workers' Compensation law specified that in calculating an injured worker's average weekly wage, account must be taken of the employee's cost of continuing the employer's group health insurance plan in the event of the employee's termination. In *Celebrity*, claimant suffered a compensable work injury. His average weekly wage was calculated to be $400. Following a period of treatment, claimant was terminated from his employment, and later claimed that his average weekly wage should be increased to reflect the additional costs he incurred following his termination to continue his health insurance coverage. In other words, claimant contended that these additional insurance costs he bore following his termination constituted additional "wages" under the Colorado workers' compensation laws. In an action before the Industrial Commission, Celebrity contended that this provision of Colorado law was preempted by ERISA and that the cost of health insurance could not be included in the wage calculation. The administrative law judge agreed with Celebrity, finding that the applicable Colorado statute was unconstitutional because

it was preempted by ERISA. The Industrial Claim Appeals Office reversed the administrative law judge, concluding that both it and the administrative law judge lacked authority to determine the constitutionality of the Colorado statute and ordered that the claimant's average weekly wage should therefore be increased to reflect the additional costs claimant incurred following termination in order to keep his health insurance in effect. On appeal, the Colorado Court of Appeals ruled that since a preemption claim is a challenge to the constitutionality of a statute, the administrative law judge's determination that Colorado law was preempted by ERISA constituted a finding by the administrative law judge that the state statute was unconstitutional. However, in Colorado, as in Idaho, administrative agencies do not have the authority to pass on the constitutionality of statutes or ordinances. That function is reserved to the judicial branch of government.

We believe the same rule should apply to this case. As previously stated, under Idaho law we believe that Aetna is entitled to recover the sum of $30,899.28. We agree with Respondents that the Industrial Commission does not have jurisdiction to consider whether Idaho law on this issue is preempted by ERISA. We believe that this is an issue that must be addressed either by the Idaho Supreme Court on appeal of this decision, or by some other tribunal.

CONCLUSIONS OF LAW AND ORDER

In accordance with the foregoing we conclude as follows:

1. The charging lien of Petitioner's attorney is approved in the amount of $22,519.19, representing attorney fees of $18,263.69 and costs of $4,255.50.

2. Aetna is awarded $30,899.28 in satisfaction of its right of subrogation.

3. The Industrial Commission does not have jurisdiction to consider whether Idaho law applicable to this decision is pre-empted by ERISA.

DATED this 19th day of December, 2014

INDUSTRIAL COMMISSION

_/s/________________________________
Thomas P. Baskin, Chairman

_/s/________________________________
R.D. Maynard, Commissioner

_/s/________________________________
Thomas E. Limbaugh, Commissioner

ATTEST:

_/s/____________________________
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of December ,2014, a true and correct copy of the foregoing **ORDER ON PETITION FOR DECLARATORY RULING** was served by regular United States Mail upon each of the following:

RICHARD S OWEN
PO BOX 278
NAMPA ID 83653

JAMES A FORD
PO BOX 1539
BOISE ID 83701

NEIL D MCFEELEY
PO BOX 1368
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ka __/s/________________________________