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Industrial Commission
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Via email only: kamerron.monroe@iic.idaho.gov

RE: Comment Regarding Proposed Rule 17.02.04.281
Docket No. 17-0208-1801

Dear Commissioners:

I write to thank you for taking my oral comments this morning during the Negotiated Rulemaking meeting concerning IDAPA rule 17.02.04.281.

As you know from our meeting, I am opposed to the proposed rule change.

My office represents workers' compensation claimants in Idaho. As the Commission is aware, there is constant tension between injured workers trying to receive benefits and the employer/sureties that scrutinize the costs of these benefits. It is all too common for my office to field calls from claimants wherein sureties have denied additional benefits forcing them to hire my office and litigate their case.

As those who work in the field of workers compensation know, the system came about as a result of the Great Compromise. Workers and employers both gave up rights and benefits to create a better system. IDAPA 17.02.04.281 is one rule that captures this compromise because it is fair to both parties and does not place one doctor and their opinion over another regarding impairment ratings.

It should be no surprise that the interests of the parties push them to seek the opinions of other doctors when searching for justice in the workers' compensation system. In the system, these philosophies emerge in terms of the evidence doctors weigh and analyze, as well as how they read the same text of medical treatises. President Franklin Roosevelt is credited with saying that "[t]here are as many opinions as there are experts..." Another saying I have heard since I was young is that a doctor is only as good as his opinion. Both quotes sum up the state of medicine in the case of workers' compensation disputes.

The current rule which has been in place for years took these realities into consideration. It did so by providing equal weight to all doctors unless there was a "manifest injustice." This does happen. See *LaBleu v. Challenger Companies* IC 2013-013166 decided November 23, 2016.

The proposed rule puts this precedent on its head and places the discretion in the hands of one of the parties in these disputes. The proposed language of paragraph number 3 guts the

substance of the averaging rule in paragraph number 2. This new language gives sureties unilateral discretion to choose whether to average the impairments of all doctors. The practical effect under such a rule is it makes it more expensive for a claimant to recover for his/her industrial injuries for impairment benefits. With this proposed rule sureties will force claimants in every case to file a complaint with the Commission when disputing impairment benefits. This is not swift or certain relief for injured claimants.

Currently, it is common for sureties to not follow the rule as written. *See Grant v. Paramount Floor Cleaning* IC 2014-029800 decided August 25, 2017. Why would we expect sureties to do so under this proposed rule when granted unilateral discretion?

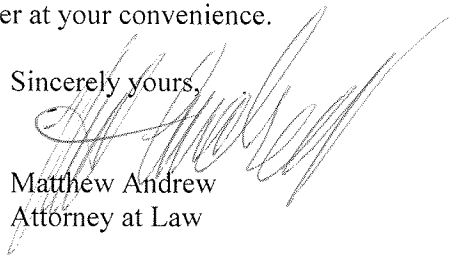
During today's hearing, I heard some advocate that changing the rule has the same effect as the current rule. I want to make it clear that is not the case for a Claimant. The current rule is a source of authority in most cases to grant additional benefits to a needy Claimant. It puts the cost of choosing not to pay those benefits on sureties. The proposed change will require a Claimant to have to fight the issue that could have been resolved without litigation prior. This makes all the difference for a Claimant who many times is struggling in the aftermath of an industrial injury.

When a party has the discretion to do (or not do something), a party will do what is in their best interests. For sureties in the context of this rule, they will refuse to average impairment ratings and tip the balance of the scales in their favor. This undermines the compromising spirit of the Workers' Compensation system, and undermines the humane purposes for which the system exists.

I urge the Commission to keep IDAPA 17.02.04.281 as it has been for decades and not implement the proposed rule.

I thank you for your attention to this matter and for holding the meeting this morning. I am available for questions or comments on the matter at your convenience.

Sincerely yours,



Matthew Andrew
Attorney at Law