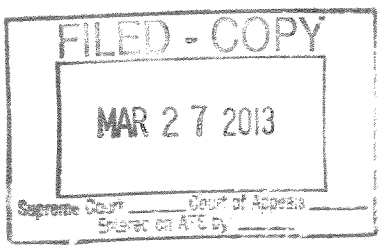
3-27-2013

Page v. McCain Foods, Inc. Appellant's Brief Dckt. 40568

IN THE SUPREME COURT OF THE STATE OF IDAHO

* * * * * * * *

VerDENE PAGE, Claimant-Appellant, vs. McCAIN FOODS, INC., Employer, TRANSCONTINENTAL INSURANCE COMPANY, Surety, Defendants-Respondents, and IDAHO INDUSTRIAL COMMISSION, Real Party in Interest-Respondent, L. CLYEL BERRY, individually, Intervenor-Appellant.	)	Supreme Court No. 40568



APPELLANT'S OPENING BRIEF

Appeal from the Idaho State Industrial Commission

Chairman Thomas E. Limbaugh, Presiding

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

TABLE OF CASES AND AUTHORITIES

STATEMENT OF THE CASE

I. Nature of Case:

The nature of the underlying case is that for workers' compensation benefits due Claimant, VerDene Page. Ms. Page's underlying workers' compensation claim was settled upon lump sum basis by that Order of the Idaho State Industrial Commission dated November 9, 2011, pertaining to all Title 72 benefits excepting prospective medical benefits; and, potential prospective Title 72 medical benefits were settled by the Commission's Order dated August 17, 2012. Following those settlements, the only issue remaining is the entitlement of Ms. Page's counsel, Clyel Berry, to attorney's fees for his representation of Ms. Page throughout the Title 72 proceedings. The instant appeal relates to attorney fee issues.

II. Course of Proceedings and Disposition:

Claimant/Co-Appellant herein, VerDene Page, suffered injury upon August 17, 2001. Ms. Page retained counsel, Clyel Berry, upon April 24, 2002. Defendants Employer and Surety denied the Title 72 claim, in its entirety. Hearing before the Idaho State Industrial Commission was held upon April 22, 2003. Thereafter, the Commission entered its December 8, 2003 Order, holding that Ms. Page failed to prove a compensable "accident," and that her oral notice to the employer was insufficient.

Ms. Page filed appeal from the December 8, 2003, decision. The Supreme Court thereafter released its Opinion in ***Page v. McCain Foods, Inc.***, 141 Idaho 342, 109 P.3d 1084, upon February 17, 2005, determining that the Commission erred in concluding that Ms. Page

failed to prove an "accident," and/or that her oral notice was insufficient. The matter was then remanded to the Idaho State Industrial Commission for further proceedings.

The Commission released its Order on Remand upon June 14, 2005, finding that Ms. Page was entitled to medical and temporary total disability benefits for the period August 18 through November 26, 2001; and, awarded five percent (5%) permanent partial disability, inclusive of permanent impairment.

Counsel then filed Ms. Page's Motion for Reconsideration; Motion for Additional Findings; and, Alternative Motion to Reopen. The Commission released its Order Regarding Pending Motions, denying the same, upon September 23, 2005. Claimant's Second Motion for Reconsideration was then filed. By its Order dated November 23, 2005, the Commission denied that Motion.

By reason of disagreement between Title 72 Defendants and Claimant as to the computation of benefits awarded by the Order on Remand, Claimant's Motion for Entry of Order for Award Sum Certain/Motion for Additional Findings was filed. After an evidentiary hearing the Commission released its Order determining with specificity benefits due Claimant pursuant to the June 14, 2005, Order on Remand, and awarding fees by reason of Defendants' conduct.

By instrument dated January 18, 2006, Claimant's Motion for I.C. § 72-719(3) Review to Correct Manifest Injustice was filed. Thereafter, the Commission filed its Order Dismissing Further Reconsideration, dated March 16, 2006.

Ms. Page's second appeal then followed. The Supreme Court issued its Opinion in ***Page v. McCain Foods, Inc.***, 145 Idaho 302, 179 P.3d 265, upon January 31, 2008, and again

remanded the matter to the Commission. Subsequently herein, the February 17, 2005, Supreme Court Opinion will be referenced as "***Page I***," and the January 31, 2008, Opinion will be referenced as "***Page II***."

Upon November 1, 2008, Claimant's Request for Calendaring; and, Request for Emergency Hearing was filed. The parties thereafter agreed to mediation, which was held upon February 12, 2009, but was not successful.

Another full evidentiary hearing was held before the Commission upon April 9, 2009. Thereafter, the Commission released its September 8, 2009, Findings of Fact, Conclusions of Law, and Order, which awarded Ms. Page benefits totaling two hundred fifty-four thousand four hundred one dollars and eighty-six cents ($254,401.86). Issues then remaining before the Commission included Ms. Page's entitlement to medical benefits for right TKA; entitlement to temporary disability benefits following September 21, 2008; entitlement to permanent partial impairment; and, entitlement to permanent disability in excess of impairment.

Following further medical procedures and Ms. Page achieving maximum medical stability therefrom, hearing upon Title 72 Defendants' responsibility for additional benefits was set for September 20, 2011. Approximately three weeks prior to hearing, the Title 72 parties agreed to vacate and again proceeded to mediation, with Industrial Commissioner Thomas P. Baskin as mediator. At mediation, all remaining Title 72 claims against Defendants Employer and Surety were settled by two Agreements. One Agreement provided that Title 72 Defendants prepare and present a Set-Aside for Medicare approval, as Ms. Page was then a Medicare beneficiary/recipient, regarding future potential medical procedures. Ultimately, Title 72

Defendants funded the Medicare Set-Aside by paying eight thousand seven hundred fifty-four dollars ($8,754.00). The second Agreement encompassed all other Title 72 benefits. Pursuant thereto, Defendants paid consideration of two hundred forty-eight thousand seven hundred fifty dollars ($248,750.00), new and additional monies. The Commission approved each of these Agreements, with the exception of the request of Ms. Page and counsel that the Commission approve fees at the contingent rate of forty percent (40%).

A Request for Calendaring re Claimant's Counsel's Petition for Approval of Fees/Request for IDAPA 17.02.08.033.03.b Hearing was then filed. Hearing upon said Petition was held upon March 10, 2012, at which Ms. Page appeared and participated. The Commission entered its Order on Attorney Fees limiting fees to thirty percent (30%), upon June 21, 2012. A Motion to Reconsider and/or Motion for Further Findings; and, Brief in Support of Said Motion was filed by instrument dated July 3, 2012. The Commission entered its Order on Reconsideration Regarding Attorney Fees upon November 19, 2012, denying said Motion. Upon the same date, the Commission entered its Order Granting Motion to Intervene, filed by Ms. Page's counsel, Clyel Berry, individually. Thereafter, Notice of Appeal was filed by instrument dated December 6, 2012.

III. Statement of Facts:

1. Personal Data and Employment History for Claimant, VerDene Page:

Ms. Page was born upon [redacted]; is now within months of being sixty-nine years of age; and, is formally educated through the tenth grade. ***Tr.***, April 22, 2003, hearing, p. 30, LL. 4-12; p. 33, LL. 15-16. Subsequently herein, the transcript for the April 22, 2003, hearing will

be designated as "Tr. I"; the transcript of the February 2, 2006, hearing will be designated as "Tr. II"; and, the transcript for the April 10, 2012, hearing will be designated as "Tr. III."

Throughout her adult life, Ms. Page has had but two employments. Her first employment was seasonal, at a potato packing facility, which lasted for three summers and was labor intensive. ***Tr. I***, p. 34, L. 14 – p. 37, L. 8. Ms. Page's second employment commenced in 1974, with the Title 72 employer's predecessor, Ore-Ida. ***Tr. I***, p. 37, L. 13 – p. 38, L. 7. After McCain Foods purchased Ore-Ida, Ms. Page's employment with McCain Foods continued over a period of approximately twenty-seven years, to the August 17, 2001, industrial accident. Ms. Page's employment at Ore-Ida and McCain Foods was labor intensive. ***Tr. I***, p. 42, L. 3 – p. 49, L. 17.

At the time of the industrial injury, Ms. Page earned an average weekly wage of five hundred eight dollars and twenty cents ($508.20). Non-wage benefits included vacation, retirement and group health insurance coverages for Ms. Page and her family. ***R.*** 1/12/04 Appeal, p. 1, 5; ***Tr. I***, p. 55, L. 6 – p. 56, L. 7. For purposes of identification, subsequently herein the Clerk's Record relative to ***Page I*** will be designated "R. I"; the Clerk's Record relative to ***Page II*** will be designated "R. II"; and, the Agency's Record flowing from the instant Appeal will be designated "R. III."

2. Personal Data and Employment History for Claimant's Counsel, Clyel Berry:

Clyel Berry has been a licensed attorney practicing within the State of Idaho from April, 1976, through current. During this almost thirty-seven year period, Berry's practice has primarily been limited to the areas of personal injury and workers' compensation law. Affidavit

of L. Clyel Berry in Support of Petition for Approval of Fees, dated December 17, 2009, p. 12, at paragraph 21g, Exhibit 8, ***R. III***.

3. Berry's Employment by and Representation of Ms. Page in the Underlying Title 72 Proceedings:

Clyel Berry was retained by Ms. Page pursuant to a Contingent Fee Agreement dated April 24, 2002. p. 2, paragraph 2, Exhibit 8, ***R. III***. A true and accurate copy of said Fee Agreement is attached as Exhibit A to said Exhibit. Pursuant thereto, attorney's fees were upon a contingent basis of,

> "...25% of all benefits obtained for you by L. Clyel Berry prior to the date your claim is scheduled for hearing. Once hearing in the matter has been commenced, attorney's fees will then be equal to 30% of all benefits obtained for you by L. Clyel Berry. Following the filing of an appeal or if the matter is scheduled for rehearing, attorney's fees will then be 40% of all benefits obtained."

April 24, 2002, Contingent Fee Agreement, at paragraph 4 thereof.

Ms. Page's industrial accident was upon her arising from a seated position and experiencing pain in her left knee. Ms. Page's initial conference with Berry upon April 24, 2002, was for a matter unrelated to any Title 72 claim. Ms. Page had not realized that the August 17, 2001, occurrence could constitute an industrial accident. ***Tr. I***, p. 85, L. 22 – p. 86, L. 9; ***Tr. III***, p. 20, L. 21 – p. 21, L. 5. After counsel advised Ms. Page that she may have a Title 72 claim relating to the August 17, 2001, event, the April 24, 2002, Contingent Fee Agreement was fully discussed. It was further discussed that in light of difficulties perceived by counsel regarding Ms. Page's potential Title 72 claim, if Title 72 proceedings required an appeal, fees upon post-appeal benefits would be at forty percent (40%). Ms. Page fully understood the fee agreement and agreed to the same. ***Tr. III***, p. 21, LL. 3 – 23.

The detailed description of the proceedings required to resolve Ms. Page's Title 72 claims has been previously addressed within the instant Brief. Following Ms. Page being denied benefits upon the initial hearing, by the Commission's Order dated December 8, 2003; the appeal of the December 8, 2003, Order in ***Page I***; and, the disappointing benefits awarded by the Commission within its June 14, 2005, Order on Remand, Ms. Page was exhausted, felt victimized by the Title 72 proceedings, and was not inclined to further pursue her Title 72 claims. It was counsel who convinced Ms. Page to allow him to appeal the June 14, 2005, Order on Remand. ***Tr. III***, p. 21, L. 24 – p. 22, L. 14.

4. Ms. Page's Concurrence With and Joinder in Petition for Approval of Fees:

As above-noted, at the time that counsel was retained by Ms. Page, the Contingent Fee Agreement was fully discussed with and understood by Ms. Page. Following the September 8, 2009, Award, the December 17, 2009 Petition for Approval of Fees was filed. By that Petition, the Commission was requested to approve the April 24, 2002, Contingent Fee Agreement. Prior to the filing of that Petition or the Affidavit of L. Clyel Berry in Support, both instruments were forwarded to Ms. Page for review, with counsel's correspondence of December 17, 2009, which advised Ms. Page that,

> "[a]t this point, I wish to state the obvious. To the extent that I am asking the Commission to approve fees greater than 30%, your interests are not compatible with mine. This simply means that you certainly have the prerogative of requesting that the Commission not allow fees in excess of 30% as, to the extent that the Commission fails to approve fees greater than 30%, you would receive additional monies from your workers' compensation claim corresponding with the Commission's decision. Upon my prior occasions to discuss this issue with you, it has been my understanding that you are actually supportive of my Petition.

However, if not, I would hope that you would speak candidly to me upon this issue."

Second Affidavit of L. Clyel Berry in Support of Petition for Approval of Fees, dated December 28, 2009, together with the copy of the December 17, 2009, correspondence to Ms. Page attached thereto. Exhibit 9, ***R. III.***

Thereafter, counsel received Ms. Page's Approval and Joinder in Petition for Approval of Fees, dated and signed by her upon December 22, 2009. Exhibit S-5, ***R. III.*** Ms. Page also telephoned counsel to advise that if the Commission declined to approve the Petition, Ms. Page wished to gift those monies to counsel. ***Tr. III***, p. 23, L. 7 – p. 24, L. 15. Ms. Page's support for counsel's fees at the forty percent (40%) rate has been unwaivering. At hearing, she reconfirmed that support. ***Tr. III***, p. 24, LL. 16-18.

The importance to Ms. Page and her family of her workers' compensation claim was discussed by Ms. Page during the April 10, 2012, hearing, as follows:

"Q. Are you glad that you allowed me to file the appeal?
A. Yes, I am.
Q. Are you satisfied with the benefits that you have been - -
A. Very satisfied.
Q. - - that you have received? Are you satisfied with my work product?
A. Very satisfied.
Q. Anything about me you want to - - derogatory you want to share with the Commission?
A. He just - - he tries to get you to do it whether you want to or not. He just tells you you're worth something instead of just giving up and - - I mean I - - I think he's done a fantastic job and he done more than I or my family ever expected. We are all thrilled with it."

Tr. III, p. 25, LL. 4-19.

5. Summary of Commission Orders upon Fee Issue:

a. Order Regarding Attorney Fees, dated April 1, 2010. Exhibit 6, ***R. III.***

Although the Petition for Approval of Fees as well as Ms. Page's Approval and Joinder each requested approval of fees pursuant to the April 24, 2002, Contingent Fee Agreement, the Commission's April 1, 2010, Order only discussed benefits awarded by the Commission's September 8, 2009, decision, and limited fees to thirty percent (30%) of the value thereof.

b. Amended Order Approving in Part Stipulation and Agreement of Lump Sum Discharge, dated December 9, 2011. Exhibit S-8, ***R. III***.

By its Amended Order, the Commission noted that it had approved fees of thirty percent (30%) from previous benefits, and limited fees to thirty percent (30%) upon the value of the Title 72 parties' lump sum settlement. Thusly, the Order encompassed not only benefits achieved upon lump sum settlement, but also those awarded/received prior thereto.

c. Order on Attorney Fees, filed June 21, 2012. ***R. III***, pp. 118-125.

To the extent pertinent to the instant Appeal, that Order held as follows:

(1) Denied the Motion for Reconsideration filed upon the April 1, 2010, Order Regarding Attorney Fees.

(2) Determined that the I.C. § 72-804 fee award must be accepted by counsel as payment in full of his fees. In doing so, the Commission determined that an I.C. § 72-804 fee award should not be included within benefits against which a claimant's counsel may impose fees.

(3) Approved fees upon the value of the lump sum settlement at the contingent rate of forty percent (40%).

(4) Approved fees at thirty percent (30%) upon the May 18, 2006, benefit payment.

d. Order on Reconsideration Regarding Attorney Fees, dated November 19, 2012. ***R. III***, pp. 155 – 159.

To the extent pertinent to the instant appeal, this Order again held that counsel was not entitled to fees, to any extent, upon the value of an I.C. § 72-804 fee award.

ISSUES PRESENTED ON APPEAL

1. Did the Idaho State Industrial Commission err in limiting attorney fees upon benefits awarded by the September 8, 2009, Order to thirty percent (30%) of the value thereof?

a. Did the Idaho State Industrial Commission err in reviewing the Petition for Approval of Fees submitted pursuant to I.C. § 72-803, upon the basis of I.C. § 72-804?

b. Was the Idaho State Industrial Commission without jurisdiction to modify and/or reject a Contingent Fee Agreement upon a Fee Petition in which Ms. Page specifically joined; there was no fee dispute by and between counsel and Ms. Page; and, no guidelines had been promulgated pertaining to fees presumed reasonable by the Commission upon rehearing or following appeal?

(1) Did the conduct of the Idaho State Industrial Commission in *sua sponte* reducing an uncontested fee agreement without properly enacted regulations or guidelines constitute a deprivation of property rights in violation of the Contract and Due Process Clauses

as well as the Fourteenth Amendment of the United States Constitution, and/or Article 1, Section 16 of the Idaho Constitution?

2. Did the Idaho State Industrial Commission err by denying fees, to any extent, upon the value of the I.C. § 72-804 fee award within the September 8, 2009, Order?

a. Does the refusal of the Idaho State Industrial Commission to approve a claimant's attorney's fees upon the value of an I.C. § 72-804 award violate the Equal Protection Clause of the United States Constitution, where attorneys representing Title 72 defendants are at liberty to charge their clients for time and services in defending that same I.C.§ 72-804 claim?

b. Whether the services of L. Clyel Berry, Chartered and/or Clyel Berry, individually, operated primarily or substantially to secure the I.C. § 72-804 fee award within the September 8, 2009, Decision, such that said fee award constitutes "available funds" to which a "charging lien" may attach?

(1) If so, did the Idaho State Industrial Commission err in failing to follow the guidelines established by and within IDAPA 17.02.08.033.01.c, promulgated by the Commission as the "Rule Governing Approval of Attorney Fees in Workers' Compensation Cases?"

c. Whether IDAPA 17.02.08.033 and/or the interpretation and application thereof by the Idaho State Industrial Commission contravene the underlying purpose of the Workers' Compensation Act, codified by and within I.C. § 72-201, that the Commission is constrained to promote under I.C. § 72-508?

3. Did the Idaho State Industrial Commission err in refusing to approve fees greater than thirty percent (30%) upon benefits awarded/received prior to the September 8, 2009, Order?

a. Is counsel entitled to fees greater than thirty percent (30%) upon benefits awarded by the Commission's Findings upon Remand, dated June 14, 2005?

b. Is counsel entitled to fees greater than thirty percent (30%) upon the May 18, 2006, benefit payment?

4. Did the Idaho State Industrial Commission err by its failure to discuss within its Orders and/or Decisions appealed from, to any extent, whether the fees requested were reasonable upon consideration of the April 24, 2002, Contingent Fee Agreement and/or factors set forth within ***Hogaboom v. Economy Mattress***, 107 Idaho 13, 684 P.2d 990 (1984)?

5. Whether the Idaho State Industrial Commission's findings, rationale and/or determinations within the Orders appealed from, to the extent adverse to Appellants herein, are erroneous as a matter of law; supported by substantial and competent evidence of record; set forth specific findings necessary and required for meaningful appellate review; are arbitrary, capricious, and/or the product of abuse of discretion; or, whether relevant thereto, the Commission failed to make proper application of law to the evidence and/or facts of record herein, in reaching the same?

6. Whether the Commission's Notices for the April 10, 2012, hearing upon counsel's Petition for Approval of Fees failed to comply with the mandate of I.C. § 72-713, by not identifying as issues whether the I.C. § 72-804 fee award was subject to attorney fees, and/or

that counsel's fees upon the September 8, 2009, Order would be limited to the I.C. § 72-804 fee award, thereby denying opportunity of counsel to adequately prepare for the same?

7. Whether Clyel Berry, individually, and/or L. Clyel Berry, Chartered, are entitled to reasonable attorney fees on appeal herein, either pursuant to the "Private Attorney General Doctrine" and/or I.C. § 12-117(1), together with Rule 41, Idaho Appellate Rules?

ARGUMENT

I. Standard of Appellate Review:

The Court may set aside an order or award by the Industrial Commission if: (1) the Commission's findings of fact are not based on substantial competent evidence; (2) the Commission acted without jurisdiction or in excess of its powers; (3) the findings of fact, order or award were procured by fraud; or, (4) the findings of fact do not as a matter of law support the order or award. I.C. § 72-732; ***Ewins v. Allied Sec.***, 138 Idaho 343, 63 P.3d 469 (2003). The Supreme Court exercises free review over the Commission's legal conclusions but does not disturb factual findings that are supported by substantial and competent evidence. The substantial evidence rule requires the Court to determine whether the findings of fact are reasonable. ***Mulder v. Liberty N.W. Ins. Co.***, 135 Idaho 52, 14 P.3d 372 (2000)

Determining the meaning of a statute or applying law to undisputed facts constitutes matters of law on appeal. An appellate court may apply the law to undisputed facts, *de novo*. ***Martel v. Bulotti***, 138 Idaho 451, 65 P.3d 192 (2003). The Court is required to set aside the order of the Commission where the Commission failed to make a "proper application of law to the evidence." Where the Commission's conclusions of law are unsupported by its findings of

fact, the decision of the Commission must be vacated. ***Bortz v. Payless Drug Store***, 110 Idaho 942, 719 P.2d 1202 (1986). To properly review an order of the Commission under the appropriate standard, it is essential that the order of the Commission be based upon reviewable findings of fact and conclusions of law. ***Curr v. Curr***, 124 Idaho 686, 864 P.2d 132, 136 (1993); ***Iverson v. Farming***, 103 Idaho 527, 650 P.2d 669, 672 (1982).

II. Preliminary Statement:

Ms. Page's industrial injury occurred upon August 17, 2001. By settlement approved by the Commission upon August 8, 2012, Ms. Page's Title 72 claims were fully and finally resolved. The litigation of those Title 72 claims encompassed a period just one week shy of eleven years, and resolution was only achieved by reason of and following an extraordinary and epic legal journey before the Industrial Commission and Idaho's Supreme Court, involving six contested and fully briefed motions; multiple mediations; three evidentiary hearings before the Commission; and, two appeals to the Idaho Supreme Court. Counsel is aware of no other Title 72 claim requiring litigation or procedures at both the Commission and appellate levels which remotely approximates those required in the instant matter.

With the Title 72 claims of Ms. Page having been fully and finally resolved, the instant appeal concerns the issue of Ms. Page's attorney's entitlement to compensation for his efforts.

III. The Idaho State Industrial Commission Erred in Limiting Attorney Fees upon Benefits Awarded by the September 8, 2009, Order to Thirty Percent (30%) of the Value Thereof.

1. The Idaho State Industrial Commission Erred in Reviewing the Petition for Approval of Fees Submitted Pursuant to I.C. § 72-803, upon the Basis of I.C. § 72-804.

By the Commission's Orders herein, counsel's fees were "capped" by the I.C. § 72-804 fee award. The I.C. § 72-804 fee award was granted by the Commission's September 8, 2009, Order. Pursuant to that Order, Title 72 Defendants and Claimant entered into a Stipulation Regarding Attorney Fees providing that the I.C. § 72-804 award be for fees equal to thirty percent (30%) of the value of benefits encompassed within the September 8, 2009, Order. Exhibit S-2, ***R. III***. That Stipulation was approved by the Commission by its Order Granting Stipulation, dated October 22, 2009. Exhibit S-3, ***R. III***. In reviewing both the Stipulation as well as the Commission's Order, counsel notes the obvious. Neither the Stipulation nor the Commission's Order hint that either would have any effect upon the Contingent Fee Agreement entered into by and between Ms. Page and her counsel, or attorney's fees due counsel for his representation of Ms. Page in her Title 72 proceedings. In this regard, counsel takes exception to the Commission's more recent characterization of the Stipulation and the October 22, 2009, Order.

> Within the Commission's Order on Attorney Fees, the Commission stated that,
>
> "A stipulation was submitted stating that Counsel agreed to accept, and Defendants agreed to pay, 30% of the total benefits awarded in the September 8, 2009, order as attorney fees to counsel." (Emphasis added.)

R. III, p. 119. The Order also noted that,

> "The most important fact in the assessment of attorney fees pursuant to Idaho Code § 72-804 and the Commission's September 2009 order in this case is that Counsel and Defendants came to an agreement as to the amount of attorney fees

> Defendants would pay counsel in satisfaction of the award of Idaho Code § 72-804 attorney fees. ...Counsel chose to accept 30% attorney fees from the September 2009 order. The Commission will not award additional attorney fees on the same benefits." (Emphasis added.)

R. III, p. 121 – 122.

This finding is not only without support of, but actually misstates the clear record herein. The Stipulation Regarding Attorney Fees reads,

> "COME NOW the parties, ...and hereby stipulate that attorney fees due Claimant by and from Defendants herein pursuant to the September 8, 2009, Award shall be the sum equal to thirty (30) percent of the value of Title 72 benefits awarded Claimant by and/or encompassed within said September 8, 2009, Findings of Fact, Conclusions of Law, and Order." (Emphasis added.)

Exhibit S-2, ***R. III***.

Similarly, the actual language of the Commission's October 22, 2009, Order Granting Stipulation, to the extent pertinent to the instant issue, is that,

> '...the parties ...filed a stipulation regarding attorney fees. The parties have agreed that, ...Defendants will pay to Claimant attorney fees in the amount of 30% of the value of the workers' compensation benefits awarded to Claimant by the decision." (Emphasis added.)

Exhibit S-3, ***R. III***.

Clearly, what was identified by the Commission as the "most important fact" in its consideration of fees from the September 8, 2009, Award, does not exist. There was no "agreement" on the part of Ms. Page's counsel to accept fees encompassed within the parties' Stipulation rather than the fees to which he was entitled pursuant to the Contingent Fee Agreement. The issue then turns to whether counsel is otherwise required to accept an I.C. § 72-804 fee award in lieu of fees to which he is otherwise entitled. Logically, the response must be in the negative.

Limiting counsel's fees to the I.C. § 72-804 award is clearly in error. Most certainly, fees approved pursuant to I.C. § 72-803 as well as fees awarded pursuant to I.C. § 72-804 must, each, be reasonable. However, factors to be considered in determining "reasonable fees" as between the two Code sections are not identical.

The I.C. § 72-804 fee award was by reason of Defendants' conduct for a specific period of time. The September 8, 2009, Order, by Findings 38 and 39, clearly awarded fees by reason of Defendants' conduct following Page II. The Commission therein specifically determined that Defendants were then no longer entitled to rely upon prior decisions of the Commission which had been overturned by the Supreme Court, and that Defendants' denial of Ms. Page's claim for total knee replacement following Page II without expert medical opinion was "a clear derogation" of the workers' compensation statutes. Exhibit S-1, ***R. III***, pp. 13-14.

Defendants' conduct prior to Page II could not be considered in determining "reasonable" I.C. § 72-804 fees awarded by the September 8, 2009, Order. Rather, Defendants' obligation for fees was limited to conduct following Page II, which required the April 19, 2009, hearing. As such, Defendants' obligation for fees was thirty percent (30%), by analogy to IDAPA 17.02.08.033.01.3.ii. In other words, Defendants' obligation for fees was for a period not requiring or encompassing a Supreme Court appeal.

It was error for the Commission to consider the Petition for Approval of Fees upon the basis of I.C. § 72-804. Rather, the Commission should have considered the Petition upon the basis of I.C. § 72-803. In this regard, the Petition encompassed the entirety of counsel's work-product upon behalf of Ms. Page in these proceedings, then spanning multiple hearings and two

appeals, as opposed to only the period following Page II to the September 8, 2009, Order, within which the I.C. § 72-804 fee award was granted. Thusly, the Petition should have been considered by the Commission upon the basis of I.C. § 72-803, together with IDAPA 17.02.08.033 and controlling case law.

Further, irrespective of the above, the Commission was in error in capping counsel's fees at the I.C. § 72-804 fee award. In ***Hogaboom***, *supra*, the Court cited Berger, ***Court Awarded Attorney's Fees: What is "Reasonable"?*** 126 U. Pa. L. Rev. 281, 282 (1977), for the proposition that,

> "Under either equitable or statutory rationales for fee awards, the amount the client agreed to pay the attorney does not necessarily determine what others should be compelled to pay by the Court. ...What constitutes a reasonable fee may be more or less than the client is obligated to pay the attorney."

684 P.2d 993. This Court has specifically determined that a statutory fee award may be more or less than that provided in the contingent fee contract. ***Ada County High. Dist. v. Acarrequi***, 105 Idaho 873, 673 P.2d 1067, at 1072 (1983).

2. The Idaho State Industrial Commission was Without Jurisdiction to Modify and/or Disregard the Contingent Fee Agreement Upon a Fee Petition in Which Claimant Specifically Joined; There Was No Fee Dispute by and Between Counsel and Claimant; and, No Guidelines Had Been Promulgated Pertaining to Fees Considered Reasonable by the Commission upon Rehearing or Following Appeal.

Most certainly, the Petition for Approval of Fees submitted to the Commission pursuant to I.C. § 72-803 was absent any "dispute" between Ms. Page and counsel. Rather, the instant appeal involves the Commission refusing to approve a Contingent Fee Agreement upon a Fee Petition in which Ms. Page specifically joined. Exhibit S-5, ***R. III***. Prior to being retained by Ms. Page, counsel thoroughly discussed the Contingent Fee Agreement with her, inclusive of the

provision that upon appeal fees would increase to forty percent (40%). At the April 10, 2012, hearing, Ms. Page testified that she had understood the fee structure set forth within the Agreement and agreed to the same. ***Tr. III***, p. 21, LL. 6-23. Ms. Page also confirmed that upon being advised that the Commission initially denied fees at greater than thirty percent (30%), she telephoned counsel and offered to "gift" him the differential in fees. At hearing, Ms. Page expressed that she had "no problem" with fees at forty percent (40%). ***Tr. III***, p. 23, L. 4 – p. 24, L. 8.

In ***Curr***, this Court specifically held that, "[i]n *sua sponte* modifying uncontested attorney fees absent the guideline of a properly enacted regulatory scheme, the Commission ...exceeds (its) statutory authority." 864 P.2d 137.

Upon review of IDAPA 17.02.08.033, it is clear that no guidelines have been promulgated which speak as to fees in Title 72 matters following appeals or rehearing. This omission is made all the more perplexing and confusing by the Commission's mandate, within IDAPA 17.02.08.033.01.d, that a Title 72 fee agreement be in conformity with Rule 1.5, Idaho Rules of Professional Conduct. IRPC 1.5(c) specifically requires that contingent fee rates for settlement, trial or appeal shall be separately provided for within the fee agreement, and thusly that fees for each stage of the proceeding may well be different. In ***Curr*** this Court held that,

> "Without clear guidelines nestled in appropriately promulgated regulations, attorney's actions are plagued by doubt, which may have a chilling effect on the underlying purpose of the Workers' Compensation Act that the Commission is constrained to promote under I.C. § 72-508."

864 P.2d 137.

In ***Rhodes v. Industrial Commission***, 125 Idaho 139, 868 P.2d 467, 469, this Court stressed the importance of "predictability" in the application of I.C. § 72-803. However, "predictability" is nowhere to be found in the instant matter. As example, the Commission's Orders, collectively, result in fees, as follows:

a. Thirty percent (30%), upon benefits awarded by the Commission's Findings upon Remand.

b. Thirty percent (30%), upon benefits encompassed within the May 18, 2006, benefit payment.

c. Thirty percent (30%), upon benefits encompassed within the September 8, 2009, Award.

d. Forty percent (30%), upon benefits encompassed within the Title 72 parties' lump sum settlement (excepting future medicals).

There is absolutely no reason why the Commission approved contingent fees at different rates for benefits obtained following ***Page II***. The Commission's approval of fees pursuant to I.C. § 72-803 and/or IDAPA enactments were without continuity or "predictability," to any extent.

By its June 21, 2012, Order on Attorney Fees the Commission, citing ***Hogaboom***, *supra*, determined that it,

> "...has no need to approve or modify the contingent fee agreement entered into between Claimant and Counsel. While instructive in determining the understanding of the parties at the outset of the case, the contingent fee agreement is not determinative of the fees to be awarded by the Commission in an award of Idaho Code § 72-804 attorney fees or Idaho Code § 72-803."

It is respectfully submitted that the Commission cited ***Hogaboom*** out of context. What the Court actually said in ***Hogaboom*** was that the contingent fee agreement, "...though persuasive evidence, is not itself dispositive, but rather must be considered in conjunction with the factors cited in Clark ...in order to determine whether the fee ...is reasonable under all the circumstances." 684 P.2d 993.

In the instant case, the Commission simply ignored the Fee Agreement. Such was error. In ***Curr*** the issue, as here, concerned the Commission's approval of fees pursuant to I.C. § 72-803. There, Court stated,

> "Under I.C. § 72-803, the Commission has a duty to approve or disapprove attorney fee claims. The basis for approval depends upon a finding that the fee agreement sails the wake of reasonableness. Reasonableness, in turn, derives from the totality of the circumstances from the perspective of the parties at the time that the fee agreement was made. Two cases, Hogaboom v. Economy Mattress, and Clark v. Sage, offer helpful, but not determinative, factors to be thoughtfully considered when ascertaining reasonableness." (Internal citations omitted. Emphasis added).

864 P.2d at 136.

The ***Hogaboom*** factors relevant to the instant matter were before the Commission within counsel's Affidavit in Support of Petition for Approval of Fees, at pp. 8-13. Exhibit 8, ***R. III***. Those factors were up-dated by counsel's Third Affidavit in Support of Petition for Approval of Fees (***R. III***, pp. 13-28), and discussed within Claimant's Post-Hearing Brief Upon Attorney Fee Issue, at pages 7-11 thereof. ***R.III***, pp. 72-76.

The Order Regarding Attorney Fees, dated April 1, 2010, acknowledged that counsel's Affidavits had discussed each of the ***Hogaboom*** factors. However, by its June 21, 2012, Order on Attorney Fees, the Commission determined that the most important fact considered by it was

the parties' Stipulation Regarding Attorney Fees, which the Commission erroneously construed as counsel's "agreement for fees," previously discussed herein at pp. 16-17.

At this juncture, counsel notes that the Commission did approve fees at forty percent (40%) from the proceeds upon lump sum settlement, pursuant to the Contingent Fee Agreement between himself and Ms. Page. In doing so, the Commission noted,

> "...the long road that this case has taken and the dogged persistence which (counsel) maintained through the years of litigation at the Commission and the Idaho Supreme Court. Claimant testified that it was counsel who pushed her along and had faith, even after unfavorable decisions, that the claim was valid and worth pursuing. Counsel's efforts in this case are beyond the ordinary case and the Commission finds that such an effort entitles counsel to a fee beyond the ordinary."

R. III, p. 123. It is respectfully submitted that these comments describing counsel's efforts in his representation of Ms. Page are also applicable to the September 8, 2009, Award, and that but for the Commission re-writing the parties' Stipulation Regarding Attorney Fees it would have been equally compelled to approve fees at forty percent (40%) upon the September 8, 2009, Award.

If the Commission's position that a claimant's counsel's fees are limited to an I.C. § 72-804 fee award is upheld, claimants' attorneys, across the board, will be disinclined to prosecute any I.C. § 72-804 claim, to the detriment of Title 72 claimants as well as the public policy expressed by and within I.C. § 72-201, to provide "...sure and certain relief for injured workmen," that the Commission is constrained to promote under I.C. § 72-508. The "real-world" effect of the Commission's position is that claimant's counsel's fees will be limited to any I.C. § 72-804 fee award, and that counsel will receive no compensation for prosecuting the

I.C. § 72-804 fee claim. It should be obvious that an I.C. § 72-804 claim is always vigorously defended and requires significant resources to successfully prosecute. After the Commission determines that a Title 72 claimant is entitled to fees, securing those fees requires additional efforts by the claimant's counsel. Counsel first attempts to negotiate the amount of fees due with Title 72 defendants. If those negotiations fail, securing the fee award requires yet another evidentiary hearing, where the sole issue is the amount of the I.C. § 72-804 fee award. Of course, the Title 72 defendants then have the option to appeal.

Not only should the Commission logically not require that counsel's services (in prosecuting an I.C. § 72-804 fee claim) be without anticipation of fees, such was specifically rejected by this Court in ***Curr***. 864 P.2d 138.

3. Modifying and/or Refusing to Consider the April 24, 2002, Contingent Fee Agreement Violates the Idaho and U.S. Constitutions.

The ***Curr*** Court held that,

> "An attorney fee agreement constitutes a valid contract under Idaho law, and (attorneys perform services for their clients) in reliance upon the terms of their fee agreements. It is clear that, in Idaho, parties to a contract have a property interest in the subject matter of the contract that is protectable both under the Contract Clause and the Due Process Clause of the United States Constitution. In addition, the right to follow a recognized and useful occupation is protected by a Constitutional guarantee of liberty under the Fourteenth Amendment to the U.S. Constitution and Idaho Const. art. 1, § 13."

864 P.2d 137-8. ***Curr*** furthered determined that, at a minimum, the Commission must, "...formally publish clear guidelines upon which it will base fee modifications in order to eliminate any latent arbitrariness." Absent such, "[t]he net result of the Commission's *sua*

sponte conduct is a deprivation of (the attorney's) property rights under the fee agreement without due process of law."

The underlying facts herein are exactly on point to those considered by the Court in ***Curr***. In the instant matter, the Commission had not enacted guidelines, clear or otherwise, regarding attorney's fees in Title 72 matters following appeals or upon rehearing. It therefore follows that the conduct of the Commission herein violates the Contract and Due Process Clauses of the Idaho and United States Constitutions as well as the guarantee of liberty afforded thereby, as specifically determined by ***Curr***.

4. The Idaho State Industrial Commission Erred by Denying Fees, to Any Extent, upon the Value of the I.C. § 72-804 Fee Award Within the September 8, 2009, Order.

By its June 21, 2012, Order, the Commission took "exception" to counsel treating an I.C. § 72-804 fee award as a benefit to his client, against which contingent fees could lie. Such constitutes clear error. This Court has previously determined that, "...an award of attorney fees in a workers' compensation case must be deemed compensation to the injured employee...." ***Dennis v. School District # 91***, 135 Idaho 94, 15 P.3d 329, at 333 (2000). Thusly, an I.C. § 72-804 fee award, being compensation to the Claimant, should be treated no differently than other Title 72 benefits achieved by reason of a Claimant's attorney's efforts, for purposes of the parties' Contingent Fee Agreement.

The I.C. § 72-804 fee award within the Commission's September 8, 2009, Order required counsel's energies, time, resources and work-product, no different than other benefits encompassed within that Order. But for the efforts of counsel Ms. Page would have received

nothing from her Title 72 claim, and most certainly would not have received the I.C. § 72-804 fee award. Both counsel and Ms. Page fully anticipated that upon counsel's efforts generating a fee award, counsel would be entitled to fees therefrom pursuant to their Contingent Fee Agreement. Affidavit of Clyel Berry in Support of Motion for Reconsideration, generally, and specifically Exhibit A thereof. ***R. III***, at pp. 134-141.

The Commission's denial of fees upon an I.C. § 72-804 fee award is in disregard to and contravention of IDAPA 17.02.08.033.01.c, promulgated as the "Rule Governing Approval of Attorney Fees in Workers' Compensation Cases." As noted by subparagraph .01 thereof, said Rule was intended "...to govern the approval of attorney fees." (Emphasis added). The "governing" consideration, pursuant to the Rule, is whether the services of counsel, "...operated primarily or substantially to secure the fund out of which the attorney seeks to be paid." If so, the I.C. § 72-804 fee award constitutes "available funds" to which counsel's "charging lien" attaches.

The entirety of Ms. Page's Title 72 recovery, inclusive of I.C. § 72-804 fees, was achieved solely by reason of counsel's efforts. By definition, the I.C. § 72-804 fee award constitutes "available funds" secured primarily or substantially by the services of counsel out of which counsel seeks to be paid pursuant to the Contingent Fee Agreement between Ms. Page and himself. IDAPA 17.02.08.033.01.c does not limit or define "available funds" by the nature or type of Title 72 monies recovered. Thusly, upon consideration of the Commission's "Rule Governing Approval of Attorney Fees in Workers' Compensation Cases," the requested fees, if otherwise reasonable, must be approved and allowed as against the I.C. § 72-804 fee award.

Absent potential of entitlement to fees upon an I.C. § 72-804 fee award, claimants' counsel could not invest their time or offices' resources required to develop and prosecute an I.C. § 72-804 claim. It must be recalled that as fees are calculated upon a contingency basis, claimant receives the lion's share of any fee award and thusly is greatly benefited thereby. Counsel's prosecution of an I.C. § 72-804 fee award also provides valuable public services to the workers of Idaho and the Commission, by bringing wrongful conduct and practices of employers and their sureties to the attention of the Commission, and thereby serves to both punish past and deters potential future wrongful conduct by Title 72 Defendants.

The Commission's position requires that a claimant's attorney's time, resources, energies and work-product required to develop and prosecute an I.C. § 72-804 fee claim be without fees. Such is not realistic and was specifically rejected by the Court in ***Curr***. 864 P.2d 138.

Lastly upon this issue, counsel notes that he reviewed the propriety of adding fee awards to the "pot" of other Title 72 benefits to be disbursed pursuant to a contingent fee agreement with Attorney Tom High, who served upon the Committee for Professionalism for the Idaho State Bar, and was also a hearings officer for disciplinary complaints against attorneys, with the issue oft-times involving the propriety of fees between an attorney and that attorney's client. Mr. High advised counsel of his belief and understanding that adding fee awards to the recovery to be disbursed pursuant to the Contingent Fee Agreement is the practice, procedure and custom followed by most attorneys, and of his opinion that the same is the procedure which should be followed. ***Tr. III***, p. 36, LL. 7-23; Affidavit of Clyel Berry in Support of Motion for Reconsideration, at paragraph 6, pp. 3-4, ***R. III***, pp. 134-141.

a. The refusal of the Idaho State Industrial Commission to approve a Claimant's attorney's fee upon the value of an I.C. § 72-804 award violates the Idaho and United States Constitutions.

The prosecution of an I.C. § 72-804 fee claim requires significant briefing and, absent agreement between claimant and Title 72 defendants upon the amount of fees, a separate evidentiary hearing before the Commission. Yet, irrespective of the efforts of counsel and the benefit of those efforts to counsel's client, it is the position of the Commission that claimant's counsel is entitled to no fees, whatsoever, upon an I.C. § 72-804 award.

The Commission's refusal to approve fees upon an I.C. § 72-804 fee award violates the equal protection clauses of the Idaho and United States Constitutions; the Contract Clause of the United States Constitution; and, the Fourteenth Amendment to the United States Constitution, together with Article 1, Section 13, of the Idaho Constitution.

In ***Curr***, this Court noted that the attorney fee agreement constitutes a valid contract pursuant to which the claimant's attorney performs services upon behalf of his client. The Court continued that,

> "It is clear that, in Idaho, parties to a contract have a property interest in the subject matter of the contract that is protectable under both the Contract Clause and the Due Process Clause of the United States Constitution. In addition, the right to follow a recognized and useful occupation is protected by a constitutional guarantee of liberty under the Fourteenth Amendment to the U.S. Constitution and Idaho Const. art. 1, § 13." (Internal citations omitted).

864 P.2d 138.

The Commission's discharge of its responsibilities pursuant to I.C. § 72-803, or more appropriately the withholding of the same regarding an I.C. § 72-804 fee award, also violates the equal protection clauses of the State and U.S. Constitutions. This Court has noted that the equal

protection clause is designed to ensure that persons similarly situated with respect to a governmental action should be treated similarly. ***Primary Health v. State Dept. of Admin.***, 137 Idaho 666, 52 P.3d 307, 313 (2002). In the instant matter, the Commission refuses to approve any fees upon an I.C. § 72-804 fee award. However, Title 72 defendants' counsel are not so constrained. Defendants' counsel is at liberty to charge and collect fees from his clients for services in defending I.C. § 72-804 claims, even where those services fail to benefit his clients.

Title 72 defendants' counsel is an attorney licensed for the practice of law, as is claimant's counsel. Each counsel represents Title 72 parties litigant. Each is subject to the same "governmental action," being decisions of the Idaho State Industrial Commission. Yet, with respect to I.C. § 72-804 claims, Title 72 defendants' counsel and claimant's counsel are not treated similarly. Title 72 defendants' counsel has expectation of fees, win or lose. Claimant's counsel is denied fees, even should his efforts prevail.

Irrespective of constitutional argument, the logic and rationale of the Commission's position escapes this counsel. The Commission fully expects a claimant's counsel to prosecute an I.C. § 72-804 claim without expectation of fees where defendants' counsel is at liberty to impose fees upon his clients to defend the I.C. § 72-804 fee argument, which fees are neither scrutinized by nor require the Commission's approval as a condition precedent to payment, irrespective of the fact that it is defendants' conduct by reason of which the I.C. § 72-804 fee award is entered.

IV. The Commission's Notices for the April 10, 2012, hearing upon counsel's Petition for Approval of Fees failed to comply with the mandate of I.C. § 72-713, by not identifying issues to be heard therein.

By its April 1, 2010, Order Regarding Attorney Fees (Exhibit 6, ***R. III***), the Commission determined that fees pursuant to the Contingent Fee Agreement were not reasonable. Thereafter, Claimant's Request for Calendaring re Claimant's Counsel's Petition for Approval of Fees/Request for IDAPA Hearing was filed. ***R. III***, pp. 3-9. The only issue therein identified was "...whether circumstances in the instant case are such that the Idaho State Industrial Commission should or will approve attorney's fees at the rate of forty (40%) percent,... ." Hearing was thereafter scheduled by the Commission's Notices dated December 2, 2011, and January 12, 2012. ***R. III***, pp. 8-11. Neither Notice identified any "issue" to be heard within the April 10, 2012, hearing.

I.C. § 72-713 mandates that, "[t]he Commission shall give at least ten (10) days' written notice of the time and place of hearing and of the issues to be heard,... ." (Emphasis Added). The Commission's June 21, 2012, Order on Attorney Fees, upon page 1 thereof, acknowledged that, "[t]he Commission is aware that ...recitation of the issues was not presented prior to hearing,...." ***R. III***, at 118.

Prior to hearing, counsel was not aware of the Commission's position that an I.C. § 72-804 fee award could not be added into the "pot" of benefits, to thereafter be disbursed pursuant to the applicable Contingent Fee Agreement; or, that the Commission would allow no fees, whatsoever, upon benefits encompassed within an I.C. § 72-804 fee award. By the Commission's failure to both set forth the reasons why the Petition for Approval of Fees was

originally denied, as required by IDAPA, and its failure to provide prior notice of issues to be heard at hearing, the Commission violated procedural due process.

V. The Idaho State Industrial Commission Erred in Refusing to Approve Fees Greater than Thirty Percent (30%) upon Benefits Awarded/Received Prior to the September 8, 2009, Award and Not Encompassed Therein.

In the Commission's consideration of the Petition for Approval of Fees, it was agued by counsel that even if benefits encompassed within the September 8, 2009, Order were limited by the parties' Stipulation, fees upon Title 72 benefits not encompassed within that Order were not subject to or controlled by that Stipulation. During the April 10, 2012, hearing, Commissioner Limbaugh advised that he agreed. ***Tr. III***, p. 43, LL. 2-14. Such was also argued by counsel within Claimant's Post-Hearing Brief Upon Attorney Fee Issue, at IIB and III thereof. ***R. III***, pp. 66-118.

For reasons not explained by the Commission within any of its Orders, fees upon benefits awarded by the Order on Remand and the May 18, 2006, Title 72 benefit check were limited to thirty percent (30%). Both by the Confidential Addendum to Lump Sum Settlement Agreement (Exhibit 1, ***R. III***, at pages 13-14) and the Summary and Accounting of Title 72 Benefits (Exhibit 1 to Claimant's Post-Hearing Brief Upon Attorney Fee Issue, ***R. III***, at pages 96-101), the Commission was fully advised that counsel had received fees upon benefits encompassed within the Order on Remand of thirty percent (30%); held in trust the ten percent (10%) differential between fees at thirty percent (30%) and fees at forty percent (40%); and, was requesting I.C. § 72-803 approval for fees at the forty percent (40%) rate.

To the best of this counsel's review of the record, benefits encompassed within the Order on Remand were inferentially addressed within the Amended Order Approving in Part Stipulation and Agreement of Lump Sum Discharge. Exhibit S-8, ***R. III***. At page 2 thereof, it states that "[t]he Commission has approved fees of 30% from previous benefits awarded to Claimant and will do so for this settlement." Fees upon benefits encompassed within the Order on Remand were also inferentially encompassed within the June 21, 2012, Order on Attorney Fees, by the Commission's calculations within "Amount Remaining in Trust," at pages 8 and 9 thereof. ***R. III***, pp. 118-125.

With respect to fees upon benefits encompassed within the May 18, 2006, payment, the Order on Attorney Fees determined, at page 8,

> "Counsel further requests attorney fees from the $15,630.73 benefit check issued on May 18, 2006. Counsel states that in an oversight he did not deduct fees from that check. The Commission will approve counsel's request for 30% of $15,630.73 in attorney fees, equaling $4,689.22." (Emphasis added).

R. III, p. 123.

In approving fees at thirty percent (30%), the Commission misstated counsel's request for I.C. § 72-803 approval. Counsel's actual and specific request for I.C. § 72-803 approval upon the May 18, 2006, benefit check is set forth within section III of Claimant's Post-Hearing Brief, as follows:

> "Although request is made for approval of fees at forty (40%) percent, being $6,252.29, at the minimum counsel would be entitled to fees at a thirty (30%) percent rate, being $4,689.22." (Emphasis added).

R. III, p. 25.

Clearly, counsel requested approval of fees at a forty percent (40%) rate. Benefits encompassed within the Commission's Order on Remand and/or the May 18, 2006, benefit check were not encompassed within the September 8, 2009, Order, and not subject to the parties' Stipulation, even if that Stipulation somehow superseded the Contingent Fee Agreement between Ms. Page and counsel.

It is respectfully submitted that counsel is entitled to fees of forty percent (40%) upon benefits encompassed within both the Order on Remand as well as the May 18, 2006, benefit check, upon the Commission's rationale and analysis in approving fees at forty percent (40%) upon benefits within the Title 72 parties' lump sum settlement. There is absolutely no basis to determine otherwise.

VI. The Idaho State Industrial Commission Erred by its Failure to Discuss Within Its Orders and/or Decisions Appealed From, to Any Extent, Whether the Fees Requested Were Reasonable.

There are four instruments filed of record wherein the Commission considered Claimant's counsel's attorney fees, being the Order Regarding Attorney Fees, dated April 1, 2010 (Exhibit 6, ***R. III***); the Amended Order Approving in Part Stipulation and Agreement of Lump Sum Discharge, dated December 9, 2011 (Exhibit S-8, ***R. III***); the Order on Attorney Fees, dated June 21, 2012 (***R. III***, pp. 118–125); and, the Order on Reconsideration Regarding Attorney Fees, dated November 19, 2012 (***R. III***, pp. 155-159).

Within the April 1, 2010, Order Regarding Attorney Fees, the Commission considered the Petition for Approval. The Order identified the nine factors expressed by ***Hogaboom***; acknowledged that the Affidavit of Berry in Support of Petition for Approval of Fees discussed each of the ***Hogaboom*** factors; and, recited that, "[h]aving considered Mr. Berry's Petition and the ***Hogaboom*** factors, we do not find the requested fee of 40% to be reasonable," upon the basis that, "Claimant and Defendants have stipulated to fees at 30%." Order Regarding Attorney Fees at page 2. Thus, without comment upon the sufficiency of the ***Hogaboom*** factors discussed within counsel's Affidavit, the Commission determined that the Title 72 parties' Stipulation trumped discussion of whether the Contingent Fee Agreement entered into by and between Ms. Page and counsel was otherwise reasonable.

The Amended Order Approving In Part Stipulation and Agreement of Lump Sum Discharge revisited the fee issue. Exhibit S-8, ***R. III***. The entirety of the Commission's discussion of fees is as follows:

> "The total lump sum amount is $248,750.00. Fees from that amount have been requested at 40%. Such a fee has not been substantiated to the Commission in accordance with IDAPA 17.02.08.033. The Commission has approved fees of 30% from previous benefits awarded to Claimant and will do so for this settlement."

Order Approving in Part, at page 2.

The IDAPA 17.02.08.033.03.B hearing upon the Petition for Approval of Fees was held upon April 10, 2012. Thereafter, the Commission entered its Order on Attorney Fees. ***R. III***, p. 118. Thereby, the Commission determined as follows:

1. Fees upon the value of benefits awarded by the September 8, 2009, Order.

A Motion for Reconsideration had been filed upon the Commission's Order Regarding Attorney Fees. In ruling upon that Motion, the Commission refused to discuss or consider the April 24, 2002, Contingent Fee Agreement, determining that it,

> "...has no need to approve or modify the contingent fee agreement entered into between Claimant and Counsel. While instructive in determining the understanding of the parties at the outset of the case, the contingent fee agreement is not determinative of the fees to be awarded by the Commission in an award of Idaho Code § 72-804 attorney fees or Idaho Code § 72-803."

R. III, pp. 121-122.

It is significant to the instant appeal that this Order sets forth the Commission's position that it has "...no need to approve or modify the contingent fee agreement entered into between Claimant and Counsel." Thusly, from the perspective of the Commission the Contingent Fee Agreement between Ms. Page and counsel was irrelevant and without consequence, as would then be any consideration of the ***Hogaboom*** factors.

In fact, during the April 10, 2012, hearing, Chairman Maynard acknowledged that the Commission was not questioning the Contingent Fee Agreement, but that the Commission was "...not bound by any fee agreement." ***Tr. III***, p. 32, LL. 12-14. The Commission's position flies in the face of this Court's holding in ***Curr***, *supra*, that a fee agreement's reasonableness derives from the totality of circumstances from the perspective of the parties at the time that agreement was made.

Secondly, the Commission's consideration of fees was without dispute between Ms. Page and counsel. Thusly, again pursuant to ***Curr***, *supra*, the Commission was without jurisdiction or

authority to *sua sponte* modify the uncontested attorney fee agreement absent clear guidelines, which the Commission conceded had not been established for Title 72 claims following appeal or re-hearing. ***R. III***, p. 122b. The Commission should not be at liberty to side-step this issue by asserting that it did not "modify" the fee agreement, where it refused to even consider it.

2. The June 21, 2012, Order held that a claimant's attorney was entitled to no fees, whatsoever, upon the successful prosecution of an I.C. § 72-804 Fee Award.

This holding of the Commission is addressed earlier in the instant brief, at pp. 25-29.

3. The June 21, 2012, Order approved fees at forty percent (40%) upon the Title 72 parties' Lump Sum Settlement Agreement.

The June 21, 2012, Order acknowledged, for the first time, that "Counsel's efforts in this case are beyond the ordinary case and the Commission finds that such an effort entitles counsel to a fee beyond the ordinary."

4. The June 21, 2012, Order did not revisit its limitation of fees to thirty percent (30%) upon benefits awarded prior to the September 8, 2009, Order.

Entitlement to fees at the forty percent (40%) rate upon both the June 14, 2005, Order upon Remand as well as the May 18, 2006, benefit payment is previously addressed in the instant brief, at pp. 31-33.

A Motion to Reconsider was filed upon the Commission's June 21, 2012, Order on Attorney Fees. The Commission's Order on Reconsideration limited discussion to entitlement of fees upon the I.C. § 72-804 fee award. ***R. III***, pp. 155-159. In denying <u>any</u> fees, the Commission merely noted that IDAPA 17.02.08.033.01 does not apply to I.C. § 72-804 fee awards, but governs lump sum settlements, and that, "...awards of attorney fees under Idaho

Code § 72-804 are guided by the analysis set forth in ***Hogaboom***...," but failed to address or discuss any of the ***Hogaboom*** factors.

Curr, reaffirmed that,

> "To properly review an order of the Commission under the appropriate standard of review, it is essential that the order of the Commission be based upon reviewable findings of fact and conclusions of law."

864 P.2d 136. In the instant matter, the Commission's progression of Orders upon the attorney fee issue did not set forth either Findings of Fact or Conclusions of Law. However the record upon appeal clearly establishes that the Commission found that,

> "The most important fact in the assessment of attorney fees (upon the September 8, 2009, Order) ...is that Counsel and Defendants came to an agreement as to the amount of attorney fees Defendants would pay Counsel. ...Counsel chose to accept 30% attorney fees from the September 2009 order. The Commission will not award additional attorney fees on the same benefits."

R. III, pp. 121-122.

As previously discussed, this finding misstates the clear record herein. Exhibit S-2, ***R. III***. In fact, the Commission's Order Granting Stipulation specifically noted that, "[t]he parties have agreed that, ...Defendants will pay to Claimant attorney fees in the amount of 30% of the value of the workers' compensation benefits awarded to Claimant...." (Emphasis added). Exhibit S-3, ***R. III***. The April 1, 2010, Order Regarding Attorney Fees also accurately noted that, subsequent to the September 8, 2009, Order, "...the parties stipulated that Defendants would pay Claimant attorney fees in the amount of 30% of the value of the workers' compensation benefits awarded by the decision." That Order further accurately noted that, "Claimant and Defendants have stipulated to fees of 30%." (Emphasis added.) Exhibit 6, R. III,

pp. 1-2. Thusly, the "finding" which the Commission specifically noted as the "most important fact" in its consideration of fees from the September 8, 2009, Order, was one which it created within the June 21, 2012, Order on Attorney Fees, and is clearly inconsistent with the record.

Further, the Commission's series of Orders upon the fee issue were without benefit of any stated Conclusions of Law. Rather, the Orders were based upon the Commission's positions, without benefit of properly enacted guidelines, that no fees would be approved upon the September 8, 2009, Order excess to the I.C. § 72-804 fee award against Defendants; and, that counsel is entitled to no fees for his services in successfully prosecuting that I.C. § 72-804 fee award.

Without discussion of the reasonableness of fees pursuant to the Contingent Fee Agreement upon consideration of the ***Hogaboom*** factors, the findings, rationale and/or determinations of the Commission within the Orders appealed from, to the extent adverse to Appellants, are not supported by substantial and competent evidence of record; fail to set forth specific findings necessary and required for meaningful appellate review; and, fail to demonstrate that the Commission made proper application of law to the uncontroverted facts of record herein.

VII. Is Appellant Berry Entitled to Attorney Fees Either Upon the Proceedings Before the Commission Upon the Petition for Approval of Fees; or, Upon Appeal, Pursuant to the Private Attorney General Doctrine and/or Idaho Code § 12-117(1)?

In arguing entitlement to fees, counsel acknowledges that ***Curr*** held that the Private Attorney General Doctrine does not apply to claims for attorney fees on appeal in workers' compensation cases. 864 P.2d 140. Further, ***Smith v. Washington County Idaho***, 136 Idaho

542, 38 P.3d 121 (2010), determined that I.C. § 12-117(1) does not allow a Court to award attorney fees in an appeal from an administrative decision. Appellants invite the Court to revisit these prior rulings.

Almost thirty-seven (37) years ago counsel graduated from law school with the conviction that for every wrong there must be a remedy. Dean Menard lectured loud and often that if the Court could be convinced that equity and common sense could lead to but a single just result, it would find a way to right the wrong and reach the result that common sense, conscience and equity demanded.

In the instant case, the legal path to secure Ms. Page the Title 72 benefits to which counsel believed she was entitled was long, rocky and steep. Once Ms. Page's Title 72 benefits were secured, counsel has been required to travel an equally difficult path in his attempt to achieve I.C. § 72-803 approval of the attorney fees provided for in the Contingent Fee Agreement between Ms. Page and himself, culminating with the instant appeal.

By its Orders upon the fee issues, the Commission acknowledged that the Petition for Approval of Fees was fully supported by Ms. Page, and that the Commission had not promulgated guidelines, clear or otherwise, for fees upon rehearing or following appeal. ***R. III***, p. 122b. Of course, clear guidelines for fees were mandated by ***Curr*** and fully anticipated by ***Rhodes,*** to be, "...promulgated to foster ease, utility, and predictability in the application of I.C. § 72-803,...." 868 P.2d 469. The Commission also failed to follow or even discuss IDAPA 17.02.08.033, its "Rule Governing Approval of Attorney Fees in Workers' Compensation Cases," in refusing to approve any fees upon the September 8, 2009, I.C. § 72-804 fee award.

Counsel cannot help but note that it was not until the Commission's June 21, 2012, Order on Attorney Fees that it acknowledged,

> "...the long road that this case has taken and the dogged persistence which (counsel) maintained through the years of litigation at the Commission and the Idaho Supreme Court. ...Counsel's efforts in this case are beyond the ordinary case and the Commission finds that such an effort entitles Counsel to a fee beyond the ordinary."

R. III, p. 123. These efforts of counsel were apparently overlooked by the Commission in both its April 1, 2012, Order and the Amended Order Approving in Part Stipulation and Agreement of Lump Sum Discharge, signed December 9, 2011, which each limited fees upon all Title 72 benefits to thirty percent (30%).

Within the April 10, 2012, hearing upon the Petition for Approval of Fees then Chairman Maynard stated upon the record that the Commission was not questioning the Fee Agreement between Ms. Page and counsel, "...but (the Commissioners) are not bound by any fee agreement." ***Tr. III***, p. 32, LL. 12-14. It was also in that hearing, in the presence of Ms. Page and certain of her family, that Commissioner Limbaugh admonished counsel that, "...you can't double dip." ***Tr. III***, p. 9, L. 8.

Commissioner Limbaugh's implied accusation that counsel had "double dipped" illustrates exactly the conduct on the part of the Commission which ***Curr*** sought to prevent. It was therein noted that, "...the Commission's arbitrary actions made suspect (counsels') integrity in the eyes of their clients, thereby seriously undermining the attorney-client relationship." 864 P.2d 138. What makes Commissioner Limbaugh's statement all the more troubling is that he later acknowledged that he had "...seen the numbers and didn't think that (counsel) had (double

dipped)." ***Tr. III***, p. 9, LL. 23-25. There was therefore absolutely no reason to have made such a disparaging remark toward counsel, with the sin being compounded by the presence of Ms. Page.

Counsel's efforts to secure I.C. § 72-803 approval of the Contingent Fee Agreement between Ms. Page and himself have required significant of his time and office's resources. As of Claimant's Post-Hearing Brief Upon Attorney Fee Issue, counsel had recorded 785.6 hours in the instant matter. Had fees then been approved at the agreed forty percent (40%) rate, counsel's effective hourly earnings would have been two hundred eighty-four dollars and seventy-one cents ($284.71), being but fifty-nine dollars and seventy-one cents ($59.71) greater than his hourly fee rate. ***R. III***, p. 93.

It is clear that at the end of the day, absent an award of fees upon the instant appeal counsel's effective hourly rate in the instant matter will fall far short of what he charges upon a non-contingency basis, solely by reason of Commission conduct which ***Curr*** previously determined to be arbitrary, capricious and a manifest abuse of discretion. Upon behalf of instant counsel as well as attorneys representing Title 72 claimants in future proceedings, this result flies in the face of both equity and common sense, and represents the wrong for which there must be a remedy.

CONCLUSION

Curr, *supra*, clearly held that, in *sua sponte* modifying an uncontested fee agreement absent clear guidelines nestled in appropriately promulgated regulations, the Commission acts

beyond the bounds of its statutory authority. ***Curr*** determined that in doing so, the Commission acts arbitrarily, capriciously and manifestly abuses its discretion. ***Curr*** reaffirmed that,

> "... a reasonable contingent fee must be sufficiently high to compensate the lawyer not only for the reasonable value of the time he or she anticipates devoting to the particular lawsuit, but also for the time devoted to other lawsuits undertaken on the same basis but unsuccessful in result."

864 P.2d 139. ***Rhodes*** noted that the guidelines required by ***Curr*** should be such so as "...to foster ease, utility, and predictability in the application of I.C. § 72-803,...." 868 P. 2d 469.

As of current date, guidelines promulgated by the Commission, being IDAPA 17.02.08.033.01, speak as to attorney fees only through the initial hearing. The Disclosure Statement set forth within IDAPA 17.02.08.033.04 states that, "[d]epending upon the circumstances of your case, (the claimant) and (the claimant's attorney) may agree to a higher or lower percentage which would be subject to Commission approval."

Within its June 21, 2012, Order on Attorney Fees, the Commission conceded that,

> "While, as Counsel argues, the IDAPA does not have a specific fee percentage set for situations of cases that go to rehearing or on appeal, (the Commission) is able to handle those situations within the current framework."

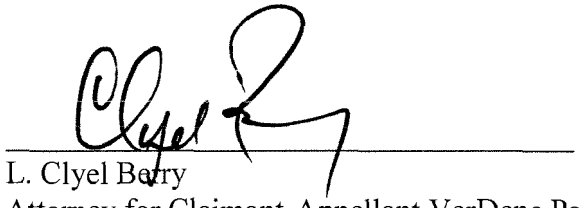
Such falls far short of the "clear guidelines nestled in appropriately promulgated regulations" mandated by this Court in ***Curr***, and ignores any expectation of the "predictability" envisioned by ***Rhodes***.

In the instant matter, the Commission failed to discuss the reasonableness of the Contingent Fee Agreement at issue upon consideration of the ***Hogaboom*** factors; refused to follow its own IDAPA "Rule Governing Approval of Attorney Fees in Workers' Compensation Cases"; and, acted in excess of statutory authority, thusly infringing upon Appellants'

constitutional rights. In sum, to co-equal extent as this Court found in ***Curr***, by exceeding the bounds of its statutory authority the Commission acted arbitrarily; acted capriciously; manifestly abused its discretion; and, waded into regulatory conduct with indifference to constitutional requirements that adhere to rights fixed by private contract.

It is respectfully submitted that the Commission's sua sponte reduction of fees herein constitutes clear error and must be reversed.

RESPECTFULLY SUBMITTED this 26 day of March, 2013.

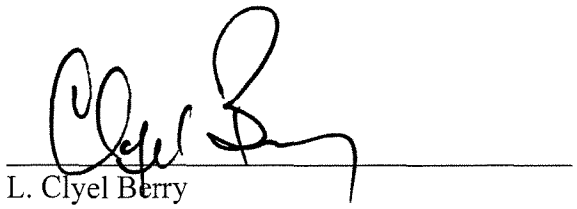


L. Clyel Berry
Attorney for Claimant-Appellant VerDene Page
Individually, as Intervenor-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I am a resident attorney of the State of Idaho and that on the 26 day of March, 2013, I served a copy of the foregoing document, by depositing a true copy thereof in the United States mail, postage prepaid, upon the following:

David Young
Deputy Attorney General
P.O. Box 83720
Boise, ID 83720



L. Clyel Berry