5-17-2013

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

IN THE SUPREME COURT OF THE STATE OF IDAHO

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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 Docket No. 40568-2012 Industrial Commission No. 2002-7246

APPELLANTS' REPLY BRIEF

Appeal from the Idaho State Industrial Commission
Chairman Thomas E. Limbaugh, Presiding

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PRELIMINARY STATEMENT

The citations and argument set forth within the instant Reply Brief are intended by Appellants to be supplemental to those citations and that argument originally advanced within Appellants' Opening Brief, dated March 26, 2013, of record herein. Therefore, it is not intended that the instant Reply Brief respond to each of the arguments advanced by or within Respondent's Brief, dated April 24, 2013, to the extent that any such response would duplicate citations or argument previously made by Appellants.

SUPPLEMENTAL ARGUMENT WITH CITATIONS

STATEMENT OF THE CASE

I. Nature of Case

At pages 1-4 of Respondent's Brief, Respondent-Idaho State Industrial Commission (hereafter referenced as "Commission") makes argument, as opposed to merely setting forth and describing the Nature of the Case at issue by the instant appeal. Appellants believe it important to respond to certain of that argument.

The Commission argues that I.C. § 72-804 enables it to order an employer to pay the injured worker's attorney's fees, thereby advancing the legislature's purpose in enacting that code section, which the Commission contends was to "...enable an injured worker to keep her entire award of workers' compensation benefits and not to have those benefits lessened by any legal expenses,... ." As will be more thoroughly discussed subsequently herein, the

Commission's interpretation of the legislature's "purpose" in enacting I.C. § 72-804 is short-sighted at the minimum, if not clearly erroneous.

It is submitted that the "purpose" of I.C. § 72-804 was to act as inducement for a Title 72 employer and its surety to accept Title 72 claims not subject to valid, reasonable defenses. Pursuant to the statute, upon the employer or its surety contesting a Title 72 claim without reasonable grounds, "...the employer shall pay reasonable attorney fees in addition to the compensation provided (by the Idaho Worker's Compensation Act)." I.C. § 72-804 is titled "Attorney's fees – Punitive costs in certain cases." (Emphasis added.) Clearly, the statute is intended to punish Title 72 employers and/or sureties which contest claims without reasonable grounds to the extent of paying "...reasonable attorney fees in addition to the compensation provided by this law."

Although certainly implied by the statute and so interpreted by the Court, language within the four corners of the statute does not state that "reasonable attorney fees" shall be paid either to the claimant or that claimant's attorney. Further, the statute does not require or even suggest that Title 72 defendants coming within the statute are obligated for the entirety of the fees due claimant's counsel.

The effect of I.C. § 72-804 is that a Title 72 employer and/or its surety which unreasonably contests a claim is punitively assessed costs in the form of "reasonable attorney fees." The Title 72 claimant receives the benefit of those punitively assessed fees, "...in addition to the compensation provided (by the Worker's Compensation Act)."

Simply stated, what the Commission describes as, "...the important purpose contained in Section 804, which is to make sure the injured worker is paid her full benefits without having to deduct legal expenses," is not found within the four corners of the statute or implied therein.

Ironically, at pages 3-4 of its Brief, the Commission concedes that which goes to the very heart of the argument herein made by Appellants, that "...a Section 804 award of attorney fees against the recalcitrant employer does benefit the injured worker,... ." Upon recognizing that an I.C. § 72-804 fee award constitutes a "benefit," it is obvious that the fee award comes squarely within the Contingent Fee Agreement between Ms. Page and counsel, which provides for fees upon a contingent basis of,

> "...25% of all 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." (Emphasis Added).

April 24, 2002 Contingent Fee Agreement, at paragraph 4 thereof. Exhibit 8, ***R. III***.

II. Course of Proceedings

At pages 5-8 of its Brief, the Commission emphasizes the "Stipulation & Order Regarding Attorney Fees." Unfortunately, the Commission again takes poetic license in describing the September 8, 2009, Findings of Fact, Conclusions of Law, and Order; the parties' Stipulation Regarding Attorney Fees, filed October 20, 2009; and, the Commission's Order Granting Stipulation, dated October 22, 2009.

First of all, the September 8, 2009, Order did not award Ms. Page "her attorney fees." Rather, the Order merely stated that "Claimant is entitled to attorney fees." Secondly, the Commission's argument limiting counsel's fees to 30% of Title 72 benefits encompassed within the September, 2009, Order is based upon that which does not exist, excepting upon illusion created by the Commission. That illusion provides the basis for the Commission's statement at page 8 of its Brief, that "[t]he Commission's denials of Berry's requests to retain more attorney fees than that amount agreed to and awarded pursuant to the September 2009 Order forms the basis for the present appeal."

The parties' October 20, 2009, Stipulation Regarding Attorney Fees was never understood by Ms. Page or counsel to be the amount to which counsel was entitled as and for attorney fees pursuant to their Contingent Fee Agreement, nor was the same intended to modify or limit the same. Rather, the Stipulation was intended by the Title 72 Defendants and Ms. Page as being nothing more or less than was clearly indicated upon the face thereof, being "...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." Exhibit S-2, ***R.III***. To co-equal extent, the Commission's Order Granting Stipulation, dated October 22, 2009, provided no hint that the Stipulation would modify or limit counsel's entitlement to fees pursuant to the Contingent Fee Agreement entered into between

Ms. Page and himself. Rather, the Order merely noted "[t]hat the stipulation between the parties is GRANTED." Exhibit S-3, ***R. III.***

III. Statement of Facts

Again, within the Statement of Facts portion of its Brief, the Commission makes a representation of fact which is not only clearly erroneous, but flies squarely in the face of the record. The Commission represents that,

> "...Berry has included many matters in his Statement of Facts from Page's entire workers' compensation case. To the extent Berry asserts that this appeal revolves around Berry's entitlement to fees for his representation of Page *throughout* the entirety of these proceedings, the Commission submits the following correction. ...The only issue on appeal here is the Commission's denial of Berry's request for additional attorney fees from one discreet sum of money – those awarded pursuant to the September 2009 Order and stipulation."

To "clarify" what is and what is not at issue within the instant appeal, the Commission set forth a "Payment Summary" at page 10 of its Brief. Incredulously, the Commission attempts to convince this Court that the first three entries upon that Payment Summary, regarding which the Commission approved fees at only a 30% rate, are not encompassed within the instant appeal. Bluntly stated, the Commission could not be more wrong.

The very crux of the instant appeal is exactly that which the Commission refuses to acknowledge. Central to this appeal is the fact that the I.C. § 72-804 fee award within the September 8, 2009, Order was by reason of Defendants' conduct for one specific period of time, whereas Berry's entitlement to fees is pursuant to the Contingent Fee Agreement between Ms. Page and himself, which encompassed the entirety of his representation of Ms. Page throughout

her Title 72 proceedings, then spanning multiple hearings and two appeals. Rhetorically speaking, did the Commission overlook Appellants' argument set forth within sections III.1. and V. of Appellants' Opening Brief? Further, could the Commission have overlooked issue 3, within the Issues Presented upon Appeal section of Appellants' Opening Brief? There, it is seen that the first three payments set forth within the Commission's Payment Summary are clearly encompassed within the instant appeal, to co-equal extent as benefits awarded by the September 8, 2009, Order.

ISSUES ON APPEAL

At page 11 of the Commission's Brief, it "condenses" issues to be decided upon appeal to three, with the first two characterized as the calculation of Berry's Section 804 Attorney Fees to which, "...the parties stipulated to – and Berry assented – to the amount of the award," with the third encompassing constitutional violations.

Again, the Commission muddles the facts. Overlooked and/or not recognized by the Commission is that counsel/Berry was not awarded I.C. § 72-804 fees. The September 8, 2009, Order determined that "Claimant is entitled to attorney fees." The parties' Stipulation provided that, "...attorney fees due Claimant by and from Defendants herein... shall be the sum equal to 30% of the value of Title 72 benefits... encompassed within said September 8, 2009, Findings of Fact, Conclusions of Law, and Order." The Commission's October 22, 2009, Order Granting Stipulation merely provided "[t]hat the stipulation between the parties is GRANTED."

The Commission's argument is that counsel somehow "assented" to the I.C. § 72-804 fee award in lieu of fees to which he otherwise was entitled, by his signature upon the parties' Stipulation. This argument is premised upon the language within the Stipulation that, "COME NOW the parties, each by and through counsel of record,... and hereby stipulate... ." The actual language of the Stipulation does not give support to the Commission's argument. Rather, the Stipulation was clearly by and between the Title 72 parties, with the Stipulation's language and form being that of common usage to submit the Title 72 parties' agreement to the Commission.

RESPONSE TO CERTAIN OF THE ARGUMENT ADVANCED BY THE COMMISSION

Upon Appellants' review of the Commission's Brief, arguments made therein by the Commission warranting response, are as follows:

1. Whether the Commission Properly Calculated the Amount of Berry's Section 804 Attorney Fees to be Only That Amount Paid, as Attorney Fees, by the Employer?

As response, Appellants first again note that this argument by the Commission is fatally flawed. As previously discussed, the record is clear that the I.C. § 72-804 fee award was not "Berry's." Rather, the September 8, 2009, Order was specific as to who was granted/awarded fees. Finding 40, at page 14, clearly determined that "Claimant is entitled to attorney fees." Paragraph 4 of the Order, at page 15, was specific that "Claimant is entitled to attorney fees." Berry was never awarded fees against Defendants

in this matter, to any extent. Further, neither by the parties' Stipulation nor the Commission's Order Granting Stipulation were I.C. § 72-804 fees "payable" to counsel. Rather, the parties' Stipulation clearly provided that the agreed fees were "...due Claimant by and from Defendants,... ." The Commission's Order confirmed that,

> "The parties have agreed that, pursuant to the Commission's September 8, 2009 decision, 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).

The Order thereafter simply provided "[t]hat the stipulation between the parties is GRANTED." Exhibit S-3, ***R. III***.

The Commission argues that, "[t]his issue is resolved simply by applying the language and rationale of Section 804 to the facts in this case." Appellants concur. It is clear that determining the meaning of an attorney fee statute and whether it applies to the facts or issues of law is freely reviewed by the Supreme Court. ***Smith v. Washington County Idaho***, 150 Idaho 388, 247 P.3d 615 (2010). The Commission urges that the "plain meaning" of I.C. § 72-804 be given effect. Again, Appellants agree. The "plain meaning" of I.C. § 72-804 is not to grant claimants additional compensation or benefits. Rather, the "plain rationale" of I.C. § 72-804 is to dissuade a Title 72 employer and/or its surety from contesting claims without reasonable grounds. If I.C. § 72-804 applies, the Title 72 employer and/or that employer's surety is subject to a punitive award of attorney fees. The desired effect of I.C. § 72-804 is to "persuade" employers and sureties to

accept Title 72 claims for which there is no reasonable defense. Thusly, Title 72 claimants, both current and prospective, are benefited by the intended result of the statute, being that legitimate claims will be accepted. On a more narrow basis, to the extent of an I.C. § 72-804 award in a specific case, the claimant therein receives monetary benefit.

To the extent of the September 8, 2009, award, additional issues presented by the instant appeal encompass:

a. Is the claimant's "benefit" upon an I.C. § 72-804 fee award subject to fees by that claimant's attorney?

(1) Upon the basis of I.C. § 72-804

Reviewing I.C. § 72-804, counsel first notes the obvious. Neither I.C. § 72-804 nor any other provision of Title 72, Idaho Code, precludes or prohibits attorney's fees by Claimant's counsel upon an I.C. § 72-804 fee award. Further, the requested fees are not disputed by Ms. Page. Rather, at all stages of the proceedings, Ms. Page supported counsel's request for fee approval and specifically joined therein. Exhibit S-5, ***R. III***.

As noted by the Commission within its brief, I.C. § 72-804 specifically provides that upon a fee award, "... the employer shall pay reasonable attorney fees in addition to the compensation provided by this law." The Commission somehow interprets that language as prohibition

against counsel imposing fees upon a fee award pursuant to his contingent fee agreement. However, that interpretation is not supported by either specific language within the statute or any reasonable interpretation thereof. Rather, the cited language simply makes clear that the obligation for I.C. § 72-804 fees is separate, apart from, and in addition to obligations for Title 72 compensation.

(2) Upon the basis of IDAPA enactment

Fees upon an I.C. § 72-804 fee award are not prohibited by the Commission's enactment of rules within IDAPA 17.02.08.033. Rather, quite the opposite is true. Pursuant to the Commission's "Rule Governing Approval of Attorney Fees in Workers' Compensation Cases," the attorney's "charging lien" attaches upon "available funds," which are defined as funds which the services of counsel "operated primarily or substantially to secure." In the instant case, the totality of Ms. Page's Title 72 recovery, inclusive of I.C. § 72-804 fees, was secured solely by reason of counsel's efforts, with the September 8, 2009, fee award being after years of litigation involving numerous fully contested motions, three evidentiary hearings before the Commission, and two Supreme Court appeals.

As IDAPA 17.02.08.033 does not limit or define "available funds" by the nature or type of Title 72 monies recovered nor exclude an I.C. § 72-804 fee award therefrom, it is submitted that the requested fees, if otherwise reasonable, must be approved and allowed. At this point, Appellants note that the Commission's Orders below and Brief upon appeal omit any reference to (let alone discussion of) its IDAPA enacted "Rule Governing Approval of Attorney Fees in Workers' Compensation Cases." That omission was obviously intentional and by reason of the fact that there is no reasonable or rational defense to counsel's entitlement to fees against the I.C. § 72-804 fee award pursuant to said Rule.

The penalties for a claimant's attorney's failure to fully conform to IDAPA 17.02.08.033 are extreme. As example, in ***Cheung v. Pena***, 143 Idaho 30, 137 P.3d 417 (2006), the claimant's attorney failed to conform to IDAPA 17.02.08.033.04, requiring that the Commission's guidelines for attorney's fees be disclosed to the claimant and that the claimant acknowledge receipt of the disclosure by signing the document. In ***Cheung***, this Court upheld the determination of the Commission that that claimant's attorney forfeited all entitlement to fees, even where the terms of the fee agreement were not found to be otherwise unreasonable. Most

certainly, where a claimant's attorney is at risk for full forfeiture of fees for technical noncompliance with the IDAPA enactment, should it not follow that a claimant's attorney must be allowed reasonable fees in matters coming fully within the parameters of the Commission's "Rule Governing Approval of Attorney Fees in Workers' Compensation Cases?"

b. The major purposes of I.C. § 72-804 are advanced by Berry's arguments

The Commission argues that by enacting I.C. § 72-804, the legislature "sought to encourage Claimants to press claims which, but for such provision, would not be worth their time and effort once the costs of hiring an attorney had been deducted from the award," citing ***Hogaboom v. Economy Mattress***, 107 Idaho 13, 684 P.2d 990 (1984). However, ***Hogaboom*** also noted that I.C. § 72-804 served the additional purpose of encouraging attorneys "to represent clients and take on claims which would otherwise not be in their best financial interests due to their relative financial insignificance." It is respectfully submitted that the Commission's argument is without basis in logic and, if accepted by the Court, would be counterproductive to and irreconcilable with the Court's earlier expressions in ***Hogaboom***.

As example, assume that a Title 72 claimant's potential benefits total $9,000.00, and hearing is required. Further assume that the claimant receives an I.C. § 72-804 fee award of 30% of said benefits, being $2,700.00. Thusly, the

total sum received from Title 72 defendants is $11,700.00. Under the Commission's rationale, the claimant receives $9,000.00 and the claimant's attorney receives $2,700.00, the same amount the attorney would have received without an I.C. § 72-804 fee award. Obviously, the Commission's rationale results in the attorney receiving no incentive for representing a claimant in a Title 72 matter which, "...would otherwise not be in (the attorney's) best financial interests due to relative financial insignificance." In fact, the attorney has less incentive to represent a Title 72 claimant in a matter of relative financial insignificance by reason of the added burden of prosecuting the I.C. § 72-804 claim. Thusly, adopting the rationale urged by the Commission would actually have the effect of discouraging attorneys from representing Title 72 claimants in matters of little financial significance.

Under the rationale urged by Appellants, the claimant's attorney receives 30% (pursuant to the Commission's guidelines following a single hearing) of $11,700.00, being the total of Title 72 benefits and the I.C. § 72-804 fees awarded claimant, or $3,510.00. The claimant then receives $8,190.00. The attorney realizes $810.00 in added financial incentive for undertaking a Title 72 claim with little financial significance. The claimant's receipt of $8,190.00 equals 91% of the total value of Title 72 benefits awarded. Thusly, both the Title 72 claimant and that claimant's attorney are benefited.

Absent a Title 72 claimant being able to secure the services of competent legal counsel, there is little potential that that claimant will recover any Title 72 benefits from his claim. The rationale urged by Appellants results in higher probability that a Title 72 claimant will be able to retain legal counsel, and advances both of the stated purposes of I.C. § 72-804, being to encourage Claimants to press claims which otherwise would not be worth prosecuting and to encourage attorneys "...to represent clients and take on claims which would otherwise not be in their best financial interests due to their relative financial insignificance."

It is respectfully submitted that allowing counsel fees pursuant to the Contingent Fee Agreement between Ms. Page and himself is both mandated by IDAPA 17.02.08.033.01.c, promulgated by the Commission as the "Rule Governing Approval of Attorney Fees in Worker's Compensation Cases," and is necessary to achieve "sure and certain relief" to injured workers, by encouraging attorneys to represent Title 72 claimants in claims regarding which those claimants could not otherwise secure representation.

2. Whether counsel's fees upon the value of Title 72 benefits encompassed within the September 8, 2009, Order are limited to or "capped" by the I.C. § 72-804 fee award granted Ms. Page therein?

In limiting counsel's fees to 30% of the Title 72 benefits encompassed within the September 8, 2009, Order, the Commission advised 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, pp. 121-122. Appellants' Opening Brief noted that not only was the Commission's stated basis in limiting counsel's fees unsupported of record, but that it actually misstated the clear record herein. The Commission's Brief argues that counsel "chose" to accept the 30% attorney fees provided by the parties' Stipulation as counsel had "signed off" upon and "assented" thereto. In essence, the Commission's argument is that by Berry submitting the parties' Stipulation to the Commission as Ms. Page's counsel of record, counsel "chose" to accept the fees due Ms. Page from Defendants in lieu of fees to which he was otherwise entitled pursuant to the Contingent Fee Agreement

between Ms. Page and himself. The Stipulation is of record as Exhibit S-2, ***R. III.*** The entirety of the language is as follows:

> "COME NOW the parties, each by and through counsel of record, pursuant to the Commission's Findings of Fact, Conclusions of Law, and Order, dated and filed September 8, 2009, and hereby stipulate that attorney fees due Claimant by and from Defendants herein pursuant to the September 8, 2009, Award shall be the sum of 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.)

The Stipulation was then dated and signed by counsel of record upon behalf of the respective parties. Specifically, Berry signed the Stipulation as "Attorney for Claimant."

The parties' agreement was presented to the Commission in the only manner it could, short of open hearing, being in the form of the Title 72 parties' Stipulation. The Stipulation was signed by both Attorney Mark Peterson, upon behalf of Title 72 Defendants, and Berry, as attorney for Ms. Page. Neither Mr. Peterson nor Berry were parties to that Stipulation and neither was bound by the terms thereof. Rather, each attorney acted within his representative capacity as counsel of record for their respective clients.

The record in this matter is clear. Counsel for Ms. Page did not "choose" to accept the I.C. § 72-804 fee award in lieu of fees to which he was entitled pursuant to the Contingent Fee Agreement between Ms. Page and himself, or otherwise "assent" that his fees would be capped by the parties' Stipulation related thereto.

In all bluntness, the argument made within the Commission's Brief that Ms. Page's counsel "chose" to accept the I.C. § 72-804 fee award or "assented" to the same in lieu of fees to which he was otherwise entitled pursuant to the Contingent Fee Agreement between Ms. Page and himself flirts with if not constitutes clear violation of Rule 11(a)(1), Idaho Rules of Civil Procedure, as obviously being not, "...well grounded in fact, ..."

If Berry's fees are to be capped by the I.C. § 72-804 fee award, the limiting of those fees must be upon the basis of I.C. § 72-804; the IDAPA "Rule Governing Approval of Attorney Fees in Workers' Compensation Cases"; or, that the Contingent Fee Agreement by and between Ms. Page and counsel was not reasonable.

I.C. § 72-804 provides no basis for capping or limiting of Claimant's counsel's fees to an I.C. § 72-804 fee award. This Court earlier acknowledged that an I.C. § 72-804 fee award may be different in amount to that which is due the attorney by that attorney's client. ***Hogaboom***, *supra*, 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. When applied to the facts of record in the instant matter, it becomes obvious that Ms. Page's counsel's fees must not be limited or "capped" by the I.C. § 72-804 fee award entered against the Title 72 Defendants.

Punitive fees imposed against the offending employer/surety pursuant to I.C. § 72-804 must be "reasonable," from the perspective of those Title 72 defendants. In other words, fees imposed pursuant to I.C. § 72-804 must be reasonable in relation to Title 72 defendants' offense giving rise to their obligation for fees. Dependent upon the circumstances, the employer could be found liable for fees encompassing the entirety of the Title 72 proceedings or only a portion thereof. As example, if the employer/surety had accepted a Title 72 claim and paid corresponding benefits excepting costs for a single medical presentment, which were unreasonably denied, "reasonable" fees to impose punitively should be in relation to the single denied medical procedure as opposed to the totality of the Title 72 claim.

In the instant matter, the Commission's discussion of the I.C. § 72-804 fee award within the September 8, 2009, Order is at Findings 34-40, at pages 12-14. There, the Commission found that Ms. Page was entitled to fees by reason of Title 72 Defendants' conduct "[f]ollowing the issuance of ***Page II***,... ." Specifically, Finding 39, upon page 14 of the September 8, 2009, Order, determined that,

> "Under Idaho Code § 72-804, attorney fees are appropriate where the denial or delay in payments is unreasonable. Here, the record establishes that Defendants, for more than one year following the issuance of *Page II*,

had no basis for their denial. This is per se unreasonable." (Emphasis added.)

Exhibit S-1, ***R. III***.

Clearly the attorney fees punitively imposed against Defendants was for conduct falling within a specific period of time, being from and following ***Page II*** to the April 9, 2009, evidentiary hearing which resulted in the September 8, 2009, Order. That period of time did not encompass a Supreme Court appeal and required but a single evidentiary hearing. Pursuant to IDAPA 17.02.08.033.01.e.ii, "[i]n a case in which a hearing has been held and briefs submitted (or waived) under Judicial Rules of Practice and Procedure (JRPP), Rules X and XI, thirty percent (30%) of available funds shall be presumed reasonable." Upon that basis, from the perspective of Ms. Page and counsel, Title 72 Defendants' responsibility for "reasonable fees" was set at thirty (30%) percent of the value of Title 72 benefits encompassed within the September 8, 2009, Order. The parties' Stipulation so provided.

Contrasted with Title 72 Defendants' responsibility for "reasonable fees" for the period following ***Page II*** to the April 9, 2009, evidentiary hearing, Ms. Page's obligation for fees to her counsel was pursuant to their Contingent Fee Agreement of April 24, 2002. Pursuant thereto, attorney 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." (Emphasis added.)

Exhibit 8, ***R. III***.

As of the Commission's September 8, 2009, Order, counsel's representation of Ms. Page had encompassed a period in excess of seven and one-half years of active litigation, involving multiple fully contested and briefed motions; several evidentiary hearings before the Commission; and, two Supreme Court appeals, in stark contrast to the Title 72 Defendants' responsibility for I.C. § 72-804 fees, which encompassed a period involving but a single evidentiary hearing. It is obvious that Defendants' responsibility for I.C. § 72-804 fees bore no relation to Ms. Page's counsel's entitlement to fees for his years of work-product which cumulated in the Title 72 benefits encompassed within that September 8, 2009, Order. Thusly, Counsel's Petition for Approval of Fees 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.

It must again be remembered that the attorney fee issue before the Commission in the proceedings below and upon instant appeal does not involve any dispute by and between Ms. Page and counsel. In fact, quite the opposite is true. Ms. Page is fully supportive of her counsel's position in this regard. ***Tr. III***, p. 23, L. 7 – p. 24, L. 18.

Of note, within the April 10, 2012, IDAPA fee hearing, then Chairman Maynard advised that the Commission was not "questioning" the Contingent Fee Agreement of

Ms. Page and Counsel, but that the Commission was "...not bound" by it. ***Tr. III***, p. 32, LL. 12-14. In fact, the record is clear that the Commission refused to even consider the fee agreement in determining counsel's entitlement to fees upon benefits awarded by the Commission's Findings Upon Remand; the May 18, 2006, benefit payment; or, the September 8, 2009, Order. Within its June 21, 2012, Order on Attorney Fees, the Commission reasoned 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, p. 121. It is respectfully submitted that the Commission was in error. In ***Curr v. Curr***, 124 Idaho 686, 864 P.2d 132 (1993), the issue, as here, concerned the Commission's approval of fees pursuant to I.C. § 72-803. There, the 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." (Emphasis added.)

864 P.2d at 136.

Had the Commission considered counsel's entitlement to fees other than upon the basis of the I.C. § 72-804 fee award, the Commission would have approved fees at the contingent rate of 40% upon benefits encompassed within the September 8, 2009, Order. In approving fees of 40% upon the Title 72 parties' Lump Sum Settlement, 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. These comments by the Commission describing counsel's efforts in his representation of Ms. Page throughout the years are also fully applicable to the September 8, 2009, Order.

3. The Commission did herein, to the same extent as *Curr*, *sua sponte* modify uncontested attorney fees absent clear guidelines

The Commission's Brief argues that, "...*Curr* (is) not at all on point with the facts of this case." The Commission argues that its rules governing attorneys' claims for fees were in effect prior to counsel being retained by Ms. Page. Such is absolutely true. However, IDAPA 17.02.08.033 provided no guidance as to what is or is not considered by the Commission to constitute reasonable fees past the initial hearing stage of Title 72

proceedings. Such was conceded by the Commission within its June 21, 2012, Order on Attorney Fees, where it noted 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 the situations within the current framework."

R. III, p. 122b. Unfortunately, the Commission apparently missed the points made by this Court in ***Curr*** and ***Rhodes v. Industrial Commission***, 125 Idaho 139, 868 P.2d 467.

Curr 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." (Emphasis added.) 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." In the instant matter, both upon review of the IDAPA Rule as well as upon consideration of the Commission's acknowledgement within its June 21, 2012, Order that there are no fee guidelines for Title 72 proceedings beyond the initial hearing stage, it is clear that the Commission did exceed its statutory authority in *sua sponte* modifying the uncontested Contingent Fee Agreement between Ms. Page and counsel.

With respect to the Commission's position that it is "able to handle" fee approvals past the initial hearing stage, as expressed within its June 21, 2012, Order, the record speaks otherwise. In ***Rhodes***, the Court stressed the importance of "predictability" in the

application of I.C. § 72-803. Unfortunately, the only "predictability" in the Commission reviewing fees of claimants' attorneys beyond a 30% rate is that the Commission will require such efforts on the part of counsel so as to make those efforts economically imprudent upon consideration of any reasonable hourly fee and, as evidenced by the instant matter, there is total absence of "predictability," even within a single claim.

As example, the Commission's April 1, 2010, Order Regarding Attorney Fees, of record as Exhibit 6, ***R. III***, limited counsel's fees to 30% upon Title 72 benefits through the September 8, 2009, Order. Following settlement of Ms. Page's underlying Title 72 claims, the Commission's Amended Order Approving in Part Stipulation and Agreement, dated December 9, 2009, of record as Exhibit S-8, ***R. III***, limited counsel's fees to 30% upon all Title 72 benefits received, inclusive of that settlement. Following IDAPA hearing upon counsel's Fee Petition, the Commission's June 21, 2012, Order, of record at ***R. III***, pp. 118-125, approved fees of 40% upon the lump sum settlement, while limiting fees upon all other Title 72 compensation to 30%, and approved no fees upon the I.C. § 72-804 fee award.

As of the instant Appeal, the Commission had approved attorney fees as follows:

a. 30% upon Title 72 benefits encompassed within the Commission's June 14, 2005, Order on Remand, following ***Page I***;

b. 30% upon the May 18, 2006, benefit payment, following ***Page I***;

c. 30% upon Title 72 compensation encompassed within the September 8, 2009, Order, entered following ***Page II*** and another evidentiary hearing;

d. Denied fees upon the I.C. § 72-804 fee award within the September 8, 2009, Order; and,

e. 40% upon the value of the lump sum settlement between Ms. Page and Title 72 Defendants.

The Commission erroneously rationalized limiting fees to 30% upon the value of the September 8, 2009, Order upon the basis of the I.C. § 72-804 fee award entered punitively against Title 72 Defendants, as previously discussed. However, the record is without discussion or expression of the Commission's rationale, whatsoever, in limiting fees to 30% upon benefits awarded by the June 14, 2005, Order on Remand and/or the May 18, 2006, benefit check, while approving fees at 40% upon the Title 72 parties' lump sum settlement.

The entirety of Title 72 benefits paid in this matter were following appeal. There is absolutely no basis of record why fees upon benefits within the Order on Remand and the May 18, 2006, benefit check were limited to 30%, while fees upon the parties' lump sum settlement were approved at 40%. Such inconsistency of fee approval by the Commission within a single proceeding illustrates absence of the predictability anticipated by ***Rhodes,*** and the total inability of the Commission to discharge its

responsibilities for fee approval pursuant to I.C. § 72-803 under the framework of IDAPA Rules as currently enacted.

The ***Curr*** Court determined that the Commission was required to formally publish "clear guidelines" upon which it will base fee modifications, and noted that "[w]ithout properly enacted guidelines it is impossible for the Commission to exercise its duty to approve undisputed attorney fees under I.C. § 72-803." 864 P.2d at 139. Responsive to ***Curr***, IDAPA 17.02.08.033 was enacted. However, even though the Rule specifically states that fee agreements shall be in conformity with Rule 1.5, IRPC, which provides the framework for different contingent fees upon settlement, trial or appeal, the Rule is silent as to what fees shall be presumed reasonable by the Commission in the event of appeal and/or re-hearing, and is thusly internally inconsistent and most certainly less than clear. Absent formally published "clear guidelines" as to what fee is presumed reasonable upon appeal or re-hearing, the facts and issues herein presented are exactly on all fours with ***Curr***, which clearly must control.

Upon consideration of the ***Hogaboom*** factors, discussed within paragraph 21 of the Affidavit of Berry in Support of Petition for Approval of Fees, of record as Exhibit 8, ***R.III***, whether going forward from the April 24, 2002, Contingent Fee Agreement or viewed with benefit of 20/20 hindsight based upon results and looking back over the past 11 year period of time, if fees at a contingent rate of greater than 30% are not both

reasonable and fully justified in the instant matter, rhetorically speaking how could they ever be?

Curr recognized 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 anticipated 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 at 139. In ***Clark v. Sage***, 102 Idaho 261, 629 P.2d 657 (1981), this Court observed that a contingent fee also involves a risk factor such that, "...lawyers generally will not provide legal representation on a contingent basis unless they receive a premium for taking that risk." In the instant matter, contingent fees at 30% fail upon both counts.

Curr noted that ***Hogaboom*** recognized two general philosophies for the Commission to consider along with the ***Clark*** factors, being "...to encourage claimants to pursue rightful legal claims and attorneys to take on such claimants' interests." 684 P.2d at 139. As noted by counsel during the April 10, 2012, IDAPA hearing, had counsel suspected that the Commission would deny fees in excess of a 30% contingent rate following appeals or re-hearing, he most likely would not have appealed the December 8, 2003, original decision of the Commission, and Ms. Page would have received nothing from her Title 72 claim. Most certainly, following ***Page I*** and upon consideration of the Commission's Order on Remand, which awarded Ms. Page but 5% permanent partial disability inclusive of impairment, there would never have been a second appeal.

The June 14, 2005, Order on Remand awarded benefits totaling $12,375.75. Absent the second appeal, such amount would have been the total gross Title 72 benefits realized by Ms. Page's industrial claim. At the end of the day, counsel believes that the litmus test is whether the fees requested are not only "reasonable" upon consideration of the ***Hogaboom*** factors but, perhaps even more importantly, whether those requested fees are fair to counsel's client.

Solely by reason of appeals being filed in this matter, Ms. Page's past medical expenses were satisfied; her future medical expenses provided for; and, indemnity benefits totaling in excess of $376,000.00 were recovered. The monetary value of Title 72 benefits realized by reason of counsel's representation of Ms. Page herein totals $549,582.44, none of which would have been recovered but for the first appeal; only $12,375.75 would have been recovered but for the second appeal; and, benefits totaling $537,206.59 were recovered solely by reason of counsel's persistence and dedication to the interests of Ms. Page in convincing her of the merit of her Title 72 claims which warranted both the second appeal and, following ***Page II***, further evidentiary hearings.

Upon consideration of applicable statutes; the Commission's IDAPA Rule governing approval of fees; controlling case law; and, equitable considerations, approval of contingent fees herein at the 40% rate, as requested by both Ms. Page and counsel, is both reasonable and required.

CONCLUSION

By its decisions, after repeatedly refusing to approve Ms. Page's counsel's fees greater than 30% upon any Title 72 benefits awarded herein, the Commission was finally persuaded to approve fees at a 40% contingent rate upon benefits encompassed within the Title 72 parties' lump sum settlement. In doing so, 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."

However, the Commission refused to approve fees greater than 30% upon Title 72 benefits other than encompassed within that lump sum settlement. ***Curr*** specifically determined that the Commission was required to formally publish "clear guidelines" upon which it would base fee modifications and advised that absent such, "...it is impossible for the Commission to exercise its duty to approve undisputed attorney fees under I.C. § 72-803." 864 P.2d at 139.

Within its June 21, 2012, Order on Attorney Fees, the Commission freely conceded that it had not enacted guidelines, clear or otherwise, upon which it would base fee modifications in Title 72 matters following rehearing or appeal. ***R. III***, p. 122b. Thusly, the instant case presents exactly as did ***Curr***, with the Commission "*sua sponte* modifying uncontested attorney fees absent the guideline of a properly enacted regulatory scheme,... ." As such, as this Court previously determined in ***Curr***, the Commission exceeded its statutory authority. 864 P.2d 137.

Even as its successive orders denied fees greater than 30% upon Title 72 benefits, the Commission acknowledged that it was not "questioning" the Contingent Fee Agreement entered into by and between Ms. Page and counsel. Rather, it simply refused to consider that fee agreement. To the same extent, the Commission failed to discuss or follow IDAPA 17.02.08.033.01.c, which it enacted as the "Rule Governing Approval of Attorney Fees in Workers' Compensation Cases." The Commission further failed to recognize that "reasonable fees" punitively assessed Title 72 defendants pursuant to I.C. § 72-804 may well be different than "reasonable fees" to be approved upon behalf of claimant's counsel pursuant to I.C. § 72-803 and consideration of the ***Hogaboom*** factors.

In limiting counsel's fees to 30% upon Title 72 benefits not encompassed within the parties' lump sum settlement, the Commission specifically found that,

> "The most important fact in the assessment of attorney fees... is that Counsel and Defendants came to an agreement as to the amount of attorney fees Defendant 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. However, as previously discussed, that finding by the Commission, which it noted to be "the most important fact in the assessment of attorney fees," is without hint of support from the record herein.

In summary, the Commission's findings and conclusions limiting counsel's fees to 30% upon Title 72 benefits not encompassed within the parties' lump sum settlement and denying any fees upon the September 8, 2009, I.C. § 72-804 fee award were arbitrary, capricious and a

manifest abuse of discretion; not supported by substantial and competent evidence of record; failed to set forth specific findings required for meaningful appellate review; and, were not the result of the correct application of controlling statute, precedent or IDAPA enactment to facts of record.

Appellants herein, being both Ms. Page and her counsel, respectfully request that the Commission's *sua sponte* reduction of fees herein be reversed.

RESPECTFULLY SUBMITTED this 16 day of May, 2013.

L. Clyel Berry
Attorney for Claimant-Appellant VerDene Page; and,
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 16 day of May, 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