BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

JORGE L. DAMIAN, Claimant/Petitioner, v. BIG WOOD ROOFING, INC., Employer, and STATE INSURANCE FUND, Surety, Defendants/Respondents.	**IC 2019-001166** **ORDER ON PETITION FOR DECLARATORY RULING** FILED OCT 03 2022 INDUSTRIAL COMMISSION

This matter comes before the Commission on Petitioner's petition for a declaratory ruling pursuant to JRP 15. The petition was accompanied by a legal memorandum setting forth Petitioner's arguments in support of the petition. Respondents filed a timely response to the petition on or about July 12, 2022. Petitioner, in turn, filed a timely reply on or about July 22, 2022.

Pursuant to JRP 15, whenever a person has an "actual controversy" over the construction of a rule, that person may file a petition with the Commission seeking clarification of the applicability of that rule, so long as the petition alleges the existence of an actual controversy and a personal interest in the resolution of the controversy. JRP 15(C).

Here, Petitioner seeks a ruling from the Commission concerning the construction and application of IDAPA 17.02.04.281.02, the predecessor to the current IDAPA 17.01.01.402.02[1].

[1] Throughout its briefs and the exhibits attached thereto, the parties refer to the rule at issue as "IDAPA 17.02.04.281." However, in 2019, the IDAPA was revised and the provision at issue was re-numbered to IDAPA 17.01.01.402. At

In pertinent part, the rules are substantially identical. Petitioner asserts that IDAPA 17.01.01.402.02 (the "Averaging Rule") requires the averaging of impairment ratings where two or more physicians have rendered different opinions on the extent and degree of a claimant's impairment. Respondents assert that prior Commission cases establish that the Averaging Rule has no application where impairment is the subject of current litigation, and that in any event, averaging is not required where it would be manifestly unjust to do so.

For the reasons as set forth below, we conclude that this is the proper subject of a petition for declaratory relief, since we perceive that there is a substantial controversy over the construction to be given to the Averaging Rule. Further a previous Commission decision discussing the Averaging Rule requires reexamination. For the benefits of the parties and other stakeholders, we believe that it is appropriate to take up the issues raised in this matter.

FACTS

Petitioner suffered an internal carotid artery dissection on November 28, 2018, as the result of a work-related slip and fall. Though initially denied, the claim was later accepted by Respondents. The parties agree that there is no current dispute concerning the threshold issues of causation, and the compensability of Petitioner's injuries.

Following the initial denial, Petitioner filed his *pro se* complaint with the Industrial Commission. Counsel for Petitioner entered an appearance on Petitioner's behalf and, on April 19, 2019, filed an amended complaint seeking, among other things, payment of PPI benefits.

On or about September 30, 2020, Petitioner was evaluated by Robert Friedman, M.D., at the instance of Respondents. Dr. Friedman found Petitioner to be medically stable and entitled to a seven percent (7%) whole person impairment rating.

---

all times relevant hereto, IDAPA 17.01.01.402 was the applicable rule. This decision will reference the current rule. It is noted that the two rules are, in pertinent part, substantially identical.

On January 6, 2021, Petitioner was evaluated by James Bates, M.D., at the instance of Petitioner. Dr. Bates found Petitioner to be medically stable and entitled to a twenty percent (20%) whole person rating. After review of Dr. Bates' report, Dr. Friedman opined that Dr. Bates had used the wrong methodology to rate Petitioner's impairment.

Dr. Bates reviewed Dr. Friedman's report, and in a letter dated April 19, 2021 stated that he was unmoved by Dr. Friedman's criticism. Dr. Bates continued to abide by his original twenty percent whole person rating. By letter dated October 21, 2020, Respondents advised Petitioner of Dr. Friedman's seven percent PPI rating, and further advised that Petitioner would receive periodic PPI payments in the amount of $1656.60 per month until the full seven percent PPI rating, i.e., $14,495.25, was paid.

By a notice of claim status dated June 2, 2021, Respondents notified Petitioner that the seven percent PPI rating given by Dr. Friedman had been paid in full. Petitioner's Ex. 12.

In a letter of February 1, 2021, Petitioner requested that Respondents average the impairment ratings of Dr. Friedman (seven percent) and Dr. Bates (twenty percent) pursuant to the provisions of the Averaging Rule.

In their response of March 24, 2021, Respondents stated that they would not average the impairments of Drs. Friedman and Bates because (according to Dr. Friedman) Dr. Bates had used the wrong methodology under the AMA Guides to the Evaluation of Permanent Impairment, Sixth Edition, to arrive at the twenty percent PPI rating. Petitioner's Ex. 8.

Petitioner reiterated his demand for averaging of the two impairment ratings in letters dated April 6, 2021 and May 10, 2021. Petitioner's Ex. 9-10.

In a letter dated May 11, 2021, Respondents again reiterated their refusal to average the PPI ratings. Petitioner's Ex. 11.

In a letter dated June 3, 2022, Petitioner requested "for the last time" that Respondents average the two impairment ratings as required by Averaging Rule, or be prepared to respond to Petitioner's JRP 15 petition. Petitioner's Ex. 13.

The record does not reveal that Respondents replied to the June 3rd letter.

ARGUMENTS OF THE PARTIES

Petitioner argues that the provisions of the Averaging Rule are unambiguous and mandatory. Per Petitioner, Respondents must pay the average of the seven and twenty percent PPI ratings, because the Averaging Rule requires it. As to the provisions of IDAPA 17.01.01.402.03, Petitioner asserts that the Commission has no jurisdiction to consider whether it would be manifestly unjust to require the averaging of the impairment ratings since the complaint in this matter has been assigned by the Commission to a referee. Under *Fuentes v. Cavco Industries, Inc.*, 170 Idaho 432, 511 P.3d 852 (2022), the Commission does not have the power to interject itself into a matter previously assigned to a referee pursuant to the provisions of Idaho Code §§ 72-506 and 72-714. Therefore, for purposes of the instant petition, whether it would be unjust to require compliance with the provisions of the Averaging Rule is not, and cannot, be before the Commission for consideration. Finally, because the Averaging Rule makes the payment of the average of multiple impairment ratings mandatory, and because Respondents have refused, for at least 16 months, to pay the average of the two ratings, an award of attorney's fees is mandated under the provisions of Idaho Code § 72-804.

For their part, Respondents argue that IDAPA 17.01.01.402.02 and .03 must each be given meaning, and neither may be ignored by the Commission. Pursuant to *Pfenning v. City of Couer d'Alene*, IC 2008-036858 (Idaho Ind. Comm. February 5, 2018) where, as here, Petitioner's impairment is disputed and the subject of litigation before the Industrial Commission, the provisions of subsection .02 have no application, since Petitioner bears the burden of proving

entitlement to disability, of which impairment is a component. Even if the Commission determines that the provisions of subsection .02 do apply to this matter, the provisions of subsection .03 afford Respondents relief from the Averaging Rule where insistence on its application would be manifestly unjust. Respondents contend that such is the situation here.

In reply, Petitioner argues that *Pfenning, supra*, was wrongly decided and is contrary to the plainly stated mandate of the Averaging Rule. Petitioner argues that the provisions of IDAPA 17.01.01.402.03 may only be considered for application to this case following a full hearing on the matter by the referee assigned to this case. Petitioner's Reply Brief, p. 10.

DISCUSSION

First, *Fuentes v. Cavco Industries, Inc.*, *supra*, has no application to this matter. Petitioner has filed a complaint with the Commission, by which he seeks further workers' compensation benefits. The Commission has assigned that matter to a referee. Petitioner has also initiated a separate proceeding with his filing of a petition for declaratory relief under JRP 15, by which he seeks the Commission's guidance on a specific legal controversy. The two matters pass in space. *Fuentes* is inapposite.

IDAPA 17.01.01.402 provides:

> **01. Converting Single Rating of Body Part to Whole Person Rating.** Impairment ratings shall be converted in accordance with the Industrial Commission Schedule, Section 72-428, Idaho Code, with the base of five hundred (500) weeks for the whole man.
>
> **02. Averaging Multiple Ratings.** Where more than one (1) evaluating physician has given such ratings, these shall be similarly converted to the statutory percentage of the whole man, and an average obtained for the applicable rating.
>
> **03. Correcting Manifest Injustice.** In the event that the Commission deems a manifest injustice would result from the above ruling, it may at its discretion take steps necessary to correct such injustice.

Subsection .01 provides that impairment shall be paid as a percentage of the whole person. Subsection .02 provides that where more than one physician has rendered an opinion on an injured

worker's impairment such ratings shall be converted to the statutory percentage of the whole man and averaged for the "applicable rating." Nothing in the provisions of subsection .02 specifically requires that the average rating be paid to the injured worker, but such is implicit in the Averaging Rule, and finds further support in the provisions of subsection .03. That subsection specifies that should the Commission deem that averaging the impairments would result in a manifest injustice it may, at its discretion, afford some relief from the provisions of subsection .02. Averaging of impairments could not be unjust to payors absent an expectation that payment be made.

There are several things that are notable about subsection .02. First, the requirements of the rule are mandatory; multiple impairment ratings "shall" be converted to the statutory percentage of the whole person and averaged in order to obtain the applicable rating. Considered in a vacuum, the language is not discretionary. Notably, the obligation to average impairment ratings does not depend on whether or not a complaint has been filed. The obligation to average impairment ratings, and pay the average, appears to arise in any situation in which two different impairment ratings for the same injury have been proposed by two or more physicians.

However, the provisions of subsection .02 cannot be considered in a vacuum. Under IDAPA 17.01.01.402.03, relief from the averaging requirement may be given to a party by the Industrial Commission should it appear that requiring averaging in a particular case would result in a manifest injustice. Under this subsection, the Commission has the discretion to craft a remedy to "correct" such injustice. We turn first to the provision of subsection .02, and the treatment of the Averaging Rule in the recent case of *Pfenning v. City of Coeur d'Alene*, *supra*. We believe it appropriate to start with discussion of that case because Respondents have relied upon it in support of their position that in this litigated case averaging is not required, while the Petitioner decries the decision as completely vitiating the unambiguous charge of the Averaging Rule.

In *Pfenning*, the claimant suffered a work-related injury to his left shoulder on February 13, 2012. He was treated and eventually rated by Dr. Stevens on December 17, 2014 with a ten percent whole person impairment for the left shoulder. On February 27, 2017, the claimant was evaluated by Dr. McNulty (the claimant's expert) who proposed that the claimant was entitled to a twenty percent PPI rating for the right shoulder. The decision does not reveal what payments, if any, were made by surety on the left shoulder impairment prior to the date of hearing. The matter went to hearing on May 11, 2017. At hearing the claimant contended that he was entitled to either the twenty percent PPI rating given by Dr. McNulty, or the average of the ratings given by Dr. McNulty and Dr. Stevens. The claimant relied on the provisions of the Averaging Rule in support of his assertion that he was entitled, at the very least, to the average of the two ratings. Treating this argument, the Commission observed:

> The rules above quoted govern the calculation of impairment in those cases in which Claimant's entitlement to impairment has not (yet) been litigated. It contemplates the payment of the average of two or more impairment ratings given for a particular injury. Impairment is a component of disability, and is a benefit to which Claimant may be entitled under the Act. However, it is well established in a long line of cases that in any proceeding before the Industrial Commission, a claimant has the burden of proving, by a preponderance of the evidence, all facts essential to his recovery. *Ball v. Daw Forest Products Co.*, 136 Idaho 155, 30 P.3d 933 (2001); *Evans v. Hara's Inc.*, 123 Idaho 473, 849 P.2d 932 (1993); *Ellis v. Dravo Corp.*, 97 Idaho 109, 540 P.2d 294 (1975). Therefore, Claimant's burden extends to proof of impairment. The question before us is whether the averaging rule changes this basic understanding. Does it establish a presumption that Claimant is entitled to the average of the two or more ratings that happen to have been given, and shift to Defendants the burden of demonstrating that an averaged impairment rating is not owed? We believe this question must be answered in the negative. The averaging rule is a tool of ministerial convenience intended to be applied before hearing, where medical proof on Claimant's entitlement to an impairment rating may be in conflict, yet some path forward during the pendency of a Commission decision must be identified to treat multiple ratings for a particular injury. This convention has no application where impairment is the subject of a contested proceeding before the Commission following filing of a complaint. To apply the rule in the setting of a litigated case would be inconsistent with claimant's burden of proving all aspects of his claim by a preponderance of the evidence. Reliance on mathematical averaging to prove impairment would substitute a mathematical operation for actual proof of the nature and extent of his anatomic injury. Therefore, we reject reliance on the rule as a substitute for actual proof of impairment.

Pfenning, at ¶103.

We believe that the Commission correctly stated the rule that the claimant bears the burden of proving all elements of his case at hearing, including impairment, a component of disability. And yet, the provisions of IDAPA 17.01.01.402 clearly anticipate that where two or more ratings are given in a case at some point prior to hearing, a surety is obligated to pay the average of the ratings, except where it would be manifestly unjust to do so. The issue considered by the Commission in *Pfenning* was how the recognized principle of claimant's burden of proof can be reconciled with the provisions of the Averaging Rule. We believe that the Commission correctly concluded that the Averaging Rule is a rule of convenience, to be applied during the pendency of the litigation of claimant's entitlement to benefits. However, we believe the Commission erred in stating that the fact of pending litigation of the issue of the extent of impairment excuses the obligation to average impairment ratings prior to hearing.

The Averaging Rule is not intended to supplant a claimant's obligation to prove all elements of his case. Where the Averaging Rule is applied, the claimant still bears the ultimate burden of proving his entitlement to impairment. The Averaging Rule is merely an interim measure to be applied in the months or years before the extent of a claimant's entitlement is actually adjudicated before the Commission. The Averaging Rule recognizes the need to pay something to an injured worker where entitlement to impairment is recognized, yet there may be some dispute over the extent and degree of that impairment. To the extent that *Pfenning* suggests that pending litigation on the extent and degree of an injured worker's impairment excuses compliance with the Averaging Rule, *Pfenning* is hereby overruled.

Yet, it also clear that there will be circumstances where the application of the Averaging Rule may result in the payment of impairment to which a claimant is ultimately deemed not entitled. In *Pfenning*, the Commission determined that the claimant had failed to prove entitlement

to more than the ten percent PPI rating issued by Dr. Stevens. Had the defendants paid the average of the two ratings prior to hearing, they would have effectively paid a five percent impairment rating that they did not owe. However, such overpayment may be recovered in most circumstances. Idaho Code § 72-316 provides:

> **Voluntary payments of income benefits.** Any payments made by the employer or his insurer to a workman injured or afflicted with an occupational disease, during the period of disability, or to his dependents, which under the provisions of this law, were not due and payable when made, may, subject to the approval of the Commission, be deducted from the amount yet owing and to be paid as income benefits; provided, that in case of disability such deduction shall be made by shortening the period during which income benefits must be paid, and not by reducing the amount of the weekly payments.

Under this section, where a hearing on the merits results in a finding that the claimant is not, in fact, entitled to the average of the impairment ratings rendered, the overpayment may be applied against any amount yet owed to the claimant as an income benefit, such a deduction being made by shortening the period during which such income benefits are scheduled to be paid. In *Pfenning*, the claimant was found to be entitled to seventy-five percent disability, inclusive of his ten percent impairment. Had defendants previously paid the average of the two impairment ratings at issue, they could have applied to the Commission for the five percent overpayment to be applied as a credit against their obligation to pay further disability benefits, as anticipated by Idaho Code § 72-316.

IDAPA 17.01.01.402 itself contains another mechanism by which a party may attempt to ameliorate the application of the Averaging Rule. Subsection .03 provides: "[i]n the event that the Commission deems a manifest injustice would result from the above ruling, it may at its discretion take steps necessary to correct such injustice."

IDAPA 17.01.01.402.02 makes the averaging of two or more impairment ratings mandatory, yet the provisions of subsection .03 admit the Commission's authority to give relief from the mandatory Averaging Rule if necessary to prevent a manifest injustice. The facts or

circumstances which might constitute a "manifest injustice" are not defined in the IDAPA. However, of similar language found in Idaho Code § 72-719(3) it has been said that manifest injustice as a ground for review must be construed broadly. *See Page v. McCain Foods, Inc.*, 145 Idaho 302, 179 P.3d 265 (2018). In *Sines v. Appel*, 103 Idaho 9, 644 P.2d 331 (1982), it is stated:

> "Manifest" has been defined to mean: capable of being easily understood or recognized at once by the mind; not obscure; obvious. "Injustice" has been defined to mean: absence of justice; violation of right or of the rights of another; iniquity, unfairness; an unjust act or deed; wrong.

Sines, 103 Idaho at 13, 644 P.2d at 335 (internal citations omitted).

IDAPA 17.01.01.402.03 makes it clear that the Commission is vested with the discretion to make a judgment as to whether or not it would be manifestly unjust to insist that the average of two or more impairment ratings be paid to claimant during the pendency of a claim. Subsection .03 implies the need for an aggrieved party to apply for relief from the provisions of subsection .02 by way of a pleading filed with the Commission. Otherwise, the Commission would have no way of knowing that multiple impairment ratings had been issued or that a potential injustice might arise from the payment of the average of those ratings. The IDAPA is silent as to whether or not prior Commission approval is required before a surety is entitled to refuse to pay the average of two or more ratings that have been rendered. However, as we concluded in treating the provisions of Idaho Code § 72-435 in *Fomichev v. Lynch*, IC 2005-522775 (Idaho Ind. Comm. February 20, 2012), we believe employer/surety must obtain prior approval in order to be relieved of the obligation to average two or more impairment ratings. For a case in which a complaint has already been filed, a motion for relief from the Averaging Rule may be made. In a case where no complaint has been filed, relief from the Averaging Rule may be sought by the filing of a complaint. Attached

as Exhibit A hereto, is the Commission's guidance memorandum on the procedures available to the parties to resolve claims of manifest injustice under IDAPA 17.01.01.402.03.[2]

We will not attempt to describe the circumstances that might warrant relief from the Averaging Rule. Suffice it to say that merely because one of the ratings appears too high as compared to the other does not seem to be grounds for relief since one would expect the proponent of a higher rating to claim the lower rating is simply too low. Here, there is a little more information to consider. Dr. Friedman and Dr. Bates disagree about giving Petitioner additional impairment to reflect alteration of mental status sufficient to warrant a class 2 impairment based on Table 13-8 of the Guides. Both physicians have explained their reasoning. *See* Petitioner's Ex. 8,10. We are unpersuaded that one opinion is obviously right and the other obviously wrong. On the basis of what is before us, we are unable to say that it would be manifestly unjust to require the payment of an average impairment of 13.5%. We intend nothing in this decision to have any bearing on Petitioner's burden of proving impairment in the underlying case.

As noted, we conclude that *Pfenning* was incorrectly decided to the extent it suggests that a surety may ignore the Averaging Rule if it intends to controvert the extent and degree of a claimant's entitlement to impairment at a subsequent hearing. As Petitioner has noted, such an approach would make the Averaging Rule meaningless. The purpose of the Averaging Rule is to arrive at an interim solution for paying divergent impairment ratings for an accepted claim where the ultimate resolution of the extent and degree of a claimant's impairment may be many months down the pike. In most cases, defendants should be able to recapture any overpayments, or, if they are sufficiently aggrieved, apply to the Commission for relief from the Averaging Rule once all

[2] The remedy provided by subsection .03 is available to any party who disagrees that two or more impairment ratings should be automatically averaged per the provisions of subsection .02. For example, an injured worker may believe that the higher rating calculated by his physician should be paid in full, and not diluted by averaging it with a deficient rating calculated by defendant's IME doctor. Defendants may feel just as strongly that the averaging of the two ratings would be unjust, but not because the IME rating is too low.

the relevant impairment ratings are in hand. Generally, where compensability is acknowledged employer/surety does not have the right to unilaterally pay only the lowest of two or more ratings.

While it is clear that the Averaging Rule should apply to accepted claims that involve a dispute over the extent and degree of impairment, it is equally clear that it should not apply to claims that have been denied for one reason or another on matters of threshold compensability. For example, let us assume that a claim is filed for a work related low-back injury. While investigating the claim, employer/surety discovers that the low-back injury actually occurred while claimant was on a weekend hunting trip. Surety denies the claim on the basis that the claimant's injuries did not occur as the result of an accident/injury as defined in Idaho Code § 72-102. IDAPA 17.01.01.305.11 specifies that sureties must make an initial decision to accept or deny a claim within a time certain following receipt of the claim. However, nothing in rule or statute requires payment of benefits following denial of the claim. The expected consequence of a surety's decision to deny a claim is that no benefits will be forthcoming. Of course, a claimant may challenge such denial by the filing of a complaint, but a surety may nevertheless rest on its denial until the compensability of the claim is adjudicated by the Commission. No one would suggest, for example, that having denied a claim, a surety would nevertheless be obligated to pay TTD benefits to the claimant during his period of recovery. To require the payment of income and medical benefits following a surety's decision to deny a claim would make a denial meaningless. However, if following such a denial an injured worker files a complaint for the purpose of contesting the denial, it is likely that in the preparation for a hearing on the matter both parties will solicit opinions on the claimant's impairment, with the potential for conflicting impairment ratings and the potential to implicate the averaging requirements of IDAPA 17.01.01.402.02. However, as with other benefits, there can be no obligation on the part of a surety to pay a PPI award after having denied responsibility for the claim, the provisions of IDAPA 17.01.01.402 notwithstanding.

A closer question is raised by the following scenario: suppose that a claimant suffers a low-back sprain/strain as a result of a lifting episode at work. Even though the claimant has a longstanding medical history of low-back problems, the claim is accepted by surety since the claimant experienced a significant increase in symptomatology following the lifting incident at work. Time loss and medical benefits are paid, but the claimant does not enjoy any significant improvement. Eventually, a surgical recommendation is made, and at this point, surety arranges for claimant's examination under the provisions of Idaho Code § 72-433. The evaluating physician acknowledges that the claimant requires surgery to treat a longstanding L4-5 spondylolisthesis. However, surety's physician does not believe that the accident is responsible for causing any permanent injury to claimant's lumbar spine. He proposes that the claimant suffered a temporary sprain/strain as a result of the accident, and that this condition is wholly resolved. The claimant's ongoing symptoms, need for surgery, and eventual disability are entirely related to his pre-existing condition. The claimant, too, engages a medical expert, who opines that the claimant's low-back condition was permanently aggravated by the subject accident and that the accident is responsible for claimant's need for surgery. Although the claimant had significant evidence of a low-back disease on a pre-injury basis, he had been more or less asymptomatic in the years prior to the subject accident. Therefore, the physician reasons, the subject accident must have caused some permanent injury to the claimant's spine since he has been symptomatic ever since the accident. The surety chooses to rely on the opinion of its expert and denies responsibility for the payment of any additional benefits on the strength of the medical opinion that the claimant's low-back injury was minor and temporary. The surgery is performed anyway, the claimant's medical expenses being picked up by Idaho Medicaid. Time passes. Eventually, the claimant is declared medically stable and ratable. He is again sent to the surety's expert of choice who opines that the claimant has a 10% PPI rating, but sticks to his original opinion that the claimant's work accident caused a

temporary injury only and that his current problem is entirely unrelated to the subject accident. The claimant's expert agrees that the claimant is entitled to a 10% PPI rating but because claimant was asymptomatic prior to the subject accident, the entire 10% rating is attributable to the subject accident. At the end of the day, one physician has effectively proposed that the claimant's 10% impairment is not related to the work accident while another physician has proposed the claimant has a 10% rating referable to the work accident. Should surety be required to pay to the claimant the average of the two ratings?

We believe that this example is not really any different than the first example. Following initial acceptance, the surety denied responsibility for the claimant's injuries on the basis of a medical opinion that the claimant's injuries were not causally related to the subject accident. Surety denied responsibility for the payment of any further benefits and would be allowed to take this position, subject to the Commission's subsequent adjudication of the matter. Again, there is no legal basis to require a surety to pay medical or TTD benefits following a denial, nor is there any reason to treat impairment ratings any differently.

The purpose of the Averaging Rule is to require the averaging of impairment ratings in cases where there is no dispute about the compensability of the claim. In other words, where a claim has been accepted as compensable, and benefits paid, there will yet arise circumstances where different physicians, based on the results of their evaluations and methodologies, will come to different conclusions about the value to be assigned to an injured worker's impairment. It is for these cases that the Averaging Rule is intended.

Let us take another example to illustrate this point. A claimant has significant pre-existing low-back disease. He has been symptomatic off-and-on over the years. He suffers a lifting injury at work which aggravates his low-back condition. The claim is investigated and accepted by the surety. Medical treatment is provided. The claimant eventually goes on to have an L4-5

discectomy. He is eventually pronounced medically stable and ratable. The surety's medical expert examines the claimant and proposes that the claimant is entitled to a 10% PPI rating, but opines that this rating should be apportioned equally between the claimant's documented low-back disease and the effects of the subject accident. The claimant is also evaluated by a medical expert of his choosing who opines that the claimant is entitled to a 10% PPI rating, entirely referable to the subject accident, without apportionment to any pre-existing condition. Therefore, pursuant to IDAPA 17.01.01.402.02, the 5% rating for which surety acknowledges responsibility and the 10% rating given by the claimant's expert should be averaged to require surety to pay the claimant a 7.5% impairment rating. Since the surety has denied responsibility for the 5% impairment which it says is referable to the claimant's pre-existing condition, it cannot be made to pay that impairment pursuant to the Averaging Rule. Of course, the claimant is not required to agree to this denial, and one would expect such a denial to be challenged at the hearing of the matter.

Let us suppose that following a hearing, the Commission rules that the claimant, who bears the burden of proof on the matter of his impairment, has only proved entitlement to the 5% PPI rating identified by the surety's expert as related to the subject accident. However, surety has paid a 7.5% rating pursuant to the provisions of the Averaging Rule. Therefore, it has paid an additional 2.5% impairment that the Commission has decided the claimant is not entitled to. Let us further assume that the Commission has determined that the claimant has disability, inclusive of the 5% impairment, of 15%. These facts leave surety with a remedy for the 2.5% impairment it overpaid. Pursuant to the provisions of Idaho Code § 72-316, the surety may ask the Commission to apply the overpayment to the period of disability owed to claimant.[3] Instead of paying an additional 10% disability, surety would owe only an additional 7.5%.

[3] This typically happens automatically. The Commission decision in the example would probably include a conclusion stating claimant's entitlement to disability (inclusive of impairment) of 15%, with credit to defendent for impairment paid to date.

There are, however, situations in which Idaho Code § 72-316 will not avail a surety. Where a claimant is found to be totally and permanently disabled, there is no opportunity to "shorten" the period of his disability payments, since those payments for total and permanent disability are payable for the life of the claimant. In such a case, the surety who is worried about this possibility may apply for relief under the provisions of IDAPA 17.01.01.402.03, but as we have noted, such motion must be made as soon as the competing impairment ratings are issued. The argument under subsection .03 would be that averaging is manifestly unjust in view of the fact that surety will have no opportunity to be reimbursed or credited for an overpayment if the claimant is eventually found to be totally and permanently disabled. A version of this argument is made in the instant matter. Respondents argue that it would be unjust to require them to pay the average of the impairments at issue. They speculate that (1) Petitioner's impairment will be adjudicated at less than the average of the two ratings and (2) Petitioner will not be found to be entitled to any disability over impairment. In such a hypothetical scenario, Respondents would be unable to recoup any overpayment of impairment under Idaho Code § 72-316, since there would be no income benefits yet due and owing pursuant to an award of the Commission against which the overpayment could be applied. Respondents will be stuck with an overpayment they cannot recoup. The Commission acknowledges that there will be cases in which application of the Averaging Rule may result in an overpayment that cannot be recovered under Idaho Code § 72-316. For such cases relief may be sought under IDAPA 17.01.01.402.03, but something more than speculation is necessary to demonstrate that it would be manifestly unjust to require averaging of impairments.

Situations in which averaging may be unjust can be imagined, but we need not speculate on possible scenarios. Suffice it to say that a mechanism does exist for a concerned party to seek relief from the averaging provisions of IDAPA 17.01.01.402.02 in a case where it may be unjust to insist on strict application of the Averaging Rule for an accepted claim. Of course, a motion

under subsection .03 must be made as soon as the Averaging Rule is implicated, in other words, as soon as two or more impairment ratings for an accepted claim are generated.

Based on the foregoing, we agree with Petitioner that the provisions of the Averaging Rule require Respondents to pay the average of the impairment ratings at issue in this case pending adjudication of the extent and degree of Petitioner's impairment by the Commission; the claim is an accepted claim, and the parties agree that there is no dispute over the compensability of Petitioner's injuries. The dispute is simply over the extent and degree of Petitioner's impairment. Indeed, Respondents should have paid the average of the two ratings as soon as they were issued, or sought relief under the provisions of subsection .03. However, at the time Respondents refused to pay the average of the two impairment ratings at issue, the applicable guidance from the Commission in *Pfenning*, *supra*, provided that where a claimant's impairment is the subject of litigation, the employer/surety need not abide by the averaging rule. Though we overrule this holding of *Pfenning* in this decision, under such circumstances, it would be unfair to entertain Petitioner's request for an award of attorney fees under Idaho Code § 72-804, and the Commission hereby denies the same.

DATED this 30th day of September, 2022.

INDUSTRIAL COMMISSION

Aaron White, Chairman

Thomas E. Limbaugh, Commissioner

Thomas P. Baskin, Commissioner

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

ATTEST:

Kamerron Slay
Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of October, 2022, a true and correct copy of the foregoing **ORDER ON PETITION FOR DECLARATORY RULING** was served by regular United States Mail and Electronic Mail upon each of the following:

JUSTIN AYLSWORTH
P.O. BOX 6190
BOISE, ID 83707
justin@goicoechealaw.com

BRIDGET VAUGHAN
2279 N 20TH STREET
BOISE, ID 83702
bridgetvaughanlaw@msn.com

mm

Kamerron Slay