BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

SHERRI S. CORONADO, Claimant/Petitioner, v. CITY OF BOISE, Employer, Self-Insured, Defendant/Respondent.	**IC 2019-015657** **ORDER DENYING NOVEMBER 6, 2023 PETITION FOR DECLARATORY RULING**

This matter is before the Idaho Industrial Commission upon Petitioner's *JRP 15 Petition for Declaratory Ruling and Affirmative "Arreola" Relief,* which was filed on November 6, 2023. Petitioner argues that pursuant to the Idaho Supreme Court's June 23, 2023 decision in *Arreola v. Scentsy*, Respondent's conduct in unilaterally suspending benefits without a prior Commission order justifies sanctions, attorney fees, and "affirmative relief." The suspension was undertaken pursuant to I.C. § 72-434 after Petitioner failed to attend an independent medical examination, which was scheduled by Respondent and had not been cancelled after Petitioner's objection. The suspension was in place from June 11, 2020, when the Respondent notified Petitioner that benefits would be suspended, to no later than June 9, 2021, when Respondent paid permanent partial impairment for Petitioner's right hip injury. Respondent contests the petition for declaratory judgment, and requests that sanctions be imposed against Petitioner for misrepresentation and that the petition be held in abeyance.

For the following reasons, the Commission denies the petition for declaratory judgment, will not hold the matter in abeyance, and declines to award sanctions or attorney fees to either party.

ISSUES

1. Whether Petitioner's reply brief should be stricken from consideration on the grounds that it was filed without a signature from an attorney of record.

2. Whether issuance of a declaratory ruling under JRP 15 is procedurally proper.

3. Whether *Arreola v. Scentsy, Inc.*, 531 P.3d 1148 (Idaho 2023) applies or controls Petitioner's entitlement to relief in this situation, as well as to similarly situated workers.

4. Whether Petitioner is entitled to affirmative relief under any controlling law, including *Arreola v. Scentsy, Inc.*, 531 P.3d 1148 (Idaho 2023).

5. Whether this matter will be held in abeyance.

6. Whether Petitioner or Respondent is entitled to sanctions.

7. Whether Petitioner's issues may be certified for immediate appeal.

ARGUMENTS OF THE PARTIES

Petitioner seeks an order from the Commission stating that *Arreola v. Scentsy, Inc.*, 531 P.3d 1148 (Idaho 2023), decided in June of 2023, applies to Surety's unilateral suspension of benefits on June 11, 2020. To support this argument, Petitioner argues claimants in situations comparable to that of the *Arreola* claimant must receive similar outcomes. Respondent is required to file a JRP 15 Petition to enforce I.C. § 72-434 and initiate a hearing on the suspension. As Respondent did not respond to the *Arreola* decision by filing a motion to justify the earlier suspension, or paying the benefits previously suspended, Petitioner is entitled to "affirmative relief," an order that *Arreola* applies to Petitioner and similarly situated workers, sanctions and attorney fees.

Respondent argues that there is no actual controversy supporting a declaratory judgment under JRP 15. The Idaho Supreme Court's decision in *Arreola v. Scentsy, Inc.*, 531 P.3d 1148

(Idaho 2023), was prospective only and has no retroactive effect. *Arreola* is limited to the facts of its case. Alternatively, Respondent argues that JRP 22 (enacted September 9, 2023) and the case of *Arreola* do not require Respondent to handle the I.C. § 72-434 suspension differently. Furthermore, no benefits are suspended, no IME exam is scheduled or pending, and Respondent is not seeking to suspend benefits under I.C. § 72-434. Respondent requests that the declaratory petition be held in abeyance until the worker's compensation complaint has been fully litigated. Sanctions should be awarded against Petitioner's counsel for misrepresentation.

On a procedural issue, Respondent has also moved to strike Petitioner's reply brief in this matter, arguing that it was not signed by an attorney of record. Petitioner argues that the reply brief was signed by Justin Aylsworth, who remained an active attorney of record even after a notice of appearance was filed by Michael Kessinger.

FACTS

I. Factual History

1. On May 29, 2019, Petitioner was working as a police officer for the City of Boise, Respondent.[1] Def. Ex. U. During a traffic stop, Petitioner reached inside the vehicle's driver's window, open 4-5 inches, with her left arm. The suspect suddenly began driving away. As the vehicle accelerated, Petitioner was dragged along for an estimated thirty feet or more. Def. Ex. U; Def. Ex. G. Petitioner was largely dragged on her right side and fell onto her right side on pavement before rolling several times. *Id.* She suffered abrasions, contusions, and an injury to her right hip which Respondent found to be a compensable worker's compensation claim. *Id.* The parties continue to dispute the full extent of injury, including whether a left hip condition was caused by

[1] For ease of reference in this decision, the term Respondent will be used in the singular form and will be used to refer both to the City of Boise directly and the third party adjuster that handled the claim on its behalf.

the work accident.

2. Due to her employment and the nature of her work accident, Petitioner's benefits were also subject to the Peace Officer And Detention Officer Temporary Disability Act. Cl. Ex. 16. She continued to receive wages from Respondent in lieu of compensation. Def. Ex. B. Medical benefits were paid. Def. Ex. Z.

3. A total right hip replacement was performed on November 18, 2019, to treat post-traumatic osteoarthritis of the right hip. Cl. Ex. 2; Def. Ex. G.

4. Approaching a year after the accident, on May 5, 2020, Petitioner reported a new sharp stabbing pain in her left hip. Cl. Ex. 3. Treating physician Dr. Colin Poole referred Petitioner for an MRI. Def. Ex. G. Respondent asked Dr. Poole, "[a]re you able to state on a medically more probable than not basis that the new onset of left hip pain and the need for the left hip MRI is related to the industrial accident of 05-29-2019?" *Id.* On May 7, 2020, Dr. Poole checked the box for "No." *Id.* Respondent next asked Dr. Poole, "[i]f the need for the MRI is unrelated, has Ms. Coronado reached medical stability with regard to her industrial injury of 05-29-2019?" Dr. Poole checked the box "Yes."[2] Dr. Poole also indicated Petitioner would need permanent restrictions. Cl. Ex. 4.

5. Four days later, on May 11, 2020, Respondent contacted Petitioner via telephone regarding Dr. Poole's opinion. Def. Ex. H. Via email the same day, Respondent asked Petitioner if the date of June 10, 2020, would be available for an impairment rating evaluation with Dr. Chen. Petitioner did not respond, nor did she respond to a subsequent email on May 14, 2020. The emails were sent to the same address used in other communications with Petitioner.

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[2] This statement is important, as once a claimant attains medical stability, he is no longer in the period of recovery. *Jarvis v. Rexburg Nursing Center,* 136 Idaho 579, 38 P.3d 617 (2001). Idaho Code § 72-408 only provides temporary income benefits "during the period of recovery."

6. In the interim while this exchange occurred, Dr. Poole reviewed Petitioner's left hip MRI and diagnosed Petitioner with left hip moderate osteoarthritis involving the anterior aspect of the left acetabulum, cartilage fissuring involving the femoral head, and anterior superior labral tear. Cl. Ex. 6. The diagnosis was made on May 12, 2020. Surgery was recommended.

7. On May 14, 2020, Dr. Poole wrote to provide "additional clarification" that Petitioner was medically stable, but based on her right hip was still not at medical maximum improvement and was to remain on light duty. Def. Ex. L.

8. On May 18, 2020, the Respondent scheduled an IME evaluation for June 10, 2020, and forwarded Petitioner the appointment information via email and written letter. Def. Ex. H; Def. Ex. I; Cl. Ex. 5. Mes Solutions[3] also provided a notice of the time, date, and location via letter dated the same day. Def. Ex. J.

9. On May 19, 2020, Petitioner responded to Respondent's email notice of the IME examination stating, "I am back to work (light duty) and received all your emails." Def. Ex. K. There was no objection to the IME appointment and Respondent informed Petitioner it would still proceed as scheduled. *Id.*

10. On May 28, 2020, Dr. Poole signed off on a "check-the-box" medical opinion in response to a letter from Petitioner's counsel. Cl. Ex. 6. Dr. Poole checked the box "[y]es," Petitioner suffered a left hip injury as a consequence of the work-related incident. In handwriting, Dr. Poole stated that "[i]n my medical opinion, more likely than not, (L)Hip aggravation [resulted] from trauma (5/29/19), existing OA [exacerbated][4] by trauma." Cl. Ex. 6. When asked if Dr. Poole was recommending a left hip replacement surgery as a reasonable medical means to address the

[3] Mes Solutions or Medical Evaluation Specialists provides independent medical examinations and peer review services.

[4] The handwriting is difficult to decipher, but appears to read as "resulted" and "exacerbated."

left hip injury resulting from the work accident, Dr. Poole checked the box "Yes." *Id.*

11. On June 1, 2020, 11:38 AM, Petitioner provided Respondent with Dr. Poole's opinion, her left hip MRI which had been obtained through her private insurance, and documentation she had surgery for her left hip scheduled for July 1, 2020. Cl. Ex. 6. She asserted an IME was not feasible and stated that "[w]hen I am recovered and am at my MMI, we can reschedule the IME." *Id.*

12. On June 1, 2020, 12:16 PM, the Respondent informed Petitioner that the left hip claim was not accepted, and that Respondent would not be authorizing payment for the left hip MRI or surgery. Def. Ex. M.

13. On June 8, 2020, Petitioner's counsel stated that Petitioner would not attend the IME on the upcoming date, June 10, 2020, "due to pre-surgical obligations/appointments." Cl. Ex. 7. Any IME must be scheduled via the attorney's office. *Id.* Respondent's counsel and Petitioner's counsel exchanged letters about the IME. Cl. Ex. 8, 9. On June 9, 2020, Petitioner's counsel revoked all medical releases. Cl. Ex. 9; Def. Ex. N. Claimant's counsel asserted there was "a scheduling conflict" on June 10, 2020, and stated there was a "time-sensitive pre-surgery appointment." *Id.* No supporting documentation was provided.

14. On June 10, 2020, Petitioner failed to appear for the medical examination. The next day, on June 11, 2020, the Respondent found the failure to attend, with less than two days' notice of unavailability, was unreasonable and terminated benefits for the duration of the obstruction. Def. Ex. N; Cl. Ex. 10. An IME would be rescheduled when authorization to access medical records was again provided. Cl. Ex. 10.

15. Just before July 1, 2020, Respondent attempted to contact Dr. Poole's office for information but was denied access. Petitioner had informed Dr. Poole's office that the claim was

closed and that Respondent's authority to access information was rescinded. Cl. Ex. 13.

16. On July 1, 2020, Petitioner underwent a total hip replacement on her left hip. Cl. Ex. 12.

17. Over the next several months, Respondent's counsel continued to contact Petitioner's counsel in attempts to schedule an evaluation and obtain medical records. Def. Ex. O, P, R, S, T. On March 19, 2021, Respondent sent a notice which stated that Petitioner must provide authorization to access medical records, "[f]ailure to respond may impact your benefits." Def. Ex. Q. A specific reference to I.C. § 72-434 was made in April, (Def. Ex. S), but according to the evidence submitted, no suspension was ever carried out in relation to this statement. The left hip claim had already been denied on June 1, 2020. Def. Ex. M.

18. Respondent ultimately scheduled an independent medical evaluation to be held on May 25, 2021, with Dr. Timothy E. Doerr. Def. Ex. S. Petitioner's counsel informed Respondent that due to the unreasonable discontinuation of benefits under I.C. § 72-434, the fact that benefits had not been reinstated, and Petitioner's full-time job with its professional/legal obligations, Petitioner would not attend. Cl. Ex. 14. Petitioner's counsel also stated it was a violation of law to unilaterally schedule a date.[5] Cl. Ex. 14. Petitioner did not appear for the examination. Def. Ex. V.

19. Dr. Doerr issued an opinion based on record review dated May 5, 2021. Def. Ex. U. He opined that Petitioner's left hip pain was medically more probable than not due to the natural progression of her underlying left hip degenerative joint disease and was unrelated to the May 29, 2019, industrial injury. Petitioner was at medical maximum improvement as of May 7, 2020, and suffered 10% whole person impairment for her right hip injury, with 50% apportioned to

[5] Note that this statement was made prior to the Supreme Court's issuance of *Arreola v. Scentsy, Inc.*, 531 P.3d 1148 (Idaho 2023), and was contrary to the then authoritative opinion issued by the Supreme Court in *Brewer v. La Crosse Health & Rehab*, 138 Idaho 859, 864, 71 P.3d 458, 463 (2003).

preexisting degenerative joint disease. Def. Ex. U.

20. On June 9, 2021, Respondent notified Petitioner that permanent partial impairment would be paid per Dr. Doerr's opinion. The corresponding amount of $10,807.50 was sent in two separate checks, which Petitioner's counsel refused to cash and returned. Def. Ex. V; Def. Ex. Y; Def. Ex. X. Between June 7, 2019, and July 6, 2020, Respondent paid medical benefits in the amount of $49,660.60, for services that occurred up until May 12, 2020. Def. Ex. Z.

21. Over two years later, on October 11, 2023, Petitioner's counsel sent an ultimatum demanding that Respondent "render full compliance" with *Arreola v. Scentsy, Inc.*, 531 P.3d 1148 (Idaho 2023). Cl. Ex. 15. Counsel placed Respondent's liability for Petitioner's left hip injury at minimum to include the "full rate of base salary" under I.C. § 72-1104, 571.5 hours of lost time, and *Neel* costs on the left hip medicals. Cl. Ex. 15.

22. Respondent answered Petitioner's demands in the negative. *Arreola* was decided after the events of the case and was not retroactive in application. Cl. Ex. 16. Petitioner's full salary was paid by the City per I.C. § 72-1104. Permanent impairment had also been paid, although Petitioner refused to cash the check. Respondent disputed all liability for the left hip condition.

II. Procedural History

23. On November 6, 2023, Petitioner filed this petition for a declaratory ruling. Respondent contested the Petition and moved for sanctions against Petitioner for misrepresentation. Respondent later moved to strike the reply brief arguing that it was not filed by an attorney of record. Petitioner had been given an extension of time for filing a reply brief when attorney Michael Kessinger explained Petitioner's original attorney Justin Aylsworth was expected to leave the firm. The motion explained that an extension would permit a new attorney to become familiar with the case. Notwithstanding this request, the reply was filed by the original attorney

Justin Aylsworth.

24. As additional contextual information, on November 16, 2023, Respondent filed a complaint for the May 29, 2019, injury and requested discovery. Petitioner filed a motion to dismiss the complaint which was denied by the referee on December 19, 2023. On January 4, 2024, Petitioner submitted a second petition for declaratory judgment. It challenges whether Respondent may legally file a worker's compensation complaint litigating a worker's right to compensation. As a petition for declaratory ruling, it went directly before the Commission rather than the referee assigned to the complaint. Upon Petitioner's motion, the Commission issued an order that the second petition stayed the complaint proceedings at the time it was filed on January 4, 2024. The additional issues raised by the complaint proceedings will not be decided here and will be resolved in a separate forthcoming decision.

DISCUSSION

I. Petitioner's Reply Brief

25. As a preliminary matter, Respondent has moved to strike Petitioner's reply brief on the grounds that it was not correctly signed by an attorney of record.

26. The pertinent facts for this objection are as follows: Justin Aylsworth was the first attorney to appear on Petitioner's case. He entered his appearance by filing the petition with his firm's caption at the head of the petition, listing Goicochea LLC with his name, and signing the petition himself. Respondent responded to this petition. On November 21, 2023, Michael Kessinger entered the case by requesting an extension of time to file a reply. The motion contained a modified heading for the Goicoechea law firm that replaced Mr. Aylsworth's name with Mr. Kessinger's. It explained that the law firm was winding down, Mr. Aylsworth no longer worked for Goicoechea, and that Mr. Kessinger was entering appearance as Petitioner's new attorney. An extension of time was requested to permit the new attorney to access files. An extension was

granted. On the day of the new deadline, December 15, 2023, Petitioner filed the reply. Rather than being signed by the new attorney however, only Petitioner's first attorney, Mr. Aylsworth, signed the document.

27. JRP 3(E) provides that a pleading, motion, or other paper filed on behalf of a represented party must be filed by an attorney of record. Entering appearance as an attorney does not require any special action. To withdraw however, JRP 14(A) provides that the "attorney of record for a party may be changed or substituted by notifying the Commission and all parties. Approval by the Commission will not be necessary if both the withdrawing attorney and the new attorney sign the notice." However, "[e]xcept as provided above, or by stipulation between an attorney and his or her client, no attorney may withdraw as an attorney of record without first obtaining approval by the Commission." JRP 14(B). "A request to withdraw shall be made by filing a motion, supported by affidavit, with the Commission and served on all parties to the action, including the client." *Id.* There is no prohibition on a claimant retaining multiple attorneys.

28. Here, Mr. Aylsworth was an attorney of record and was qualified to sign the reply brief on Petitioner's behalf for either of two reasons. First, Mr. Aylsworth never withdrew as counsel. While the notice of appearance filed by Mr. Kessinger indicated an informal withdrawal had occurred or was underway, the notice itself was for the purpose of requesting an extension; it was not a motion to withdraw. None of the formal steps required by JRP 14 to withdraw as counsel were taken. Therefore, Mr. Aylsworth remained an attorney of record before the Commission on this case. Second, appearance as an attorney of record is commonly made by filing a document with the appropriate caption and attorney's signature as described in JRP3(E). Filing the reply brief would have been sufficient to enter as an attorney of record. For either reason, Mr. Aylsworth's signature satisfied the requirements of JRP 3(E). The reply will not be stricken.

29. It should be noted that there does not appear to be any bad faith or intent to mislead in the motion filed by Mr. Kessinger, although the matters related to winding down the law firm did not proceed as originally anticipated.

II. Declaratory Judgment Under JRP 15 Is Procedurally Improper

30. Moving to the substance of the petition, the first question is whether issuing a declaratory ruling is procedurally proper. A party may request a declaratory judgment to resolve a dispute with a written petition when there is "an actual controversy over the construction, validity or applicability of a statute, rule, or order." JRP 15(C).

> 1. The petitioner must expressly seek a declaratory ruling and must identify the statute, rule, or order on which a ruling is requested and state the issue or issues to be decided;
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> 2. The petitioner must allege that an actual controversy exists over the construction, validity or applicability of the statute, rule, or order and must state with specificity the nature of the controversy;
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> 3. The petitioner must have an interest which is directly affected by the statute, rule, or order in which a ruling is requested and must plainly state that interest in the petition;

JRP 15(C). A supporting memorandum must also be filed. "The Commission may hold a hearing on the petition, issue a written ruling providing guidance on the controversy or decline to make a ruling when it determines that there is no controversy or that the issue at hand is better suited through resolution in some other venue, or by some other administrative means." *Miller v. Yellowstone Plastics, Inc.*, 100722 IDWC, IC 2019-024650 (Idaho Industrial Commission Decisions, 2022).

31. The issue before the Commission concerns the applicability of Idaho Code § 72-434 as currently interpreted under *Arreola v. Scentsy, Inc.*, 531 P.3d 1148 (Idaho 2023), to the suspension of benefits which occurred from June 11, 2020, to June 9, 2021. The Commission

denies the petition for declaratory judgment. First, the subject matter of the petition is better resolved as a worker's compensation complaint. Second, Petitioner does not have an actual controversy or a direct interest in the answer to this question.

A. The Issues Raised in the Petition Should Be the Subject of a Worker's Compensation Complaint Under JRP 15(F)(4)

32. A declaratory ruling is improper here as the subject matter of the petition ought to be resolved by a worker's compensation complaint.

33. Pursuant to JRP 15(F)(4)(c), the Commission may decline to issue declaratory judgment where "the issue on which a determination is sought is or should be the subject of other administrative or civil litigation or appeal." *Also see Miller v. Yellowstone Plastics, Inc.*, 100722 IDWC, IC 2019-024650 (Idaho Industrial Commission Decisions, 2022), *Bonner General Hospital, Inc. v. Pincenti*, 082415 IDWC, IC 2010-031621 (Idaho Industrial Commission Decisions, 2015) (petition for declaratory ruling was properly the decision of the referee in charge of case management on an issue that was not statutory construction).

34. Here, the substance of the Petition relies heavily on facts of medical entitlement, the dates of maximum medical improvement, and whether Respondent suspended actual benefits. The complexity of these issues is better resolved where facts may be investigated using discovery, and the parties have the ability to obtain expert opinions and testimony. JRP 15 lacks discovery mechanisms. Nor does it provide a robust structure to handle objections and interlocutory issues. Declaratory judgment is intended to resolve disputes over the meaning of a rule, statute, or order. JRP 15 is not an accelerated substitute for filing a complaint and prosecuting a worker's compensation case. When the parties question whether a law is applicable or seek the correct procedure in an ambiguous area, JRP 15 provides a method to obtain an authoritative answer. Where the dispute of the parties is one of fact that involves entitlement to benefits however, the

parties must file a motion to be heard by the assigned referee, first filing a complaint if no case has yet been initiated.

B. Petitioner Does Not Have A Direct Interest Or Actual Controversy in the Resolution of the Current Question

35. A declaratory ruling is further improper here as Petitioner has no actual controversy or direct interest in the issue of whether *Arreola* would apply to a past suspension of benefits.

36. First, no benefits are currently owing to Petitioner for the suspension period regardless of the application of I.C. § 72-434. Per JRP15(C), Petitioner "must have an interest which is directly affected by the statute, rule, or order in which a ruling is requested and must plainly state that interest in the petition." "[A] litigant seeking a declaratory judgment must demonstrate that an actual controversy exists and that the requested relief will provide actual relief, not merely potential relief." *Bettwieser v. N.Y. Irrigation Dist. & Dirs. Richard Murgoitio*, 154 Idaho 317, 326-27, 297 P.3d 1134, 1143-44, (Idaho 2013).

37. To the extent Petitioner's entitlement to benefits under worker's compensation law is conceded, Respondent paid temporary disability pursuant to the Peace Officer and Detention Officer Temporary Disability Act. Medical benefits for the right hip injury were also paid. Petitioner was placed at maximum medical improvement – cutting off entitlement to temporary disability benefits – as of May 7, 2020, which occurred *prior* to the suspension. A year later, Respondent ended the suspension of benefits by sending Petitioner payment of permanent partial impairment ("PPI") pursuant to Dr. Doerr's opinion, which was the first estimate of PPI. No unpaid benefits based on the conceded liability have been identified. Under these facts, Respondent has already paid all benefits owing to Petitioner that would pertain to the period of suspension. In other words, the suspension was a paper tiger. The suspension did not result in the loss of any benefits, and voiding the suspension would not result in payment of any additional benefits.

38. To the extent the parties contest Petitioner's entitlement to benefits, it is Petitioner's burden to prove entitlement, and no such entitlement has yet been proven. Even if all I.C. § 72-434 and *Arreola* issues were resolved in Petitioner's favor, entitlement depends on resolution of issues such as the date of maximum medical improvement, and whether Petitioner's left hip condition was caused by the accident. For now, the benefits sought by Petitioner are merely "potential" relief. Not actual relief. The fact that entitlement to benefits is undetermined prevents declaratory judgment from proceeding.

39. Second, Petitioner has no direct interest in the issues presented due to any loss of a legal right. Petitioner has argued that a surety's unilateral suspension under I.C. § 72-434 would bar Petitioner from filing a claim or motion to contest the suspension, and has cited language from *Arreola* originally given in context of that concern. Claimant's Petition, 5. The loss of a legal right – i.e. the ability to file – would potentially meet the elements for actual controversy and direct interest. This argument is moot however, as Petitioner did not make any attempts to file during the suspension. The suspension ended two years before the present petition was filed, and no bar is even theoretically in place. A complaint to determine Petitioner's right to compensation is currently filed, and all contested issues may be litigated via filing a motion in that forum. The arguable interruption of Petitioner's ability to litigate in the past does not provide the basis to currently proceed with declaratory judgment.

40. Even if the argument is not moot, however, there was never any loss of Petitioner's ability to file a complaint or prosecute her claim. I.C. § 72-434 provides that a claimant may not prosecute a claim while simultaneously making an unreasonable refusal to participate in an IME. Under *Brewer v. La Crosse Health & Rehab,* a surety could unilaterally suspend benefits without an order from the Commission under the authority of I.C. § 72-434 if it determined there was an

unreasonable refusal to participate in an IME. 138 Idaho 859, 864, 71 P.3d 458, 463 (2003) (overruled in 2023 by *Arreola v. Scentsy, Inc.*, 531 P.3d 1148 (Idaho 2023)). However, a surety's determination suspending benefits was not a legally binding adjudication that I.C. § 72-434 applied and had no authority to bar legal proceedings.

41. The Idaho Supreme Court has held that a surety's "assessment regarding a worker's eligibility for benefits does not have the force of a decision and is not the equivalent of a decision issued by the Industrial Commission itself." *Dominguez v. Evergreen Resources, Inc.*, 121 P.3d 938, 943-944, 142 Idaho 7, 12-13 (Idaho 2005). A surety is "simply an insurance carrier." *Id.*at 12, 943. Per *Hewson v. Asker's Thrift Store* 120 Idaho 164, 168, 814 P.2d 424, 428 (1991), it is and was employer's burden to prove that an injured worker has unreasonably refused to participate in a scheduled Idaho Code §§ 72-433 and 434 exam. Had a claimant chosen to contest a suspension or even to ignore a suspension and proceed with the case,[6] it was the surety's burden to defend the suspension before the Commission and prove that I.C. § 72-434 provided grounds to bar further prosecution. Under Idaho Code, it would have been the Commission's jurisdiction and statutory responsibility to make a final binding determination. *See* I.C. §§ 72-707, 712. Respondent's decision to initiate a suspension lacked any authority to bar Petitioner's prosecution of a case before the Commission.

42. Sureties regularly make determinations to accept claims, issue payments, stop payments, deny claims, or authorize medical benefits without input from the Commission. While such decisions have great impact on workers' immediate benefits, they do not carry legal weight before the Commission if contested. Suspending payment of benefits pursuant to I.C. § 72-434

[6] While numerous burden shifting provisions exist in worker's compensation, it is Claimant's burden to prove the central elements supporting an award of benefits. *See Fife v. Home Depot, Inc.*, 260 P.3d 1180, 151 Idaho 509 (Idaho 2011); *Basin Land Irr. Co. v. Hat Butte Canal Co.*, 114 Idaho 121, 754 P.2d 434 (Idaho 1988).

was no different. Therefore, Petitioner was not cut off from legal relief during the period of the suspension. No loss of a legal right exists to establish that there is an actual controversy or that Claimant has a direct interest in resolution of the question presented. Declaratory judgment under JRP 15 is not supported.

III. *Arreola v. Scentsy* Does Not Provide Grounds to Award Petitioner "Affirmative Relief"

43. Even if Petitioner was able to show an actual controversy and direct interest, declaratory judgment could not be granted in Petitioner's favor. The legal question presented by Petitioner is whether *Arreola* requires Respondent to take action to address a past suspension of benefits under I.C. § 72-434.

44. From 2003 to 2023, a surety's suspension of benefits was analyzed under *Brewer v. La Crosse Health & Rehab*, 138 Idaho 859, 864, 71 P.3d 458, 463 (2003), which held that private employers and sureties could unilaterally enforce and execute I.C. § 72-434 without first obtaining authority to do so through an order from the Commission. The Idaho Supreme Court reversed the holding of *Brewer* on June 23, 2023, in *Arreola v. Scentsy, Inc.*, 531 P.3d 1148 (Idaho 2023). The Court held "before any 'suspen[sions]' pursuant to Idaho Code section 72-434 *can* be executed, the Commission must adjudicate the dispute through a hearing." *Arreola*, 531 P.3d at 1155 (emphasis original). In so holding, the Court explicitly stated that "our overruling of *Brewer* applies only prospectively." *Id.* at 1159.

45. When the Idaho Supreme Court stated *Brewer* was overruled only prospectively, it meant that *Brewer* continues to apply to cases determined prior to when it was overruled, and that *Arreola* does not retroactively apply to change the rules applicable to such cases. A Supreme Court case will typically "apply both prospectively and retroactively, but this Court can limit the retroactive application of a particular decision in its discretion." *State v. Brown*, 170 Idaho 439,

445, 511 P.3d 859, 865 (2022); *also see Sanders v. Bd. of Trustees of Mountain Home Sch. Dist. No. 193,* 156 Idaho 269, 273, 322 P.3d 1002, 1006 (2014) (the Court retains "discretion to limit the retroactive application of a particular decision for policy reasons.")

46. In Supreme Court precedent, the phrase "prospective only" is used as an opposite of "retroactive." *See Black v. Peter Kiewit Sons' Co.,* 94 Idaho 755, 758, 497 P.2d 1056, 1059 (1972) ("appellants concede that a state court has the right to decide whether a new rule declared by it shall operate prospectively only or apply also to past transactions."); *Powell v. Spackman*, 7 Idaho 692, 65 P. 503, 507 (1901), overruled on other grounds by *Hawkins v. Winstead*, 65 Idaho 12, 138 P.2d 972 (1943) ("The question in those cases was whether a similar provision was retrospective, or prospective only, and the court held that it was prospective only."); *also see Baker v. Shavers, Inc.*, 117 Idaho 696, 703, 791 P.2d 1275, 1282 (Idaho 1990)(Baker, Chief Justice, concurring and dissenting in part) ("Those were all reasons given by this Court in *Smith v. State, supra*, for making a similar reversal of a longstanding rule of law prospective only. Based upon those same reasons, I believe that a prospective application of *Harrison* is mandated . . . As the Court's opinion today acknowledges, the Court in *Arrington*, while citing the *Harrison* decision, did not address the question of the retroactive application of *Harrison*.")

47. In legal definition, retroactive is defined to mean "extending in scope or effect to matters that have occurred in the past." RETROACTIVE, Black's Law Dictionary (11th ed. 2019). Prospective is defined to mean "[e]ffective or operative in the future" such in the "prospective application of the new statute," a second definition is that it means "[a]nticipated or expected; likely to come about" such as in "prospective clients." PROSPECTIVE, Black's Law Dictionary (11th ed. 2019).

48. The Idaho Supreme Court's use of "prospective only" in *Arreola* appears to be

consistent with its prior usage of the term and common legal usage, and is well understood as the opposite of retroactive. The intent of the language is best read as stating that *Arreola* does not apply to past cases and will only apply to future cases. Consequently, when the Idaho Supreme Court stated *Brewer* was overruled only prospectively, it necessarily meant that *Brewer* continues to apply to cases determined prior to when it was overruled, and that *Arreola* does not change the rules applicable to such cases.

49. Petitioner has argued that similarly situated claimants should be able to obtain the same outcome as the claimant in *Arreola.* However, this argument begs the question of what qualifies as similarly situated. The type of reasoning Petitioner relies upon has previously been rejected by the Supreme Court.

> [T]he appellants argue that because both they and the plaintiffs in *Smith* were injured prior to the decision abolishing sovereign immunity, they are similarly situated, and it is denial of equal protection of the laws to grant a cause of action to the plaintiffs in *Smith* and not to the appellants. In the recently released case of *Dawson v. Olson*, 94 Idaho 636, 496 P.2d 97 (1972), the contention made here was considered and rejected by this Court; as we stated there, 'the person who [successfully] challenges existing legal doctrine can be, and has been, regarded as having thereby set himself apart.' Schaefer, The Control of 'Sunbursts': Techniques of Prospective overruling, 42 N.Y.U.L.Rev. 631, 638 (1967). Since the appellants and the *Smith* plaintiffs are not similarly situated, they do not have to be treated equally. The reasons for making the abolition of sovereign immunity prospective only, except as to the litigants then at bar, are adequately set forth in *Smith* itself (93 Idaho at 808, 473 P.2d 937) and need not be reiterated here.

Black v. Peter Kiewit Sons' Co., 94 Idaho 755, 758, 497 P.2d 1056, 1059 (1972).

50. In accordance with this reasoning, the Commission does not find legal support to apply *Arreola* retroactively on the grounds that Petitioner may factually be in a similar position to the claimant in *Arreola.* This is not changed simply because Respondent may be connected to the surety or claims examiner in the *Arreola* case. *Arreola* does not require sureties or employers to reevaluate past suspensions where benefits have since been reinstated. Sureties and employers are

not required to initiate filings to justify pre-*Arreola* suspensions.

51. As it does not apply retroactively, *Arreola* does not provide grounds to grant Petitioner's request for relief. The suspension at issue in this case ended no later than June 9, 2021, when Respondent notified Petitioner that PPI payments would be made. It quite possibly ended sooner. *Arreola* was not decided until June 23, 2023. Therefore, *Arreola* is inapplicable to Petitioner. While Petitioner may challenge a pre-*Arreola* suspension, the challenge is subject to I.C. § 72-434 as interpreted by *Brewer* and cases such as *Coray v. Idaho Regional Hand & Upper Extremity Center PLLC*, 020223 IDWC, IC 2018-034888 (Idaho Industrial Commission Decisions, February 2023). The petition for declaratory relief is denied.

52. To the extent that historical standards under I.C. § 72-434 and *Brewer* would be applicable to the present case, they are not discussed here for two reasons. First, the issue of whether Respondent reasonably suspended benefits pursuant to I.C. § 72-434 as interpreted by *Brewer* was not raised by either party. Second, resolution of those issues would be a factual inquiry. As discussed above, JRP 15 is not the appropriate mechanism to resolve factual disputes.

IV. The Matter Will Not Be Held in Abeyance

53. Respondent requested as a possible alternative outcome that the matter be held in abeyance. The Commission does not find it necessary to discuss the viability of such an approach as the issues have been decided in Respondent's favor.

V. Sanctions And Attorney Fees

54. The Commission does not find grounds for attorney fees or sanctions. As for Petitioner, *Arreola* does not apply to the present case, and does not provide Petitioner with grounds for "affirmative relief," sanctions, or attorney fees. As for Respondent, Petitioner's argument is selective and interprets much in Petitioner's own favor but does not rise to the level of

misrepresentation.

VI. Petitioner's Request That The Issues Be Certified For Appeal Is Denied.

55. Petitioner requests that the issues be certified for appeal if the Commission determines Petitioner is not entitled to such relief or protection, or otherwise decides against Petitioner. Petitioner's Memorandum, 16. The Commission is not a person who may appeal the judgment under Idaho Appellate Rule 4 on Petitioner's behalf. Petitioner's request that the issues be certified for appeal is denied.

CONCLUSIONS

1. Petitioner's reply will not be stricken.

2. Declaratory ruling under JRP 15 is not proper here as the issues are not appropriate to a declaratory ruling forum, and there is no actual controversy in which Petitioner has a direct interest.

3. *Arreola v. Scentsy, Inc.*, 531 P.3d 1148 (Idaho 2023) does not apply to nor control Petitioner's entitlement to relief in this situation.

4. Petitioner is not entitled to affirmative relief.

5. Neither Petitioner nor Respondent is entitled to sanctions.

6. The matter will not be held in abeyance.

7. The issues are not certified for immediate appeal.

DATED this _23rd_____ day of __February_____, 2024.

INDUSTRIAL COMMISSION

INDUSTRIAL COMMISSION SEAL STATE OF IDAHO

Thomas E. Limbaugh, Chairman

Claire Sharp, Commissioner

Attest:

Kamerron Slay
Commissioner Secretary

Aaron White, Commissioner

CERTIFICATE OF SERVICE

I hereby certify that on 23rd day of February, 2024 a true and correct copy of the foregoing **ORDER DENYING NOVEMBER 6, 2023 PETITION FOR DECLARATORY RULING** was served by email upon each of the following:

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