3-19-2008

Gibson v. Ada County Sheriff's Office Appellant's Brief Dckt. 34368

IN THE SUPREME COURT OF THE STATE OF IDAHO

STACY A. GIBSON,

Claimant-Appellant,

v.

ADA COUNTY SHERIFF'S OFFICE,

Employer,

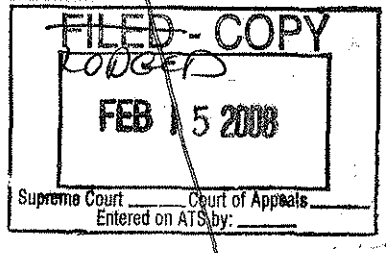
and

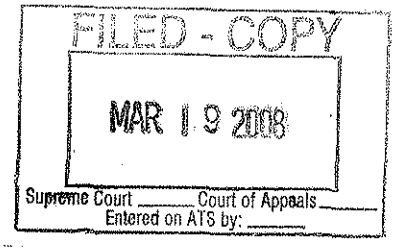
STATE INSURANCE FUND,

Surety,

Defendants-Respondents.

Supreme Court No. 34368





APPELLANT'S OPENING BRIEF

Appeal From The Industrial
Commission Of The State Of Idaho

Douglas A. Donohue – Presiding Referee

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STATEMENT OF THE CASE

I.

Nature Of The Case

This dispute regards critical issues of the Industrial Commission's failure to address the medically diagnosed condition of Post-Traumatic Stress Disorder (PTSD), and a failure to recognize the physical manifestations and physical injury involved, which entitle a claimant to an award of benefits, and specifically as required here, to award Appellant compensation benefits for the injury suffered during the course of her employment with Ada County. The nature of this injury is a "mental-physical" injury, classified and defined under § 72-451 and § 72-102, *Idaho Code*, wherein the Idaho Legislature specifically intended injuries of this nature to be compensable under the law. Appellant's injuries are workplace injuries, accompanied by the presence of physical manifestations and physical injuries, caused from the effects of the traumatic confrontational encounter she underwent, when the erroneous and false accusations, malicious threats of prosecution, threats of incarceration and extreme fear of the permanent loss of her law enforcement career was suddenly exploded upon her, causing a psychological workplace injury of extreme magnitude and resulting physical consequences.

Appellant had dedicated her life to attain a law enforcement career, and made that commitment to Ada County, only then to be obliterated from that sudden and extraordinary encounter brought about from the confrontational and accusatory setting caused when Ada County detective agents unleashed this "accident", leaving physical and bodily injury, accompanied with physical manifestations, that has culminated in a permanent change of the functioning aspects of several components within Claimant's brain, forever causing identifiable

physical changes and damage to the structure of the brain and its normal range of function. The resulting disorder has been determined by medical analysis (clinical and psychometric) to be predominately caused from this horrific trauma from this confrontational event, as diagnosed by Dr. F. LaMarr Heyrend, M.D., an internationally recognized psychiatrist residing in Idaho, who classified Appellant's condition to be Post-Traumatic Stress Disorder (PTSD), with resulting and ongoing objectively confirmed and defined physical injuries and physical manifestations, with permanent physical injury and a permanent medical disability, and an entitlement for her impairment that does approximate 50% loss of normal function.

II.

Course Of Proceedings Below

This matter was processed through the Idaho Industrial Commission, upon the hearing and post-hearing depositions, from which Findings, Conclusions and Recommendation was rendered by Referee Douglas A. Donohue, denying any right to benefits. The series of post-hearing depositions was taken to address aspects of the medical analysis from the experts presented by the parties. A preliminary decision and recommendation was rendered March 2, 2007 (Ag. R., p. 1629-1653), and the Industrial Commission adopted and approved the proposed findings, conclusions, and recommendation on March 16, 2007 (Ag. R., p. 1654-1655). On April 5, 2007, Appellant sought reconsideration of the Commission's final order (Ag. R., p. 1661-1699), but such request was denied by the Commission (Ag. R., p. 1768-1769), from which an appeal was taken to the Idaho Supreme Court from that final order and denial of any benefits to Claimant.

The issues as presented to the Referee at hearing on September 12, 2005, were as follows:

1. Whether Claimant has complied with the notice and limitations requirements set forth in Idaho Code, § 72-701 through Idaho Code § 72-706, and whether these limitations are tolled pursuant to Idaho Code § 72-604.

2. Whether the condition for which Claimant seeks benefits was caused by the alleged industrial accident.

3. Whether Claimant suffered an injury caused by an accident arising out of and in the course of employment.

4. Whether Claimant's condition is due in whole or in part to a subsequent intervening cause.

5. Whether and to what extent Claimant is entitled to the following benefits:

   a) Temporary partial and/or temporary total disability benefits (TPD/TTD);
   b) Permanent partial impairment (PPI);
   c) Disability in excess of impairment; and
   d) Medical care.

6. Whether apportionment for a pre-existing condition pursuant to Idaho Code § 72-406 is appropriate.

7. Whether Claimant's condition is compensable under Idaho Code § 72-451.

By virtue of the March 2, 2007 Decision (Ag. R. p. 1629-1653), the Commission Referee submitted his Findings and Conclusions, contained on pages 24-25 of the Decision, stating:

1. Claimant failed to give timely notice of accident and injury as required by Idaho Code § 72-701, and the running of the statute was not tolled by operation of Idaho Code § 72-604;

2. Claimant failed to show she suffered a compensable accident;

3. Claimant failed to show she suffered an injury caused by an event arising from or in the course of employment;

4. Claimant failed to show she suffered a physical manifestation of a psychological injury as required by Idaho Code 72-451(1);

5. Claimant's claim is barred by application of Idaho Code § 72-451(2);

6. Each of the foregoing conclusions of law independently precludes compensation under the Idaho Workers Compensation Law, and

7. All other issues are moot.

Those Findings and Conclusions were approved by the Commission and became part of the final order entered March 16, 2007 (Ag. R., p. 1654-1655), from which this appeal was taken.

III.
Statement of Facts

In early 1997, Ms. Gibson, Claimant and Appellant herein, committed her lifelong desire to a career with law enforcement. She became employed initially on July 10, 1997 as a Records Technician with the Ada County Sheriff's Office, located at the Boise State University (BSU) Substation (Cl. R., p. 536). Appellant was promoted and transferred to the main Jail Facility October 15, 1998, serving as a Jail Technician (Cl. Ex. 17, p. 3 & p. 33; Cl. Ex. 20, p. 3). At the time of this transfer, Appellant's gross wage was $1,500.00 a month (Cl. Ex.. 17, p. 3 & p. 33; Cl. Ex. 20, p. 3), and the County Payroll Department was directly depositing wages into a joint checking account belonging to Appellant and her husband (Cl. Ex.. 17, p. 36).

The Ada County Payroll Department, by virtue of their use of a flawed computerized payroll system, had created pay period errors in calculating each of Appellant's monthly wage records, and consequently had miscalculated all payroll disbursements to her. In addition to the

failure to properly calculate each of the Jail Technicians' overtime salaries, an event ongoing since 1994 and confirmed to be known to the County, the Payroll Department failed to calculate correctly Appellant's salary for the regular monthly wage due Claimant ($1,575.00) as required from the promotion. Payroll had incorrectly calculated wages by adding together an old wage pay scale of $1,500.00, with an incorrect wage scale of $1,550.00, creating a gross miscalculation and resulting erroneous deposit of $3,050.00 to the direct deposit account (Cl. Ex. 17, p. 4, 14-18; Cl. Ex. 20, p. 3), instead of a single pay scale monthly wage of $1,575.00. As a component of her regular wage scale, there would also be added to it some amount for her accrued overtime wage for the month, though that had always proved to be uncertain and unpredictable, and always was being miscalculated for the historic reasons referenced herein. Payroll performed this "regular" wage error for eight (8) months, unknown to Payroll personnel, unknown to Appellant or her husband, and unknown to the Sheriff's Finance-Budget Director.

The direct deposit process received no accounting analysis from anyone. Appellant had no involvement with the check register, and neither Appellant or her husband opened bank statements on a regular basis, and found no need to balance the account status on any occasion, as they were never notified of an overdraft in its occasional use. The absence of oversight for account reconciliation from Appellant's household stemmed from the fact associated with Appellant's husband's work schedule, as he was on commission sales, selling farm equipment out of state, gone 75% of each month, used cash from ATM withdrawals, and he alone would deposit funds if an overdraft would occur from his withdrawals, which did not occur during the 8 month period regarding the erroneous deposits of Claimant's regular wage. Whatever Mr.

Gibson drew against the account by way of ATM procedure for cash expenditures on out-of-state sales' campaigns, he always deposited that much or more, as he made deposits of his commissions and reimbursed the account for travel expenditures when paid. He was never informed what sums Ada County had automatically deposited into their account. The account would only get a reconciliation when individual tax returns were prepared, but on this occasion, Appellant and her husband had before requested C. Grant King, Attorney At Law, to file a Voluntary Reorganization under Chapter 13 in Federal District Court, Boise, Idaho, under *In Re Gibson*, Case No. 99-01258-TLM, Federal District Court, District of Idaho, because of certain tax disputes Mr. Gibson had ongoing before his marriage to Appellant. Mr. King did file that Petition on May 17, 1999, and Schedule I of that Petition did show the 1999 wage expectation for use in the Plan from Ms. Gibson's contribution to the marriage to be the monthly sum of $1,550.00 (Ag. R. p. 1711-1745; Cl. Ex. 17, p. B-26).

The County's erroneous calculations and deposits constituted a series of violations of the *Fair Labor Standards Act* (FLSA). That included § 211(c), regarding wage record-keeping errors, as the County was utilizing a flawed computer system, and it included a violation of § 207(k), from the ongoing underpayment of accrued overtime wages, actually being a known misuse of the "7k" exemption used by Ada County since 1994, as it was knowingly causing accounting errors on **all** Jail Technician employees for overtime wages. *See Knickerbocker, et al. v. Ada County, Idaho*, Case No. CV 04-288-S-BLW, U.S. District Court, District of Idaho (2007). This Court may take Judicial Notice of the County Affidavits submitted and Decision as was rendered in that matter. These record-keeping practices used to generate regular wages

(affecting § 211(c)), together with the ongoing underpayment of overtime wages (affecting § 207(k)), constituted miscalculations, and resulted in the consequence of a net **over**payment directly deposited to this account, that had no regular oversight by either the receipt(s) or from the source of deposit.

To add to the confusion, from January 1, 1999 through June 30, 1999, Appellant had worked extensively beyond her scheduled regular work shifts, accruing 281 hours of overtime wages, none of which was calculated correctly or properly paid even to this day, as required by FLSA.

On July 19, 1999, the Sheriff's Office Finance-Budget Director, solely by coincidence and unrelated to this ongoing series of errors, discovered other errors occurring in the County's accounting process for unpaid "overtime" wages due Sheriff's Office employees, and Payroll then determined overtime wages were due to nine (9) County employees (Cl. Ex. 21; Ag. R. p. 424-430), and Appellant was identified as one of those underpaid employees, because of the confusion on the combination of the mixed wage issue, where two pay scales were being mingled. It was only from that beginning reconciliation Payroll was then able to discover the errors of overpayment generated and processed for deposit. Reacting in a rather unprecedented manner, and undoubtedly regretful behavior in hindsight, when the Sheriff heard of the errors, he assumed criminal activity was in process because of the way he perceived it had taken place (assumed a conspiracy), and the Sheriff ordered two (2) detectives to conduct an internal criminal investigation (Cl. Ex. 17; Cl. Ex. 20; Cl. Ex. 18; Cl. Ex. 19; and focus was then placed directly and solely upon Appellant. The error was identified later to approximate $8,000.00-$8,500.00 in excess net deposits.

On July 20, 1999, while Appellant was recovering at home because of outpatient back surgery (Def. Ex. 12), and on medical leave from her shift assignments, she received a call from the detectives, requesting she get dressed and come to the Sheriff's Office (Cl. Ex. 17, p. 4).

For two and one-half (2 ½) hours these detectives interrogated Appellant over the accounting error (Cl. Ex. 18 & 19), and threatened her during their intrusive investigative techniques, with such accusations she was a thief (Cl. Ex. 19, p-38.42), a liar (Cl. Ex. 18, p. 9-10; 17-20; 26-27; 33; 48; Cl. Ex. 19, p. 33-34; 36), and had collaborated with members of Payroll to cause overpayments deposited into the account (Cl. Ex. 18, p. 37); threatened her with criminal prosecution for grand theft (Cl. Ex. 19, p. 10-11; Cl. Ex. 15), threatened her with incarceration (Cl. Ex. 19, p. 11), loss of her job (Cl. Ex. 19, p. 37-38, and destruction of her law enforcement career. Appellant was traumatized by the event, devastated by the accusations, and perceived these traumatic threats as now destroying her career, her job, her future, and her very life, resulting in substantial fear from the insanity of these unfounded claims, and now feared for her very safety and security, as County officials were choosing to use her potential right to control the depository status of the account as the essence of some claimed criminal behavior. Appellant was placed on immediate leave (Cl. Ex. 19, p. 43; Cl. Ex. 20, p. 4), though had done nothing wrong under the responsibilities of her employment. Appellant was frightened to the brink of an emotional meltdown and saw herself being "framed" because of the County's irresponsibility and reckless errors, and being told about and seeing what happens to banished law enforcement personnel accused of crimes, she felt abandoned and completely helpless from these outrageous contentions and lingering criminal accusations.

The detectives knew Appellant had no involvement in causing wage payments (Cl. Ex. 19, p. 6; Cl. Ex. 21), long or short, and had no control over funds directly deposited by computer into an account; that all aspects of payroll record-keeping was entirely controlled by the County, as their responsibility, and these detectives were acting under Sheriff orders to engage their interrogation techniques.

Because of the leave status imposed, Appellant's husband secured an attorney to represent his wife, and on July 28, 1999, Vernon K. Smith, her counsel, received a call from R. Monte MacConnell, Sheriff's Legal Advisor, stating the Sheriff wanted Ms. Gibson terminated, and if she refused to resign from the Sheriff's Office, she would be processed with felony grand theft, and would then be fired immediately (Cl. Ex. 3). A cascade of events then followed.

Appellant absolutely refused to resign the hard-earned dedication to a law enforcement career, and because of her stubbornness, she came officially under surveillance by law enforcement officers, stalked by Sheriff detective(s) or officers, whose acts were documented in discovered file records, confirming what she knew had occurred on December 16th and 17th, 1999 (Cl. Ex. 19, p. 7-8), as that surveillance was overtly conducted, believed to be orchestrated to intensely frighten Appellant into seeing her need to resign to avoid being constantly shadowed, as to that point she had refused to resign and refused to accept fault for the County's administrative errors, and persisted in demanding a reconciliation of wages required under FLSA and exercised her right to retain her career.

The initial leave status was converted to "leave without pay", clearly in violation of the County's own Merit System, contrary to Federal law, and in disregard of her expressed agreement to cooperate fully with a reconciliation process and accept pay reduction identified in the County Ordinance (Exhibit H of Cl. Ex. 63), upon reconciliation of the deposits (Cl. Ex. 8, p. 10-11). As she persisted, she was met with threats and fear, and finally fired December 27, 1999, as a further traumatic blow to her future and her career.

At all times prior to July 20, 1999, Appellant enjoyed superb employee status, regarded an exemplary employee, received exceptional and excellent performance ratings, and deemed an excellent asset to Ada County and its Sheriff's Office (Cl. Ex. 27).

From this traumatic encounter in July, 1999, Appellant first was examined by a physician on July 23, 1999, and placed under the care of Dr. Stephen E. Spencer, M.D., for what he described to be "acute depression secondary to situational distress", and "acute depression and anxiety accompanied by **physical manifestations** of elevated blood pressure, migraine headaches, severe rash, sleeplessness, diarrhea, lack of appetite and hair loss, as a result of the July 20, 1999 encounter (Cl. Ex. 39; Cl. Ex. 38; Cl. Ex. 37; Cl. Ex. 36; Cl. Ex. 35; Def. Ex. 11). As the analysis progressed, it was confirmed Appellant was diagnosed to have suffered a psychological workplace injury, by diagnoses undertaken by Dr. Joseph A. Lipetzky, Psy.D., who confirmed Panic Disorder With Agoraphobia (Cl. Ex. 58). She was clinically diagnosed by Dr. F. LaMarr Heyrend, M.D. to be a well-documented case of neurological brain function change and physical injury to the brain from this disorder, defined medically as a Post-Traumatic Stress Disorder (PTSD) (Cl. Ex 42 & 56; Ag. R., p. 893). Her condition continued to degrade from the encounter through the resulting

dysfunction associated from this disruptive brain function and impairment to that of normal brain behavior, as the situation continued to replicate the reintroduction of the trauma, flaring up from the Sheriff's demands for confrontational "informal hearings" (Cl. Ex. 8, August 25, 1999 letter) and the overt awareness intended from the surveillance episodes, and this process of unintended revictimization served to intensify the physical injury and ongoing physical manifestations caused from the changes to the hippocampus and locus caeruleus regions within the brain, impacted from intense trauma of this nature. Dr. Heyrend became her primary treating physician and psychiatrist in 2002, developing treatment through psychotherapy and medication. He saw it critical to engage an outpatient psychiatric treatment program, and she received outpatient medical care from Dr. Heyrend continuously from October, 2002 (Cl. Ex. 42), until he retired in the Fall, 2007, including needed psychotherapy and such medication as required to address this brain function disorder, as he attempted to sooth the degree of resulting damages.

Since the initial diagnosis of PTSD, Dr. Heyrend continued to observe her physical condition and manifestations through ongoing therapy and treatment, and uniquely saw her again become revictimized by certain specific events and documents brought about by the repeated examinations pursued by Ada County's ongoing analysis and counter efforts to defeat a claim for benefits, and he saw the subsequent empirical effects from these examinations, validating his clinical diagnosis. His observations during treatment demonstrated the condition she suffered, and exhibited the full characteristic and nature of the very signature of the disorder as diagnosed by him, and those demonstrable characteristics had confirmed her **physical** injury to the brain and the objective assessment of physical manifestations from the impaired physical components

in the brain, as described by Dr. Heyrend, causing the brain's dysfunctional activity. The process of revictimization produced the unquestioned empirical and objective evidence of the very disorder in question, and its physical properties identified the physical injuries to the brain's function, demonstrated by her reactions to each of these external experiences she endured.

Dr. Heyrend well-expressed his medical opinion in his medical reports (Cl. Ex. 42, 46, 51, 52, 53), letters to Claimant's counsel (Ag. R., p. 859 & 893-904), Affidavits (Ag. R., p. 948-968), and post-hearing depositions, including that of November 17, 2005, confirming the PTSD he diagnosed to be objectively identified to an **absolute medical certainty**, and confirmed her physical brain injury, which he found to be initially severe in nature, became presently considered by him from the benefit of treatment to still have such a physical brain damaging consequence to be at or approximate a 50% impaired state (Cl. Ex. 42; November 17, 2005 Deposition of Dr. Heyrend, page 44, line 17- page 45, line 24). Her condition was medically evident, as it was evidenced by the empirical fact of her reactions when revictimized from the intrusive examinations forthcoming from the initial orders for examination of June 19, 2003 and April 12, 2005, which caused effects of physical manifestations from the examination that produced the clinical consequences (Ag. R., p. 859 & 893-904). This first occurred when confronted by Dr. Cynthia Brownsmith, the psychologist selected by the Employer-Surety, who sought Ms. Brownsmith to "evaluate" Appellant's condition. Appellant was instructed to comply with these orders (Ag. R., p. 150-151; 865-866; 944-945;977-978;1067-1068; 1122-1123; 1188-1189; 1192, entered by the Industrial Commission, and the result was to exhibit the severe reactions in that process, as a consequence. Dr. Brownsmith conducted four evaluations, June 20, 2003, June 24, 2003, July 11, 2003, and again April 14, 2005. These

encounters caused Claimant to relive the trauma on each occasion, and her documented reaction was characteristic of PTSD brain damage, due to psychological consequences because of the physical injuries in the brain, that caused the encounter to trigger the trauma over and over again. This was occurring because she had endured a degree of permanent brain disorder, revealed as described by the testimony of Dr. Heyrend in his November 17, 2005 Deposition. *See* November 17, 2005 Deposition of Dr. Heyrend, page 50, line 13-page 53, line 19; page 42, line 19-page 46, line 2; page 46, line 3-page 51, line 11.

The revictimization by Dr. Cynthia Brownsmith from the April 14, 2005 session was video-taped and preserved for future reference in analysis (Cl. Ex. 61). Dr. Heyrend did review that session in detail (Ag. R., p. 948-968), by virtue of that preservation, and concluded Dr. Brownsmith had triggered the characteristic of this established disorder, and was unable to find even the threshold needed to relieve and manage the stress she had created from that intrusion, serving to demonstrate it was that severe. The examination, from a clinical posture, could be seen as fruitful, as it demonstrated the reactionary consequence of the disorder; however, it was horribly destructive, as it served to leave a "hurricane of trauma" built up like a steaming volcano, and it can be released and soothed only by therapy and medication. Dr. Heyrend had to stabilize Appellant from each of the re-lived experiences, requiring his use of an "alpha-2 blocking agent" medication to address the PTSD anxiety reaction. That particular medication, Guanabenz (Cl. Ex. 41, 42, 75, 77, 79, 81 & 83), is a powerful drug (alpha-2 blocking agent), and serves to intervene the functions of the brain, as the physical injury is caused to the locus caeruleus of the brain, and the medication works to calm the area of damage from the physical injury caused to that portion of the brain. It is effectively used

to reduce anxiety, and structure a pathway for psychotherapy used to modulate the injury (Cl. Ex. 41, 42 & November 17, 2005 Deposition of Dr. Heyrend, page 46, line 5-15).

Dr. Heyrend saw it was a beneficial opportunity to attempt to educate the State Insurance Fund, as they acted as though they did not want to recognize PTSD as a compensable claim. Dr. Heyrend wanted to demonstrate the objective nature of this physical damage and injury to the brain, as he believed he could enable the State Insurance Fund to understand the supportive analysis of an electroencephalogram evoked-potential (EEG) brain map diagnostic testing of Ms. Gibson's brain, and he then chose to conduct that procedure on March 31, 2005 (Ag. R., p. 948-968). He felt it was necessary, as Ada County and the State Insurance Fund were contending the claim lacked a physical injury, and should be viewed only as a "mental-mental" injury, rather than a "mental-physical" workplace injury (Ag. R., p. 948-968). The data collected from Ms. Gibson's EEG (Cl. Ex. 47) was then provided to State Insurance Fund in this further venue format as made available in this stimuli-response, reaction technique, to show true brain function disorder and correlated activity. It served to demonstrate, through this venue, a clear objective observation of brain function, along with objective consequences of stimulated episodes of revictimization, and that clinical analysis presented by Dr. Heyrend demonstrated his PTSD clinically diagnosed condition, which he continued to confirm as well from his ongoing analysis during efforts spent at treatment and therapy. Ms. Gibson has a variety of confirming characteristics (including physical manifestations such as headaches, stomachaches, dizziness, blurred vision, fatigue and excessive sweating and chills) of what has been described to be the well-known conditions of PTSD brain damage patients, all of which Dr. Heyrend concluded had objectively confirmed what he found, and what he

diagnosed in October 16, 2002, when announcing his medical opinion on the injury of Ms. Gibson (Cl. Ex. 42). Dr. Heyrend had declared, by a medical certainty, not just medical probability, that Claimant had suffered a "mental-physical" injury (Cl. Ex. 42; November 17 Deposition of Dr. Heyrend, page 41, line 5-15), recognized as a clinically diagnosed Post Traumatic Stress Disorder, properly compensable under Idaho Workers' Compensation Law.

Ms. Gibson had been specifically diagnosed as a personality type in a unique group of humans that falls into a subset base of people who more easily downgrade into a dysfunctional state in these situations caused from a traumatic disaster, and they more easily develop these neurosis of panic and stress disorders that identify conditions that are clinically diagnosed as Post Traumatic Stress Disorder and traumatic neurological brain function disorders from the physical change within the hippocampus and locus caeruleus that impairs brain function. Ms. Gibson is of a personality trait that responds more sharply to verbal assaults, is of a character that is more intensely engaged, and has a decreased pain tolerance by her emotional structure, and is clearly within that subset and characteristic of human beings that develop this clinically recognized Post Traumatic Stress Disorder (Cl. Ex. 42; November 17, 2005 Deposition of Dr. Heyrend, page 41, line 16- page 44, line 16).

Continuing with his medical treatment and therapy, Dr. Heyrend submitted an evaluation on June 23, 2005, containing a written report and stated in detail:

CLINICAL IMPRESSION/MENTAL CONDITION:

> "As a result of my October 16, 2002 evaluation, I determined Ms. Gibson exhibited symptoms of short-term memory loss, panic attacks, anxiety, hyperreactivity, depression, feelings of loss of self-esteem, and intrusive recollection.

I initially diagnosed Ms. Gibson to be suffering from Post Traumatic Stress Disorder (PTSD), classified as constituting a **"mental-physical" injury**, and **caused as a result of the catastrophic, intrusive and threatening course of conduct utilized by detectives (co-employees if you will), who were ordered to interrogate Ms. Gibson on July 20, 1999.** This condition has not and will not resolve fully. On March 31, 2005, I conducted an EEG on Ms. Gibson to demonstrate an objective means of conducting my ongoing findings that support that clinical diagnosis of PTSD, and to determine the **ongoing extent of her mental and physical injuries**. Findings of that assessment are that Ms. Gibson has lived with the following since the events of July 20, 1999:

- Intrusive memories of the interrogations on a daily basis
- **Sleep disturbances** where she awakens from nightmares in a panic state
- Emotionally distant, withdrawn and isolated from others
- Loss of interest in social and other activities
- Hypervigilance and startled reactions as a daily activity
- Avoidance of activities that arouse memories or trauma, such as anything to do with Ada County and the Ada County Sheriff's Office
- She gets angry and agitated with mixed episodes of depression
- Difficulty with authority figures, and a hard time dealing with others
- An occasional fugue state, accompanied by short-term memory loss and anxiety
- **Headaches, stomachaches, dizziness, blurred vision, fatigue and excessive sweating and chills**
- Panic attacks, flashbacks, feelings of helplessness, paranoia, insecurity and lack of confidence

Ms. Gibson has been traumatized and does experience progressively worsening anger, irritability, difficulty sleeping, and sometimes unprovoked rage frightening to her and to those around her, especially those in her family that have experienced the change. During the first thirteen (13) months following the events of July 20, 1999, Ms. Gibson remained severely traumatized from the experience she suffered and endured, and due to that condition, she remained unemployed until the month of August 2000. During that period, my opinion is Ms. Gibson suffered from Post Traumatic Stress Disorder, to the extent of being Severe. Since then, taking into consideration her medical history, symptoms, interview behavior, EEG and then having stabilized to the degree to be able to maintain some degree of employment, it would indicate she now suffers from Post Traumatic Stress Disorder in the Moderate Range.

Axis I 309.81	Post Traumatic Stress Disorder, Moderate
Axis II 296.3	Major Depressive Disorder
Axis III	None

Axis IV	Occupational and Social Impairments with deficiencies in many areas
Axis V	Global Assessment Functioning 55 (current). In the last year 55 to 65."

(Emphasis added). *See* Cl. Ex. 42

ISSUES PRESENTED ON APPEAL

I.

WHETHER APPELLANT'S PSYCHOLOGICAL WORKPLACE INJURY, RESULTING IN PHYSICAL MANIFESTATIONS AND PHYSICAL BRAIN INJURY, IS A COMPENSABLE INJURY AS DEFINED BY § 72-102(18)(A) THROUGH (C), AND PROVIDED FOR UNDER § 72-451, *IDAHO CODE*.

II.

WHETHER FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION OF THIS REFEREE, TOGETHER WITH THE "FINAL" ORDER OF THE COMMISSION, AND THEIR ORDER DENYING CLAIMANT'S MOTION FOR RECONSIDERATION, WERE ARBITRARY AND CAPRICIOUS ORDERS ENTERED CONTRARY TO LAW.

III.

WHETHER THE REFEREE'S ORDER TO STRIKE EXHIBIT 2 OF DR. F. LAMARR HEYREND'S NOVEMBER 17, 2006 DEPOSITION FROM THE RECORD WAS AN ABUSE OF DISCRETION, ARBITRARY AND CONTRARY TO LAW.

IV.

WHETHER THE CONSTRUCTION, VALIDITY AND COMMISSION'S FORCIBLE APPLICATION OF IDAHO'S WORKERS' COMPENSATION LAW, § 72-433, § 72-434, AND § 72-435, *IDAHO CODE*, IS A DIRECT VIOLATION OF THE STATUTE AND APPELLANT'S RIGHTS UNDER THE DUE PROCESS CLAUSE AND EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT OF THE U.S. CONSTITUTION, AS IT CAUSED CLAIMANT TO BE "REVICTIMIZED".

V.

WHETHER APPELLANT IS ENTITLED TO ATTORNEY FEES AND COSTS, AS A MATTER OF RIGHT AND LAW, FOR ALL PROCEEDINGS BELOW, AND ON APPEAL.

STANDARD OF REVIEW

When reviewing a decision from the Industrial Commission, this Appellate Court exercises free review over questions of law, and reviews questions of fact as needed to determine whether substantial and competent evidence supports the Commission's findings. *See Pierce v. School District #21*, 144 Idaho 537, 164 P.3d 817 (2007); *Stolle v. Bennett*, 144 Idaho 44, 156 P.3d 545 (2007); *Spencer v. Allpress Logging, Inc.*, 134 Idaho 856, 859, 11 P.3d 475, 478 (2000) (citing *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996)). Whether the law was correctly applied to the facts by the Commission is an issue of law over which appellate courts exercise free review. *Konvalinka v. Bonneville County*, 140 Idaho 477, 478, 95 P.3d 628, 629 (2004) (citing *Combes v. State, Indus. Special Indem. Fund*, 130 Idaho 430, 942 P.2d 554 (1997)).

Findings of fact will not be disturbed if supported by **substantial** and **competent** evidence **in the record** to support a Commission's findings. *See Excell Const., Inc. v. State*, 141 Idaho 688, 692, 116 P.3d 18 (2005); *Jensen v. City of Pocatello*, 135 Idaho 406, 412, 18 P.3d 211 (2000); *Zapata v. J. R. Simplot Co.*, 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999); and *Taylor v. Soran Restaurant, Inc.*, 131 Idaho 525, 527, 960 P.2d 1254 (1998). *See also Hutton v. Manpower, Inc.*, 143 Idaho 573, 149 P.3d 848 (2006); *Page v. McCain Foods, Inc.*, 141 Idaho 342, 344, 109 P.3d 1084, 1086 (2005); *Bollinger v. Coast To Coast Total Hardware*, 134 Idaho 1, 4, 995 P.2d 346 (2000); and Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759 (1996).

In a Workers' Compensation claim, a claimant carries the burden of proof to a reasonable degree of medical probability the injury for which benefits are claimed is causally related to an accident occurring in the course of employment.....**The causation must be proved by expert medical testimony**. *See Jensen v. City of Pocatello*, supra. *See* also *Curtis v. M. H. King Co.*, 142 Idaho 383, 387, 128 P.3d 920 (2006; *Bowman v. Twin Falls Const. Co.*, 99 Idaho 312, 317, 581 P.2d 770, 775 (1978); and *Hart v. Kaman Bearing & Supply*, 130 Idaho 296, 299, 939 P.2d 1375, 1378 (1997).

Any findings, conclusions, or decisions of an agency which are found to: **(a)** violate constitutional or statutory provisions; **(b)** exceed the agency's statutory authority; **(c)** be made upon unlawful procedure; **(d)** not be supported by substantial evidence in the record as a whole; **(e)** be arbitrary, capricious, or an **abuse of discretion**; or **(f)** be the result of a **prejudicial infringement of a substantial right of an individual**, are in **violation of Idaho law** and **cannot be sustained**. *See Chisholm v. Idaho Dept. of Water Resources*, 142 Idaho 159, 162, 125 P.3d 515 (2005); *Cooper v. Bd. of Id. State Bd. of Med.*, 134 Idaho 449, 454, 4 P.3d 561, 566 (2000); *see also* § 67-5279(3), *Idaho Code*.

Any erroneous findings and **conclusions on the issue of "credibility"**, and the weight of evidence, which have been **rendered** upon **arbitrary or capricious acts**, **abuse of discretion**, **unlawful procedure**, or in violation of a constitutional or statutory provision, are **inconsistent with Idaho law**, and **subject to review on appeal**, and any **agency decision based upon erroneous findings and conclusions on credibility**, and weight of evidence, **will not be sustained** when the basis is clearly erroneous.

ARGUMENT PRESENTED ON ISSUES ON APPEAL

I.

WHETHER APPELLANT'S PSYCHOLOGICAL WORKPLACE INJURY, RESULTING IN PHYSICAL MANIFESTATIONS AND PHYSICAL BRAIN INJURY, IS A COMPENSABLE INJURY AS DEFINED BY § 72-102(18)(A) THROUGH (C), AND PROVIDED FOR UNDER § 72-451, *IDAHO CODE*.

The Legislative history dealing with what constitutes compensable claims in Workers' Compensation matters is an issue in this case. With the addition of § 72-451, *Idaho Code*, to Idaho Workers' Compensation Law in 1994, the Legislature's Statement of Purpose (RS 03232C1) provided the following guidance:

> "The purpose of the legislation is to clearly state that Idaho Workers' Compensation Laws will **not** recognize what is commonly referred to as the "mental/mental" claim. However, claims for what are commonly called "physical/mental" and "**mental/physical**" **will be recognized**, assuming certain conditions are met. The "**mental/physical**" claims must be of **sudden and extraordinary onset**. All psychological claims, because of their subjectivity, must meet certain elements to be recognized". (Emphasis added).

§ 72-451, *Idaho Code*, thereupon allowed a claimant to be compensated for psychological injuries, disorders, and conditions as follows:

> 1) Such **injuries of any kind** or nature emanating from the workplace shall be compensated only if **caused by accident** and **physical injury** as **defined in section 72-102(18)(a) through (18)(c), Idaho Code**, or only if accompanying an occupational disease with resultant physical injury, except that a **psychological mishap** or event may **constitute an accident** where: (i) it results in **resultant physical injury** so long as the psychological mishap or event meets the other criteria of this section, and (ii) it is readily **recognized and identifiable as having occurred in the workplace**, and (iii) it must be the **product of a sudden and extraordinary event**; and
>
> (2) No compensation shall be paid for such injuries arising from conditions generally inherent in every working situation or from a personnel related action

including, but not limited to, disciplinary action, changes in duty, job evaluation or employment termination; and

(3) Such **accident and injury** must be the **predominant cause** as compared to all other causes combined of any consequence **for which benefits are claimed** under this section; and

(4) **Where psychological** causes or **injuries are recognized** by this section, such causes or **injuries must exist in a real and objective sense**; and

(5) Any permanent impairment or permanent disability for psychological injury recognizable under the Idaho workers' compensation law must be based on a condition sufficient to constitute a diagnosis using the terminology and criteria of the American psychiatric association's diagnostic and statistics manual of mental disorders, third edition revised, or any successor manual promulgated by the American psychiatric association, and must be made by a psychologist, or psychiatrist duly licensed to practice in the jurisdiction in which treatment is rendered; and

(6) Clear and convincing evidence that the psychological injuries arose out of and in the course of the employment from an accident or occupational disease as contemplated in this section is required.

Nothing herein shall be construed as allowing compensation for psychological injuries from psychological causes without **accompanying physical injury**. (Emphasis added).

The terms injury and accident as used in § 72-451, *Idaho Code*, are defined in § 72-102(18), to be as follows:

§ 72-102(18)(a), *Idaho Code*, defines **injury** as:

"a personal injury caused by an accident arising out of and in the course of **any employment** covered by the workers' compensation law".

§ 72-102(18)(b), *Idaho Code*, defines **accident** as:

"an "**unexpected**, undersigned, and unlooked for mishap, or **untoward event**, connected with the industry in which it occurs, and which can be reasonably located with the industry in which it occurs, and which can be reasonably located as to **time when** and **place where** it occurred, **causing an injury**.

§ 72-102(18)(c), *Idaho Code*, states:

> "**injury** and **personal injury** shall be construed to **include** only an **injury** caused **by** an **accident**, which **results in violence** to the **physical structure** of the **body**. (Emphasis added).

Pursuant to Idaho law, the employment needs to be a contributing factor to the psychological and physical injuries forming the basis of the claim. *See Kiger v. Idaho Corp.*, 85 Idaho 424, 430, 380 P.2d 208, 210 (1963), *quoting Eriksen v. Nez Perce County*, 72 Idaho 1, 235 P.2d 736 (1951); *accord, Comish v. Simplot Fertilizer Co.*, 86 Idaho 79, 86, 383 P.2d 333, 338 (1963). Idaho case authority has established that a "claimant's employment **need not be** the **only cause** of disability, but rather that the **job must** have **contributed** to the disability". *See O'Loughlin v. Circle A. Const.*, 112 Idaho 1048, 1051, 739 P.2d 347 (1987).

An analysis of this Claimant's psychological workplace injury begins with a review of the relevant statutory language. In *Luttrell v. Clearwater Co. Sheriff's Office*, 140 Idaho 581, 584, 97 P.3d 448 (2004), the Court held psychological injury claims under § 72-451, *Idaho Code*, are compensable when they meet the following conditions:

a. The **injury** was **caused by an accident** and **physical injury** or occupational disease or **psychological mishap** accompanied by **resultant physical injury**;

b. The injury did not arise from conditions generally inherent in every working situation or from a personnel related action;

c. Such **accident and injury** must be the **predominant cause** as compared to all other causes combined of any consequence;

d. The causes or **injuries must exist in a real and objective sense**; and,

e. The **condition must** be one which **constitutes a diagnosis** under the **American Psychiatric Association's most recent diagnostic and**

statistics manual, and must be **diagnosed by** a psychologist or **psychiatrist** *licensed in the jurisdiction in which treatment is rendered.*

By June 23, 2005, and with the benefit of continuing medical diagnosis, therapy and observations of ongoing encounters resulting in predictable reactions, Dr. Heyrend submitted his evaluation to a medical certainty, and stated Ms. Gibson was suffering from Post Traumatic Stress Disorder (PTSD), classified as constituting a "**mental-physical**" injury, and **caused as a result of the catastrophic, intrusive and threatening course of conduct utilized by detectives** ordered to interrogate Ms. Gibson on July 20, 1999" (Cl. Ex. 42; November 17, 2005 Deposition of Dr. Heyrend, page 41, line 5-15.

The Evaluation Report of Dr. Joseph Lipetzky on April 29, 2004(Cl. Ex. 58), described *the interrogation conducted* on July 20, 1999 by Sergeant Scott Johnson, to be the traumatic cause of Appellant's injuries, and stated, "Detective Johnson did a good job of placing Stacy Gibson squarely in Criteria A for Agoraphobia. Anxiety about being in situations from which escape might be difficult (a felony conviction for embezzlement) or in which help may not be available in the event of having an **unexpected** or *situationally predisposed* Panic Attack or panic like symptoms. (DSM-IV-TR, P.433)" (Cl. Ex. 58, page 13-15.

Ms. Gibson's Workers' Compensation claim has been determined by a physician-psychiatrist and a psychologist to have been predominately caused from the sudden, traumatic and frightful event that occurred on July 20, 1999, within the facility where she worked at the Ada County Sheriffs' Office. That specific, extraordinary, unanticipated and untoward workplace event was the predominant cause of Claimant's resulting physical injuries and physical manifestations that culminated in diagnosis of these clinically recognized injuries of

Panic Disorder and PTSD disorder. Dr. Heyrend's diagnosis confirmed Appellant suffered Post-Traumatic Stress Disorder (PTSD) and since it was predominately caused by the sudden and extraordinary events of July 20, 1999, such an injury is intended to be a compensable injury, regarded to be a psychological workplace injury as defined by § 72-451 and § 72-102(18), *Idaho Code.*

Medical diagnosis and opinions of physicians who treat a claimant **must** be given equal or greater weight to other opinions of physicians (or psychologists) who only see a claimant in preparation for trial, and designed only to challenge the right of benefits in the context of their assignment as a "hired gun". *See McGee v. Lumber*, 135 Idaho 328, 334, 17 P.3d 272 (2000) and *Graves v. American Smelting & Refining Co.*, 87 Idaho 451, 456, 394 P.2d 290, 293 (1964).

Medical testimony presented for a claimant needs only support a claim to a reasonable degree of medical probability. *Langley v. State, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" has been defined as the state of the record "having more evidence for than against." *Fisher v. Bunker Hill Co.*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Magical words are not necessary to show a doctor's opinion was held to provide a reasonable degree of medical probability; the only requirement is the existence of plain and unequivocal testimonial evidence conveying a conviction that events are causally related to the injury. *Jensen v. City of Pocatello*, 135 Idaho 406, 412-13, 18 P.3d 211, 217-18 (2001). A physician's testimony is not required in every case, and medical records may be utilized to provide such source of "medical testimony." *Jones v. Emmett Manor,* 134 Idaho 160, 164, 997

P.2d 621, 625 (2000). *See also Burton v. Beck Cabinet Company, Inc.*, Findings Of Fact, Conclusions, And Order, IC 02-522585 and IC 03-505022, Filed May 11, 2006.

In this claim, Dr. Heyrend has presented medical records, testimony in both pre- and post-hearing depositions, developing objective data to support the claim of PTSD to a degree of **medical certainty, not** just to a degree of **medical probability**. Furthermore, there has been no intervening cause; rather there has been confirming intervening events that have excited the physical manifestations by the ongoing process of revictimization, which serves to identify the full symptomology of the severe physical injury to the normal functionality of the brain, being the classic effect of PTSD, and what took place in this traumatic event.

When determining impairment, the opinions are advisory, and the Commission must decide the benefits a claimant is entitled to receive for any impairment. *See Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989). But the decision cannot be contrary to law, or arbitrary or capricious.

The Workers' Compensation Law is to be liberally construed *in favor* of an employee. *See Reese v. V-1 Oil Company*, 141 Idaho 630, 115 P.3d 721 (2005); *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990); *Sprague v. Caldwell Transportation, Inc.*, 116 Idaho 720, 721, 779 P.2d 395, 396 (1989). The humane purposes which it serves leaves no room for narrow, technical construction. *See Reese v. V-1 Oil Company, supra; Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1966). *See also Burton v. Beck Cabinet Company, Inc.*, Findings Of Fact, Conclusions, And Order, IC 02-522585 and IC 03-505022, Filed May 11, 2006.

Idaho's Workers' Compensation Law does provide for the exclusive remedy for injuries arising out of and in the course of employment. *See Yeend v. United Parcel Service, Inc.*, 104 Idaho 333, 659 P.2d 87 (1982); *Provo v. Bunker Hill Co.*, 393 F. Supp. 778 (D.Idaho 1979); *Tucker v. Union Oil Co. of Calif.*, 100 Idaho 590, 603 P.2d 156 (1979); *Adam v. Titan Equipment Supply Corp.*, 93 Idaho 644, 470 P.2d 409 (1970); *Nichols v. Godfrey*, 90 Idaho 345, 411 P.2d 763 (1966).

When the Idaho Legislature created the Industrial Commission, it did intend for all proceedings to be as "summary, economical, and simple as the rules of equity would allow'". *See Hite v. Kulhenak Bldg. Contractor*, 96 Idaho 70, 72, 524 P.2d 531, 533 (1974) and *Stolle v. Bennett*, 144 Idaho 44, 156 P.3d 545 (2007). *See also* § 72-708, *Idaho Code.* Review of the Commission proceedings must be addressed with that intention in mind, as Commission proceedings are designed to be informal and for simplicity; the primary purpose being the **attainment of justice** in each individual case. *Hagler v. Micron Technology, Inc.*, 118 Idaho 596, 599, 798 P.2d 55, 58 (1990). Industrial Commission proceedings are intended to be simple, accommodating, and **must seek justice**. *Id.* "[T]he Commission has historically been imbued with certain powers that specifically enable it to simplify proceedings and enhance the likelihood of equitable and **just results**." *Id.*

Respondents suggest the "**sudden** and extraordinary event" language contained in § 72-451(1), *Idaho Code*, is defined to mean instantaneous, brief or immediate in nature. The word "**sudden**", however, should be defined to mean "happening without previous notice or with very brief notice; coming or occurring **unexpectedly**; **unforeseen**; **unprepared for**." *See Black's*

Law Dictionary, Revised Fourth Edition, page 1,600. The word "**extraordinary**" is defined to mean "out of the ordinary; **exceeding the usual**, average, or normal measure or degree; **beyond or out of the common order or rule**; **not usual**, regular, or of a customary kind." *See Black's Law Dictionary*, Revised Fourth Edition, page 699.

Where an employer, through its assigned agents, undertakes to conduct the unannounced and sudden events of accusatory criminal investigation, creating a severely heightened trauma and frightened results in a particular worker that triggers a reaction of fear and trauma, reasonably perceived by a person as destructive betrayal, deception and threatening to her safety, life, future, employment and hard-earned career, we have a situation extraordinary, beyond the common order or rule, and unlikely to recur. *See Brown & Root Constr. Co. v. Duckworth*, 475 So.2d 813 (Miss. 1985).

Appellant was unexpectedly confronted by Detective Glenn and Sergeant Johnson, who gruesomely interrogated her (Cl. Ex. 17, 18, 19 & 20) over the County's wage errors, and threatened her by using intrusive criminal techniques, calling her a thief (Cl. Ex. 19, p. 38-42), a liar (Cl. Ex. 18, p. 9-10; 17-20; 26-27; 33; 48; Cl. Ex. 19, p. 33-34; 36), claimed she collaborated with others to cause these overpayments (Cl. Ex. 18, p. 37); threatened her with criminal prosecution (Cl. Ex. 19, p. 10-11; 16), claiming she committed a felony (Cl. Ex. 19, p. 37), said she would be incarcerated (Cl. Ex. 19, p. 11), would loose her job (Cl. Ex. 19, p. 37-38), and suffer the destruction of her career. She was devastated by all of that false pretense and accusations, felt helpless, feared for her personal safety and her career, felt her future and her very life destroyed, caused from County errors, and now expressed in threats by these trained

interrogationists who pummeled unjust threats towards her. She had done none of what they accused her of doing, and perceived herself as being "framed" and to be used as this scapegoat for the County's ongoing record-keeping errors, despite the fact the County had an ongoing accounting problem since 1994. *See Knickerbocker, et al. v. Ada County, Idaho*, Case No. CV 04-288-S-BLW, U.S. District Court, District of Idaho (2007).

Pursuant to § 7.05, Ada County Sheriff's Office Policy Manual (Exhibit C of Cl. Ex. 63), Ms. Gibson had specific protection afforded to her should she become the subject of any internal investigation. Subparagraph 7 of § 7.05, specifically states, "No member will be **subjected** to **punitive action** because of the **exercise** of **privileges granted** under this order or the **exercise** of any **rights** under **the U.S. Constitution, Idaho Constitution, or applicable law**".

Detective Glenn initiated his intense conversation with Appellant on July 20, 1999 (Cl. Ex. 17 & 18), followed with Sergeant Johnson until approximately 5:30 p.m. (Cl. Ex. 19 & 20), and all actions during that period took place at Claimant's workplace in a room at the Ada County Sheriff's Office, located at 7200 Barrister Drive, Boise, Idaho 83704. The event was **extraordinary and sudden**, and endured with threats and accusations for 2 ½ hours. The event happened without Ms. Gibson having prior knowledge the event was going to occur (Cl. Ex. 18), nor provided notice of any subject matter to be discussed, or idea the situation was about to occur. Appellant's exposure to the event was outside any recognizable or identifiable condition of her workplace, and well-beyond the common order or rule of her normal and expected working conditions.

These officers have never admitted it was their intent to injure Claimant. "The words 'out of' have been held to refer to the **origin** and **cause** of the accident, and the words 'in the course of'' refer to the **time**, **place**, and the **circumstances** under which the accident occurred". *See Dinius v. Loving Care and More, Inc.*, 133 Idaho 572, 574, 990 P.2d 738, 740 (1999). "**If there is doubt surrounding whether the accident in question arose out of and in the course of employment, the matter will be resolved in favor of the employee**". *Id.* (Emphasis added).

It is simply not an event inherent in the workplace situation, nor found within the specification of her employment contract. It would not be normal when the event is diagnosed to have caused traumatic and physical brain function changes and physical injury and resulting physical manifestations, diagnosed as a PTSD and Panic Disorder condition, with documented irreversible and permanent physical brain injury.

§ 72-451(2), *Idaho Code*, states:

> "No compensation shall be paid for such injuries arising from conditions generally inherent in every working situation or from a personnel related action, including, but not limited to, disciplinary action, changes in duty, job evaluation or employment termination"

The course of events orchestrated by Detective Glenn and Sergeant Johnson were not actions undertaken as authorized discipline, or to engage any change in duty status, or impose any form of punishment or discipline, as that was not their assignment. They were not there to deliver a job evaluation, and were not authorized to impose any form of personnel related action of any kind. As Sergeant Johnson specifically states in his Sheriff's Case Log No. 1A 99-008, at page 4 (Cl. Ex. 20), "Deputy Butch **Glenn was assigned** to **investigate** the case in regards to **criminal charges**". Because Claimant refused to resign when demand was made upon her counsel on July 28, 1999,

Detective Glenn forwarded his Case Status Report (Cl. Ex. 17) to the Ada County Prosecutor's Office on August 3, 1999, seeking prosecution for grand theft, and on August 9, 1999, the Ada County Prosecutor, Greg Bower, sought to have Ms. Gibson prosecuted for grand theft through the assistance of a Chief Criminal Deputy Prosecutor in Canyon County (Cl. Ex. 16).

After July 20, 1999, Ms. Gibson was never allowed to return to her workplace in the Sheriff's Office (Cl. Ex. 19, page 43). The County escalated her initial administrative leave (suspension), to administrative leave, without pay, on August 25, 1999 (Cl. Ex. 8, p. 8), and then elected to terminate her classified employment after ongoing surveillance activity, on December 27, 1999, as Claimant persisted in her refusal to resign. The acts of Ada County and its agents, from July 20, 1999 through December 27, 1999, were not good faith efforts of Ada County, but rather repeated acts in violation of Appellant's classified employment status under her employment contract, were in violation of the Sheriff's Policy Manual, and violated Claimant's constitutional rights, as no remedy existed through any available forum under State Statute or County Ordinance for review, as the provision(s) were held to be infirm. *See Gibson v. Ada County Sheriff's Department*, 139 Idaho 5, 72 P.3d 845 (2003).

In *O'Loughlin v. Circle A. Const.*, supra, the Court reversed a Commission's decision to deny benefits, holding a claimant's employment need not be the only cause of disability, just a contributing cause.

When an individual sustains PTSD, supported by medical diagnosis and testimony to a medical certainty, the nature and extent of the damage is physical brain injuries by definition, and the physical manifestations from the July 20, 1999 traumatic encounter have become self-

evident and the evidence and diagnosis is sufficient. Dr. F. LaMarr Heyrend, M.D., as a "licensed physician" defined under § 54-1803(3), is eminently qualified to make the PTSD diagnosis he has made of Claimant, and he made the medical findings of **physical** injury to the brain, to a degree beyond that of medical probability, as he objectively documented the integral and inseparable component of PTSD by his EEG analysis, undertaken to address that "extra mile" assurance in his attempt to educate the State Insurance Fund. Individuals, who suffer PTSD, by definition, suffer and exhibit physical manifestations, as well as an element of physical injury to the brain, and medical science has brought that medical fact to the courts, such that the case authority has now declared that to be part of the recognized science to a degree of reliable medical science.

A mental impact or stimulus which caused the result of a distinct physical injury, is considered a "**mental-physical**" injury, and is compensable. *See* Chapter 56.02(1), 3 Arthur Larson, et al., Larson's Workers' Compensation Law. The Digest to Chapter 56 (56.02D), 3 Arthur Larson, et al., Larson's Workers' Compensation Law, is a list of case authorities compiled to illustrate what are considered "mental-physical" injuries, and under what conditions those injuries are found to be compensable under the various state workers' compensation laws.

In *Daniel Construction Company v. Tolley*, 24 Va. App. 70, 75, 480 S.E.2d 145 (1997), claimant's treating physician, Dr. Michael Hoffman, described the physical injury to claimant's brain as follows:

> "[Claimant] suffered a **traumatic experience** that directly resulted in a neurochemical imbalance in his central nervous system. These are changes that occur at a cellular level and are entirely beyond the patient's control. It is shown **throughout** the **medical literature** that **post-traumatic responses** often

> **manifest** themselves in neurochemical changes in the brain. Recent **evidence** from the **National Institute of Mental Health** shows **specific structural changes** within the **neurons** that is **permanent** and **irreversible. Damage is done** to neurosynaptic receptors and serotinergic neurotransmitters which are **extremely difficult to treat**..." Emphasis added.

Relying on Dr. Hoffman's reports, the commission found claimant "suffered from both a brain injury that manifested itself through a psychiatric condition and an actual physical injury to the brain". *Id.* 75.

In *Ligeti v. British Airways*, No. 00-CIV. 2936, U.S. District Court, S.D. New York (2001) (citing *Turturro v. Continental Airlines*, 128 F.Supp.2d 170, 178 (S.D.N.Y. 2001), the court stated:

> "New technology has allowed doctors to perceive that **extreme stress**, ...can actually **change brain cell structure** and **cause** a **specific area of the brain to atrophy**."); *see also Turturro*, 128 F. Supp.2d at 179 ("According to *Floyd*, bodily injury encompasses `a change in the structure of an organ,' . . . . and the **brain's physical architecture** can **transform** during **PTSD**. Although the American Psychiatric Association still classifies **PTSD** as a mental disorder, that classification is not dispositive, and we acknowledge that under some circumstances a **diagnosis** of chronic **PTSD** may fall within the Convention's definition of `**bodily injury**". (Emphasis added).

In *Trinh v. Allstate Insurance Company*, 109 Wn. App. 927, 37 P.3d 1259 (2002), the Washington Court held PTSD, since it is accompanied with physical manifestations, fell within the definition of "bodily injury, and is compensable. The State of Washington follows this majority view that "bodily injury" is not ambiguous in the context of emotional injuries accompanied with physical manifestations. The ordinary meaning "bodily injury" connotes a "physical problem", such as those experienced by *Trinh*, when her PTSD condition resulted in

physical symptoms of headaches, nausea, sleep disorders, and hair loss, constituting physical manifestations of her disorder. The *Trinh* Court stated:

> "...many courts have held that allegations of physically-manifested emotional distress fall within "bodily injury" coverage in the insurance context. **[fn19]** A law review article observes that "[e]ven courts that have concluded that nonphysical harm does not constitute bodily injury have held otherwise when the emotional distress produces discernible physical symptoms."**[fn20]** And, many jurisdictions that deny "bodily injury" coverage for purely emotional injuries have indicated that there would be coverage if an emotional injury were accompanied by physical manifestations. **[fn21]**"

In *Pekin Insurance Co. v. Hugh*, 501 N.W.2d 813 (Iowa 1990), "the court stated:

> [a]ny attempt to distinguish between "physical" and "psychological" injuries just clouds the issue. This is because the medical community now knows that "every emotional disturbance has a physical aspect and every physical disturbance has an emotional aspect."

In *Trinh*, the Court found it helpful to review Federal Court decisions, and looked to those courts in the initial analysis to see how they interpreted the Warsaw Convention, in light of *Eastern Airlines, In. v. Floyd*, 499 U.S. 530 (1991), which consistently concluded an accident victim's PTSD condition constitutes a "physical injury because it results in discernible physical changes to the structure of the brain."

These recent cases of *Daniel Construction Company v. Tolley*, supra, *Ligeti v. British Airways*, supra, *Trinh v. Allstate Insurance Co.*, supra, and *Turturro v. Continental Airlines*, supra, has verified individuals who suffer extreme stress from a traumatic experience, who are then diagnosed with PTSD, did suffer physical damage and specific structural injury to the body and brain, accompanied by resulting physical manifestations as a physical injury, and at times,

determined to be permanent and irreversible. They identified the injury as bodily injury and as physical injury.

In light of the established precedence in Federal Courts, *Trinh v. Allstate Insurance Company*, supra, concluded the term "bodily injury" includes emotional injuries "accompanied by physical manifestations." The *Trinh* court held that physically-manifested PTSD unambiguously and clearly falls within the broad term of bodily injury and physical injury.

In *Weaver v. Delta Airlines, Inc.*, 56 F.Supp.2d 1190 (Mont.1999), the court stated:

> "Weaver **experienced terror** and **felt physical manifestations** of that terror. (Id.) Subsequently, Weaver **sought medical treatment** for **emotional and physical problems attributable to** her flight experiences, and she **was diagnosed** with, and received treatment for, **post-traumatic stress disorder**."
>
> "Weaver asserts that she suffered physical injury and physical manifestations of injury."
>
> "Weaver explains that, in **recent years**, **medical science** has **determined** that **extreme stress causes actual physical brain damage**, i.e., **physical destruction or atrophy of portions of the hippocampus of the brain**. Weaver attaches several articles from scientific journals and expert reports in support. Weaver asserts that her diagnosed **post-traumatic stress disorder** arose from the **physical changes in her brain** brought on during the **extreme stress** of the emergency landing."
>
> "**Weaver has presented evidence of physical injury**. (*See*, e.g., Aff of Dr. Bigler [Doc. No. 19], Ex. 2 at 4 (stating that "Kathy Weaver has a classic case of chronic posttraumatic stress disorder, PTSD has a physical basis [and] this physical basis is secondary to alteration in brain chemistry, physiology, and anatomy."); Aff. Of Dr. Yelvington [Doc. No. 20] at 2 (stating that the "impact on Kathy Weaver of the events which occurred on that flight was extreme and included **biochemical reactions** which **had physical impacts upon** her **brain and neurologic system**.") Weaver has met her burden of showing an absence of any factual basis that the emergency landing physically impacted Weaver's brain."

> "her claim is presented as a **physical injury** and she relies on **recent scientific research** explaining that post-traumatic stress disorder **evidences actual trauma to the brain cell structures.** Weaver's post-**traumatic stress disorder evidences** an **injury to** her **brain,** and the only **reasonable conclusion is** that it is, **a bodily injury.**" (Emphasis added).

PTSD constitutes a physical manifestation of bodily injury or personal physical injury because "PTSD is a biological as well as an emotional and psychological illness." *See In re Air Crash at Little Rock, Ark., on June 1, 1999*, 118 F.Supp.2d 916, 924-25 (E.D. Ark. 2000).

Contrary to Respondents' contention Dr. Heyrend never "tested" or "measured" Appellant's brain to determine what portions of her brain "shrunk", or to what extent shrinkage occurred, suffice it to say, that in 1997, two years before this traumatic encounter occurred and even in the year of the encounter, 1999, there was extensive medical literature and medical science abounding that was available to Respondents from the case authority, as well as the National Institute of Mental Health that did provide conclusive medical science and proof that Post-Traumatic Stress Disorder (PTSD) manifests permanent and irreversible neurochemical changes in the brain through specific structural changes and physical damage to neurosynaptic receptors and serotinergic neurotransmitters in the brain. ***See especially*** *Daniel Construction Company v. Tolley* (1997), supra and *Weaver v. Delta Airlines, Inc.* (1999), supra.

Dr. Lipetzky stated in his Evaluation and Report, page 16 (Cl. Ex. 58), Ms. Gibson met the criteria for Panic disorder "with" Agoraphobia (300.21) following her interrogation by detectives Glenn and Johnson, and "Ms. **Gibson met** the **criteria** for **Panic disorder** "without" agoraphobia (300.01) until the summer of 2002 **based on Dr. Brownsmith's psychological**

evaluation." He also reported there was present the accompanying physical manifestations from his observations and evaluations that included insomnia, weight gain, migraine headaches and nightmares (Cl. Ex. 58).

According to current Diagnostic and Statistical Manual of Mental Disorders, 4th Ed. (soon to be expanded), American Psychiatric Association (DSM-IV), there exists five criteria for PTSD; (1) the stressor or traumatic event; (2) re-experiencing, or re-victimizing symptoms, flashbacks, ruminations about the trauma, and/or nightmares; (3) avoidance behavior; (4) depression or numbing of general responsiveness and arousal (anxiety); and (5) clinically significant distress or impairment in significant areas of life (Def. Ex. 37). When these psychiatric elements are present, an individual suffers unconditionally from PTSD. The physical injury sustained to a claimant's brain is a consequence of the presence of those criteria.

Other physical injuries that **could** occur as a result of such traumatic settings may include heart attack, brain aneurysm, cerebral hemorrhage, stroke, and other seizure related consequences, potentially fatal, and they too are accompanied by physical manifestations or debilitating physical injury resulting from traumatic events. *See* Digest to Chapter 56 (56.02D), 3 Arthur Larson, et al., Larson's Workers' Compensation Law.

Post-Traumatic Stress Disorder is a unique injury, and concentrates on physical changes in the brain that affect brain structure or architecture. It is defined medically and embraced legally, and is being classified as a "mental-physical" injury, and has physical components to the psychological event to include the brain injury and the occurrence of physical manifestations, and those factors have been diagnosed and determined in Claimant's situation by Dr. Heyrend,

who has confirmed not just a medical probability, but to a medical certainty, that Appellant is suffering the injury, and has found an impairment disability rating as identified in his report(s).

Whether a psychologist report, such as from Dr. Brownsmith, meets the definition of a "licensed physician" as defined under § 54-1803(3), *Idaho Code*, is a question of law, and whether a psychologist is qualified to undertake to diagnose and provide testimony as to the presence or absence of PTSD and "physical injuries" caused to a brain of PTSD victims is likely to be of less degree than the qualified physician and psychiatrist, Dr. Heyrend, and acting as Claimant's treating physician. The placement for psychologist licensing is intended to relate to psychological diagnosis defined under § 54-2302(f), *Idaho Code*, and not that relating to physical injuries of the brain.

§ 72-432(1), *Idaho Code*, requires an employer provide an injured employee "such reasonable medical, ... attendance or treatment, ... medicines, ... , as may be reasonably required by the **employee's physician** (Dr. F. LaMarr Heyrend, M.D. and Dr. Stephen E. Spencer, M.D.) or needed immediately after an injury or manifestation of an occupational disease, and for a reasonable time thereafter." There is no difference between failing to provide medical treatment that is "reasonably required by the **employee's physician** or needed immediately after an injury" from failing to provide treatment "for a reasonable time thereafter." In *Burch v. Potlatch Forests, Inc.*, 82 Idaho 323, 327, 353 P.2d 1076, 1078 (1960), the word "treatment" was a broad term employed to indicate all steps taken to **effect a cure** of an injury or disease. *See Reese v. V-1 Oil Company*, 141 Idaho 630, 115 P.3d 721 (205). Once an employer has wrongfully failed to provide medical treatment, "the injured employee **may do so at the**

expense of the employer." *See Reese v. V-1 Oil Company*, supra. Dr. Heyrend has confirmed Claimant needs therapy and medicinal management from her traumatic encounter, resulting PTSD and physical injuries. She continued with his therapy until he retired in 2007.

Appellant and the physician(s) are entitled to compensation under the Workers' Compensation Law for all medical expenses incurred for treatment and for all benefits and entitlements as a result of this injury caused by this accidental encounter "arising out of and in the course of her employment". *See Page v. McCain Foods, Inc.*, supra; *Dinius v. Loving Care and More, Inc.*, 133 Idaho 572, 574, 990 P.2d 738, 740 (1999); *Seamans v. Maaco Auto Painting*, 128 Idaho 747, 918 P.2d 1192 (1996).

Ada County is held to accept its employee with their health conditions as they are; preexisting infirmities do not preclude or eliminate the employee's right to seek workers' compensation, providing the injury was caused by, or at least aggravated or accelerated by the event. *See Page v. McCain*, supra, at 347; *Wynn v. J.R. Simplot*, 105 Idaho 102, 104, 666 P.2d 629, 631 (1983). If injuries combine such that preexisting conditions are also there to cause or prolong disability, impairment or need for treatment, the condition is compensable when the injury is a major factor contributing to the cause of the resulting disability. *See* § 72-406, *Idaho Code*; *see also Everingim v. Good Smaritan Center*, 1996 SD 104, 552 N.W.2d 837.

§ 72-406(1), *Idaho Code*, provides:

> "In cases of permanent disability less than total, if the degree or duration of **disability** resulting **from** an industrial **injury** or occupational disease is **increased** or prolonged because of a **preexisting physical impairment**, the employer shall be liable only for the additional disability from the industrial injury or occupational disease". Emphasis added.

Apportionment of benefits would not be appropriate under § 72-406, *Idaho Code*, as the statute **requires** an apportionment or deduction of a claimant's benefits **only** for the existence of a **preexisting physical impairment**. Appellant did not have any of these physical manifestations or physical damage to her brain before July 20, 1999. The statute does not require a preexisting disability, whether it be physical or psychological. *See Henderson v. McCain Foods, Inc.*, 142 Idaho 559, 130 P.3d 1097 (2006).

Respondents have attempted to utilize the services of paid medical advocates to minimize the nature of Ms. Gibson's physical brain damage, and to build a defense with the use of a non-treating psychologist and a non-treating neurologist to suggest they are not aware of or have not found a physical injury, in an effort to stifle benefits. This strategy merely serves to invite reversible error, as the consequence of PTSD is de facto and equivalent to "brain injury", and that is physical injury as medically and legally defined. To challenge the expert medical opinion of Dr. F. LaMarr Heyrend, M.D., who had unconditionally confirmed Ms. Gibson's PTSD condition, it cannot take away the confirmed diagnosis of PTSD and Dr. Lipetzky's diagnosis of Panic Disorder, both having physical manifestations and findings that confirm to a medical certainty, going well-beyond the burden of "medical probability" only.

In their attempts to challenge these findings, on August 27, 2003, Dr. Cynthia Brownsmith, the psychologist advocate, submitted her evaluation (Cl. Ex. 62), and after review of that report, Appellant's counsel sent Dr. Brownsmith a lengthy letter on October 29, 2003, challenging the assessment upon which it was based, and objecting to the baseless opinions in her report, as it was seen to be false and misleading (Cl. Ex. 63). Dr. Brownsmith was invited to respond, and it was

anticipated she would correct her report so as to properly reflect facts and address the medical science and issues involved, but no response was received, and no corrections were made.

Of interest, and to emphasize the overreaching involved, even before Ms. Gibson's appointment, Dr. Brownsmith circulated a purported "curriculum vitae" to include this case determination. (Cl. Ex. 59, p. 9). It fictitiously claimed Dr. Brownsmith had "forensic psychology experience" with Ms. Gibson. That was a *faux pas* of major magnitude, as Dr. Brownsmith did not even speak to Ms. Gibson until June 20, 2003. Based upon that pretense, Appellant's counsel addressed her misstatement in an October 29, 2003 letter to Dr. Brownsmith, and the only consequence was a new circulation, eliminating the false claim, and stating the "forensic psychology experience" would be an upcoming event involving a Workers' compensation claim (Cl. Ex. 60).

Of grave concern, and we trust will be recognized by this Court, is the insincere attitude of Respondents, to use a strategy to ignore medical science and to develop a strategy to combat the true physical injury medical science has confirmed PTSD patients unconditionally do suffer, and such a strategy could only be undertaken for the purpose to insulate Ada County from liability from its rather poor choice of conduct that creates extreme psychological trauma from such trauma inflicting encounters. There is no credibility in a "forensic evaluation" that ignores science, and is based on deception and falsehoods, and undertaken at an expense to the State Insurance Fund to obtain a non-qualified analysis as contained in a psychology report to defeat a valid claim. This flawed effort to impugn Ms. Gibson, both as to her character, her brain function injuries and physical manifestations, is grievous misconduct by an advocate, being a psychologist who may not

even be allowed to give an opinion on physical injuries as she may not be one qualified to render diagnosis on the injuries to the brain, but nonetheless advancing a false evaluation and misplaced opinions to discredit the professionally documented condition from this disorder by a highly experienced figure on the subject of PTSD and other organic disorders in this medical community. The effects of her evaluation with the encounter, however, did serve to confirm the PTSD condition, as it degraded Appellant's brain functioning to a state of rumination, and caused a serious consequence of revictimization, having thereby demonstrated the very consequence that occurs in PTSD injury victims, something they apparently failed to understand, does occur when doing what they did.

To complicate this approach, and to further demonstrate their lack of understanding of the medical science, Appellant was forced again to be revictimized by Dr. Brownsmith on April 14, 2005, when Ms. Gibson, against the specific and declared medical concerns and advice of Dr. Heyrend, was required to endure more contact with Respondents' paid advocate (Cl. Ex. 42, 43 & 44; **see especially** Cl. Ex. 61). The VHS video recording of this examination confirmed the uncontrollable reaction forthcoming from this intrusive conduct by Dr. Brownsmith. Ms. Gibson ruminated significantly in the confrontation. Appellant was forced by the Commission Order to attend that "re-evaluation" on April 14, 2005 (Ag. R., p. 865-866), and Dr. Heyrend, as the treating psychiatrist, went on record to express his medical opinion any entry of such an Order, compelling Ms. Gibson to be again confronted and "evaluated", would serve only to again revictimize her, as it cannot be discounted the fact that would be the most probable result from her injuries, and it would

cause another relapse and derailment of his efforts and accomplishments made toward the goal of reducing the effects of her brain damage (Ag. R., p. 948-968).

After that evaluation, Dr. Heyrend was required to undergo medical intervention once again and stabilize Ms. Gibson from visiting that traumatic episode, and again requiring greater use of medications to balance the physical injury caused to the deep structures of Ms. Gibson's brain (locus caeruleus), to temporarily reduce her anxiety, and structure a pathway for more psychotherapy sessions. It was now becoming a further medical concern to Dr. Heyrend, if this revictimization should be allowed to happen over and over again, defeating his efforts at her recovery with use of psychoanalysis and medicinal treatment of her injury, he would need to consider action to address their conduct. On May 10, 2005, in an effort to avoid his need to go to the State Board of Medicine for assistance, Dr. Heyrend presented his Affidavit and stated it was his medical opinion any further advocacy by more intrusive examinations would only serve to revictimize Ms. Gibson, and it had the clear potential to cause permanent harm to her mental, emotional and physical health (Ag. R., p. 948-968). This unorthodox and intrusive intervention, however, was allowed to happen one more time.

Dr. Heyrend's perception, from his medical awareness and scientifically assured research, was precisely correct, as Appellant's reactions proved to be absolutely consistent with her PTSD symptomology, and each of Dr. Heyrend's concerns were born out and well-founded by the consequence of Respondents' efforts, and it served to demonstrate the extensive awareness he had, based upon his extensive study and practice of PTSD injuries. The Commission demonstrated a complete lack of understanding or ability to deal with the realities of the PTSD disorder, and we

respectfully presume, out of a complete lack of understanding, did then order Ms. Gibson to see yet another medical advocate hired by Respondents, which served to produce another revictimization from that advocate, Dr. Richard Wilson, M.D., and to add further insult to this ongoing relentless injury, even **before** he even **saw** her, he submitted a "Health Insurance Claim Form", requesting payment of $1,266.00, and also chose to opine, "**patient's condition is not related to employment**" Cl. Ex. 66). This reflects even better advocacy at its finest moment, as it was done before Dr. Wilson ever spoke to, saw or met Appellant. How could it get much more obvious? To add further insult to ongoing physical injury, Dr. Wilson then provided an Affidavit on May 11, 2005, and stated, there "may be evidence of a neurological problem, namely that Mrs. Gibson may have complex partial epilepsy", an event that had no probable medical history (Cl. R, p. 983). There is **no** medical diagnosis to support even a medical probability that Claimant has or had "complex partial epilepsy". Appellant has no family history of epilepsy, no medical diagnosis or symptoms to assume that, yet that is the statement generated from this paid advocacy.

The PTSD and Panic Disorder conditions have a specifically identifiable physical manifestations and physical disability components associated with it, caused from the damage resulting to the brain's functionality, and that dysfunction has been especially described by Dr. F. LaMarr Heyrend in his November 17, 2005 Deposition, identified in his medical records, demonstrated very well in his extensive research documentation he compiled from the medical analysis and literature available on the subject of PTSD, contained in Exhibit 2, made part of Dr. Heyrend's November 17, 2005 Deposition (page 50, line 13-page 53, line 19; page 42, line 19-page

46, line 2; page 46, line 3-page 51, line 11), and from the consequences of Respondents' repeated acts of revictimization. Exhibit 2 is made a specific issue as well in this appeal.

VALIDITY AND TREATMENT OF PTSD DIAGNOSIS

It does require a medical expert knowledgeable in PTSD phenomena to conduct the in-depth review of a patient's condition to establish a treatment regimen and a diagnostic methodology (Def. Ex. 38). *See also* § 72-451, *Idaho Code.* According to the Diagnostic and Statistical Manual of Mental Disorders (DSM-IV), 4th Ed. (soon to be expanded), the American Psychiatric Association has identified those five criteria for PTSD mentioned earlier; (1) the stressor or traumatic event; (2) re-experiencing, or re-victimizing symptoms, with flashbacks and ruminations about the trauma, and/or nightmares; (3) avoidance behavior; (4) depression or numbing of general responsiveness with anxiety); and (5) clinically significant distress and impairment in significant areas of life (Def. Ex. 37). When this basic criteria is present, an individual is diagnosed to have PTSD, and the physical manifestations and brain dysfunction becomes a resultant component of that disorder. *See also* Deposition of Dr. F. LaMarr Heyrend, M.D., page 5, line 17-page 27, line 15.

The traumatic event causes the traumatic stressor, and that typically involves some type of actual or threatened injury or assault. Where there is some fear of serious injury or threat to the physical integrity of the individual, these situations constitute traumatic stressors (Def. Ex. 38).

Psychometric or mental measurement instruments are useful and valid means to objectively demonstrate the symptomatic criteria for PTSD. Data from psychometric tests are

used to develop objective validation of diagnostic assessments of PTSD. The psychometric measures are often used to supplement and objectively substantiate the degree of findings gleaned from interview assessments and other clinical sources of diagnostic data.

A critical component of diagnosing PTSD is the patient's level of functioning pre- and post-trauma, as that view will address what has become significantly different. Changes often observed as a result of PTSD include the deterioration of concentration, loss of a former achievement level, and the erosion of work performance, and a presence of a worsening in aspects of physical health, changes in interpersonal relationships, seclusion and loss of interest in leisure activities and family role functioning.

Electroencephalograms (EEG) have been utilized by these experts for modeling and clinically mapping aspects of brain activity, and taking "snapshots" of activity will find symptoms of the physical change present in patients who are suffering extensively from conditions such as Post-Traumatic Stress Disorder, Schizophrenia, Attention Deficit Hyperactivity Disorder, advanced signs of alcoholism, and neurophysiology resulting in learning disabilities, and explosive behaviors in adolescents.

Dr. Heyrend had chosen to make this mental and physical disorder a major part of his life-long history in the analysis of complex psychiatric behavior and physical manifestations of injury, and has chosen to use psychometric tests in his study of the condition, and has documented his analysis with over 10,000 (yes, ten thousand) EEGs of patient analysis (Cl. Ex. 41), and has utilized that mechanism to objectively confirm the degree of the traumatic impact to show the presence of physical injury, so he could better determine a preferred method of

treatment and intervention. EEG neurotherapy and neurofeedback is a well-established process, and has become an accepted method to get at an objective analysis of the brain condition for treating PTSD military veterans (Cl. Ex. 49), which has become a well-known venue of study and environment of this trauma analysis, due to the levels of stress and development of disorders from acute and chronic stress. Their study of such a vast assessment of the neurological conditions of patients has confirmed the physical damage to the brain as part of the basis of this medically recognized scientific fact

The "mental-physical" injury is well-accepted in medical and legal fields, and is a resultant deterioration of a physical state caused by a psychological or psychiatric confrontational event that arises out of some perceived trauma, more susceptible in some than in others, and does occur during the course of employment, travels, combat, or any perceived hostile environment or threat of any particular venue when trauma enters the equation.

Dr. Heyrend's medically diagnosed opinion was well documented, and comes from years of analysis and treatment of this disorder and other physical and behavioral disorders, and based upon clinical signs he observed, responses from intrusive examinations, victimized reactions and ruminations, observing and documenting physical manifestations, understanding characteristics from viewing mental activity and assessing physical resultant injuries, detailed analysis and attention given to the criteria addressed in the DSM-IV, and his EEG analysis that has objectively demonstrated the effects of Post-Traumatic Stress Disorder (PTSD) upon brain function, confirming brain function impairment. He has had the benefit of ongoing observations as the treating physician during his years of providing treatment and therapy to address the disorder and the physically

challenged condition. He has given a medical opinion, to a medical certainty, Appellant has sustained a PTSD injury, a "**mental-physical**" injury, with resulting physical manifestations, caused as a result of the catastrophic, traumatic, abrasive, intrusive and threatening course of conduct utilized by County officials in this accusational interrogation setting conducted July 20, 1999, an unfortunate consequence of stress where detectives elected to go grossly beyond any beneficial and intended focus of their inquiry, all too much like a military forward accusatory style of interrogation, to frighten the subject, and set into motion a course of psychological ramifications that has left this individual so devastated as to suffer a permanent physical change in the brain from the intensity of the trauma, causing her to become physically impaired and disabled as a result, to a degree of being diagnosed to a level of approximately 50% loss of a normal human behavioral function with a resulting permanent impairment (November 17, 2005 Deposition of Dr. Heyrend, page 43-46).

Dr. Heyrend's forty-eight years of continuous, in-depth service to the community as an intense practicing physician and psychiatrist in Idaho, has made him a nationally recognized and published expert on these intriguing forms of brain disorders, and his medical opinion is the supporting basis of Appellant's PTSD injury (Cl. Ex. 40).

It has become known, in recent months, that the "class motto" of the recently graduating Class of 2007 from the POST Academy (training school for law enforcement officers), has been publicly announced to be: "**Don't Suffer PTSD; Go Out And Cause It**." That well demonstrates the POST Academy has some awareness of stress injuries, and its effects on human behavior. Hopefully, this class motto does not become part of the expected policy or practice of

our law enforcement agencies, to describe their workplace behavior or their treatment of the general public, but it demonstrates a level of awareness that overzealous conduct may be found in the training behavior, and that is a driving force in investigators, and consequences like this suggest such behavior might be better suited for hard-minded use at Guantanamo Bay, rather than being used on soft-spoken gentle-minded loyal County employees in Boise, Idaho.

II.

WHETHER FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION OF THIS REFEREE, TOGETHER WITH THE "FINAL" ORDER OF THE COMMISSION, AND THEIR ORDER DENYING CLAIMANT'S MOTION FOR RECONSIDERATION, WERE ARBITRARY AND CAPRICIOUS ORDERS ENTERED CONTRARY TO LAW.

Unfortunately for Appellant, the Referee assigned to this case has contradicted the provisions of § 72-708, *Idaho Code*; the case authority identified in *Hite v. Kulhenak Bldg. Contractor*, 96 Idaho 70, 72, 524 P.2d 531, 533 (1974); and the latest authority of *Stolle v. Bennett*, 144 Idaho 44, 156 P.3d 545 (2007). These Commission proceedings have become "circumstantial", "complex" and "costly", and does suggest to Appellant to be the result of an abuse of discretion by the Commission to "justify" denial of Worker's Compensation benefits to PTSD patients, contrary to the stated purpose of Idaho's Worker's Compensation Law. Appellant does challenge the Referee's Findings, Conclusions and Recommendation (Ag. R., p. 1629-1653), the final Order of the Commission (Ag. R., p. 1654-1655), and the "rubber-stamped" denial of Appellant's Motion for Reconsideration (Ag. R., p. 1768-1769), as said Orders are arbitrary, capricious and contrary to Idaho law, specifically being § 67-5279, *Idaho Code*.

In a manner comparable to this Court's decision in *Page v. McCain Foods, Inc.*, 141 Idaho 342, 344-346, 109 P.3d 1084 (2005), the Ada County Sheriff's Office, through its Legal Advisor, R. Monte MacConnell, possessed actual and sufficient notice and knowledge of Ms. Gibson's July 20, 1999 psychological workplace injury, both orally and from written documents (Cl. Ex. 8, 10 & 11), as demands began to be made by him on July 28, 1999, for Claimant to resign (Cl. Ex. 3). By then, she was already under a doctor's care, which fact demonstrated a medical expense and a claim for medical treatment and medical care was known to the County. These communications later confirmed the extent of her doctor's care, and with repeated scheduling of "informal proceedings", the County was informed such confrontational settings were unacceptable to the treating physician because of the stressful damage it would cause. That information and other events was communicated by Claimant's counsel's letter (with attachments) to the County, in response to need for medical coverage claims, and why Claimant had to remain under doctor's care (Cl. Ex. 35, 36, 37, 38 & 39; Def. Ex. 11). Eventually, a letter was sent to the Director of the Idaho Industrial Commission, Mr. Gary Stivers, on May 15, 2001 (Cl. Ex. 8). As noted on page 2, paragraph 5 of Claimant's Exhibit 8, Claimant's counsel explained to Mr. Stivers he made repeated verbal attempts to the Sheriff's Advisor to submit the "incident to the Idaho Industrial Commission as a Worker's Compensation Claim, and to United Heritage Mutual Life Insurance Company for Short-Term Disability", as medical expenses were accumulating and no other medical coverage was available, as the County had cancelled all of Ms. Gibson's medical benefits beginning September, 1999 (Cl. Ex. 8, p. 8) Mr. Stivers replied on June 8, 2001 (Cl. Ex. 7), stating, "Our investigation revealed no workers' compensation claim

was filed on behalf of Stacy Gibson", and "The reason given [by Ada County] was that Ms. Gibson did not request that a claim be filed".

Under Idaho law, knowledge of the employer, however it is gained, makes the employer **liable** to the employee for those benefits, even in situations where the employee had given no notice of any kind at all. *See Page v. McCain Foods, Inc.*, supra; *see also* § 72-704, *Idaho Code.* The Commission could not reasonably conclude that even though Claimant was placed immediately on leave, after a traumatic encounter, 3 days later she is under a doctor's care for depression and acute stress disorder, and then demands for resignation are made or criminal charges were being filed, along with repeated requests for informal hearings and repeated responses that Claimant was under doctor's care from the traumatic encounter she endured and had to avoid any confrontational settings to avoid further injury to her health and physical welfare, such facts would not constitute sufficient awareness of an injury or claim to the County would be an arbitrary and capricious conclusion. The written communications contained in Claimant's Exhibit 8, 10 & 11 were adequate confirmation of the knowledge of the event and Claimant's injury to Ada County, and does give appropriate effect to the remedial purpose of Idaho's Worker's Compensation Law. To suggest otherwise would be an arbitrary determination, contrary to law. Claimant's forced leave, such that she could not personally give notice to a supervisor at Ada County for her workplace injury, and being placed almost immediately under a doctor's care, would not be a bar to her claim for Worker's Compensation benefits, as Ada County had complete awareness of the event and the injury, and has never suffered any prejudice as the employer, and there was constant endeavor to identify the extent of

her injury. The Sheriff even had the County Doctor, Dr. Charles Steuart, M.D., examine Claimant on October 5, 1999 (Ag. R., p. 319; Cl. Ex. 10, 11, & 13, p. 33), and he too confirmed she could not be exposed to any confrontational settings, because of her mental and physical state (Cl. Ex. 11). The **Sheriff**, his **Legal Advisor**, and the physician under County contract, each **had immediate knowledge** of Claimant's workplace psychological encounter and injury, and each successive day through the 27th day of December 1999 (Cl. Ex. 3, 8, 10 & 11, and documents included therewith).

In *Taylor v. Soran Restaurant, Inc.*, 131 Idaho 525, 960 P.2d 1254 (1998), the Court stated:

> "Although section 72-702 requires that notice of an employee's injuries be made in writing, "[o]ral notice to the employer may provide the employer with actual knowledge of an injury, thus obviating the necessity of a written notice. *Murray-Donahue v. National Car Rental Licensee Ass'n*, 127 Idaho 337, 340, 900 P.2d 1348, 1351 (1995). Oral Notice must be made within the statutory time for giving notice. *Stoddard v. Mason's Blue Link Stores*, 55 Idaho 609, 45 P.2d 597 (1935)".

Ada County, as Claimant's employer, was required under § 72-604, *Idaho Code*, to file a report (§ 72-602(1), *Idaho Code*) to the Idaho Industrial Commission of **any injury** which requires treatment by a physician. The County knew Claimant began treatment on July 23, 1999, three days after the encounter, and was under doctor's care for months thereafter (Cl. Ex. 35-39, 42 & 58). She had been ostracized from the workplace, and then placed on leave, without pay, while she was under a doctor's continuing care, repeatedly discussed and known to the County. *See Petry v. Spaulding Drywall*, 117 Idaho 382, 384, 788 P.2d 197 (1990); *Tonahill v. Legrand Johnson Cont. Co.*, 131 Idaho 737, 741, 963 P.2d 1174 (1998). The statute of limitation

addressed in § 72-701, *Idaho Code*, does not commence until Ada County has **filed** the required report with the Commission; clearly Ada County knew well of Claimant's medical attention and was repeatedly told she was still under doctor's care and would be for some foreseeable future, and that became medically imperative only three days after the encounter had occurred.

Pursuant to *Idaho Code*, § 72-604, the one-year filing requirement under these specific facts, cannot apply, as Ada County, its Sheriff's Office and its **legal** and **medical** staff personnel, **had** adequate knowledge of Ms. Gibson's traumatic encounter that resulted in her psychological workplace injury, and the County and its responsible agents **did** willfully decline to file the report as required by § 72-602(1), *Idaho Code*, to avoid medical liability, after repeated attempts by her counsel notifying them of her claim and her injury, even after it was **confirmed** by Dr. Charles Steuart, the County physician, during attempts to repeatedly schedule informal meetings, but rejected by both Dr. Steuart and the treating physician, Dr. Stephen E. Spencer, in 1999 (Cl. Ex. 11, 35-39; Def. Ex. 11). Ada County Sheriff's Office agents simply failed to report Mrs. Gibson's injury, as confirmed by the June 8, 2001 letter of Mr. Gary Stivers, Director of the Idaho Industrial Commission (Cl. Ex. 4 & 7).

III.

WHETHER THE REFEREE'S ORDER TO STRIKE EXHIBIT 2 OF DR. F. LAMARR HEYREND'S NOVEMBER 17, 2006 DEPOSITION FROM THE RECORD WAS AN ABUSE OF DISCRETION, ARBITRARY AND CONTRARY TO LAW.

The November 17, 2005 post-hearing deposition of Dr. Heyrend contains the materials on his diagnosis, the identification of the physical injury, the impairments and permanent damage, and his treatment and supportive analysis used to confirm his clinical diagnosis. During that oral

examination of Dr. Heyrend, he gave a well-documented clinically developed basis for his medical opinion concerning his diagnosis of her impairment as a consequence of her injuries, his treatment, and use of medications. *See* November 17, 2005 Deposition of Dr. Heyrend. He had exhausted much effort to prepare a compilation of Internationally recognized medical treatises (Exhibit 2 of Dr. Heyrend's November 17, 2005 Deposition) to assist Respondents' understanding of the disorder, and support his well-documented contentions Ms. Gibson does suffer PTSD, with resulting physical changes in her brain function, and the objectively confirmed physical brain injuries and changes he diagnosed.

In the Referee's findings, conclusions and recommendation, however, it was ordered **Exhibit 2** of **Dr. F. LaMarr Heyrend's November 17, 2006 Deposition** be struck from the record, stating:

> "JRP 10 requires that parties disclose proposed evidence timely before the hearing. It states that evidence may not be "**developed, manufactured, or discovered**" after the hearing, except upon **good cause shown**". (Emphasis added).

Dr. Heyrend was disclosed as being a medical expert and the treating physician who would testify as to Claimant's PTSD condition, and he would obviously utilize his entire file compilation and related research materials to support his opinions and conclusions at any hearing or deposition. Dr. Heyrend stated in his November 16, 2005 Affidavit (Ag. R., p. 1468-1474), he had extensively researched, compiled and printed his **Exhibit 2** file materials **prior** to the date scheduled for the hearing to be held on September 12, 2005. It was certainly made available for review and examination in the deposition testimony and responses, and it was defense counsel who actually **invited** Dr. Heyrend to **compile this material** during an earlier deposition taken of

Dr. Heyrend on May 5, 2005, long before the hearing date scheduled to take place on September 12, 2005. Dr. Heyrend took up the invitation from Mr. Bauman, seeing it was an opportunity to educate both defense counsel and the Industrial Commission, and could serve to educate the Referee, Mr. Donohue, as well, as PTSD is not a well understood phenomenon, as one might like to assume, despite the medical and legal recognition in medical science and legal decisions prior to Claimant's traumatic encounter. The Referee, choosing arbitrarily to perceive the meaning of Rule 10, J.R.P. to be a bar to the use of evidence, decided to suppress this medical material in an effort to prevent equitable use of the medical documentary research material that existed and should be known to and shared by the parties. This Exhibit 2 was a compilation **actually invited to be prepared** by counsel for a party to the dispute, who wanted it assembled for later consideration. Clearly, Dr. Heyrend had a medical basis for his opinions, as he was aware of all the medical analysis, and he wanted it documented with his file research and wanted to make it available to support what he wanted to say in his live testimony, planned to take place on September 12, 2005. The deposition format, however, was instead used as the evidentiary gathering process of medical testimony instead of taking his live testimony. This was decided, in part, because of his mother's demise (Ag. R., p. 1425; Ag. R., p. 1468-1474), as well as the convenience it would allow the parties and the Referee. The contents of Exhibit 2 were made part of Dr. Heyrend's office file, and it was produced for review during his post-hearing testimony on November 17, 2005 (Ag. R., p. 1468-1474). Defendants benefited from a better understanding of the basis of the opinion, but apparently don't want the medical science in this Record, as it serves then to confirm the arbitrary nature of the decision of the Referee to reject

Claimant's right to recover benefits. The production of this type of evidentiary disclosure is part of the expert testimony as would have been given at the hearing, and that was given at his post-hearing deposition, instead of the scheduled hearing, as decided by agreement of the parties and the Referee (Ag. R., p. 1425). Doctors use medical treatises and studies to form and support their medical opinions and that is no surprise to anyone. *See also* Ag. R., p. 1549-1566.

Exhibit 2 of Dr. Heyrend's November 17, 2005 Deposition presents a gathering of medical definitions, research documents and medical treatises compiled for submission with his testimony as supporting data to be presented during the Commission hearing on September 12, 2005. It was not manufactured, discovered or **developed** after the hearing date (Ag. R., p. 1468-1474), in any event. Exhibit 2, along with medical literature available from the National Institute of Mental Health, provides an understanding of Ms. Gibson's PTSD condition, and identifies how and why a physical injury and physical manifestations occur, being due to changes in specific structure changes in the brain, causing physical damage and impairment that will impact lifestyle in a permanent way. The physical injuries to the brain caused from psychological trauma, has also been proven in this literature to cause a person to be susceptible to infectious diseases, and increased risk of hypertension and cardiovascular disease. *See* Heyrend's Exhibit 2, Document 5 & 13. Physical injury to the brain is not limited just to a PTSD disorder; Claimant's Panic Disorder is a physical disorder as well, accompanied by physical injury to the brain, with physical manifestations of physical and bodily injury. *See* Heyrend's Exhibit 2, Document 8 & 11. In his November 17, 2005 Deposition (p. 14, L 5-p. 16, L 15; p. 25, L 6-p. 26, L 16), Dr. Heyrend described the fight-or-flight response as it relates to PTSD and to Panic

Disorder. The documents in Exhibit 2 confirm physical injury to the brain and that does support Dr. Heyrend's diagnosis of injury from her PTSD (Heyrend's Exhibit 2, Documents 1, 2, 3, 4, 11, 12, 14, 16, 17, 18 & 19), and does occur from a Panic Disorder as Dr. Joseph Lipetzky found. *See* Heyrend's Exhibit 2, Documents 1, 2, 3, 4, 6, 8, 10, 11 & 13.

An agency hearing officer has no authority to strike or exclude any substantial and competent evidence presented by an expert, even upon a belief the evidence is of hearsay nature, as hearsay evidence in these agency proceedings is admissible. *See Lockhart v. State, Dept. of Fish & Game*, 127 Idaho 546, 550,903 P.2d 135 (Ct. App. 1995); *Hoyt v. Morrison-Knudsen Co.*, 100 Idaho 659, 661, 603 P.2d 993, 995 (1979); *see also* § 67-5251(1), *Idaho Code.*

When ruling on the admissibility of evidence, a hearing officer **must admit evidence to assist, rather than frustrate**, development of the record. As stated, Exhibit 2 was compiled at the invitation of Respondents to assist in their understanding of PTSD injuries, and was prepared for presentation with his testimony and the medical files, which was initially planned to occur on September 12, 2005. It was not "discovered", "developed" or "manufactured" after September 12, 2005, but rather was published literature, used by experts, and compiled by Dr. Heyrend and his staff before September 12, 2005, upon invitation by Respondents' counsel (Ag. R., p. 1468-1474).

In *Stolle v. Bennett*, 144 Idaho 44, 156 P.3d 545 (2007), , the Court noted § 67-5251, *Idaho Code*, is what **controls** the **admission** of **evidence** in Industrial Commission proceedings, governed by the Idaho Administrative Procedure Act. § 67-5251 identified upon what conditions

a Hearing Officer is allowed to **exclude** evidence from the record. By statute, evidence in an agency proceeding may be **excluded only** when it is:

> "irrelevant, unduly repetitious, or excludable on constitutional or statutory grounds, or on the basis of any evidentiary privilege provided by statute or recognized in the courts of this state. All other evidence may be admitted if it is of a type commonly relied upon by prudent persons in the conduct of their affairs". (Emphasis added).

The literature is relevant to the diagnosis, and is relied upon by experts involved in the analysis and diagnosis of PTSD, its physical damage components, and its treatment by psychotherapy and medications. Though the experience, technical competence, and specialized knowledge of a Commission Referee may be utilized in the **evaluation of evidence**, he may not utilize his expertise as a **substitute for evidence**, and it would be arbitrary for him to do so, since administrative decisions must be based upon substantial evidence and reasoned findings, to allow for effective judicial review. That process becomes meaningless if relevant material known to exist as reliable and scientific research data, and relied upon by a doctor as a basis of an opinion, is not to be allowed in the record by the agency. It becomes reversible error to do so. *See Laurino v. Board of Professional Discipline*, 137 Idaho 596, 602, 51 P.3d 410 (2002); *see also* § 67-5248, *Idaho Code.*

Without dwelling on the obvious reasons why a referee would not want a record replete with supporting materials that validates the basis of physical injuries, physical manifestations, and a clear basis for confirming a PTSD diagnosis, let it suffice to say an objective seen by Appellant has been the desire to limit, avoid, and deny expensive claims from flowing into the system from trauma caused injuries. These type claims are out there, and are just and equitable

in their own right for proper compensation. Regardless of the reason, the fact remains it serves to be an abuse of discretion, arbitrary and capricious for a referee to exclude compiled medical documentation in existence, and that was not discovered, developed or manufactured after September 12, 2005; it existed, was compiled, and was relied upon as a scientific basis to support the expert's opinion. Such an order of exclusion is contrary to a referee's authority and to the law, and must be set aside with an order of inclusion of all materials in Exhibit 2, to become part of the deposition record and basis for the opinion of the medical diagnosis from the medical science that confirms the physical injury and right to benefits for this injury.

IV.

WHETHER THE CONSTRUCTION, VALIDITY AND COMMISSION'S FORCIBLE APPLICATION OF IDAHO'S WORKERS' COMPENSATION LAW, § 72-433, § 72-434, AND § 72-435, *IDAHO CODE*, IS A DIRECT VIOLATION OF THE STATUTE AND APPELLANT'S RIGHTS UNDER THE DUE PROCESS CLAUSE AND EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT OF THE U.S. CONSTITUTION, AS IT CAUSED CLAIMANT TO BE "REVICTIMIZED".

The meaning of a statute and its application is a matter over which the appellate court exercises free review. *See Woodburn v. Manco Prods., Inc.*, 137 Idaho 502, 504, 50 P.3d 997, 992 (2002). "Where the language of the statute is clear and unambiguous , legislative history and other extrinsic evidence should not be consulted for the purpose of altering the clearly expressed intent of the legislature." *See State v. Hart*, 135 Idaho 827, 829, 25 P.3d 850, 852 (2001). *See also Horner v. Sani-Top, Inc.*, Docket No. 31588, 141 P.3d 1099 (2006). Here we have statutes that may be in conflict.

On June 15, 2005, pursuant to Rule 15, Judicial Rules of Practice and Procedure (J.R.P.), Claimant filed a Petition and supporting Memorandum with the Commission, seeking Declaratory Ruling on the application, construction and validity of Idaho's Workmen's Compensation Law, as reflected by Orders entered by the Commission Referee, Douglas A. Donohue, on March 25, 2005, April 12, 2005, May 10, 2005, May 12, 2005, and June 3, 2005. *See* Appendix 1. Claimant's Petition was sought to materially advance an orderly resolution of this dispute and ripen the dispute for later appeal. It involved the concerns:

1. Whether a claimant can be compelled to participate in a series of adversarial medical examinations without allowing a claimant the accommodating effects of her primary care psychiatrist and therapist to accompany her at such intrusive evaluations that could invoke a revictimization from the reoccurrence of trauma, when such emotional and physical reactions from confrontational proceedings are known to result in further injury and setback to a claimant's health and welfare, when such accommodation is contemplated by the applicability of § 72-433(2), *Idaho Code*. The Orders entered by the Referee on March 25, 2005 (Ag. R., p. 860-861), April 12, 2005 (Ag. R., p. 865-866), May 10, 2005 (Ag. R., p. 944-945), May 12, 2005 (Ag. R., p. 1067-1068) and June 3, 2005 (Ag. R., p. 1109-1110), were contrary to existing case law, specifically designed to accommodate Defendants' medical advocate(s) only, and not accommodate a claimant or her primary care physician in any manner.

2. Whether a claimant can be compelled to participate in a series of medical examinations by paid advocates, without allowing needed time and treatment required to stabilize a claimant from earlier episodes of revictimization and resulting injury. Claimant's

stabilization was needed to subdue the severe re-victimization effects and resulting psychological trauma; that Claimant's treating therapist needed to address the trauma with medicinal intervention and psychotherapy sessions to stabilize Claimant from the negative effects of Defendants' earlier intrusive and exhaustive re-evaluations and re-victimizations conducted by their medical advocates.

3. Whether a claimant participating in these intrusive evaluations, before being treated and stabilized, is acting in a manner contrary to the medical advice of her primary care psychiatrist, and consequently become subject to the exclusionary effects of § 72-435, *Idaho Code*, for participating in a course of conduct knowingly unreasonable and injurious to her health, that will retard and seriously impede and imperil her medical recovery.

4. Whether a claimant can be ordered by the Industrial Commission to attend and cooperate with a scheduled evaluation conducted by medical advocates, when deliberately unaccommodating to a claimant **and** her primary care physician, and scheduled **only** to accommodate the availability of a Defendants' advocate, contrary to the accommodating requirements contemplated by § 72-433(2), *Idaho Code*.

5. Whether a claimant can be ordered by the Industrial Commission to reimburse charges of Dr. Richard Wilson, M.D., a paid advocate, for a "missed appointment", when Defendants and the Industrial Commission were fully advised, prior to the alleged "missed appointment" Claimant's attendance at any such controversial and adversarial medical evaluations was **contrary to** and **working against** the medical advice given by her primary care physician, and **would cause** further physical harm and injury, if not treated and stabilized.

Unfortunately, after being fully advised of the genuine threat against Claimant's health, the Referee entered Orders on May 10, 2005 (Ag. R., p. 944-945) and May 12, 2005 (Ag. R., p. 1067-1068), which ordered Claimant attend and cooperate with an examination by Dr. Wilson, contrary to the medical advice of Claimant's primary care psychiatrist. Then, in his June 3, 2005 Order (Ag. R., p. 1109-1110), the Referee ordered Claimant attend and cooperate with Dr. Wilson, upon Dr. Wilson's availability **only**.

The Referee then **unilaterally** ordered Claimant reimburse Dr. Wilson (Ag. R., p. 1109-1110). Claimant continues to object to any order directing reimbursement of Dr. Wilson for a non-accommodating appointment, unilaterally scheduled by Defendants, in light of the injury to her health and the existing controversy concerning the construction, validity and applicability of § 72-433(2), § 72-434 and § 72-435, *Idaho Code*.

Prior to this, on April 6, 2005, Defendants' counsel had unilaterally scheduled Claimant for an evaluation with Dr. Brownsmith on April 14, 2005, without accommodating Claimant or her primary care psychiatrist. Before that event would be acceptable, Claimant's counsel suggested dates that would accommodate both Claimant and Dr. Heyrend by his notice on April 8, 2005.

On April 12, 2005, the Commission Referee, after telephone conference on April 11, 2005, entered an order which stated "**the availability of any other physician was not a basis for scheduling**" (Ag. R., p. 865-866), thus abrogating the meaning and application of § 72-433(2), *Idaho Code*, and nullifying Claimant's right to have her primary care physician in

attendance at any further evaluations, already having identified a revictimization consequence had occurred and would likely occur again.

On April 14, 2005, under protest, Claimant complied with the Referee's March 25, 2005 Order, and did attend a follow-up evaluation by Dr. Brownsmith. After being questioned for over two (2) hours, Claimant experienced the revictimized result, and was diagnosed by Dr. Heyrend after reviewing the video-tape taken of the encounter. Claimant had suffered a severe panic attack (Cl. Ex. 61).

Because Dr. Brownsmith is a psychologist and may not regularly deal with disorders or physical injuries in the brain, like a psychiatrist does, and especially in these disorders, as Dr. Heyrend does in treatment and course of therapy, it would be logical to conclude Dr. Brownsmith must be viewed as lacking appropriate training, education and skills to diagnose and evaluate a Post Traumatic Stress Disorder (PTSD) and the associated physical brain injuries. To demonstrate that view, Dr. Brownsmith was not able to assist Claimant with any means in her immediate need of medical treatment or therapy to calm Claimant's traumatic reaction. Claimant was left only to leave Dr. Brownsmith's office in a state of hyperventilation, shaking and crying uncontrollably, experiencing dizziness, blurred vision, and in need of medical attention and treatment, giving rise for the need to immediately secure help from Dr. Heyrend.

This April 14th session came only as a result of the Referee's March 25, 2005 and April 12, 2005 Orders (Ag. R., p. 860-861; p. 865-866) , directing Claimant attend the additional evaluation by Dr. Brownsmith, **scheduled solely at Dr. Brownsmith's choosing**, with no

consideration given to Claimant or her primary care doctor's schedule for available participation needed for protection, as contemplated under § 72-433(2), *Idaho Code.*

Thereafter, on April 28, 2005, we find Jewel Owen at State Insurance Fund, without providing Claimant any accommodation required by § 72-433(2), *Idaho Code*, also unilaterally scheduled Claimant to be evaluated on May 11, 2005, by Dr. Richard W. Wilson, M.D. (Cl. Ex. 74), who was a local neurologist and a known medical advocate. On May 9, 2005, Claimant submitted an Objection to this unilateral, unaccommodating effort of Defendants (Ag. R., p. 884-919).

On May 10, 2005, Claimant filed a Motion, requesting the Commission undertake reconsideration of its May 10, 2005 Order (Ag. R., p. 946-973, as that Order required Claimant submit to more intrusive examinations by advocates, brought into the medical-mix of assessment by a neurologist. In support of Claimant's Motion, the Affidavit of Dr. F. LaMarr Heyrend, M.D. was prepared, and he verified his medical opinion, as Claimant's primary care psychiatrist, that Ms. Gibson was suffering significantly from physical effects of Post Traumatic Stress Disorder (PTSD) caused by the County, and had been revictimized twice already by Dr. Cynthia Brownsmith (Ag. R., p. 948-968; Cl. Ex. 43 & 44).

On May 10, 2005, the Commission Referee issued an Order compelling Claimant attend and **cooperate** with the examination by Dr. Wilson, **unilaterally scheduled** earlier by Jewel Owen, again unaccommodating to Claimant or Dr. Heyrend, as required by Idaho law (Ag. R., p. 944-945)

On May 12, 2005, the Commission Referee issued a further Order, compelling Claimant to attend and **cooperate** with Dr. Wilson, and again, the order was unreasonable and unaccommodating to Claimant (Ag. R., p. 1067-1068).

On June 3, 2005, the Commission Referee entered another Order, again compelling Claimant to attend and cooperate in the evaluation by Dr. Wilson, and "**scheduling is at Dr. Wilson's availability only**" (Ag. R., p. 1109-1110).

These Orders of May 10, 2005 (Ag. R, p. 944-945), May 12, 2005 (Ag. R., p. 1067-1068) and June 3, 2005 (Ag. R., p. 1109-1110), were in error, and the Commission Order of June 3, 2003 (Ag. R., p. 1109-1110) did erroneously order Claimant to reimburse Dr. Wilson for an alleged "missed appointment", despite this need for medical accommodation to protect the health of Claimant. Each of these Orders are contrary to Claimant's health and welfare, and should be set aside, and the Order compelling payment of Dr. Wilson's bill vacated in its entirety.

V.

WHETHER APPELLANT IS ENTITLED TO ATTORNEY FEES AND COSTS, AS A MATTER OF RIGHT AND LAW, FOR ALL PROCEEDINGS BELOW, AND ON APPEAL.

Idaho Code, § 12-117, provides for attorney fees to a person, in any administrative or civil judicial proceeding, involving adverse parties with a state agency, a city, a county or other taxing district. That statute does allow the Court to award the person reasonable attorney fees, witness fees and reasonable expenses, if the Court finds in favor of the person, and finds the Agency acted without a reasonable basis in fact or law. *See Gunter v. Magic Valley*, 143 Idaho 63, 137 P.3d 450

(2006); *Neighbors For A Health Gold Fork v. Valley County*, Docket No. 33552, Idaho Supreme Court, Filed December 27, 2007.

Appellant requested an award of attorney fees from the Commission in accordance with § 72-804, *Idaho Code*, as the actions of Ada County in these Worker's Compensation proceedings had been solely designed to deny a valid claim for benefits, beginning with the decision to refuse even to report the injury, known to the County to be required when immediate care from a physician is necessary. The history of bad faith was well-documented: Claimant had been put on leave without any hearing, the degraded leave status, without pay, without a hearing, took no formal action to conduct a hearing to address status or the existence of cause for termination, and then refused to disburse lawful pay which was due her, then denied any accounting on the regular wage and overtime wage disputes, then would not accept the fact she had physical injuries, despite the medical science and obvious symptoms, chose to deny benefits to which she was entitled, and would elect to do so by the use of paid advocates who knew of, but would avoid the medical science on PTSD diagnosis, physical brain changes, physical injury and physical manifestations. This conduct must be viewed as grossly unreasonable, and the legitimate purpose of the Industrial Commission is to bestow justly due benefits, not attempt to abrogate with capricious behavior, to avoid the exposure of liability to address a course that has caused injury from traumatic behavior, and the entire experience has served to cause ongoing injury, expense, and grossly prolong the instability and stifling of the healing process of Claimant, committed in what appears to be a designed effort, as the episodes of revictimization

was a known consequence to occur, and Defendants were told it would serve to be damaging, and did seriously retard Appellant's stability, and prolong the severity from the PTSD condition.

Idaho Code § 72-804 states that:

> "If the commission **or any court before whom any proceedings are brought** under this law determines that the employer or his surety contested a claim for compensation made by an injured employee . . .without reasonable ground, or that an employer or his surety neglected or refused within a reasonable time after receipt of a written claim for compensation to pay to the injured employee or his dependents the compensation provided by law, or without reasonable grounds discontinued payment of compensation as provided by law justly due and owing to the employee or his dependents, the employer *shall* pay reasonable attorney fees *in addition* to the compensation provided by this law. In all such cases the fees of attorneys employed by injured employees or their dependents shall be fixed by the commission." (Emphasis added).

The plain meaning of *Idaho Code* § 72-804 is to compel the Commission to take action, and "**shall**" award attorney fees to the employee when the employer's denial of compensation was unreasonable. Though the amount of the award is subject to the discretion of the Commission, refusing to award any fees where the employer unreasonably denied compensation to the employee is a decision beyond the "outer boundaries" of the Commission's discretion, and the Commission's refusal to award attorney fees is an abuse of discretion. *See Bradley v. Washington Group Intern.*, 141 Idaho 655, 115 P.3d 746 (2005). § 72-804 requires attorney fees be awarded where the employer's actions were unreasonable. *See Page v. McCain Foods*, Docket No. 33158, Idaho Supreme Court, Filed January 31, 2008.

In *Swett v. St. Alphonsus Reg'l Med. Ctr.*, 136 Idaho 74, 29 P.3d 385 (2001), the Court considered whether the Commission could make an attorney fee award under I.C. § 72-804 based on a percentage of the benefits awarded to the employee. The Court held the Commission could

base an award "on a percentage of benefits awarded", so long as those factors articulated in *Hogaboom v. Economy Mattress,* 107 Idaho 13, 684 P.2d 990 (1984) were considered. If the Commission stated it had considered the *Hogaboom* factors, the award may be based on a percentage of benefits awarded to the employee and would be proper. *Swett*, 136 Idaho at 78, 29 P.3d at 389.

CONCLUSION

The Post-Traumatic Stress Disorder suffered by Appellant is medically and legally defined as a "**mental-physical**" injury, and is compensable under Idaho's Workers' compensation law, and Claimant has suffered an impairment and disability rating from this physical injury, identified to approximate a 50% impairment of normal function.

Dr. Heyrend's medical opinion remains absolute: Claimant suffers a severe case of PTSD with the presence of obvious physical manifestations and scientifically confirmed physical injury to components of the brain, caused by the Ada County officials on July 20, 1999, and Claimant was revictimized each time she was confronted by advocates of the County and State Insurance Fund who demonstrated an agenda to be intrusive in their evaluation of Appellant, without accommodating Claimant and her physician in any manner. Dr. Heyrend confirmed the confrontational episodes of these paid advocates on June 20, 2003, June 24, 2003, July 11, 2003, April 14, 2005, and by Dr. Wilson on June 28, 2005 (Cl. Ex. 65) and August 23, 2005 (Ag. R., p. 1188), observing repeated re-victimization, and the damaging effect to her treatment and physical health; that Dr. Heyrend was required to balance the locus caeruleus structure of Claimant's brain, as he has done in other cases, with such "allpa-2 blocking agent" and SSRI

medications as used in severe cases to reduce the level of anxiety, and structure a pathway for the effects of psychotherapy sessions; that he had to provide medical treatment to stabilize her health after each of these adversarial proceedings, that caused him need to intervene in the intrusive and damaging process, to protect Claimant against this abusive self-serving conduct.

Claimant requests an award of attorney fees under § 72-804, Idaho Code, as the course of conduct taken by Ada County has been pursued in bad faith, and has pursued a state of denial, despite the medically recognized physical damage and brain function changes associated with PTSD and Panic Disorder trauma caused injuries. This conduct has been unreasonable, and by their efforts, have served to grossly prolong Claimant's instability and stifle the healing process required, and in further aggravation, has pursued a course of action that has only served to revictimize Appellant and retard her stability, which has grossly complicated and extended all efforts in the recovery process, at substantial cost and medial expense to Appellant.

Respondents have shown no desire to seek or administer justice in this case; rather they seek to dispute a just claim and promote conduct to encourage the Commission to ignore the medical science and documentation of injuries, solely pursued to deny benefits, and to avoid a just and fair result. We understand fear of other claims that are founded in PTSD, but the law and medical science must prevail. The defense tactics have been pursued to limit the right of recovery and no doubt intended to address all PTSD patients, but in doing so here, has exposed Appellant to ongoing and prolonged emotional, mental and physical stress, causing intensified physical injuries, and potentially causing the impairment and disability to become lasting and of permanent effect, with medical bills of mounting concern. This must be seen as bad faith,

unreasonable and unjust, and an award of attorney fees is in order, for all proceedings below and upon appeal. It is incumbent for this Court to bestow benefits, prevent more injury, and allow Appellant a fair resolution and find some level of closure in this matter.

Dated this 15th day of February 2008.

Vernon K. Smith
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 15th day of February 2008, I caused two (2) true and correct copies of the above and foregoing to be delivered to the following persons at the following addresses as follows:

Jon M. Bauman
Elam & Burke
P.O. Box 1539
Boise, Idaho 83701

( ) U.S. Mail
( ) Fax
( ) Hand Delivered

Vernon K. Smith

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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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STACY A. GIBSON Claimant, v. ADA COUNTY SHERIFF'S OFFICE, Employer, and STATE INSURANCE FUND, Surety, Defendants.	I.C. Case No. 01-015332 MEMORANDUM IN SUPPORT OF PETITION FOR ENTRY OF DECLARATORY RULING ON THE APPLICATION, CONSTRUCTION AND VALIDITY OF IDAHO'S WORKMEN'S COMPENSATION LAW, AS REFLECTED BY ORDERS ENTERED BY REFEREE ON MARCH 25, 2005, APRIL 12, 2005, MAY 10, 2005, MAY 12, 2005 AND JUNE 3, 2005

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INTRODUCTION

The Claimant above-named, as the party of interest herein, through counsel, Vernon K. Smith, and pursuant to Rule 15, Judicial Rules of Practice and Procedure (J.R.P.), has requested the Idaho Industrial Commission to enter a written declaratory ruling concerning the construction, validity and applicability of certain provisions of Idaho Workmen's Compensation law, as reflected in those

orders entered by Industrial Commission Referee, Douglas A. Donohue, on March 25, 2005, April 12, 2005, May 10, 2005, May 12, 2005 and June 3, 2005.

Claimant has requested the Commission to grant her relief by (1) entering their written declaratory ruling, which has the effect of a final order or judgment, and allow Claimant to remain compliant with the medical advice of her primary care psychiatrist, permit her physician to continue efforts to stabilize Claimant's medical condition over such time as needed before being confronted again with any order to attend any further adversarial and intrusive evaluations by any further medical advocates of Defendants, (2) rejecting and denying the Referee's June 3, 2005 order, which required Claimant to reimburse Dr. Wilson for the alleged "missed appointment" and assessments billed that had been unilaterally scheduled by Defendants, with no cooperation or accommodations for Claimant and her primary care psychiatrist, (3) suspend all proceedings in this matter until such time the Commission has entered a final written order or judgment, and until such time Claimant or Defendants have completed, if necessary, their right to an appellate review of these significant and controlling questions of law, and (4) schedule a hearing in this matter and allow Claimant the presentation of evidence to support the Record for further review, if deemed needed.

Nature of this Dispute

The nature of this dispute involves an existing controversy between parties concerning the construction, validity and applicability of certain provisions of Idaho Workmen's Compensation law, from which there exists a substantial difference of opinion advanced between the parties, and a declaratory ruling

would materially advance an orderly resolution of some aspects of this dispute, or ripen the extent of the dispute for later appeal. This dispute presents the following issues:

1. Whether a Claimant, such as here, can be compelled to participate in a series of adversarial medical examinations by known advocates for Defendants, now to include Dr. Richard Wilson, and being proposed to be done without allowing Claimant any accommodating effects of her primary care psychiatrist and therapist to accompany her at these intrusive and re-victimizing evaluations, as the emotional and physical reactions from these confrontational settings and proceedings has been experienced from the prior intrusive advocacy of Defendants' first advocate, Dr. Cynthia Brownsmith. That Claimant contends accommodation is contemplated by the applicability of § 72-433 (2), Idaho Code, but the orders entered by Referee Donohue on March 25, 2005, April 12, 2005, May 10, 2005, May 12, 2005 and June 3, 2005, are contrary to that accommodating requirement expressed in the existing case law. These orders do not accommodate Claimant and her primary care physician in any manner.

2. Whether a Claimant, such as here, can be compelled to participate in such series of medical examinations, without time allowed to stabilize earlier episodes of re-victimization and resulting injury. Claimant's stabilization needs have been diagnosed by her psychiatrist to subdue the severe re-victimization effects resulting from the renewed psychological trauma; that Claimant's treating therapist needs to address the trauma with medical treatment and psychotherapy

sessions to stabilize her from the negative effects of the intrusive and exhaustive re-victimizations conducted by Defendants' medical advocates.

3. Whether a Claimant, such as here, by participating in these intrusive evaluations, is acting in a forbidden manner as it is contrary to the medical advice of her primary care psychiatrist, and consequently could become subject to the applicability of the exclusionary effects of § 72-435, Idaho Code, as Claimant would be participating in a course of conduct imposed upon her that is knowingly unreasonable and injurious to her health, and will retard and has seriously impeded and imperiled her medical recovery.

4. Whether a Claimant, such as here, can be ordered by an Industrial Commission Referee to attend such evaluations conducted by Defendants' medical advocates, when the scheduling is deliberately unaccommodating to Claimant and her primary care physician, and in fact scheduled only to accommodate the availability of Defendants' advocate, contrary to the accommodating requirements contemplated by § 72-433 (2), Idaho Code.

5. Whether a Claimant, such as here, can be ordered by an Industrial Commission Referee to reimburse Defendants for the charges of Dr. Richard Wilson, M.D., for what Referee Donohue has characterized in his June 3, 2005 order as a "missed appointment", when in fact, Defendants and the Industrial Commission Referee were fully advised prior to the alleged "missed appointment" Claimant's attendance at such a controversial and adversarial medical evaluation was contrary to her doctor's medical advice, and working against the medical treatment needed and given by her primary care physician,

and would cause (not just speculatory) Claimant to have further psychological and physical harm and injury, and to a debilitating nature if not treated and stabilized. After being fully advised of the threat against Claimant's health, the Referee entered the orders on May 10, 2005 and May 12, 2005, directing Claimant to attend and cooperate with the examination of Dr. Wilson, contrary to the medical opinion, advice and required treatment of Claimant's primary care psychiatrist. The June 3, 2005 order from Referee Donohue has again ordered Claimant to attend and cooperate with Dr. Wilson, but only upon Dr. Wilson's availability.

Of concern, and also an issue in need of declaratory ruling, is the fact Defendants have not presented a motion to the Commission requesting Claimant be held responsible to pay for the "missed appointment" assessments billed by Defendants' medical advocate. The Referee unilaterally ordered Claimant to reimburse Dr. Wilson. See Rule 3E, J.R.P. Claimant does vehemently object to the entry of any order directing reimbursement to Dr. Wilson for any non-accommodating appointment scheduled by Defendants, in light of the existing controversy and dispute concerning the construction, validity and applicability of § 72-433 (2), § 72-434 and § 72-435, Idaho Code.

STATEMENT OF FACTS

In early 1997, Claimant decided to seek a career with law enforcement, and on July 10, 1997, Claimant became employed as a Records Technician with the Ada County Sheriff's Office, located at the Boise State University (BSU) Substation. Claimant was employed there as a non-commissioned officer (no arrest powers) to

October 15, 1998, when she was promoted and transferred to the main Jail Facility as a Jail Technician. At the time of Claimant's transfer, her gross wages were $1,500.00 per month, and the County Payroll Department had been directly depositing those wages into a joint checking account she had with her husband.

Sometime after Claimant's transfer to the Jail Facility on October 16, 1998, and before November 1, 1998, the Ada County Payroll Department created an error in Claimant's wages. Instead of paying Claimant $1,575.00 per month as would be due her for wages in light of the pay increase from her promotion, the Ada County Payroll Department incorrectly calculated her wages by combining her old wage of $1,500.00 with a new wage figure of $1,550.00, creating a wage of $3,050.00, and that incorrect figure was directly deposited into the joint checking account. The County Payroll Department continued this error for a period of eight (8) months. Because Claimant had no involvement with the check register or accounting process, and Mr. Gibson never opened bank statements or balanced the checking account on any occasion, due to his busy work schedule selling farm equipment, they were both unaware monies were actually being deposited into their account in excess of her required wages.

From January 1, 1999 through June 30, 1999, Claimant worked well beyond her scheduled regular shifts of four days on, four days off (ten hour days), and she accrued 281 hours of overtime. During this same period, Claimant completed 204 hours of correspondence courses, as was sponsored, recommended, and supplied by the County Sheriff's Office.

On July 19, 1999, the Sheriff's Office discovered errors had been created in accounting, which at first was thought to be underpayment for overtime hours owed to nine (9) County employees. Claimant was one of the nine. After further examination, Payroll thought there may be an overpayment of some wages to Claimant. The County Sheriff thereupon ordered detectives to conduct an internal investigation regarding the wages of Claimant. On July 20, 1999, and while Claimant was on medical leave from outpatient back surgery, Claimant received a phone call from a Sheriff detective as she was recovering at home. The detective requested she meet him at the Sheriff's Office. Claimant assumed the request was for her to participate in more special projects, as she was known by the Department to be an employee who cooperated with special work assignments, as she believed would help advance her career.

For two and one-half (2 ½) hours on July 20, 1999, two Sheriff detectives interrogated Claimant about the wage errors and threatened her with intrusive techniques; they called her a thief and a liar, claimed she had collaborated with others to intentionally cause these overpayments into the checking account, and threatened her with criminal prosecution for the acts of felony grand theft and threatened her with incarceration. Claimant perceived these threats as destroying her career, her job and her life, causing immediate impact to her physical health, safety and well being. It was a death threat to her, as she was aware what happens to law enforcement personnel who face the prospect of jail.

Claimant told the detectives she had no knowledge of any overpayments to any account; that all aspects of payroll record-keeping was not her responsibility,

and she had nothing to do with the accounting of the joint checking account, but did agree if excess wages had been deposited, and a refund was immediately needed, the County could take her accrued comp time, overtime, holiday time and vacation time, as a good faith showing, and the County could then complete a full reconciliation of all her wage and benefit records, and determine how the wage issue could be resolved.

Approximately one week following this interrogation process, on July 28, 1999, Claimant's representative received a phone call from R. Monte MacConnell, Sheriff's Legal Advisor, who stated the message be relayed to Claimant that the Sheriff wanted Claimant terminated, and if she did not resign from the Sheriff's Office, she would be processed with felony charges for grand theft and fired immediately. A cascade of events followed, including false statements expressed by the Ada County Sheriff and his agents, saying Claimant was involved in the error, the effect of which was to escalate the County's errors into contention Claimant was at fault, and she knew or should have known of the overpayment, and immediately reported it.

That in violation of County employment policy, and contrary to a consensual alternative to receiving pay, while the investigation was in a continued state, Claimant was then wrongfully placed on administrative leave, without pay, and remained on that inappropriate status until December 27, 1999, when the Sheriff terminated Claimant, as she refused to resign her employment over the County's accounting and payroll errors.

As a consequence of the County's extortious attempts, their capricious and malicious action, ongoing threats and false statements against Claimant in an attempt to coerce her into surrendering her employment, Claimant became physically impaired, and required to seek medical attention with Dr. Stephen E. Spencer, who diagnosed her as having suffered acute depression and severe situational distress from the psychological injury and extreme trauma imposed upon her.

From August 1999 through December 1999, Ada County, through R. Monte MacConnell, acting in behalf of the Sheriff, presented Claimant with numerous demands for informal meetings to occur, notwithstanding the fact said Killeen and MacConnell knew Claimant was then under a physician's care, on medication, and forbidden to participate in any confrontational meetings due to her psychological trauma and needed medical treatment, until further notice.

On October 5, 1999, after Claimant had been threatened with malicious prosecution, and wrongfully placed on Administrative Leave Without Pay, the Sheriff still regarded her to be a "full status" employee, and "ordered" Claimant to report to the County Jail Facility, at 1:00 p.m., to be diagnosed by the County Physician, Dr. Charles Steuart. Claimant did as ordered, and in the company of her husband, did go to the Jail Facility and as "ordered", did meet Dr. Steuart as required, and was then paraded past employees in the facility, and compelled to undergo a diagnosis by Dr. Steuart to determine her mental and physical state; that Dr. Steuart confirmed the state of trauma as diagnosed by Dr.

Spencer, and informed the County she could not then participate in any such confrontational settings.

On December 14, 1999, Sheriff Killeen again was informed Claimant still remained under the care and supervision of her physician, Dr. Spencer; that her condition was worsening, and the County would not be allowed to engage her in any confrontational settings, and Claimant submitted physician verification of the nature and extent of her injuries in her continuing compliance with Ada County Code, § 1-7I-1F.

It was later confirmed by the events on December 16th and 17th, 1999, Claimant had been under surveillance (stalked) by Sheriff detective(s), and specifically such surveillance was linked solely to these administrative overpayment errors.

Without accommodating Claimant in any manner, in light of the medical advice and opinion being provided to her by Dr. Spencer, on December 27, 1999, Sheriff Killeen chose to terminate Claimant, effective immediately and without showing any good cause for termination, required by Federal and State law and Ada County Code.

During this entire time Claimant was employed with the Ada County Sheriff's Office, she was always regarded as an exemplary employee; had never received an unsatisfactory rating, and was deemed to be an excellent asset to the Sheriff's Office. A copy of Claimants February 16, 1999 and March 17, 1999 performance evaluations are attached as Exhibit 1 and 2.

Due to the severity of Claimant's psychological workplace injury and its continuing and worsening state, caused from the misconduct of the Sheriff and his agents, Claimant sought the medical advice and opinion of Dr. F. LaMarr Heyrend, M.D. on October 16, 2002. Dr. Heyrend advised Claimant she was suffering a severe mental-physical injury, and referred to it as Post Traumatic Stress Disorder.

In February 2003, these Defendants, refusing to compensate Claimant, chose to initiate the process to have Claimant evaluated by Dr. Cynthia Brownsmith, who has labeled herself to be a "forensic" psychologist. During February and March 2003, and instead of contacting Claimant's counsel to schedule Claimant for an evaluation by Dr. Brownsmith, Defendants' counsel, Jon Bauman, called Claimant's place of employment on three (3) occasions and specifically requested to speak directly with Claimant.

Claimant informed Dr. Heyrend of Defendants' attempt to have Claimant evaluated by Dr. Brownsmith, and on April 21, 2003, Dr. Heyrend notified Claimant's counsel of his concern over the structure of Dr. Brownsmith's intended evaluation when he stated (the evaluation) "could smack of re-victimization". See Exhibit 3.

Based upon this medical opinion provided by Dr. Heyrend, and concern Dr. Brownsmith was a psychologist, not a surgeon or physician, as defined by § 72-102 (24), Claimant expressed her objection to such an evaluation. On June 18, 2003, Industrial Commission Referee, Douglas A. Donohue, entered a Notice of Intent to Rule and Order, granting Defendants Motion to Compel Claimant's attendance and cooperation at the evaluation scheduled to commence with Dr. Brownsmith on June

20, 2003. On June 19, 2003, Claimant submitted a response to the Commission's Notice, providing concerns and argument, and on June 19, 2003, the Commission issued an order consistent with its June 18th Notice and Order, requiring Claimant to appear and cooperate with Dr. Brownsmith.

On June 20, 2003, and with heightened emotional trepidation, Claimant did appear for this appointment with Dr. Brownsmith, and then presented herself for follow-up appointments on June 24, 2003 and July 11, 2003. On August 29, 2003, Dr. Brownsmith's report and evaluation was received, found to contain substantial misstatements, errors, and fabrications which clearly distorted the facts and events surrounding Claimant's involvement, her termination, and the use on non-behavioral words and phrases in her attempt to deflect fault away from Ada County, and to focus the underlying cause of the County's payroll errors directly on and back to Claimant.

On October 29, 2003, Claimant's counsel sent Dr. Brownsmith very detailed correspondence (19 pages) summarizing the complete history of events that caused Ms. Gibson to incur the psychological workplace injury, and requested Dr. Brownsmith correct the contents and implications in her evaluation and report. Attached to that letter was a forty-two (42) page Addendum, describing in specific detail her errors, fabrications and misstatements which were created solely by Dr. Brownsmith. As of this date, Dr. Brownsmith has not responded to this request to correct her report to insure the Record in this dispute reflects what she believes to be an accurate, factual and fair assessment presented by her. See Exhibits 4 and 5.

On March 4, 2005, Defendants' counsel contacted Claimant's counsel as a further effort to have "Stacy Gibson meet with Dr. Brownsmith for an update of her original interview", and said "Dr. Brownsmith needs to interview Mr. Gibson, Stacy's husband, as well" (Exhibit 6), and on March 14, 2005, Defendants' counsel requested the Commission Referee schedule a telephone hearing, seeking a determination of how to proceed with a follow-up interview of Claimant and husband by Dr. Brownsmith. See Exhibit 7.

On March 25, 2005, Commission Referee, Douglas A. Donohue, entered an order stating "Claimant shall attend the evaluation with Dr. Brownsmith as scheduled at Dr. Brownsmith's availability". Emphasis added. See Exhibit 8.

On April 6, 2005, Defendants' counsel, unilaterally and without accommodating Claimant and her primary care psychiatrist, Dr. Heyrend, chose to schedule Claimant for a further evaluation with Dr. Brownsmith on April 14, 2005 (Exhibit 9), and on April 8, 2005, Claimant's counsel responded to Defendants, to acknowledge Claimant would present herself for a follow-up evaluation by Dr. Brownsmith, and provided Defendants with dates which would be accommodating to both Claimant and Dr. Heyrend. See Exhibit 10.

On April 12, 2005, the Commission Referee, after telephone conference on April 11, 2005, entered an order which stated "that the availability of any other physician was not a basis for scheduling", thus abrogating Idaho law and nullifying Claimant's right to have her primary care physician in attendance at the evaluation.

On April 14, 2005, Claimant and her husband, under protest, complied with the Referee's March 25, 2005 order, and did present themselves for the follow-up

evaluation conducted by Dr. Brownsmith. After being questioned for over two (2) hours during Dr. Brownsmith's evaluation on April 14, 2005, Claimant became extremely disconcerted, angry, crying and explosive, and was clearly victimized, as confirmed on the video taken by Defendants; Claimant suffered at that moment a severe panic attack, as Dr. Brownsmith continued to ignore Claimant's concerns over the multitude of inaccuracies, fabrications and misstatements in Dr. Brownsmith's August 27, 2003 report, created from earlier stressful evaluations, and Claimant's efforts to discuss the glaring errors and need for honesty and correction was being brushed off and ignored. See video tape, Exhibit 11.

Because Dr. Brownsmith does not deal with disorders of the mind and brain, like a psychiatrist is doing in the treatment and chosen course of therapy, Dr. Brownsmith was viewed as lacking the appropriate training and education to comprehend, diagnose or evaluate Claimant's Post Traumatic Stress Disorder (PTSD), and as clearly demonstrated, Dr. Brownsmith could not manage the stress, and could not assist Claimant with any means of medical treatment to calm Claimant's reactionary outburst, and Claimant was simply left to leave Dr. Brownsmith's office, in her state of heightened outrage and helplessness. Claimant's husband was required to attend to Claimant's immediate medical need, as she was hyperventilating, shaking and crying uncontrollably, experiencing dizziness, blurred vision, and in need of immediate medical attention; Claimant could not return to work on April 14, 2005, and medical treatment was sought from Dr. Heyrend as soon as his scheduled permitted, which occurred April 15, 2005. See Exhibit 12.

This April 14th session came as a result of the Referee's March 25, 2005 and April 12, 2005 orders, directing Claimant to attend the further evaluation with Dr. Cynthia Brownsmith, scheduled solely at Dr. Brownsmith's choosing, with no consideration or accommodation given to Claimant and her primary care doctor's schedule for available participation.

Approximately two (2) weeks before, on March 31, 2005, Dr. Heyrend did conduct an electroencephalogram (EEG) brain mapping diagnostic testing process on Claimant to confirm the objective presence of Claimant's PTSD injury, and in an effort to demonstrate the need for Defendants to properly compensate Claimant, not re-victimize her, as required by Idaho Workmen's Compensation law, and not aggravate her further with unnecessary and confrontational evaluations and intrusive diagnoses. On April 6, 2005 Claimant's counsel notified Defendants' counsel Dr. Heyrend had conducted the EEG of Claimant's brain. See Exhibit 13.

On April 28, 2005, Jewel Owen, State Insurance Fund (SIF), without providing Claimant any accommodating effects required by Idaho law, and without inquiry, unilaterally scheduled Claimant to be evaluated on May 11, 2005, by Dr. Richard W. Wilson, M.D., a local neurologist and known SIF medical advocate (Exhibit 14). On May 6, 2005, Claimant submitted an Objection to these unilateral and unaccommodating efforts by Defendants to schedule further evaluations without needed accommodations.

On May 10, 2005, Claimant caused to be filed a Motion requesting the Commission to undertake to reconsider its order of May 10, 2005, as that order required Claimant to submit to an intrusive examination by Defendants' advocate,

Dr. Richard W. Wilson, M.D., who has now been brought into the medical assessment as Defendants' neurologist. In support of Claimant's Motion, an Affidavit was prepared by and presented from her primary care psychiatrist, Dr. F. LaMarr Heyrend, M.D., who verified his medical opinion Claimant is still suffering significantly from the Post Traumatic Stress Disorder (PTSD) caused by the County, and has been re-victimized by Dr. Cynthia Brownsmith, Defendants' choice of a psychologist, during examination and re-examination efforts, as desired by Defendants. See Exhibit 15.

On May 10, 2005, the Commission Referee compelled Claimant to attend and cooperate with the examination by Dr. Wilson as unilaterally scheduled by SIF, but the order was again unreasonably unaccommodating to Claimant and Dr. Heyrend, as required by Idaho law.

Again, on May 12, 2005, the Commission Referee issued a further order, therein once again compelling Claimant to attend and cooperate with the examination by Dr. Wilson as was unilaterally scheduled by SIF, and again, the order was unreasonable and unaccommodating to Claimant.

On June 3, 2005, the Commission Referee entered another order again compelling Claimant to attend and cooperate with an evaluation by Dr. Wilson, and "Such scheduling is at Dr. Wilson's availability only".

These orders of May 10, 2005, May 12, 2005 and June 3, 2005, entered by the Industrial Commission Referee, ordered and compelled Claimant to attend and cooperate in an independent medical evaluation (IME) conducted by Dr. Richard W. Wilson, even though Claimant had clearly not stabilized from the previous

disruption in her recovery and treatment, and needed therapy and medication to contain her trauma.

In that final order of June 3, 2003, Referee Donohue did order Claimant to reimburse Defendants for Dr. Wilson's assessment billed for an alleged "missed appointment".

ARGUMENT AND CASE AUTHORITY

Dr. Heyrend has classified Claimant's condition as a "mental-physical" workplace injury in accordance with his medical diagnosis and as defined by existing case law, and Dr. Heyrend has verified the extreme nature of Claimant's PTSD condition with electroencephalogram (EEG) diagnostic brain mapping and testing. Dr. Heyrend's medical opinion remains absolute: Claimant suffers from a severe case of PTSD, caused by the County, and Claimant is being re-victimized each time she is confronted by advocates of the County and State Insurance Fund who have had an agenda to be very intrusive in their evaluation of Claimant with their paid advocacy professionals, who appear to seek to undermine the validity of Ms. Gibson's claim, and who have continued in a manner to unilaterally schedule Claimant for medical evaluations by advocates of Defendants, without accommodating Claimant and her physician in any manner to safeguard her well being. Dr. Heyrend has confirmed the confrontational effects of the episodes conducted by the paid advocates on June 20, 2003, June 24, 2003, July 11, 2003, and lastly on April 14, 2005, which has resulted in repeated re-victimization, whether it had been intended as creating that result, or whether it was simply a resulting consequence thereof; the damaging effect was real and very injurious to

her treatment and physical health and well being; that Dr. Heyrend was required to prescribe Guanabenz to Claimant on April 15, 2005, as a final effort to balance the locus caeruleus aspect of Claimant's brain, which, as confirmed with time in other cases, will serve to reduce the level of anxiety, and structure a pathway for the beneficial effect of ongoing psychotherapy sessions; that additional time was required for Dr. Heyrend to provide the medical treatment to sufficiently stabilize her health before a patient, such as Claimant, is capable of being confronted by further adversarial medical evaluators and examinations. Because of this trauma, any future adversarial proceedings must be conducted in the presence of Dr. Heyrend, who would intervene if he determined he was witnessing a maliciously intrusive and damaging process, to protect Claimant and his patient from this abusive self-serving conduct engaged in by the County.

Dr. Heyrend is responsible for Claimant's treatment and therapy for recovery, and would be contradicting his medical opinion and advice given to her to allow these injuries to take place, as it prevents healing, and serves only to debilitate her. Dr. Heyrend is Claimant's primary care psychiatrist, and is vehemently opposed to these further confrontations by advocates of Ada County and the State Insurance Fund, especially when such intrusive procedures are of such a debilitating consequence. Dr. Heyrend is convinced should Claimant be subjected to any more intrusive and unwarranted examinations, there is a great and real risk of causing Claimant psychological trauma and increase the level of permanent psychological injury.

Pursuant to § 72-435, Idaho Code, the Industrial Commission may suspend proceedings when a Claimant participates in unreasonable and injurious practices (or conduct) that tend to imperil or retard medical recovery. The consequence of these intrusive and disruptive evaluation endeavors by such adversarial evaluations is causing that retardation, and the Commission cannot continue to condone conduct resulting in the disruption of what is intended to promote Claimant's recovery. To compel Claimant's participation in adversarial and confrontational examinations (IMEs) has thus far served to retard and defeat a treating psychiatrist's efforts at medical recovery, and this situation has simply degraded these evaluations into a proverbial conundrum; a Commission that appears to be condoning the interference in Claimant's efforts at medical recovery, and at the same time, requiring IMEs and giving Defendants their right of IME examination to enable them to develop a defense perception of the claim, but at the traumatic damage to Claimant's recovery At this time, for Claimant to participate in such examinations is not only unreasonable and perilous to her health, but exposing her to permanent damage, and does violate the advice and healing effects of her therapist, and does appear to contravene Idaho law.

As provided in the Affidavit of Dr. F. LaMarr Heyrend, M.D. (Exhibit 15), any such attempts by Ada County and the State Insurance Fund, through the instrumentality of the Idaho Industrial Commission, to compel Claimant to be further examined by advocates, will be injurious to her mental and physical health, and such a resulting consequence does not only violate the therapist's healing efforts, but also Dr. Heyrend's oath of practice to protect his patient.

The last three (3) attempts by Defendants for examination have not been accommodating to Claimant in any fashion, to her medical health and to Dr. Heyrend, and she was denied the intended purpose and controlling effects of Idaho law, as she was made to endure conduct that was injurious to her health and contrary to her medical recovery. In the letter dated April 6, 2005 (Exhibit 9), Mr. Jon Bauman unilaterally undertook to schedule Claimant for evaluation by Dr. Brownsmith, deliberately done without accommodating need for her psychiatrist's presence, and that prevented the treating therapist's attendance as is contemplated and absolutely allowed by § 72-433 (2), Idaho Code. In the Commission's order on March 25, 2005, the Referee stated Claimant is allowed to bring one (1) treating physician, but defeated that allowance by the April 12, 2005 order, stating the availability of any other physician was not a basis for scheduling.

In a similar fashion, done unilaterally and without sufficient notice, Defendants scheduled a medical evaluation of Claimant by Dr. Richard W. Wilson, their recently selected IME neurologist, scheduled to be conducted on May 11, 2005, as first scheduled by Jewel Owen, State Insurance Fund, under demand letter to Claimant's counsel on April 28, 2005 (Exhibit 14). This request did not accommodate Claimant and Dr. Heyrend, and was intentionally designed to prevent any opportunity for reasonable notice for attendance of Claimant's primary care psychiatrist, contrary to § 72-433 (2), Idaho Code.

These unilateral schedulings are in contradiction of Idaho law, as Industrial Commission proceedings are intended to be simple, accommodating to claimants, and above all, to seek justice. See Hartman v. Double L Manufacturing, Employer,

and Everest National Insurance Company, Surety, Idaho Supreme Court, Docket No. 30372, filed April 6, 2005; Hagler v. Micron Technology, Inc., 118 Idaho 596, 798 P.2d 55 (1990). See also Claimant's Objection filed May 6, 2005.

Claimant has objected to being exposed to injury again, based on the medical treatment recovery and advice of her psychiatrist, and will not submit to examinations potentially injurious to her mental, emotional and physical health, and especially so without having the presence and assurance of her primary care psychiatrist during any such adversarial endeavors.

Claimant has provided expert medical opinions of Claimant's medical condition through the Affidavit of Dr. F. LaMarr Heyrend, M.D. (Exhibit 15) Defendants are protesting in a manner suggesting Claimant's condition is irrelevant and unimportant, proposing in a cavalier fashion her injuries are not even the result of a workplace event. Dr. Heyrend's medical opinion identifies the injury as compensable, and relevant to support Claimant's concerns over her medical inability to participate in any further adversarial and confrontational IME examinations, and especially so until such time Dr. Heyrend provides a further medical opinion Claimant is medically capable of attending more controversial evaluations conducted by advocated of Ada County and the State Insurance Fund. If Claimant were to work against the medical opinion and advice of her primary treating psychiatrist, she would be participating in unreasonable and injurious practices that will imperil and retard her medical recovery. See Gross v. Unumprovident Life Insurance Company, 319 F.Supp.2d 1129 (C.D.Cal. 2004).

The aspect of clear and obvious rejection of the claim and bias in this case by Defendants has become sensationally real. Firstly, the May 11, 2005 Affidavit of Dr. Wilson has suggested Claimant may have a condition of epilepsy. He has never spoken to or seen her. There has never been any basis to suggest Claimant has any "complex partial epilepsy", as suggested in the Affidavit of Dr. Richard W. Wilson. Claimant has no family history of epilepsy; never has any physician (including Stephen E. Spencer, M.D., F. LaMarr Heyrend, M.D., and never has any psychologist (Dr. Cynthia Brownsmith or Dr. Joe A. Lipetzky) ever found any basis to allude to such a diagnosed condition. What Claimant continues to suffer from came from the events that occurred on July 20, 1999, and continued thereafter, as a psychological workplace injury characterized as a "mental-physical" injury.

With Defendants' new adversarial advocate, and without even examining Claimant, we are given a premature medical opinion Claimant may have "complex partial epilepsy", because of the abnormal EEG results obtained by Dr. Heyrend when he conducted the brain mapping diagnostic assessment of Claimant. Even though an electroencephalogram is a useful tool and important potential to consider epilepsy, the EEG is specifically used to determine suspected brain tumors, infection, inflammation, bleeding, head injuries; or diseases in the brain and brain activity. Dr. Wilson's Affidavit lacks this awareness of information, and gives rise to a suspicion he may not be well equipped to address PTSD diagnosis, or a therapeutic treatment as best needed. EEG's are utilized for modeling (mapping) brain activity in patients suffering from conditions of Post Traumatic Stress Disorder, Schizophrenia, Attention Deficit Hyperactivity Disorder, alcoholism, the

neurophysiology of learning disabilities, and explosive behavior in adolescents. Dr. Heyrend, within his psychiatric practice, has made an extensive analysis of these conditions, having conducted and analyzed over 10,000 EEGs. With all due respect, an EEG, by itself, cannot confirm the existence of epilepsy or a seizure disorder. In epilepsy people, the EEG may appear completely normal between seizures. EEG neurotherapy and neurofeedback has become a well-established and accepted method for testing and treating PTSD military veterans. Consequently, Dr. Wilson is being viewed as not only confrontational, but also controversial.

On May 18th, the State Insurance Fund (Jewel Owen) sent Claimant's counsel another notice (Exhibit 16) advising Claimant they again scheduled Claimant to be seen by Dr. Richard W. Wilson on May 26, 2005, but prior to that, on May 20, 2005, Defendants' counsel sent Claimant's counsel a letter, requesting payment of $1,266.00 because Claimant did not show for an IME with Dr. Wilson on May 11, 2005 (Exhibit 17). In the commentary, Dr. Wilson's billing statement chose to opine "patient's condition is not related to employment", yet he never saw her. It must be appreciated, Dr. Wilson has never spoken to Claimant, and therefore, one must ask how and from whom has such an opinion been perceived.

In part of the June 3, 2005 order, Referee Donohue required Claimant to reimburse Defendants for charges of Dr. Wilson, for what Referee Donohue has characterized as a "missed appointment", when in fact, Defendants and the Referee were fully advised prior to the appointment Claimant's attendance at any such controversial and adversarial medical evaluation was contrary to and

working against the medical advice given by her primary care physician, and would cause Claimant further psychological and physical harm and injury, especially if not treated and stabilized. Unfortunately, after being fully advised of the genuine threat against Claimant's health, the Referee entered his orders on May 10, 2005 and May 12, 2005, which ordered Claimant to attend and cooperate with the examination of Dr. Wilson, contrary to the medical opinion and advice of Claimant's primary care psychiatrist.

Claimant is under no obligation to reimburse Defendants for the appointment, in light of the fact the appointment was unilaterally scheduled by Defendants, without accommodating Claimant and Dr. Heyrend in any manner. If Claimant had chosen to comply with the Referee's order(s), she would have done so against the medical advice and opinion of her primary care physician, Dr. Heyrend, and does not want to experience more psychological and physical injury.

Defendants have shown no desire to seek or administer justice in this case; rather they seek to defeat the claim and deny benefits. It appears the sole purpose (and the consequence) of these tactics is to expose Claimant to ongoing emotional and mental stress, and cause her greater emotional disturbances to encourage a settlement. As addressed above in the "Statement of Facts", the Ada County Sheriff and his agents conducted themselves in a similar manner after Dr. Spencer opined his medical advice and opinion to Claimant that she was not to attend any adversarial and confrontational informal meetings until she could become medically stable.

These repeated attempts to engage a confrontational adversarial mentality is similar to the former attempts for direct contact with Claimant, by Defense counsel, in the months of February and March 2003, and now with repeated attempts, unilaterally conducted, without accommodating Claimant, in their effort to force Claimant's attendance with a medical advocate, putting Claimant in another adversarial and confrontational setting. Such conduct has the effect of causing Claimant emotional stress and psychological harm, when Mr. Bauman asked to speak directly with Claimant at her place of employment, instead of attempting to schedule matters with Claimant's counsel. We can tolerate these disturbing strategies to some degree as undertaken by Defendants, as we seek to engage a course of fundamental good faith resolution, but this composite of conduct has culminated in overloading Claimant's ability to deal with these ongoing adversarial and deliberately confrontational acts, and efforts must be taken to prevent any more injury, as such has become the medical advice to Claimant.

CONCLUSION

Claimant respectfully requests this Industrial Commission to enter a declaratory ruling allowing her to remain compliant with the medical advice of her primary care psychiatrist, and allowing her physician to continue his efforts to stabilize Claimant's medical condition over such time as needed before being again "ordered" by the Commission (or Referee) to attend any further adversarial and intrusive evaluations by any further medical advocates of Defendants.

Claimant does request this Industrial Commission to enter an order granting all relief Claimant requested in the Petition for Declaratory Ruling, based upon the facts, concerns and case authorities set forth above.

Dated this 15th day of June 2005.

Vernon K. Smith
Attorney for Claimant, and
Party of Interest

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 15th day of June 2005, I caused a true and correct copy of the above and foregoing to be delivered to the following persons at the following addresses as follows:

Mr. Jon Bauman
Elam & Burke
P.O. Box 1539
Boise, Idaho 83701-1539

( ) U.S. Mail
( ) Fax
(✓) Hand Delivered

Vernon K. Smith