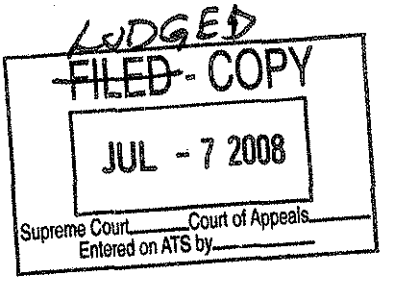
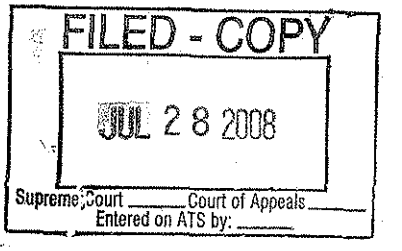
7-28-2008

Gibson v. Ada County Sheriff's Office Appellant's Reply 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 REPLY BRIEF

Appeal From The Industrial Commission Of The State Of Idaho

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INTRODUCTION

Respondents' perception of the "facts" in this matter continue to distort the merits of the case, and because of this ongoing behavior, Appellant sought review by this Court to address the actions of the Idaho Industrial Commission, and properly determine a compensation award to which Appellant is entitled, resulting from the psychological injury sustained during her employment with the Ada County Sheriff's Office.

Ms. Gibson sustained this compensable injury from this unintended result, but an accident and mishap nonetheless, as defined by Idaho law, on July 20, 1999, when Sheriff Deputies made an unexpected request of her presence at the worksite, only to become the focus of a criminal grand theft investigation assigned to them by her employer. *See* Cl. Ex. 12, p. 113, L 2-p. 114, L 4; Cl. Ex. 17, cover pages 1 & 2 and pages 1 & 11 of Supplemental Report. This contact was not for the purpose of evaluating job performance, change of duty status or work hours, or to terminate employment; they requested her presence at the workplace for the purpose of participating in an internal criminal investigation that turned into immediate accusations of wrongdoing. In accordance with § 7.05(2), Ada County Sheriff's Office Policy Manual, Ms. Gibson was "on the clock" during the entire event, and entitled to receive wages during this ordeal and her captive audience in this internal investigation. *See* Ag. R., p. 843.

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

1. Whether Ms. Gibson 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 Ms. Gibson seeks benefits was caused by the alleged industrial accident.

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

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

5. Whether and to what extent Ms. Gibson 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 Ms. Gibson's condition is compensable under Idaho Code § 72-451.

See Ag. R., p. 1111-1112.

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

1. Ms. Gibson *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. Ms. Gibson *failed to show* she suffered a compensable accident;

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

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

5. Ms. Gibson'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. (underlined and italicized expressions our emphasis).

This dispute requires this Court determine Ms. Gibson's right to receive benefits, based upon the substantial and competent evidence confirmed through the medical analysis of Dr. F. LaMarr Heyrend, M.D., who diagnosed to a degree of **medical certainty** Ms. Gibson has an injury that entitles her to benefits under Idaho law (Cl. Ex. 41, 42, 43, 51, 52, 53, 54, 55 & 56), from Post-Traumatic Stress Disorder (PTSD) (Cl. Ex. 41, 42, 43, 51, 52, 53, 54, 55 & 56), as a result of the psychological injury that arose out of this event and accident that occurred in the course of her employment, as defined under § 72-451 and § 72-102, *Idaho Code*. *See* § 72-451(6), *Idaho Code*. *See* Cl. Ex. 41, 42, 43, 51, 52, 53, 54, 55 & 56. Based upon the record in this proceeding, the present Decision must be held without merit; based upon a disregard of the substantial and competent evidence submitted during the proceedings, and based upon faulty and unconstitutional procedure, with an abuse of discretion committed by the Referee, later endorsed by the Commission's final order.

STANDARDS OF REVIEW AND APPLICABLE AUTHORITY

When the Legislature created the Industrial Commission, it intended all proceedings 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*. A referee cannot cause proceedings to take a direction that is "circumstantial", "complex" and "costly", or pursue a unilateral direction in an effort to deny Worker's Compensation benefits to a claimant, as to do so would be contrary to the stated purpose of the *Act*, and contrary to Idaho law.

The legislation is intended to be liberally construed to favor a claimant, so as to promote justice and compensate workplace injuries. *See Reese v. V-1 Oil Company*, 141 Idaho 630, 633, 115 P.3d 721 (2005) and *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purpose this law seeks to serve leaves no room for narrow technical construction. *Id.*

When the appellate court is asked to review a decision of the Industrial Commission, it will exercise free review over questions of law, reviewing questions of fact as needed to determine if there exists substantial and competent evidence to support 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 Commission correctly applied the law to the facts or not is an issue of law over which an appellate court does 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**. *See Arel v. T & L Enterprises, Inc. and State Insurance Fund*, Opinion No. 90, Idaho Supreme Court, Docket No. 34562, decided June 30, 2008; *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); Ogden v. Thompson, 128 Idaho 87, 88, 910 P.2d 759 (1996).

In Worker's Compensation matters, a claimant must show a reasonable degree of **medical probability** the injury was causally related to an accident occurring in the course of employment.....**The causation is 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).

ARGUMENT ON THE ISSUES PRESENTED

1. **Whether Ms. Gibson 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.**

In a manner comparable to *Page v. McCain Foods, Inc.*, 141 Idaho 342, 344-346, 109 P.3d 1084 (2005), we have the Ada County Sheriff, the Sheriff's Legal Advisor, and their licensed physician, Charles D. Steuart, M.D., in actual possession of clear knowledge of Ms. Gibson's July 20, 1999 psychological workplace injury, as they acted upon it directly, and had adequate notice of her injury and medical care, as it was specifically ordered by the Sheriff, because of this injury, to determine why her physician, Dr. Stephen E. Spencer, M.D., had her under his medical care and supervision and not allow her participation in any further confrontational settings or informal hearings, and after reviewing medical correspondence on her condition from her physician over the resulting trauma from the July 20th event, the Sheriff insisted Ms. Gibson meet Dr. Steuart on October 5, 1999, to evaluate the full extent of her injury

and determine the stability of her condition (Cl. Ex 10, 11 & 14), as earlier demands were made for informal meetings with her (Cl. Ex. 8 and exhibits attached thereto), following the threatening accusations and demand(s) seeking her resignation on July 28, 1999 (Cl. Ex. 3). This unrefuted information was communicated by counsel with letters and attachments 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, Gibson's counsel explained to Mr. Stivers he made repeated verbal attempts throughout this ongoing awareness of her injury to direct 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 to secure her benefits under that coverage for medical payment for what was hoped to be a short-term disability. *See* Cl. Ex. 8, last 2 pages. The County refused to do either and unilaterally cancelled her coverage. Mr. Stivers replied to Ms. Gibson's counsel's letter on June 8, 2001, 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". Cl. Ex. 7. Not only was that statement from Ada County untrue about there being no request made to file a claim with the Commission, but it was patently false and deceptive; yet notwithstanding that falsehood, Idaho law allows a claimant to show oral notice or knowledge of the injury was given to or otherwise known by the employer, and Claimant did demonstrate the employer had "actual" knowledge of claimant's injuries, despite lack of a written demand to file a claim. *See Taylor v. Soran Restaurant, Inc.*, supra, at page 527, and *Wilson v. Standard Oil Co.*, 47 Idaho 208, 273 P. 758 (1929).

In *Taylor*, supra, 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)".

Based upon knowledge of the employer, **however gained**, the employer is **liable** to the employee even when the employee gives no notice at all. *See Page v. McCain Foods, Inc.*, 141 supra; *see also* § 72-704, *Idaho Code*. After false claims of theft, demand she resign, and knowing the details of her mental and emotional meltdown from reports generated by Dr. Spencer Cl. Ex. 33, 34, 35, 36, 37, 38 & 39), and the deliberate cancellation of her medical benefits that were needed to pay the cost of medical treatment she was undergoing for stability, with a further layer of awareness by their demand for medical examinations from Dr. Steuart to determine the extent of her injuries and her lack of mental stability to participate in hearings (who confirmed her injuries), and then confronted with the written communications identified in Claimant's Exhibits 8, 10, 11 and 14 in the record (also see Ag. R., p. 790-792), it becomes inappropriate for the Commission to conclude Ada County was not charged with **notice** and **knowledge** of Ms. Gibson's injury, and to hold as they did only serves to defeat the intended effect and remedial purpose of Idaho's Worker's Compensation Law for psychological injuries. The Sheriff, his Legal Advisor, his Detectives and the County's physician operating under the Sheriff, each, and together spoke about and had knowledge of Ms. Gibson's workplace injury and had acted in light of her injuries, discussed the injuries with Claimant's counsel, and made demands for more hearings after Dr. Steuart's medical

examination, and they cannot escape being charged with **actual notice** of her workplace **injury** from the event. *See again* Cl. Ex. 3, 7, 8, 10, 11 & 14, and documents included therewith; Ag. R., p. 790-792.

As the employer, Ada County has the responsibility under § 72-601, *et seq.*, *Idaho Code* to file a report with the Idaho Industrial Commission of **any injury** which had required treatment by a physician, which was ongoing continuously from July 23, 1999, and given the examination of their own physician, it was confirmed she did have a real and significant injury, and needed more time to attempt to stabilize her condition with her treating physician, Dr. Stephen E. Spencer, M. D., and these County officials **knew** Ms. Gibson had begun receiving medical care and treatment from Dr. Spencer on July 23, 1999; Cl. Ex. 34, 35, 36, 37, 38 & 39), and they knew why, and they knew treatment was ongoing, as the objective was to attain mental stability so she could participate in informal hearings insisted upon by the County. Their own physician said her condition required more time and more medical treatment, specifically confirmed by Dr. Steuart, the authorized and official County doctor. These officials knew Ms. Gibson was put on administrative leave (Cl. Ex. 19, p. 43, L 4-5; Cl. Ex. 20, p. 4), and her medical condition had precluded any form of work for the qualifying period of an injury claim. *See* § 72-602(1), *Idaho Code*. Ms. Gibson was initially put on that administrative leave July 20, 1999 (Cl. Ex. 19, p. 43, L 4-5; Cl. Ex. 20, p. 4), and later placed on leave without pay August 24, 1999. *See* August 24, 1999 letter from Sheriff's Legal Advisor, attached to Cl. Ex. 8. *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). These actions were taken with full knowledge of her traumatic injury. The one year statute of limitation as

addressed in § 72-701, *Idaho Code*, will not commence to run (§ 72-604, *Idaho Code*) until Ada County filed the required report with the Commission in accordance with § 72-601, *et seq.*, *Idaho Code*. Ada County cannot escape their duty and resulting liability by their decision and deliberate failure to file the report, when those injuries and medical condition were known to exist immediately from the date of the incident.

Generally, notice is an element required in § 72-701, *Idaho Code*, indicating "notice of the accident shall have been given to the employer as soon as practicable, but not later than sixty (60) days after the happening thereof"; however, § 72-704 excuses a failure to notify an employer of an accident when the employer has **notice of the injury**. Because of this "unlooked for mishap" and "untoward event", that occurred July 20, 1999, Ms. Gibson was in need of immediate medical treatment with Dr. Stephen E. Spencer, M.D. by as early as July 23, 1999, and until stabilized, could not participate in their requested informal hearings, due to her mental instability and the emotional trauma resulting from the event, and the County refused to pay her while being both medically unstable and unable to work, and not allowed to work for the County because of her leave status initially, and because of her injuries and instability.

The County knew she was under a doctor's care from this disclosed injury from this event, and with that knowledge, to show their power and authority, the County deliberately cancelled her medical benefits effective October 1, 1999 (Cl. Ex. 8, August 25, 1999 and November 1, 1999 letters from Sheriff's Legal Advisor), yet not officially firing (terminating) her until December 27, 1999. It remains undisputed the County was so well aware of her injury, they insisted on confirming the severity by the County doctor on October 5, 1999, and even then had placed her

under surveillance in December 16th & 17th), 1999 (Cl. Ex. 20, pages 7-8), to determine if she was malingering or if she had improved or would improve, and knowing she had not stabilized, took further advantage of her fragile state to frighten her with this surveillance in hopes she would resign her employment. Knowledge of the injury eliminates notice of the accident, but notwithstanding that legal element of the law, the "accident" causing the injury was very well known to them from the multitude of discussions, interrogations, threats, demands for resignation, leave status, demands for informal hearings, demands for medical records, demands for medical examinations, all of which required discussion of the accident, and that gave rise for the need for counsel to request a Worker's Compensation claim be filed and an application for short-term disability benefits be processed, since the medical coverage was threatened to be cancelled as was then done by the County (Cl. Ex. 8, August 25, 1999 and November 1, 1999 letters from Sheriff's Legal Advisor), being done to avoid exposure to payment of her medical bills from the doctor's care resulting from this accident well acknowledged to have been caused on July 20, 1999.

2. Whether the condition for which Ms. Gibson seeks benefits was caused by the alleged accident.

A claimant is entitled to compensation under the Worker's Compensation Law for injuries caused by a mishap or event, connected with the industry of her employment, arising out of and in the course of that 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); *Arel*, supra "The words 'out of' 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*, supra, at 574. **"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.

Ada County and their representatives utilized the services of paid medical advocates in an attempt to degrade the physical nature of the violence and trauma to the physical structure of the brain of Ms. Gibson, seeking to define differently the consequence and results of her injury. The County would seek to stifle and preclude this Claimant from receiving benefits by suggesting her injury is not a **physical** injury. Respondents have literally built a defense with this **non-physical** strategy, but cannot eliminate the controlling diagnosis of Claimant's treating psychiatrist, Dr. F. LaMarr Heyrend, M.D., who unconditionally and absolutely identified and objectively diagnosed and reconfirmed Ms. Gibson's injury to be **a physical injury to the components of the brain**, and she is unconditionally entitled to benefits. *See* Cl. Ex. 41, 42, 43, 51, 52, 53, 54, 55 & 56.

On August 27, 2003, Dr. Cynthia Brownsmith, Ph.D., one of the County's paid advocates, submitted an opinion on the mental condition of Ms. Gibson. *See* Cl. Ex. 62. Ms. Gibson and her counsel identified numerous errors, along with disappointing fabrications of fact, crafted into Dr. Brownsmith's report, believing that if it were left unchallenged, it could inappropriately be considered by the Referee and Commission. After thorough assessment and review of Dr. Brownsmith's report, on October 29, 2003, Ms. Gibson's counsel sent Dr. Brownsmith a 19-page letter, requesting her good faith admission and need for affirmative action to correct the false and misleading narrative and baseless opinions contained in her report. *See* Cl. Ex. 62 & 63. That

October 29, 2003 letter did request Dr. Brownsmith reflect the actual facts and issues involved, but no corrections, alterations, modifications or amendments were made to her August 27, 2003 report, leaving it inferior to the correct diagnosis of PTSD as was diagnosed and objectively confirmed by Claimant's treating psychiatrist.

Of grave concern to Ms. Gibson is the insincere strategy of Respondents, as they would use the report of Dr. Brownsmith to question the medical condition and physical injury suffered by Ms. Gibson. There is no credibility in "forensic evaluations" undertaken to ignore facts, produced by a technician unqualified to render a medical opinion of a physician on PTSD, when the treating physician had specifically addressed conditions that relate to physical injuries and physical changes in the brain. The effort to impugn Ms. Gibson's character is another insult, and to misstate her mental health must be seen as a grievous misconduct by an adversarial advocate (not a psychiatrist, but by a psychologist), being done to manipulate and falsify facts and medical issues, so that a false opinion could be entered into a record. Dr. Heyrend is a world-renowned, highly experienced and credible figure on the subject of PTSD, not only in this medical community in the United States, but in the world of medical acclaim on these brain injuries. Cl. Ex. 40. A later evaluation by Dr. Brownsmith on April 14, 2005, serves only to confirm Ms. Gibson had clearly sustained a PTSD injury, as it was demonstrated as a severe **re-victimization** of Ms. Gibson at the hands of Respondents, a clear factor and manifestation that does occur in PTSD injury victims. Cl. Ex. 61.

Ms. Gibson was re-victimized a second time by Dr. Brownsmith on April 14, 2005, when forced, against specific medical advice of Dr. Heyrend, to endure another contact and undergo

further psychological abuse. *See* Cl. Ex. 41, 42, 43, 51, 52, 53, 54, 55 & 56; **see especially** Cl. Ex. 61. The VHS video recording of Dr. Brownsmith's follow-up examination, requiring Ms. Gibson to suffer again at Dr. Brownsmith's intrusive conduct was telling. In the video (Cl. Ex. 61, last 15 minutes of Tape No. 2), Ms. Gibson is severely ruminating while asking about the multitude of inaccuracies, fabrications and misstatements made about her in the inaccurate report, and inquiring why Dr. Brownsmith would allow such false information to become part of her August 27, 2003 report. Ms. Gibson saw Dr. Brownsmith on April 14, 2005, only because of the forced encounter created by the order (Ag. R., p. 865-866) compelling she attend that "re-evaluation". Dr. Heyrend, her treating psychiatrist, expressed his medical opinion the Commission's order (Ag. R., p.859) would serve only to re-victimize her, causing more trauma, injury and another relapse and derailment of his hard work and accomplishments made toward Ms. Gibson's efforts at recovery. *See* Cl. Ex. 41, 42, 43, 51, 52, 53, 54, 55 & 56.

Shortly after Ms. Gibson's appointment with Dr. Brownsmith of April 14, 2005, Dr. Heyrend had to medically intervene and stabilize Claimant from this traumatic episode, requiring he place Ms. Gibson on additional medications (Guanabenz) in an effort to balance the physical injury caused to the deep structures of Ms. Gibson's brain (locus caeruleus), in an effort to reduce her anxiety, and structure a pathway for continuing psychotherapy sessions, and undo the horrible harm caused by Dr. Brownsmith. In the May 10, 2005 Affidavit of Dr. Heyrend, he stated it was his medical opinion "any further advocacy by more intrusive examinations [of Ms. Gibson] serves only to re-victimize Ms. Gibson, and that has the clear potential to cause substantial and permanent harm to her mental, emotional and physical health". *See* Cl. Ex. 43.

Dr. Heyrend's medical advice was consistent with his extensive knowledge of PTSD symptomology, and his concerns were founded upon his extensive study, knowledge and practice of PTSD injuries. The Commission Referee, who was demonstrating no awareness of the physical nature of the injuries associated with this disorder, or a rather reckless and indifferent disregard of the medical advise provided to him by Dr. Heyrend (Ag. R., p. 895; 948-955), decided to order Ms. Gibson (Ag. R., p. 944-945; p. 977-978; p. 1067-1068; p. 1109-1110; p. 1122-1123) to see yet another adversarial medical advocate hired by Respondents, from which Ms. Gibson experienced more re-victimization from Dr. Richard Wilson, M.D., and even **before** he saw her, and **before** he could diagnose Ms. Gibson, Dr. Wilson submitted a "Health Insurance Claim Form", while requesting payment of $1,266.00, stating in that billing statement, "**patient's condition is not related to employment**". *See* Cl. Ex. 66. He had yet to see her, speak to her, or review Dr. Heyrend's medical records. That demonstrates "paid advocacy" at its best. Additionally, Dr. Wilson created an Affidavit on May 11, 2005, and stated, "may be evidence of a neurological problem, namely that Mrs. Gibson may have complex partial epilepsy". See May Affidavit of Richard W. Wilson, M.D., attached as an exhibit to Defendants' May 11, 2005 Motion to Compel Attendance at Medical Evaluation. Ag. R., 982-984. There was **never** any medical diagnosis or basis for Dr. Wilson to say Claimant has "complex partial epilepsy", let alone state her condition was not related to employment, as he had yet to see her at that point. Claimant has no family history of epilepsy, and no medical basis existed to even assume that. These statements are telling as to what paid advocacy will produce during efforts to deny an injured worker benefits.

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

Pursuant to Idaho law, an event associated with employment needs to contribute to the psychological and physical injuries. *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; *accord, Comish v. Simplot Fertilizer Co.*, 86 Idaho 79, 86, 383 P.2d 333, 338 (1963). Idaho case authority has established 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).

In accordance with Idaho's Worker's Compensation law, a workplace accident is defined as an unexpected, undersigned, and unlooked for mishap which causes an injury, and which can be reasonably determined as to time and place of occurrence. Such an accidental injury arising out of and in the course of employment is compensable under Idaho's Worker's Compensation law. *See* § 72-102(18)(a), § 72-102(18)(b), and §72-102(18)(c), *Idaho Code. See also Arel*, supra.

On June 23, 2005, Dr. Heyrend submitted his evaluation containing the medical diagnosis and opinion that stated, in part:

> "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". *See* Cl. Ex. 42.

See also Cl. Ex. 41, 42, 43, 51, 52, 53, 54, 55 & 56.

In the April 29, 2004 Evaluation Report (Cl. Ex. 57 & 58), Dr. Lipetzky described his review of the transcribed copy of Sergeant Scott Johnson's interrogation of Ms. Gibson on July 20, 1999, and from his diagnosis and opinion of Ms. Gibson's mental health analysis from those excerpts contained on pages 13-15, he confirmed that encounter was the traumatic cause of Ms. Gibson's injuries, and Dr. Lipetzky 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)".

This medical report defines a medically recognized disorder, with physical manifestations present from the anxiety. It was during this work-related criminal investigation at the Sheriff's Office, July 20, 1999, these Sheriff's agents engaged in accusations against Ms. Gibson; made threats she would be prosecuted for felony criminal behavior (grand theft); threatened her with incarceration, all of which caused Ms. Gibson to endure extreme fear of these outrageous claims associated with permanent loss of her career and the end of her life as she knew it. Those threats caused her to suffer a psychological workplace injury of extreme magnitude, and resulting physical damages to her brain, with diagnostic consequences associated with Post-Traumatic Stress Disorder. Her injuries include physical damage to significant components in her brain, resulting from the effects of the extremely traumatic, confrontational event, yet unnecessary and a completely unexpected encounter she was forced to undergo at the Ada County Sheriff's Office.

In *Silahic v. Peak Medical Corporation, dba Twin Falls Care Center*, Case No. 99-003441, decided December 14, 2001, the Idaho Industrial Commission stated: "for purposes of Idaho Code

Section 72-451, a "predominant cause" is the cause that prevails over all other cause combined". Ms. Gibson's Worker's Compensation claim was predominately caused as a result of the sudden, extraordinary, unintended and unexpected event or mishap of July 20, 1999, when she reported to the Ada County Sheriffs' Office Facility, as required by her employer, at her place of work at 7200 Barrister Drive, Boise, Idaho 83704, and there subjected to trauma for a period of time from approximately 2:35 p.m. until approximately 6:00 p.m. (Cl. Ex. 17, page 2 of the Supplemental Report; Cl. Ex.20, page 1). That specific, extraordinary, unanticipated and untoward workplace event was the predominant cause of Ms. Gibson's resulting physical brain injuries diagnosed as a PTSD disorder, created from the exuberant and threatening nature of that interrogation. Dr. Heyrend's diagnosis confirms Ms. Gibson suffered a Post-Traumatic Stress Disorder (PTSD) as predominately caused by the sudden and extraordinary event of July 20, 1999 (Cl. Ex. 41, 42, 43, 51, 52, 53, 54, 55 & 56) , and is a psychological workplace injury, as defined by § 72-451 and § 72-102(18), *Idaho Code.*

Ms. Gibson's injury was brought about when Ada County agents unleashed their "detective" skills, orchestrating an event in the workplace, leaving resulting physical brain injuries, with physical manifestations characteristic of the disorder, and culminated in a permanent change of the functioning aspects of several components of the brain, forever causing identifiable physical changes and damage to the structure of the brain and its normal range of function. Ms. Gibson's injuries have been medically determined to a degree of medical certainty by Dr. Heyrend as being a "mental-physical" injury (41, 42, 43, 51, 52, 53, 54, 55 & 56, classified and defined under § 72-451 and § 72-102, *Idaho Code,* wherein injuries of this nature are compensable under Idaho's Worker's

Compensation law. *See Georgiades v. Idaho Dept. of Environmental Quality and State Insurance Fund*, Idaho Industrial Commission, Case No. IC 02-013881, page 5, decided July 7, 2006. *See also Luttrell v. Clearwater Co. Sheriff's Office*, 140 Idaho 581, 584, 97 P.3d 448 (2004).

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

There was no subsequent intervening cause or event. There has been an ongoing process of re-victimization that confirmed the manifestations of the injury of Ms. Gibson's brain, and serves to demonstrate the full nature and symptomology of the severe physical injury to the brain. The Court is well aware of the ongoing process of re-victimization suffered by Ms. Gibson, as that information was submitted in the record, and in extensive detail, in *Gibson v. Ada County Sheriff's Department*, 139 Idaho 5, 72 P.3d 845 (2003) and *Gibson v. Ada County, et al.*, 142 Idaho 746, 133 P.3d 1211 (2006). Following the event of the interrogations held July 20, 1999, Ms. Gibson's counsel received a call July 28, 1999 from the Sheriff's Legal Advisor (Cl. Ex. 3), who stated the Sheriff wanted Ms. Gibson terminated, and if she would not resign from the Sheriff's Office, she would be processed with felony charges for grand theft and would then be fired. At all times prior to July 20, 1999, Ms. Gibson had been regarded as an exemplary employee with exceptional and excellent ratings; deemed an excellent asset to the Sheriff's Office (Cl. Ex. 22, 23, 24, 25, 26 & 27), but on July 20, 1999, she is now ostracized, placed on leave immediately, then declared on "leave without pay" August 24, 1999, forced to see the County doctor for evaluation of her injuries on October 5, 1999, all of which was done knowing she was under doctor's care, done without any formal or informal hearing, in violation of the County's Personnel System (Merit System), Federal law, and

ignored her expressed agreement to cooperate fully in any reconciliation process. She was then fired December 27, 1999, when the Sheriff formally terminated her without any termination hearing, as they knew she was not medically stable to participate in any confrontational setting associated with an informal hearing. *See* Cl. Ex. 35, 37 & 38. Ms. Gibson was even officially placed under surveillance by the Sheriff, stalked by Sergeant Scott Johnson on December 16th and 17th, 1999 (Cl. Ex. 20, pages 7-8), and done to confirm her injuries were real, and then to play on that trauma to cause Ms. Gibson more psychological fear, in an effort to force her resignation, as she refused to resign and refused to accept fault for the administrative errors that were created by the Ada County Payroll Department.

5. Whether and to what extent Ms. Gibson 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.

When determining impairment, the Commission ultimately must decide what benefit a claimant is entitled to receive for any impairment. *See Silahic v. Peak Medical Corporation, dba Twin Falls Care Center*, supra; *Urry v. Walker & Fox Masonry Contractors*, 115 Idaho 750, 755, 769 P.2d 1122, 1127 (1989). The medical diagnosis of a treating physician is to be given **substantial weight**, not ignored and given indifferent disregard. *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).

From a medical perspective, Ms. Gibson was first examined July 23, 1999 and placed under the care immediately after this event by Dr. Stephen E. Spencer, M.D., for extreme psychological disturbance from her July 20, 1999 encounter. *See* Cl. Ex. 34, 35, 36, 37, 38 & 39. As the diagnostics progressed, it became apparent she suffered a psychological workplace injury, diagnosed by Dr. Joe A. Lipetzky, Psy.D. to be "at the very least" a Panic Disorder With Agoraphobia (Cl. Ex. 58), and by Dr. F. LaMarr Heyrend to be what he knew as a well-defined and documented PTSD injury. *See* Cl. Ex. 41, 42, 43, 51, 52, 53, 54, 55 & 56.

From July 20, 1999, until February 15, 2000, Claimant's condition degraded with the ongoing trauma. Dr. Heyrend became her treating psychiatrist, and undertook outpatient psychiatric treatment through his office for her brain injuries. Claimant received outpatient medical care directly through Dr. Heyrend from October 2002 until Dr. Heyrend retired in the Fall of 2006.

Dr. Heyrend expressed his diagnosis and medical opinion in medical reports (Cl. Ex. 42, 46, 52, 53 & 55), letters to Claimant's counsel (Ag. R., p. 859 & 893-904), Affidavits (Ag. R., p. 948-968), and post-hearing depositions, including November 17, 2005 (*See* Agency Record, November 17, 2005 Deposition of Dr. Heyrend), confirming PTSD as diagnosed by him to be objectively identified to **absolute medical certainty**, and confirmed as physical brain injury, which initially he determined to be severe in nature, and considered by him after the benefit of treatment to still have physical brain damage to be at or approximately that of 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, evidenced by the empirical reality of her reactions when revictimized by intrusive examinations forthcoming from orders for examination, including

June 19, 2003 (Ag. R., p. 150-151) and April 12, 2005 (Ag. R., p. 865-866), which produced the manifestations, confirming the clinical consequences (Ag. R., p. 859 & 893-904). This occurred when confronted by Dr. Cynthia Brownsmith, a psychologist selected by Employer-Surety, who sought to "forensically evaluate" Appellant's condition. Ms. Gibson complied 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 proved a predictable consequence because of her brain damage. Dr. Brownsmith conducted four (4) evaluations, June 20, 2003, June 24, 2003, July 11, 2003, and again April 14, 2005. These encounters caused trauma and fear to be experienced, documented reactions characteristic of brain damage in PTSD patients, due to the psychological consequences expected from the result of physical injuries in the brain. This is caused when you trigger the trauma and react and relive the event over and over again. This demonstrates permanent brain damage due to physical disorder and injury to components of the brain, 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.

Post-Traumatic Stress Disorder is defined medically and legally as a "mental-physical" injury, compensable pursuant to the provisions of Idaho's Worker's Compensation law, and Dr. Heyrend testified (Cl. Ex. 42) Ms. Gibson is suffering and likely will continue to be entitled to a 50% impairment disability rating, disabled greater in the initial stages, before treatment and therapy.

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

As the employer, Ada County must take employee(s) as their health conditions exist; preexisting infirmities do not preclude or eliminate an employee's opportunity to seek worker's compensation. The injury for which compensation is sought must be 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). Even if Ms. Gibson injury combines with preexisting conditions to cause or prolong disability, impairment or need for treatment, the condition is compensable when the injury is a major contributing cause of her disability. *See* § 72-406, *Idaho Code*; *see also Everingim v. Good Smaritan Center*, 1996 SD 104, 552 N.W.2d 837.

Apportionment of benefits would be inappropriate under § 72-406, *Idaho Code*, as the statute **requires** apportionment or deduction from benefits **only** for **preexisting physical impairment**, not a preexisting **psychological** impairment. *See Henderson v.* McCain Foods, Inc., 142 Idaho 559, 130 P.3d 1097 (2006). There is no evidence in the record to suggest Ms. Gibson ever before suffered from a preexisting physical impairment to the brain.

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

The focus in this dispute must first require one to concentrate upon § 72-451, Idaho Code, which allows psychological injuries, disorders and conditions to be compensable under Idaho's Worker's Compensation Law, when certain specifically enumerated conditions are met, and the cause of the injuries exist in a real and objective sense.

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.

Post-Traumatic Stress Disorder (PTSD) is mental-physical, not a "mental-mental" psychological disorder as Respondents would have this Court believe it to be. "A "mental-mental" claim is the result of an event in which a mental stimulus or impact results in a psychological condition", without the presence of a physical injury. See *Luttrell v. Clearwater Co. Sheriff's Office*, 140 Idaho 581, 584, 97 P.3d 448 (2004). Medical research has confirmed PTSD is physical injury to components in the brain, and is considered to be a "**mental-physical**" injury, one in which a mental impact or stimulus results in a distinct physical brain injury, and a "**mental-physical**" injury is compensable under Worker's Compensation laws, not only by the majority of the states, but also by Idaho. *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 by the author to illustrate what are considered to be "mental-physical" injuries, and under what conditions those injuries are found to be compensable under the various state worker's compensation laws.

The testimony of Ms. Gibson's primary-care psychiatrist-physician, proved by clear, objective, substantial, competent and convincing evidence, Ms. Gibson's psychological workplace injuries arose from that sudden and extraordinary encounter that occurred as a result of the event on July 20, 1999, through the confrontational accusatory setting created in the workplace by Ada County agents, resulting in an accidental event in which medical analysis (clinical and psychometric) has confirmed has predominately caused this brain injury from this horrific trauma during this confrontational event on July 20, 1999, beginning at 2:35 p.m.. Dr. F. LaMarr Heyrend, M.D. is an internationally recognized psychiatrist (Cl. Ex. 40) residing in Idaho, and to a degree of **medical certainty**, classified and diagnosed Ms. Gibson's condition in a real and objective sense, strictly in accordance with the **American Psychiatric Association's most recent diagnostic and statistics manual** (DSM-IV) (Cl. Ex. 42, 43, 44, 46, 47, 49, 51, 52, 53, 54, 55 & 56), to be Post-Traumatic Stress Disorder (PTSD), caused from this workplace encounter and confrontational event with resulting and ongoing objectively confirmed and defined physical brain injuries with the associated physical manifestations, verifying permanent physical injury and permanent medical disability, that does approximate 50% loss of normal function, and the entitlement to those benefits from impairment.

In the Opening Brief, Appellant presented federal and state cases that recognize and verify that traumatic experiences result in a neurochemical changes in the brain at a cellular level entirely

beyond a patient's control, resulting in damage to neurosynaptic receptors and serotinergic neurotransmitters which are extremely difficult to treat. *See Daniel Construction Company v. Tolley*, 24 Va. App. 70, 75, 480 S.E.2d 145 (1997). The Virginia Industrial 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. Extreme stress actually changes brain cell structure and causes transformation of the physical architecture of specific area(s) of the brain, resulting in deterioration of components of the brain. *See 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).

In *Trinh v. Allstate Insurance Company*, 109 Wn. App. 927, 37 P.3d 1259 (2002), the Washington Court held, PTSD 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, and the *Trinh* Court found it helpful to review Federal Court decisions, 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." The *Trinh* court held that physically-manifested PTSD unambiguously and clearly falls within the broad term of bodily injury and physical injury, concluding the term "bodily injury" includes emotional injuries "accompanied by physical manifestations, and

These cases of *Daniel Construction Company v. Tolley*, supra, *Ligeti v. British Airways*, supra, *Trinh v. Allstate Insurance Co.*, supra, and T*urturro v. Continental Airlines*, supra, verify that individuals who suffer extreme stress from a traumatic experience, who are then diagnosed with

PTSD, do suffer physical damage and specific structural injury to the body and physical integrity of the brain, accompanied by resulting physical manifestations as a physical injury, and at times, determined to be permanent and irreversible. They identify the injury as bodily injury and as physical injury.

Post-Traumatic Stress Disorder evidences an injury to the brain, and the only reasonable conclusion is that it (PTSD) is a bodily injury. *See Weaver v. Delta Airlines, Inc.*, 56 F.Supp.2d 1190 (Mont.1999). **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).

In 1997, two years before Ms. Gibson was subjected to this traumatic encounter 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.

OTHER ISSUES TO BE ADDRESSED BY THIS APPEAL

The Referee committed an abuse of discretion by improperly impugning Ms. Gibson's credibility, and excluding portions of competent and substantial evidence submitted into the

record to support Ms. Gibson's injury. The Referee elected to wrongfully strike evidence that was relevant and essential in nature, and substantial and competent evidence to directly support the cause and nature of her claim.

On April 5, 2007, Appellant submitted a motion and memorandum (Ag. R. p. 1661-1745), seeking the Commission to reconsider the Referee's Findings, Conclusions, and Recommendation, signed March 2, 2007 and entered of record March 16, 2007 (Ag. R. p. 1629-1653), and to reconsider the Final Order of the Commission, entered of record March 16, 2007 (Ag. R., p. 1654-1655) , because the findings, conclusions and recommendation were not supported by substantial evidence in the record, but rather were contrary to the evidence in the record, did inappropriately appear designed to create an unsupported theory over Claimant's credibility as an issue, when no such factual basis existed to impeach and impugn Claimant's credibility on her injury; that the findings and conclusions were designed to indifferently and wrongfully disregard Claimant's treating physician's medical diagnosis and by doing so, sought to ignore her confirmed medical condition; that the findings and conclusions were based on faulty and obscured reasoning that constitutes an abuse of discretion by the Referee; violate existing constitutional and statutory provisions; exceeds the Commission's statutory authority; made upon unlawful authority; arbitrary, capricious, and pursued in a manner described as an abuse of the reasonable exercise of the discretion of the Referee, formulated as a result-oriented exercise so as to ignore Claimant's PTSD condition and deny Claimant her right to recovery, and by virtue thereof, such malevolent objectives could not lawfully support any basis for the

Commission to approve proposed findings, conclusions, and such a recommendation, as a matter of Idaho law.

In the Opening Brief, Appellant did request this Court review the Commission's findings, conclusions and Decision in accordance with the standards of the Idaho *Administrative Procedures Act.* Respondents would choose to argue those standards do not apply, notwithstanding *Stolle v. Bennett*, 144 Idaho 44, 156 P.3d 545 (2007), in which this Court stated:

> "Strict adherence to the rules of evidence is not required in Industrial Commission proceedings and admission of evidence in such proceedings is more relaxed. Hagler v. Micron Technology, Inc., 118 Idaho 596, 598, 798 P.2d 55, 57 (1990. When the Legislature created the Commission, it intended that proceedings before it be as "summary, economical, and simple as the rules of equity would allow." Hite v. Kulhenak Bldg. Contractor, 96 Idaho 70, 72, 524 P.2d 531, 533 (1974). The Commission should have the discretionary power to consider any type of reliable evidence having probative value, even though that evidence may not be admissible in a court of law. *Id.* Idaho Code, § 67-5251, controlling the admission of evidence **in proceedings governed by the Idaho Administrative Procedure Act**, states that evidence may be admitted by the presiding officer if " it is of a type commonly relied upon by prudent persons in the conduct of their affairs." Emphasis added.

Whether that commentary was simply the Idaho Supreme Court's attempt to "analogize" how the Commission is not bound by strict rules of evidence, or is to view IDAPA as the controlling law on the admission of evidence, it appears in *Stolle* the Court strongly recognized the importance of the Commission's discretionary power under the Judicial Rules of Practice and Procedure (JRP) to admit evidence that is of a "type commonly relied upon by prudent persons in the conduct of their affairs", and strict adherence to rules of evidence is not required in Commission proceedings, and admission of evidence in such proceedings is to be more relaxed, like in proceedings governed by the *Idaho Administrative Procedures Act.* Regardless how this

Court would review the evidentiary standard presented here, Appellant has been exposed to chilling events how Respondents have continued to exhibit disappointing conduct during these proceedings, and how the Commission has abused its discretion on both evidentiary and credibility issues regarding this dispute, and not allowed proceedings to be summary, economical, and simple as the rules of equity would require.

1. Abuse of Discretion Regarding Substantial and Competent Evidence Submitted In the Record.

Findings of fact must be 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).

As in *Stolle*, when ruling on the admissibility of evidence, a hearing officer must admit evidence to assist, rather than frustrate development of the record, and evidence a Commission proceeding may **only** be **excluded** 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". See § 67-5251.

The hearing officer should not strike or exclude substantial and competent evidence, even under circumstances when it is of a hearsay nature, as hearsay evidence in Commission proceedings is admissible as this Court held in *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.*

In *Jensen v. City of Pocatello*, supra, the Court stated:

> "**Substantial evidence**" is more than a scintilla of proof, but less than a preponderance. It **is relevant evidence** that **a reasonable mind might accept to support a conclusion.**" Id. (Emphasis added).

See also Hutton v. Manpower, Inc., Idaho Supreme Court, Docket No. 32160, filed December 20, 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 reviewing a hearing before the Industrial Commission, the *Jensen* Court went on to state:

> "The claimant carries the burden of proof that 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.**" (Emphasis added).

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).

The experience, technical competence, and specialized knowledge of the Commission may be utilized in the **evaluation of evidence**, but not as a **substitute for evidence** in the record, since the requirement for administrative decisions is based upon substantial evidence and reasoned findings, which must provide the factual basis for any effective judicial review. That process becomes meaningless if material facts known to or relied upon by the treating medical

physician and psychiatrist are not allowed in the record. *See for example Laurino v. Board of Professional Discipline*, 137 Idaho 596, 602, 51 P.3d 410 (2002); *see also* for example § 67-5248, *Idaho Code.*

Medical diagnosis and opinions of physicians and psychologists who treat a claimant **must** be given equal or greater weight to other opinions of physicians (or psychologists) who only see a claimant in an advisory role or 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).

As previously addressed, on April 5, 2007, Appellant submitted a motion and memorandum (Ag. R., p. 1661-1745), to reconsider the Referee's Findings, Conclusions, Recommendation, and the Final Order of the Commission, entered of record March 16, 2007 (Ag. R., p. 1654-1655), partially because the findings, conclusions and recommendation were not supported by substantial and competent evidence in the record. Two examples are sufficient to demonstrate how the Referee has abused his discretion by misstating, manipulating and distorting contained in the record, in an effort to "reverse engineer" the findings, conclusions and recommendation to be submitted to the Commission for approval. The complete details of Appellant's argument regarding the Referee's failure to consider competent and substantial evidence in the record is found in the Agency Record, pages 1661-1745.

a. Distortion of Facts to Discredit Claimant's Physicians

In paragraph 12 of the Referee's Findings, Conclusions, and Recommendation (Ag. R., p. 1636), the Referee distorted the July 23, 1999 Progress Note prepared by Dr. Stephen E. Spencer, M.D. The Referee's narrative reads, "Also at the time of the interview, Claimant was taking a short medical leave. She underwent a biopsy on July 14 or 16, 1999 and next visited her treater, Stephen E. Spencer, M.D., on July 23, 1999 when she learned the biopsied mass was benign". The Referee's conclusion that Dr. Spencer did the biopsy for Ms. Gibson, demonstrates a failure to correctly assess and apply competent and substantial evidence to the issues of this dispute, as Ms. Gibson's "treating physician" for the biopsy was not Dr. Spencer, but Dr. John L. Hendricks, M.D. *See* Defs. Ex. 12. The Referee incorrectly assessed Ms. Gibson's appointment with Dr. Spencer, when he stated: "on July 23, she reported insomnia, diarrhea, lack of appetite, and **abnormal thoughts**". Emphasis added. What Dr. Spencer reported was "She cannot sleep. She has diarrhea. She has no appetite. **She has trouble thinking clearly**. She cannot fall asleep. **Her blood pressure is elevated**". Emphasis added. Not only did the Referee change Dr. Spencer's comments that **"She has trouble thinking clearly"** into **"abnormal thoughts"**, but intentionally left out the critical "physical symptom" of Claimant's **"blood pressure being elevated"**. *See* Cl. Ex. 39; Ag. R., p. 1685.

The Referee also attempts to discredit the description Claimant gave to Dr. Spencer "about her work problems and symptoms. The symptoms were very real as Claimant described them to Dr. Spencer, who then stated: "She has been accused of embezzling money at the Sheriff's Office", and Dr. Spencer stated, "After several months of arguing with them she apparently gave up and now eight months later they are accusing her of accepting a payment which was higher than she was

supposed to be paid. She does not keep track of her checkbook, so she does not really know how much they overpaid her, particularly taking into account the fact that she has been billing for overtime and given the fact the payroll office seems to be in arrears much of the time with paying the employees down there". Bluntly, Dr. Spencer's July 23, 1999 Progress Note is directly on point with the fact of the confused state of the resulting overpayment events, and the Idaho Supreme Court cases of which the Referee claims to have taken judicial notice. *See* Cl. Ex. 39; Ag. R., p. 1686

The Referee goes on to state Dr. Spencer relied upon her [Claimant's] descriptions when he acquiesced to her request for a medical excuse and reported she was unable to participate in Employer's follow-up investigation. Dr. Spencer never stated Ms. Gibson made any request for any medical excuse. In his August 5, 1999 letter, Dr. Spencer stated, "We are currently trying to stabilize her with medication but her condition has not improved to the point where she can participate in a hearing until further notice". Later, in his August 30, 1998 letter, Dr. Spencer stated, "She [Claimant] has been under extreme duress for the past month related to her work. She has been extremely depressed and anxious and at times, has **panic attacks**. Her memory is extremely poor at times and she cannot focus. If she takes medication to reduce the anxiety, then she is too sleepy to focus or remember well. There is no way she can adequately represent herself in the present emotional state". Again, nothing in this report of Dr. Spencer's indicates Claimant made any request of Dr. Spencer for any medical excuse, for the purpose of avoiding any "Employer's follow-up investigation". *See* Cl. Ex. 37, 38 & 39. The Referee erroneously states, "The history of pay disputes which Claimant provided to Dr. Spencer was inconsistent with the facts as described

by other evidence of record". Claimant did not write Dr. Spencer's Progress Notes for him, and she had no control as to his perception or understanding of the details expressed to him. Dr. Spencer's awareness of Ada County's poor choices is consistent with how they cause payroll errors and force ensuing litigation in this matter, yet the Referee would rather chase an idea to impeach Ms. Gibson or pursue an indifferent disregard of a licensed physician, to design an exit path to walk away from the substantial and competent evidence and avoid the duty to award benefits Claimant is lawfully entitled to receive under Idaho law. Ag. R., p. 1686.

In paragraph 30 of his findings, conclusion and recommendation (Ag. R., p. 1639), the Referee makes erroneous conclusions as to Dr. Heyrend's medical opinion of what traumatic stressor must occur during an event before he could diagnosis Ms. Gibson as having sustained a PTSD injury in accordance with the American Psychiatric Association's most recent diagnostic and statistics manual (DSM-IV-TR). In paragraph 30, the Referee stated:

> "He [Dr. Heyrend] acknowledged the diagnosis requires that an event be objectively life-threatening and that Claimant's event – the interviews – was not objectively life-threatening. However, he asserted that because Claimant is very sensitive this prerequisite criterion – that the event be objectively life-threatening – need not be taken literally."

Dr. Heyrend confirmed (several times in his testimony) that Ms. Gibson is in a class of people that is "very sensitive" to traumatic experiences, and those threats inflicted upon her by the Sheriff's detectives during the interrogations on July 20, 1999, were direct threats against her "identity" by "annihilation" and "psychological extinction". In his April 4, 2005 EEG/Evoked Potential Review, page 2 (attachment to Cl. Ex. 42), Dr. Heyrend stated:

"Therefore, we can clearly see that we have a person who is in the group of hyperfrontal people with affective disorders, and panic disorders that are susceptible [to] development of PTSD. We all know that not everyone develops PTSD but there is a subset that do. What we find in this woman is representative of these findings. Please refer to Veteran's Administration EEG findings in PTSD.

Thus, very clearly what happens is that you have a woman who has a weak ego in that she has had a great deal of difficulty in her life in terms of becoming what she feels she should be and should become, and she finds a career as a police office[r] that solves these problems and gives her a good identity, and "presto", she is taken aside and told that her career is over and she is going to the penitentiary, and that she should understand what is going to happen to her. In other words, they are pointing out to her what happens to police officers in jail. To her, **this was a death threat**. It would simply rip her life apart.

With high-anxiety and panic reactions already, it is very easy for her to downgrade the control of the locus caeruleus, the nucleus amygda, and hippocampus, and the flight or fight response (which is what panic is) was brought about.

In retrospect, there is absolutely no question that she would qualify for traumatic neurosis, as defined in DSM-II and DSM-III, and **she qualifies for PTSD on the basis that a life-threatening event did, in fact, occur and she felt she was about to be destroyed.**" Emphasis added.

The Referee is not allowed to alter competent evidence, and cannot distort the medical opinion expressed by Dr. Heyrend, nor is he qualified to interpret the DSM-IV-TR to his preference, as to what the definition of a life-threatening event is, or how physicians interpret and apply certain events to their diagnosis of PTSD patients.

b. Distortion of the Facts to Discredit and Censure Claimant.

In paragraph 46, page 15 of the Referee's Findings, Conclusions, and Recommendation (Ag. R., p. 1643), the Referee stated:

"**Credibility**. Claimant lied under oath. She testified she regularly worked substantial overtime for Employer. She testified by written statement to the bankruptcy court that her "estimated monthly overtime" was "0". This bankruptcy

> statement, Schedule I, was signed by Claimant under penalty of perjury on May 20, 1999 and duly filed. Claimant's testimony is impeached."

Mr. and Ms. Gibson met with C. Grant King, their attorney and his legal assistant, Christine Conklin, on November 20, 1998, regarding their desire to file a Chapter 13 Petition for Reorganization. After obtaining the records, Christine and Mr. King filed the Petition on May 17, 1999 (not May 20, 1999, as stated by the Referee), and income statements were prepared by counsel, based upon what "sources of income" the Plan seeks to utilize. *See* Affidavit of C. Grant King, Agency Record, p. 1711-1745).

The Referee's statement, "Claimant lied under oath" is not only untrue, but is unsupported conjecture, and a rather illogical approach to understanding the content of forms prepared by professionals who have federal rules and reasons to support their formats. Why doesn't the Referee say Claimant lied when she signed a pay voucher that has a figure of $3,050.00 on it when it also had her pay figure of $1,550.00 on it? People sign forms when asked, and do so trustingly, and rely on the accuracy of others. This entire disaster with Ada County is the functional equivalent of an employee trusting the employer. This is an obstreperous attempt to use "credibility" to challenge testimony, and also the medical assessment and the medical opinions of each treating physician and psychologist. Claimant was told why Mr. King wanted to enter "0" overtime on Schedule I, and it was because her overtime was directly subject to speculation over future assignment tasks. It was purely speculative and not even the proper subject of estimation on a predictable basis. Claimant did not lie about anything in her Chapter 13 Reorganization proceedings, and it was Mr. King's office staff who made decisions on what was the reliable source of income to present a Plan, and

created the computer generated forms based on wage, commission and retirement income information as the predictable source of Plan payment.

c. Abuse of Discretion by Enabling Respondents' in Their Refusal to Pay Medical Expenses as Required Under § 72-432(7), *Idaho Code.*

On August 18, 2005, **based solely upon requests from Respondents**, through order of the Referee, and pursuant to demand of Dr. Richard W. Wilson, M.D., Respondents' designated physician, Ms. Gibson was directed to attend and cooperate with an EEG examination (Ag. R., p. 1188). This was being ordered by Douglas A. Donohue, Referee for the Idaho Industrial Commission, **contrary** to the expert medical advise and opinion of the primary-care psychiatrist, F. LaMarr Heyrend, M.D.; the order said **if she failed to attend**, she would be at risk of loosing **any** entitlement to Worker's Compensation benefits. On August 19, 2005, Referee Donohue entered the additional order requiring Ms. Gibson attend an EEG examination on August 23, 2005 (Ag. R., p. 1192). Under **protest** from her primary-care psychiatrist, Ms. Gibson proceeded under the Referee's orders, and attended the EEG examination requested and scheduled by Dr. Richard W. Wilson, M.D. The EEG order for examination was sought by Respondents (Cl. Ex. 67, 68, 69, 70, & 71; Ag. R., p. 1140-1144; 1147-1154; 1163-1166; 1189-1191) and their designated physician, and Ms. Gibson was **not** responsible for payment of these medical services, pursuant to § 72-432(7), *Idaho Code.*

On February 5, 2007, the billing department, acting for the benefit of St. Alphonsus Regional Medical Center, mailed Ms. Gibson a billing statement, requesting her payment in the amount of $462.60, claiming Ms. Gibson responsible to pay for the EEG services rendered by St.

Alphonsus on August 23, 2005 (Ag. R., Additional Documents – Attorney Fees, No 1 with exhibits). Ms. Gibson contacted St. Alphonsus and their billing department, inquiring about that statement, directing they seek payment from Respondent(s) who sought the services; that on February 14, 2007, St. Alphonsus generated an "explanation of benefits" (Ag. R., Additional Documents – Attorney Fees, No 1 with exhibits), confirming State Insurance Fund tendered partial payment to St. Alphonsus, as payment for part of those EEG services rendered. That on February 21, 2007, March 23, 2007, April 22, 2007, and June 27, 2007, St. Alphonsus again mailed requests for payment to Ms. Gibson for the balance on their statement (Ag. R., Additional Documents – Attorney Fees, No 1 with exhibits), declaring Ms. Gibson then owed St. Alphonsus $694.00, apparently failing to credit the $231.40 received in partial payments from Respondent(s).

On April 5, 2007, Ms. Gibson raised this specific issue within the Memorandum submitted to support a Motion for Reconsideration served upon the Commission (Ag. R. 1661), yet the Commission declined to act. Consequently, the Industrial Commission failed to review the matter, failed to correct the ongoing non-payment status, and the effect of that indifferent disregard jeopardized Ms. Gibson's credit rating.

Ms. Gibson had no involvement in creating the request for the EEG, the entry of the Commission orders, or scheduling the EEG for August 23, 2005, and was never under any fiduciary obligation to become the guarantor of Respondent(s)' obligation of payments for EEG services, and notwithstanding that fact, Respondents pursued a posture of bad faith, ignored their obligation of payment, all to the detriment of Ms. Gibson. Appellant was forced to demand the Commission act

as statutorily required of it to cause Respondent(s) make payment of the medical billing from St. Alphonsus Regional Medical Center.

On July 13, 2007, Ms. Gibson filed a Motion (Ag. R., Additional Documents – Attorney Fees, No 1 with exhibits) directing the Commission compel Respondents pay St. Alphonsus' medical bills in accordance with the information identified above, and finally on August 2, 2007, the Commission entered an Order to Compel Respondents to cause payment of that medical expense (Ag. R., Additional Documents – Attorney Fees, No 4), knowing an appeal from any failure to act would be taken, causing the Commission now to hold: "due to Defendants' unreasonable conduct in excessively delaying payment of the aforementioned medical bill", ordered payment, and to ease the financial injury, awarded Ms. Gibson attorney fees in the sum of $3,893.75 from the conduct of Respondents. *See* Ag. R., Additional Documents-Attorney Fees, No 1, 3, 5 & 6.

In lieu of presenting this Court with the lengthy analysis and argument presented to the Commission regarding the Referee's abuse of discretion to strike all or "portions" of Claimant's exhibits submitted into the record, Appellant would request the Court refer to the Agency Record, pages 1,658-1,660 and pages 1,675-1,682.

2. Abuse of Discretion Regarding Claimant's Credibility and Findings of Fact.

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 [or Commission] decision based upon erroneous findings and conclusions on credibility**, and *weight of evidence*,

should not be sustained when the basis is clearly erroneous. *See Stolle v. Bennett*, 144 Idaho 44, 156 P.3d 545 (2007); *Neihart v. Universal Joint Auto Parts, Inc.*, 141 Idaho, 802-803, 118 P.3d, 134-135 (2005). The Referee's credibility issue, identified in paragraph "**b**" above, beginning on page 35 herein, is an abuse of discretion and cannot be sustained.

On page 1,633, Agency Record, the Referee states: "The Referee takes judicial notice of the decisions of the Idaho Supreme Court arising from the same events: Gibson v. Ada County, 142 Idaho 746, 133 P.3d 1211 (2006); Gibson v. Ada County, 318[138] Idaho 787, 69 P.3d 1048 (2003; and Gibson v. Ada County Sheriff's Dept., 139 Idaho 5, 72 P.3d 845 (2003)". Black's Law Dictionary, Revised Fourth Edition, 1968, at page 986, defines "judicial notice" as:

> "The act by which a **court**, in conducting a trial, or framing its decision, will, of its own motion, and **without the production of evidence**, recognize the existence and truth of certain facts, having a bearing on the controversy at bar, which, from their nature, are not properly the subject of testimony, or which are universally regarded as established by common notoriety". (Emphasis added).

Black's Law Dictionary, Eighth Edition, 2004, at page 863-864, defines "judicial notice" as:

> "A **court's** acceptance, for the purposes of convenience and **without requiring a party's proof**, of a well-known and indisputable fact." Emphasis added.

Firstly, the Referee must have evidence in the Agency Record, and no statute or rule allows the agency, like a court can, to take judicial notice of facts instead of **creating a record**, since there is to be no substitution for evidence. However, if the Referee could take "judicial" notice of Ms. Gibson's Supreme Court cases, the Referee would be bound by the facts of the cases, and would be aware Ms. Gibson's "credibility" on the event or mishap during those proceedings was not

challenged. On page 1,634, Agency Record, the Referee prefaces his Findings with the following remark:

> "Credibility of witnesses becomes a major issue of this matter. Thus, findings of fact about certain aspects of testimony or allegations are relevant".

Why the Referee would make such a comment is unclear, as the issue before him was **medical diagnosis** and **medical analysis** undertaken by a **qualified treating psychiatrist**, who has made a diagnosis upon ***objective*** findings, and the extent of symptoms and findings demonstrate the presence of **physical** aspects of PTSD brain injuries. The credibility issue is injected by the Referee (Ag. R., page 1,643) with his controversial remark by stating: "Claimant lied under oath", over what a Chapter 13 filing submitted by an attorney who determined what to be the identifiable income sources used in presenting a Plan of Reorganization. The conclusion Ms. Gibson "lied" is not only irrelevant to her brain injury, but is a complete failure in understanding what the attorney, Mr. King, submitted for use as income information sources for Plan funding. "Overtime" wage estimations are considered unreliable and not included as a source of income to fund Chapter 13 proceedings, and is not relevant to a Worker's Compensation claim for brain injuries, and not only was it irrelevant to the Worker's Compensation claim, the statement of her being incredible because her attorney had determined it was not proper to include merely a possibility of an unpredictable future work assignment that may not materialize. This serves to demonstrate the Referee does not know how Plans of Reorganization are designed to be funded. This issue of "overtime" has been taken by the Referee from Schedule I in the Chapter 13 proceedings that is designed to identify only **reliable sources** of income. According to the office practices of an attorney handling Plans of

Reorganization in May, 1999, schedules are formulated to identify income **known** to be **actually** available for use in the Plan, not uncertain future assignments, as overtime projections or estimations will not fund, as a category, but if generated thereafter, can be applied to the Plan if the Trustee should thereafter determine. *See* Affidavit of C. Grant King, Agency Record, p. 1711-1745.

3. Equal Protection Violation Created by Conflicting Statutes

When the constitutionality of a statute is challenged, this Court presumes the statute is constitutional unless proven otherwise (*Luttrell*, 140 Idaho at 585), and when addressing equal protection violations, the Court is required to determine the constitutional standard of review and the classification being challenged. *See Arel*, supra; *Venter v. Sorrento Delaware, Inc.*, 141 Idaho 245, 251, 108 P.3d 392, 398 (2005).

The Industrial Commission, as a matter of Legislative intent, is mandated to make all proceedings "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*. A referee cannot allow or cause proceedings to take a direction that is "circumstantial", "costly" and "complex", or pursue a unilateral direction in an effort to deny Worker's Compensation benefits to a claimant, as to do so would be contrary to the stated purpose of the *Act*, and contrary to Idaho law.

"The purpose of the *Idaho Human Rights Act* (IHRA) is to provide for execution within the state of the policies embodied in the federal Civil Rights Act of 1964, as amended, Titles I and III of the Americans with Disabilities Act (ADA)": "to secure for all individuals within the state freedom from discrimination because of . . . disability in connection with employment". *See* § 67-5901, *et*

seq., *Idaho Code*; *Mackay v. Four Rivers Packing Co.*, Idaho Supreme Court, Docket No. 33829, 179 P.3d 1064, decided February 19, 2008. Said another way, a claimant cannot be denied a Worker's Compensation claim under a theory her PTSD injury is only a mental-mental injury, when the disability or disorder has been determined to be of a class of mental-physical injuries to the brain. 42 U.S.C., § 12112(a) also prohibits discriminating conduct against a qualified individual with a disability in regard to employees, and 42 U.S.C., § 12132, in relevant part, provides "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."

The class of individuals at issue in this dispute under Idaho's Worker's Compensation law are PTSD claimants, and Ms. Gibson is a member of that class, and in accordance with 42 U.S.C., § 42-12131, Ms. Gibson is also considered to be a qualified individual with a disability, and that disability has been confirmed a mental-physical disability, and she is a qualified member of such and injury and disability. Because Idaho's Worker's Compensation law "involves social and economic welfare issues and "equal protection challenges to those statutes [they] are subject to the rational basis test" (*Arel*, supra; *Venter*, supra.). This Court must determine whether § 72-433, § 72-434 and § 72-435, *Idaho Code*, bear a rational relationship to a legitimate legislative purpose. *See Luttrell*, 140 Idaho at 585, 97 P.3d at 452; *Idaho State Ins. Fund v. Van Tine*, 132 Idaho 902, 909, 980 P.2d 566, 573 (1999).

The continuing conduct of the Commission Referee to force application of conflicting portions of Idaho's Worker's Compensation statutes (§ 72-433, § 72-434 and § 72-435, *Idaho Code*), under the direct threat of dismissing the claim with prejudice if Ms. Gibson refused to comply with his orders (Ag. R. 1122-1123; 1188; 1192), is a major contradiction to the specific and certain medical advice given by her treating physician-psychiatrist, and it serves to compound, confuse and frustrate the intended purpose of healing, treatment and expense associated with benefit claims, and serves no social or economic welfare benefits to the State of Idaho. Those orders are contrary to the purpose and intent of Worker's Compensation Law in Idaho, which provides 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).

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 evaluations by adversarial analysts of PTSD patients is an injurious practice, as it is causing retardation, and the Commission should not order such an effect, as it cannot condone such conduct that results in the disruption or deterioration of PTSD treatment and therapy. To compel a claimant's participation in adversarial and confrontational examinations (IMEs) knowing to do so will cause re-victimization of PTSD patients, serves only to retard and defeat a treating psychiatrist's efforts at medical recovery, and

this situation will simply degrade Commission proceedings into a proverbial conundrum; a Commission that appears to be condoning the interference in a claimant's efforts at medical recovery from a PTSD condition is contrary to law, and such conflict is in need of correction to prevent the disruption to healing, and referees cannot be directing IME examinations to further damage a claimant, despite the belief it may develop a defense perception to the claim. The potential of causing permanent damage is too great when dealing with PTSD. For a claimant to be ordered to participate in examinations that are unreasonable and perilous to health, and expose a claimant to permanent damage, grossly violates the advice and healing effects of a therapist, and ignores the law, and it serves to contravene Idaho law, the Idaho Constitution, and the Due Process and Equal Protection Clause of the 14th Amendment to the U.S. Constitution.

These attempts by Defendants were deliberately intended to be **non-accommodating** to Claimant in any fashion, and disregarded her medical health and was not intended to assist Dr. Heyrend, but rather prevented his attendance, and such attendance is not only contemplated, but absolutely allowed by § 72-433(2), *Idaho Code*. This Claimant 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. This attitude again supports the request for the award of attorney fees to Claimant.

Even though Ms. Gibson was told to comply with those orders and did so in light of the threats presented to her by the Referee, she was indisputably placed into an environment where she was re-traumatized, re-victimized and re-injured, as her psychiatrist forewarned could only be the inevitable result to happen, and Ms. Gibson can only be of the belief the Referee's behavior was

undertaken in an effort to defeat her lawful claim for those benefits, hoping she would be emotionally incapable of enduring that trauma, and would rather suffer the loss of her right to recover benefits than suffer the effects of the brain damage. These issues must be considered by this Court to be direct violations of Idaho Worker's Compensation Law. The conflicting portions of Idaho's Worker's Compensation Law, § 72-433, § 72-434 and § 72-435, *Idaho Code*, have caused a violation of Ms. Gibson's guaranteed and protected rights under the Due Process Clause and the Equal Protection Clause of the 14th Amendment to the U.S. Constitution. *See* Appellant's Opening Brief, p. 58-64.

From all appearances, simultaneous enforcement of § 72-433, § 72-434 and § 72-435, *Idaho Code* upon the class of PTSD patients such as Ms. Gibson, is extremely harmful for individuals who have suffered the traumatic psychological impact of PTSD and resulting physical injury to the brain, and those statutes are also in conflict with 42 U.S.C., § 12132, in that § 72-435, *Idaho Code*, precludes a qualified individual with a diagnosed disability from participation in or be denied their entitled benefits under Idaho's Worker's Compensation law, when the employer, surety and Commission are relentless in pursing an individual and causing re-victimization and further medical harm.

4. Attorney Fees on Appeal and For the Proceedings Below.

§ 72-432(1), *Idaho Code*, requires an employer provide an injured employee "such reasonable medical, ... other attendance or treatment, ... medicines, ... , as may be reasonably required by the **employee's physician** 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 "reasonably required by the **employee's physician** or needed immediately after an injury", and that of failing to provide such 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" is a broad term and 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 wrongfully fails to provide medical treatment, "the injured employee **may do so at the expense of the employer.**" *See Reese v. V-1 Oil Company*, supra. Claimant has incurred huge medical expenses with a specialist in PTSD brain disorders, and these bills need to be paid.

Because these medical costs and disability – impairment benefits have not been paid or awarded, Claimant must request an award of attorney fees in accordance with § 72-804, *Idaho Code*, as the actions of Ada County has been to challenge everything, beginning with the decision to refuse to report the injury, cancel medical benefits, knowing she was under the care of a doctor, place her on leave without pay, impose a leave status and termination without procedural due process, deny lawful pay due her, deny a claim for short term disability and deny access to medical benefits by canceling coverage, refusing to file the Worker's Compensation claim fir fear of costs, and challenge Worker's Compensation claim to benefits to which she is entitled. This conduct is grossly unreasonable and malicious, and by their effects, have served to cause ongoing injury, expense, grossly prolonging her instability and has effectively resulted in stifling the healing process, committed in a malicious effort, as the episodes of re-victimization were damaging to her health, and seriously retarded Ms. Gibson's stability.

§ 72-804, *Idaho Code*, states:

> "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 meaning of § 72-804, *Idaho Code*, is the Commission "**shall**" award attorney fees to the employee when the Commission makes the determination the employer's denial of compensation was **unreasonable**. The amount of the award is subject to discretion of the Commission. Refusing to award fees when the employer unreasonably denied compensation to the employee is a decision beyond the "outer boundaries" of the Commission's discretion. § 72-804, *Idaho Code*, requires a reasonable attorney fee award to the employee where the employer's actions were unreasonable. Refusal to award attorney fees has been seen to be an abuse of discretion. *See Bradley v. Washington Group Intern.*, 141 Idaho 655, 115 P.3d 746 (2005).

CONCLUSION

Post-Traumatic Stress Disorder is a medically and legally defined condition of a "mental-physical" injury, and when such physical injuries occurred in a workplace environment, it becomes compensable in accordance with the provisions of Idaho's Worker's Compensation law. Claimant has suffered a permanent injury and is entitled to a 50% impairment and disability rating as a result thereof.

The Commission has either failed to recognize this disorder, or has assumed an indifferent disregard, or has misunderstood the physical injury and manifestations exhibited when there is a physical injury to the brain, and associated with the encounter that occurred in the workplace on July 20, 1999. This psychological workplace injury has been diagnosed to a medical certainty to be a physical injury to the internal structure of the brain, and not just to a medical probability, but to a **certainty**, and Ms. Gibson is entitled to an award of benefits and attorney fees and costs.

This case must be remanded to the Idaho Industrial Commission for further proceedings in accordance with the issues presented on appeal, and attorney fees need to be awarded to Ms. Gibson on appeal under § 12-117, *Idaho Code*, and below in accordance with § 72-804, Idaho Code, for the actions of Ada County, not only for refusing to report the injury; not only for standing silent on their knowledge of her injury and mental instability, but also for their ongoing denial of any form of rights and benefits, all of which conduct was unreasonable, and by their effects, have served to grossly prolong the nature and extent of Appellant's PTSD instability and complicate the healing process, with ruthless episodes of re-victimization that has retarded recovery, and demonstrates objective proof as to the nature and degree this PTSD condition has had on Appellant

Respectfully Submitted This 7th day of July, 2008.

Vernon K. Smith
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on the 7th day of July, 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