

5-23-2008

Chapman v. NYK Line North America, Inc Clerk's Record v. 1 Dckt. 35014

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LAW CLERK

Vol. _____ / _____ of _____

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

MERRIE E. CHAPMAN,

Claimant / Appellant,

vs.

NYK LINE NORTH AMERICA, INC.,

Employer / Respondent,

and

IDAHO DEPARTMENT OF LABOR,

Respondent.

SUPREME COURT NO. 35014

AGENCY'S RECORD

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

For Claimant/Appellant:

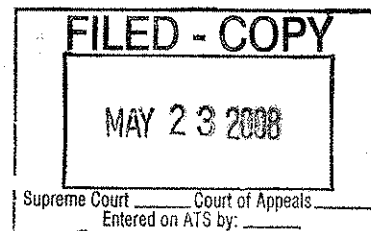
Ronaldo A. Coulter
776 E. Riverside Drive, Suite 200
Eagle, ID 83616-5959

For Employer/Respondent:

Karen O. Sheehan
PO Box 1271
Boise, ID 83701-1271

For Respondent IDOL:

Deputy Attorney General
Idaho Department of Labor
317 W. Main St.
Boise, Idaho 83735



35014

COPY

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

MERRIE E. CHAPMAN,

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vs.

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and

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AGENCY'S RECORD

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

For Claimant/Appellant:

Ronaldo A. Coulter
776 E. Riverside Drive, Suite 200
Eagle, ID 83616-5959

For Employer/Respondent:

Karen O. Sheehan
PO Box 1271
Boise, ID 83701-1271

For Respondent IDOL:

Deputy Attorney General
Idaho Department of Labor
317 W. Main St.
Boise, Idaho 83735

COPY

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LIST OF EXHIBITS

Hearing Transcript taken October 23, 2007, will be lodged with the Supreme Court:

Exhibits admitted into record before Idaho Department of Labor

1. Notice of Telephone Hearing, mailed August 23, 2007, 3 pages.
2. Important Information About Your Hearing, Read Carefully, 2 pages.
3. Eligibility Determination Unemployment Insurance Claim, mailed 8/03/2007, 2 pages.
4. Request for Appeals Hearing and Notice of Appearance by Tamsen L. Leachman, filed August 14, 2007, 3 pages.
5. Employers Data, dated 8/22/2007, 1 page.
6. Notice of Appearance by Ronaldo A. Coulter, filed September 5, 2007, 3 pages.
7. Motion to Continue Telephone Hearing, filed September 5, 2007, 3 pages.
8. Affidavit of Ronaldo A. Coulter, filed September 5, 2007, 2 pages.
9. Order to Continue Telephone Hearing, filed September 5, 2007, 2 pages.
10. Cover letter from Karen O. Sheehan, filed September 6, 2007, 1 page.
11. NYK Line (NA) Inc.'s Witness List, filed September 6, 2007, 2 pages.
12. NYK Line (NA) Inc.'s Exhibit List, filed September 6, 2007, 2 pages.
13. Company policies, 3 pages.
14. Confidential Investigative Report, dated July 27, 2007, 27 pages.
15. Copy of DVD provided by the Claimant on July 18, 2007, 1 page.
16. Payroll Personnel Change Form, dated 7/20/07, 1 page.
17. Facsimile transmission from Tamsen L. Leachman, dated September 27, 2007, 1 page.
18. Notice of Dismissal and Re-opening, dated September 28, 2007, 2 pages.
- 18a. Revised Notice of Telephone Hearing, mailed October 2, 2007, 3 pages (Listed as Exhibit 1 by A.B.).
- 18b. Proposed Exhibit List, 2 pages (Listed as Exhibit 1a by A.B.).
19. Claimant's Brief in Opposition, filed October 22, 2007, 14 pages.
20. Affidavit of Merrie E. Chapman, dated October 17, 2007, 11 pages.
21. Affidavit of Ronaldo A. Coulter, with exhibits, dated October 19, 2007, 5 pages.

APPEALS BUREAU
IDAHO DEPARTMENT OF LABOR
317 WEST MAIN STREET / BOISE, IDAHO 83735-0720
(208) 332-3572 / (800) 621-4938
FAX: (208) 334-6440

MERRIE E. CHAPMAN)

SSN: [REDACTED])

Claimant)

vs.)

NYK LINE NORTH AMERICA INC.,)

Employer)

and)

IDAHO DEPARTMENT OF LABOR.)

DOCKET NUMBER 3700-2007

DECISION OF APPEALS EXAMINER

DECISION

Benefits are **DENIED** effective July 22, 2007.

The employer's account is **NOT CHARGEABLE** on the claim.

The Eligibility Determination dated August 3, 2007, is hereby **REVERSED**.

HISTORY OF THE CASE

The above-entitled matter was heard by Thomas J. Holden, Appeals Examiner for the Idaho Department of Labor, on October 23, 2007, by telephone in the City of Boise, in accordance with §72-1368(6) of the Idaho Employment Security Law.

The claimant, Merrie Chapman, participated in the hearing and was represented by Ronaldo Coulter.

The employer, NYK Line North America Inc., was represented in the hearing by Karen Sheehan. Michael Holt, Tamsen Leachman, and Sarah Stevens also participated in the hearing as witnesses for the employer.

ISSUES

The issues before the Department are whether unemployment is due to the claimant quitting voluntarily and, if so, whether with good cause connected with the employment -OR- being

discharged and, if so, whether for misconduct in connection with the employment, according to §72-1366(5) of the Idaho Employment Security Law, and whether the employer's account is properly chargeable for experience rating purposes for benefits paid to the claimant, according to §72-1351(2)(a) of the Idaho Employment Security Law.

FINDINGS OF FACT

Based on the exhibits and testimony in the record, the following facts are found:

1. The claimant worked for NYK Line North America from 1988 to July 19, 2007.
2. The employer discharged the claimant for failure to comply with an investigation.
3. The claimant had filed a complaint with the company on June 18, 2007.
4. The employer hired an outside attorney, Ms. Tamsen Leachman, to investigate the complaint. As part of her investigation, Ms. Leachman met with a number of employees who might have relevant information.
5. On July 18, 2007, a human resources representative, Ms. Sarah Stevens, informed the claimant that Ms. Leachman would be meeting with the claimant that afternoon as part of the investigation into the claimant's complaint.
6. Prior to the meeting, the claimant went to an office supply store and purchased a tape recorder. The sales associate put batteries and a blank tape in the recorder and gave the claimant instructions on how to use the recorder.
7. When the claimant met with Ms. Leachman, the claimant asked Ms. Leachman if she could record the meeting. Ms. Leachman stated, "No." Ms. Leachman explained that she did not want to have her interviews recorded because of the potential for a breach of confidentiality and because in Ms. Leachman's experience she found that the people she interviewed tended to be more guarded and less forthcoming when the meeting was being recorded. The claimant agreed not to record the interview.
8. Approximately one hour into the interview with the claimant, Ms. Leachman left the room to retrieve some documents. Ms. Leachman returned to the room after a few minutes and resumed the interview. Approximately thirty minutes later, Ms. Leachman heard a "beep" sound that appeared to coming from the claimant's purse. Ms. Leachman recognized the sound as similar to the sound of a tape coming to an end when recording dictation.
9. Ms. Leachman asked the claimant if she was recording the meeting. The claimant denied that she was recording the meeting and took the recorder out of her purse. Ms. Leachman asked the claimant to rewind the tape a bit, and then play it back. When the tape was played back, Ms. Leachman heard two women's voices. Ms. Leachman asked the claimant if the voices were her and the claimant, and the claimant responded that they were.
10. Ms. Leachman stated to the claimant that she felt that she had been lied to and that she was not sure that she could give any credibility to what the claimant had stated during the

interview. The claimant explained that the recording had been an accident and that the recorder must have started when the claimant was looking in her purse earlier. The claimant asked Ms. Leachman if she wanted the tape, and the claimant took the tape out of the recorder and gave it to Ms. Leachman. Ms. Leachman later listened to the tape and heard the claimant state at the beginning of the recording, "OK, I'm recording now."

11. Ms. Leachman later gave to the employer a written summary of her investigation. In the summary, the Ms. Leachman described the incident with the tape recorder in the interview of the claimant. Ms. Leachman also spoke with Mr. Michael Holt, vice president and general counsel for the employer. Ms. Leachman advised Mr. Holt that she did not believe that the recording was accidental, and that it was a significant breach of trust and that termination of employment would be warranted.
12. The employer then made the decision to discharge the claimant for being untruthful and for failure to comply with an investigation.
13. In the first four of the five calendar quarters preceding the one in which the claimant applied for benefits, this employer paid the claimant more wages than any other employer.

AUTHORITY

Section 72-1366(5) of the Idaho Employment Security Law provides in pertinent part, that a claimant is ineligible for unemployment compensation benefits if he or she was discharged for misconduct in connection with employment. The issue is not whether the employer had reasonable grounds for discharging claimant, but rather whether the reasons for discharge constituted "misconduct" in connection with claimant's employment such that claimant can be denied unemployment benefits. The two issues are separate and distinct. Beaty vs. City of Idaho Falls, 110 Idaho 891, 719 P.2d 1151 (1986).

The burden of proving misconduct by a preponderance of the evidence falls strictly on the employer and, where the burden is not met, benefits must be awarded the claimant. Roll vs. City of Middleton, 105 Idaho 22, 665 P.2d 721 (1983); Parker vs. St. Maries Plywood, 101 Idaho 415, 614 P.2d 955 (1980); Hart vs. Deary High School, 126 Idaho 550, 552, 887 P.2d 1057, 1059 (1994). The Idaho Supreme Court has defined misconduct as a willful, intentional disregard of the employer's interest; a deliberate violation of the employer's rules; or a disregard of standards of behavior which the employer has a right to expect of his employees. John vs. S.H. Kress and Company, 78 Idaho 544, 307 P.2d 217 (1957).

For misconduct in standard-of-behavior cases, a two-pronged test has been delineated: (1) whether the employee's conduct fell below the standard of behavior expected by the employer; and (2) whether the employer's expectation was objectively reasonable in the particular case. However, the employer's expectations must be communicated to the employee. Davis vs. Howard O. Miller Co., 107 Idaho 1092, 695 P.2d 1231 (1984); Puckett vs. Idaho Department of Corrections, 107 Idaho 1022, 695 P.2d 407 (1985).

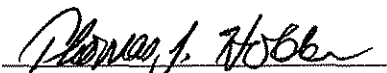
Section 72-1351(2)(a) of the Idaho Employment Security Law provides in part that for experience rating purposes, no charge shall be made to the account of such covered employer with respect to benefits paid to a worker who terminated his services voluntarily without good

cause attributable to such covered employer, or who had been discharged for misconduct in connection with such services.

CONCLUSIONS

The employer discharged the claimant for being untruthful and for failing to comply with an investigation. The claimant maintains that the recording was accidental, while the employer concluded that the claimant had deliberately recorded the meeting with Ms. Leachman after agreeing not to. The claimant explained that the voice activation feature on the recorder may have caused the recorder to begin recording after the claimant went to retrieve an item from her purse. However, the claimant has not provided a plausible explanation for the claimant stating at the beginning of the recording, "OK, I'm recording now." The claimant's statement makes it clear that the claimant knew that she was recording after she turned the recorder on. The claimant suggests that the statement had been recorded at some time prior to the meeting, but again the claimant had just purchased the recorder on her lunch hour and the claimant has not provided a credible explanation as to when and how the statement, "OK, I'm recording now," was recorded prior to the meeting.

Having concluded that the claimant intentionally recorded the meeting with Ms. Leachman after agreeing not to, a question remains as to whether the claimant's actions constituted misconduct on her part. Ms. Leachman explained to the claimant the reasons why she did not want to have the meeting recorded, and the directive given by Ms. Leachman that the meeting not be recorded was reasonable. The claimant's actions in recording the meeting interfered with and potentially compromised the investigation that the employer was conducting. The claimant's conduct in being untruthful about recording the meeting was also a serious breach of trust and honesty. The employer has established that the claimant was discharged for misconduct in connection with the employment. Therefore, the claimant is ineligible for unemployment insurance benefits, and the employer's account is not chargeable on the claim.


Thomas J. Holden
Appeals Examiner
Examinador de Apelaciones

Date of Mailing	<u>November 2, 2007</u>	Last Day To Appeal	<u>November 16, 2007</u>
Fecha De Envío		Ultimo Día Para Apelar	

APPEAL RIGHTS

You have FOURTEEN (14) DAYS FROM THE DATE OF MAILING to file a written appeal with the Idaho Industrial Commission. The appeal must be taken or mailed to:

Industrial Commission
Attn: Unemployment Appeals
317 W. Main St. 2nd Floor
P.O. Box 83720
Boise, Idaho 83720-0041

Or transmitted by facsimile to (208) 334-2321.

If the appeal is mailed, it must be postmarked no later than the last day to appeal. An appeal filed by facsimile transmission must be received by the Commission by 5:00 p.m., Mountain Time, on the last day to appeal. A facsimile transmission received after 5:00 p.m. will be deemed received by the Commission on the next business day. A late appeal will be dismissed. Appeals filed by any means with the Appeals Bureau or a Job Service office will not be accepted by the Commission. ***TO EMPLOYERS WHO ARE INCORPORATED:*** *If you file an appeal with the Idaho Industrial Commission, the appeal must be signed by a corporate officer or legal counsel licensed to practice in the State of Idaho and the signature must include the individual's title. The Commission will not consider appeals submitted by employer representatives who are not attorneys. If you request a hearing before the Commission or permission to file a legal brief, you must make these requests through legal counsel licensed to practice in the State of Idaho. Questions should be directed to the Idaho Industrial Commission, Unemployment Appeals, (208) 334-6024.*

If no appeal is filed, this decision will become final and cannot be changed. **TO CLAIMANT:** If this decision is changed, any benefits paid will be subject to repayment. If an appeal is filed, you should continue to report on your claim as long as you are unemployed.

DERECHOS DE APELACIÓN

Usted tiene CATORCE (14) DIAS DESDE LA FECHA DE ENVIO para archivar una apelación escrita con la Comisión Industrial de Idaho. La apelación debe ser llevada o enviada a:

Industrial Commission
Attn: Unemployment Appeals
317 W. Main St. 2nd Floor
P.O. Box 83720
Boise, ID 83720-0041

O puede enviarla por fax al (208) 334-2321.

Si la apelación es enviada por correo, la fecha en el sello del correo debe ser no más tarde de la fecha del último día en que puede apelar. Una apelación tardada será descartada. Apelaciones archivadas con la Agencia de Apelaciones o con la Oficina de Empleo no serán aceptadas por la Comisión. Una apelación archivada por medio de fax debe ser recibida por la comisión no mas tarde de las 5:00 P.M. Hora Standard de la Montaña, del último día en que puede apelar. Una transmisión de fax recibida después de las 5:00 P.M. se considerará recibida por la comisión, hasta el próximo día hábil. ***EMPLEADORES QUE SON INCORPORADOS:*** *Si una apelación es archivada en la Comisión Industrial de Idaho, la apelación tiene que ser firmada por un oficial o representante designado y la firma debe incluir el título del individuo. Si solicita una audiencia ante la Comisión Industrial, o permiso para archivar un escrito legal, ésta solicitud se debera de*

hacer por medio de un abogado con licencia para practicar en el estado de Idaho. Preguntas deben ser dirigidas a la Comisión Industrial de Idaho, Unemployment Appeals, (208) 334-6024.

Si ninguna apelación se archiva, esta decisión será la final y no podrá cambiarse. **AL RECLAMANTE:** Si esta decisión se cambia, todos los beneficios pagados estarán sujetos a reembolso. Si una apelación se archiva, usted debería de continuar reportando en su reclamo mientras esté desempleado.

APPEALS BUREAU
IDAHO DEPARTMENT OF LABOR
317 WEST MAIN STREET / BOISE, IDAHO 83735-0720
(208) 332-3572 / (800) 621-4938
FAX: (208) 334-6440

CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2007, a true and correct copy of **Decision of Appeals Examiner** was served by regular United States mail upon each of the following:

MERRIE E CHAPMAN
1935 E LOCHMEADOW
MERIDIAN ID 83646

RONALDO A COULTER
IDAHO EMPLOYMENT LAW SOLUTIONS
THE LAW FIRM OF
RONALDO A COULTER PLLC
776 E RIVERSIDE DRIVE SUITE 200
EAGLE ID 83616

NYK LINE NORTH AMERICA INC
101 S CAPITOL BLVD SUITE 1200
BOISE ID 83702

NYK LINE NORTH AMERICA INC
PO BOX 6501
DIAMOND BAR CA 91765-8501

TAMSEN L LEACHMAN
HALL FARLEY OBERRECHT & BLANTON PA
702 WEST IDAHO SUITE 700
PO BOX 1271
BOISE ID 83701

cc: Idaho Department of Labor Meridian Local Office – Decision of Appeals Examiner



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) DOCKET NUMBER: 3700-2007
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) **NOTICE OF APPEAL**
) **CLAIM FOR REVIEW**
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1. The above-named Appellant appeals and submits this Claim for Review against the above-named Respondent to the Idaho Industrial Commission (Commission) from the Findings of Fact, Conclusions and the Decision of Appeals Examiner made in the above-entitled case entered on the 2nd day of November, 2007, by THOMAS J. HOLDEN, Appeals Examiner.
2. That the party has a right to submit this Notice of Appeal and Claim for Review to the Commission, in regard to the Findings of Fact, Conclusions, and the Decision of the Appeals Examiner pursuant to Idaho Code (I.C.) 72-1368(6).
3. A preliminary statement of the issues on review, which the Appellant asks the Commission to review at a minimum; and, which shall not prevent the Appellant from timely asserting other issues for review are:

Errors of Fact or Law by the Hearing Officer on Review:

4. The Appeals Examiner erred in concluding that the Appellant did not provide a plausible explanation for a statement attributed to the Appellant "OK, I'm recording now."
5. The Appeals Examiner erred in relying on the testimony of Ms. Leachman for what was said on the tape.¹

¹ The only record of what is on Exhibit 15 is the testimony of Ms. Leachman. Exhibit 15 that was provided to Appellant was inaudible and distorted. Assuming that the Appeals Examiner was provided an identical DVD, the Appeals Examiner failed to rely on the best evidence on the record of what was recorded, and when it was recorded.

6. The Appeals Examiner, in light of all the evidence presented, to include Appellant's brief supported by affidavits erred when he concluded that Appellant intentionally taped the proceedings.
7. The Appeals Examiner erred in concluding that Appellant's accidental taping of a 30 minute section of a 3 hour interview constituted misconduct on the part of the Appellant.
8. The Appeals Examiner erred in concluding that Appellant's inadvertent actions interfered with and potentially compromised the investigation especially in light of all the evidence that was before the Appeals Examiner.
9. The Appeals Examiner erred in concluding that Appellant was untruthful about the recording.
10. The Appeals Examiner erred in concluding that Appellant had engaged in misconduct and that Respondent had met its burden under the law.
11. As this petition involves questions of fact established by the record, the Appellant request that two (2) full transcripts of the proceedings before the Appeals Examiner be produced. The first copy is to be used for the Commission's Review per 72-1368(6). The second copy is to be used for Appellant's review and use in

furtherance of Appellant's statement in paragraph 3 herein and in the interest of judicial economy should Appellant find the need to further appeal this matter per I.C. 72-1368(9).

12. Appellant further requests that a copy of Exhibit 15, in the custody of the Appeals Bureau, be produced for the Commission's Review and use as well as the Appellant's review and use in furtherance of Appellant's statement in paragraph 3 herein and in the interest of judicial economy should Appellant find the need to further appeal this matter per I.C. 72-1368(9).

13. Appellant asks the Commission to forward the requested transcript and Exhibit 15 to Appellant's attorney at Idaho Employment Law Solutions at the address provided on Page 1 of 1 of this Notice of Appeal and Claim for Review with charges to R.A. (Ron) Coulter's attention.

DATED this 16th day of November, 2007.

IDAHO EMPLOYMENT LAW SOLUTIONS



R. A. (RON) COULTER
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of November, 2007, I caused to be served a true and correct copy of the foregoing by the following method to:

INDUSTRIAL COMMISSION
ATTN: UNEMPLOYMENT APPEALS
317 WEST MAIN STREET 2ND FLOOR
P.O. BOX 83720
BOISE IDAHO 83720-0041

☐ U.S. Mail
☒ Hand Delivery
☐ Certified Mail, Return Receipt
Requested
☐ Overnight Mail
☐ Facsimile
☐ Statehouse Mail

APPEALS BUREAU
IDAHO DEPARTMENT OF LABOR
317 WEST MAIN STREET
BOISE, IDAHO 83735-0720

☐ U.S. Mail
☒ Hand Delivery
☐ Certified Mail, Return Receipt
Requested
☐ Overnight Mail
☐ Facsimile
☐ Statehouse Mail

KAREN O. SHEEHAN
HALL FARLEY OBERRECHT & BLANTON PA
702 WEST IDAHO SUITE 700
PO BOX 1271
BOISE ID 83701

☒ U.S. Mail
☐ Hand Delivery
☐ Certified Mail, Return Receipt
Requested
☐ Overnight Mail
☐ Facsimile
☐ Statehouse Mail

NYK LINE NORTH AMERICA INC
PO BOX 6501
DIAMOND BAR CA 91765-8501

☒ U.S. Mail
☐ Hand Delivery
☐ Certified Mail, Return Receipt
Requested
☐ Overnight Mail
☐ Facsimile
☐ Statehouse Mail

IDAHO EMPLOYMENT LAW SOLUTIONS



R. A. (RON) COULTER
Attorney for Appellant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MERRIE E. CHAPMAN,
SSN: [REDACTED]

Claimant,

vs.

NYK LINE NORTH AMERICA, INC.,

Employer,

and

IDAHO DEPARTMENT OF LABOR.

IDOL # 3700-2007

NOTICE OF
FILING OF APPEAL

PLEASE TAKE NOTICE: The Industrial Commission has received an appeal from a decision of an Appeals Examiner of the Idaho Department of Labor. A copy of the appeal is enclosed. Documents that are already part of the record or file will not be copied.

Further action will be taken by the Industrial Commission in accordance with its Rules of Appellate Practice and Procedure, a copy of which is enclosed.

PLEASE READ ALL THE RULES CAREFULLY

The Commission will make its decision in this appeal based on the record of the proceedings before the Appeals Examiner of the Idaho Department of Labor. To request a briefing schedule or hearing, refer to Rule 4(A) and 6(A,B) of the Rules of Appellate Practice and Procedure.

INDUSTRIAL COMMISSION
UNEMPLOYMENT APPEALS DIVISION
317 W MAIN ST 2ND FL
POST OFFICE BOX 83720
BOISE IDAHO 83720-0041
(208) 334-6024

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of November, 2007 a true and correct copy of the **Notice of Filing of Appeal and compact disc of the Hearing** was served by regular United States mail upon each of the following:

APPEAL:

NYK LINE NORTH AMERICA INC
PO BOX 6501
DIAMOND BAR CA 91765-8501

TAMSEN L LEACHMAN
HALL FARLEY OBERRECHT & BLANTON PA
702 WEST IDAHO SUITE 700
PO BOX 1271
BOISE ID 83701

APPEAL AND DISC:

RONALDO A COULTER
IDAHO EMPLOYMENT LAW SOLUTIONS
776 E RIVERSIDE DRIVE SUITE 200
EAGLE ID 83616

NYK LINE NORTH AMERICA INC
101 S CAPITOL BLVD SUITE 1200
BOISE ID 83702

and hand-delivered to:

DEPUTY ATTORNEY GENERAL
IDAHO DEPARTMENT OF LABOR
317 W MAIN STREET
BOISE ID 83735

cjh


Assistant Commission Secretary

RONALDO A. COULTER
IDAHO EMPLOYMENT LAW SOLUTIONS
The Law Firm of Ronaldo A. Coulter, PLLC
Attorney at Law
776 E. Riverside Drive, Suite 200
Eagle, Idaho 83616
Telephone: (208) 672 6112
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Idaho State Bar No.3850
ron@idahoels.com

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**INDUSTRIAL COMMISSION
ATTN: UNEMPLOYMENT APPEALS
317 WEST MAIN STREET 2ND FLOOR
P.O. BOX 83720
BOISE IDAHO 83720-0041**

MERRIE E. CHAPMAN
SSN: [REDACTED]
Appellant

vs.

NYK LINE NORTH AMERICA INC.
Respondent
and

IDAHO DEPARTMENT OF LABOR

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) DOCKET NUMBER: 3700-2007
)
)
) PETITION TO FILE BRIEF
) and
) REQUEST FOR HEARING
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COMES NOW, The Appellant, by and through her Attorney of Record Ronaldo A. Coulter,
and respectfully request per the Rules of Appellate Practice and Procedure under the Idaho
Employment Security Law (R.A.P.P.) Rules 4(A), 6 (A) and (B) for leave to file a brief in
support of Appellant's appeal and request for a hearing in this matter.

It is understood by the Appellant that if permission is granted to file a brief in this matter that such a brief will be filed no later than ten (10) days after notice of the Commission's decision to grant the request to allow the filing of this brief.

Additionally, the Appellant requests a hearing to enable the Industrial Commission to examine a SONY 570V tape recorder which has the Voice Operated Recording (VOR) feature with tape. This tape recorder will be presented as evidence in addition to the evidence that was presented to the Hearing Officer.

The proposed evidence is relevant as it is central to the Appellant's claim that she did not engage in any misconduct as the tape recorder can be and was activated inadvertently in the manner described by Appellant in Exhibit 20 and in the Hearing of October 23, 2007.

The reason the SONY 570V tape recorder was not presented before the Hearing Examiner was because it would have required the purchase of two additional recorders (one for the Hearing Examiner and one for the Respondent) and it would have been impossible, given the location of all parties to demonstrate just how the recorder could have been accidentally activated.

Aside from reviewing the proposed evidence, the hearing will allow the Industrial Commission to raise questions concerning the evidence and points of clarification raised through Appellant's and Respondent's brief submitted per R.A.P.P 4(A).

WHEREFORE, Appellant respectfully requests that the Idaho Personnel Commission grant this Petition to File a Brief in this matter.

DATED this 27th day of November, 2007.

IDAHO EMPLOYMENT LAW SOLUTIONS



R. A. (RON) COULTER
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of November, 2007, I caused to be served a true and correct copy of the foregoing by the following method to:

INDUSTRIAL COMMISSION
ATTN: UNEMPLOYMENT APPEALS
317 WEST MAIN STREET 2ND FLOOR
P.O. BOX 83720
BOISE IDAHO 83720-0041

☐ U.S. Mail
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APPEALS BUREAU
IDAHO DEPARTMENT OF LABOR
317 WEST MAIN STREET
BOISE, IDAHO 83735-0720

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KAREN O. SHEEHAN
HALL FARLEY OBERRECHT & BLANTON PA
702 WEST IDAHO SUITE 700
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BOISE ID 83701

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NYK LINE NORTH AMERICA INC
PO BOX 6501
DIAMOND BAR CA 91765-8501

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IDAHO EMPLOYMENT LAW SOLUTIONS



R. A. (RON) COULTER
Attorney for Appellant

LAWRENCE G. WASDEN
ATTORNEY GENERAL

CAROL LYNN BRASSEY - ISB# 2394
CRAIG G. BLEDSOE - ISB# 3431
KATHERINE TAKASUGI - ISB# 5208
TRACEY K. ROLFSEN - ISB# 4050
Deputy Attorneys General
Idaho Department of Labor
317 W. Main Street
Boise, Idaho 83735
Telephone: (208) 332-3570 ext. 3432

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MERRIE E. CHAPMAN,

Claimant,

vs.

NYK LINE NORTH AMERICA, INC.,

Employer,

and

STATE OF IDAHO,
DEPARTMENT LABOR.

IDOL NO. 3700-2007

NOTICE OF APPEARANCE


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TO THE ABOVE-NAMED PARTIES:

Please be advised that the undersigned Deputy Attorney General representing the Idaho Department of Labor hereby enters the appearance of said attorneys as the attorneys of record for the State of Idaho, Department of Labor, in the above-entitled proceeding. By statute, the Department of Labor is a party to all unemployment insurance appeals in Idaho.

NOTICE OF APPEARANCE - 1

DATED this 27th day of November, 2007.


Tracey K. Rolfsen
Deputy Attorney General
Attorney for the State of Idaho,
Department of Labor

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a copy of the foregoing NOTICE OF APPEARANCE,
was mailed, postage prepaid, this 27th day of November, 2007, to:

R A (RON) COULTER
776 E RIVERSIDE DR STE 200
EAGLE ID 83616

NYK LINE NORTH AMERICA INC
101 S CAPITOL BLVD STE 1200
BOISE ID 83702

TAMSEN LEACHMAN
BOX 1271
BOISE ID 83701

NYK LINE NORTH AMERICA INC
BOX 6501
DIAMOND BAR CA 91765-8501


Vicki Maxwell

✓

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MERRIE E. CHAPMAN,

Claimant,

vs.

NYK LINE NORTH AMERICA, INC.,

Employer,

and

IDAHO DEPARTMENT OF LABOR.

IDOL #3700-2007

**ORDER ESTABLISHING
BRIEFING SCHEDULE**

FILED

DEC - 3 2007

INDUSTRIAL COMMISSION

Claimant, Merrie E. Chapman, appeals to the Industrial Commission a Decision issued by an Appeals Examiner with Idaho Department of Labor (IDOL) finding her ineligible for unemployment benefits on the basis that she was discharged due to misconduct connected with employment. Claimant seeks a hearing before the Commission and an opportunity to provide a legal brief in support of her appeal. As provided for under Rule 4 (A) of the Rules of Appellate Practice and Procedure under the Idaho Employment Security Law, effective, as amended, February 1, 2001, we grant the request to submit a legal brief.

Idaho Code § 72-1368(7) gives the Commission authority to “in its sole discretion, conduct a hearing to receive additional evidence or may remand the matter back to the appeals examiner for an additional hearing and decision.” In this case, Claimant seeks a new hearing. (Claimant’s Petition to File Brief and Request for Hearing, filed November 27, 2007).

Rule 6(B) 5 of the Rules of Appellate Practice and Procedure Under the Idaho

ORDER ESTABLISHING BRIEFING SCHEDULE - 1

Employment Security Law, effective as amended February 1, 2001, provides that a party requesting a hearing to offer additional evidence shall submit "the reasons why the proposed evidence was not presented before the appeals examiner." Whether a party either seeks to present additional evidence or make an oral argument on the basis of the record as it stands, that party must present some justification for that request. Unemployment insurance appeals are adjudicated under the principles and procedures of administrative law. Hearings at this level of review are not a matter of right, as in some other forums.

In her request, Claimant states that she requests an appeals hearing with the Commission in order that she is able to demonstrate how a tape recorder operates. However, Claimant has not demonstrated that the only way in which the Commission can understand the functioning of the tape recorder at issue is to actually view it. After a careful review of the issue, we are satisfied that the tape recorder and its operation can be accurately and sufficiently explained through the documentary appeals record.

The Commission takes the position that conducting a new hearing at this level of review is an extraordinary measure and should be reserved for those cases when due process or other interests or justice demand no less. Claimant had a full and fair opportunity to present evidence supporting its contentions about her separation from employment. Therefore, we find no reason to conduct an additional hearing in this case to allow either party to present additional evidence. Accordingly, Claimant's request for a new hearing is *DENIED*.

ORDER ESTABLISHING BRIEFING SCHEDULE

The Commission establishes the following briefing schedule:

ORDER ESTABLISHING BRIEFING SCHEDULE - 2

Claimant's brief will be due ten (10) days from the date of this Order.


Employer and IDOL may reply within seven (7) days of the receipt of Claimant's brief, if they so choose.

DATED this 3rd day of December, 2007.

INDUSTRIAL COMMISSION

Patrick J. Grace
Patrick J. Grace, Referee

ATTEST:

Carol J. Haight
Assistant Commission Secretary


CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of December, 2007 a true and correct copy of **Order Establishing Briefing Schedule** was served by regular United States mail upon each of the following:

RONALDO A COULTER
IDAHO EMPLOYMENT LAW SOLUTIONS
776 E RIVERSIDE DRIVE SUITE 200
EAGLE ID 83616

NYK LINE NORTH AMERICA INC
101 S CAPITOL BLVD SUITE 1200
BOISE ID 83702

and hand-delivered to:

DEPUTY ATTORNEY GENERAL
IDAHO DEPARTMENT OF LABOR
317 W MAIN STREET
BOISE ID 83735

cjh

Carol J. Haight

ORDER ESTABLISHING BRIEFING SCHEDULE - 3

Candy W. Dale
ISB #2909; cwd@hallfarley.com
Karen O. Sheehan
ISB #7279; kos@hallfarley.com
HALL, FARLEY, OBERRECHT & BLANTON, P.A.
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ORIGINAL

Attorneys for Employer NYK Line (North America) Inc.

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MERRIE E. CHAPMAN,

Claimant/Appellant,

vs.

NYK LINE NORTH AMERICA, INC.,

Employer/Respondent.

and

IDAHO DEPARTMENT OF LABOR.

IDOL NO. 3700-2007

NOTICE OF APPEARANCE

Hall, Farley, Oberrecht & Blanton, P.A., hereby gives Notice of Appearance on behalf of employer/respondent NYK Line North America, Inc. in this cause of action, and requests that all documents and pleadings filed herein be served upon said attorneys at Post Office Box 1271, Boise, Idaho 83701-1271.

DATED this 17th day of December, 2007.

HALL, FARLEY, OBERRECHT
& BLANTON, P.A.

By Kaush
Karen O. Sheehan – Of the firm
Attorneys for Employer NYK Line (North
America) Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 17th day of December, 2007, I caused to be served a true copy of the foregoing **NOTICE OF APPEARANCE**, by the method indicated below, and addressed to each of the following:

R.A. (Ron) Coulter
Idaho Employment Law Solutions
776 East Riverside Drive, Suite 200
Eagle, Idaho 83616

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
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Tracey K. Rolfsen
Deputy Attorney General
Idaho Department of Labor
317 West Main Street
Boise, Idaho 83735

☒ U.S. Mail, Postage Prepaid
☐ Hand Delivered
☐ Overnight Mail
☐ Telecopy

Kaush
Karen O. Sheehan

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MERRIE E. CHAPMAN,

Claimant,

vs.

NYK LINE NORTH AMERICA, INC.,

Employer,

and

IDAHO DEPARTMENT OF LABOR.

IDOL # 3700-2007

CERTIFICATE OF SERVICE

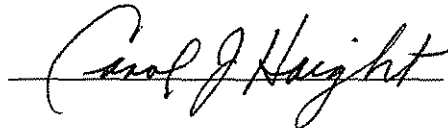
Based on Candy W. Dale's Notice of Appearance for Employer, filed December 17, 2007, I hereby certify that on the 18th day of December, 2007 a true and correct copy of the compact disc and Order Establishing Briefing Schedule, filed December 3, 2007 were served by regular United States mail upon:

CANDY W DALE
HALL FARLEY OBERRECHT & BLANTON PS
PO BOX 1271
BOISE ID 83701-1271

and a copy of the Certificate of Service was mailed to:
RONALDO A COULTER
IDAHO EMPLOYMENT LAW SOLUTIONS
776 E RIVERSIDE DR STE 200
EAGLE ID 83616

and a copy of the Certificate of Service was hand-delivered to:
DEPUTY ATTORNEY GENERAL
IDAHO DEPARTMENT OF LABOR
317 W MAIN STREET
BOISE ID 83735

cjh



RONALDO A. COULTER
IDAHO EMPLOYMENT LAW SOLUTIONS
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Idaho State Bar No.3850
ron@idahoels.com

2007 DEC 13 P 4:03
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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MERRIE E. CHAPMAN

SSN: [REDACTED]

Claimant/Appellant

vs.

NYK LINE NORTH AMERICA INC.

Employer

and

IDAHO DEPARTMENT OF LABOR

)
)
)
)
) IDOL #:3700-2007
)
)
) **BRIEF IN SUPPORT OF**
) **APPELLANT'S APPEAL**
) **OF THE NOVEMBER 2, 2007**
) **DECISION OF THE APPEALS**
) **EXAMINER**
)
)
)

COMES NOW, The Claimant/Appellant, Merrie E. Chapman (Ms. Chapman), by and through her attorney, Ronaldo A. Coulter, and hereby timely submits her BRIEF IN SUPPORT OF APPELLANT'S APPEAL OF THE DECISION OF THE APPEALS EXAMINER OF NOVEMBER 2, 2007.

I

RELEVANT BACKGROUND AND FACTS

As a preliminary matter, all "Relevant Background and Facts" delineated in exhibit 19, Appellant's "BRIEF IN OPPOSITION TO EMPLOYER APPEAL OF THE ELIGIBILITY DECISION MADE BY THE DEPARTMENT OF LABOR AUGUST 23, 2007," are incorporated herein by reference. The relevant background facts that follow are additional facts to be considered.

That on October 23, 2007 a hearing was held in this matter (CD)¹.

That during the hearing, Ms. Tamsen Leachman testified in relevant part as follows:²

- That she had set the ground rules for the interview with Ms. Chapman that the tape recording of the interview was prohibited;
- That Ms. Tamsen Leachman was concerned that the interview had been deliberately taped by Ms. Chapman and this taping adversely affected Ms. Tamsen Leachman's perception of Ms. Chapman's credibility;
- That Ms. Tamsen Leachman testified that she clearly heard Ms. Chapman's voice at the very beginning of the tape in question saying: "OK I'm recording now;" and
- That for Ms. Tamsen Leachman, the "OK I'm recording now" statement was the deciding factor that convinced Ms. Leachman that Ms. Chapman had knowingly and deliberately taped a portion of the interview and that such taping was a deliberate violation of the established interview ground rules.

That the tape recorder in question was a SONY 570V tape recorder. (CD)

¹ Any reference to "CD" means that the information is contained on the CD that was provided to Claimant/Appellant by the Idaho Industrial Commission.

² All references to Ms. Tamsen Leachman's testimony and Ms. Chapman's testimony either paraphrased or quoted are from the CD of the October 23, 2007 hearing in this matter provided by the Idaho Industrial Commission.

That Ms. Tamsen Leachman never inspected or handled the SONY 570V tape recorder during the interview of Ms. Chapman. (CD)

That Ms. Chapman prior to July 18, 2007 had never used a tape recorder. (CD)

That Ms. Chapman totally relied on the expertise of the salesperson from the Office Depot to set up the SONY 570V tape recorder; (CD) and (Exhibit 20)

That Ms. Chapman in response to the Office Depot salesperson statement of you are all set was the question from Ms. Chapman "OK I'm recording now?"

That Ms. Chapman was totally surprised when the alarm indicating that the tape recorder had stopped sounded; (CD) (Exhibit 20)

That Ms. Chapman told Ms. Leachman that she was unaware that the tape recorder was and in regard to the tape recorder Ms. Chapman told Ms. Leachman that she "didn't know how to use the thing".

That on November 2, 2007, the Appeals Examiner provided his decision in the case which concluded that Ms. Chapman had intentionally recorded part of the investigation; the rationale for the decision is follows:

The claimant explained that the voice activation feature on the recorder may have caused the recorder to begin recording after the claimant went to retrieve an item from her purse. However, *the claimant has not provided a plausible explanation*

for the claimant stating at the beginning of the recording, "OK, I'm recording now." The claimant's statement makes it clear that the claimant knew that she was recording after she turned the recorder on. The claimant suggests that the statement had been recorded at some time prior to the meeting, but again the claimant had just purchased *the recorder on her lunch hour and the claimant has not provided a credible explanation as to when and how the statement, "OK, I'm recording now," was recorded prior to the meeting.* (Emphasis added) (Exhibit "T")

That the decision of the Hearing Officer rested in large measure on the testimony of Ms. Tamsen Leachman, the investigator retained by the Employer in this matter. *See* the November 2, 2007 Decision in this case.

That Exhibit 15, the DVD of the Tape provided by Merrie to Employer, was submitted as an evidentiary exhibit by Ms. Tamsen Leachman and Ms. Karen O. Sheehan, the attorneys representing the Employer NYK Lines (North America).

That Ms. Chapman through counsel filed a notice of appeal/claim for review on November 16, 2007 in this matter.

That a Notice of Filing of Appeal was issued by the Industrial Commission on November 21, 2007.

That a Petition to File a Brief and Request for Hearing was filed by Ms. Chapman on November 27, 2007.

That through the Briefing and Scheduling Order of the Idaho Industrial Commission dated December 3, 2007, Claimant/ Appellant was granted permission to file a brief within ten (10) days of the date of the scheduling Order but was denied the requested hearing in this matter.

II

THE APPLICABLE LAW

The law in this area is well settled:

When an employer discharges an employee, the worker is not eligible for unemployment benefits if unemployment is "due to the fact that [she] left [her] employment voluntarily without good cause connected with [her] employment, or that [she] was discharged for misconduct in connection with [her] employment." I.C. § 72-1366(5). Misconduct is defined as a willful, intentional disregard of the employer's interests; a deliberate violation of the employer's rules; or a disregard of the standards of behavior which the employer has a right to expect of its employees. Under the "standards of behavior" test, NYK had to prove by a preponderance of the evidence that (1) Merrie's conduct fell below the standard of behavior expected by NYK; and (2) that NYK's expectations were objectively reasonable in this particular case.

Gunter v. Magic Valley Regional Medical Center, 143 Idaho 63, 137 P.3d 450, 453 (2006) citing *Johns v. S.H. Kress & Co.*, 78 Idaho 544, 548, 307 P.2d 217, 219 (1957) and *Harris v. Elec. Wholesale*, 141 Idaho 1, 4, 105 P.3d 267, 270 (2004).

III

ANALYSIS

A. The Appeals Examiner Erred in Concluding that the Appellant did not Provide a Plausible Explanation for a Statement Attributed to the Claimant Appellant "OK I'm Recording Now"

1. Ms. Chapman's Conduct was Consistent with the Expected Behavior of One with No Experience in Using a Tape Recording Device

There is no other way to say this other than to say the Appeals Examiner was just wrong in his analysis that Ms. Chapman failed to provide a plausible explanation for the following statement attributed to her: "OK I'm recording now." The record has been established through Ms. Chapman's testimony that the statement was made in response to the statement of the salesperson at Office Depot. Not only is Ms. Chapman's explanation plausible, given the fact that Ms. Chapman had never handled a tape recorder in her life, her response, in a question format is not only plausible but would be expected of one with her non-existent experience.

2. The Appeals Examiner Impermissibly Shifted the Burden of Proof From the Employer to Ms. Chapman

The applicable law is stated in the appropriate section in this brief and in Exhibit "19". The law places the burden on the employer to prove by a preponderance of the evidence that (1) Ms. Chapman's conduct fell below the standard of behavior expected by the employer; and (2) that the employer's expectations were objectively reasonable. Contrary to the opinion of the Appeals Examiner, Ms. Chapman, although she did, was under no obligation provide any more of an explanation that was given through her sworn testimony as to why the critical words "OK I'm recording now?" were spoken. Rather the employer had an obligation to show by a preponderance of the evidence that the employer's interpretation of the words was correct; and this they failed to do.

B. The Appeals Examiner Erred in Relying on the Testimony of Ms. Leachman as to What was Actually on the Tape

1. The Best Evidence of What was is on the Tape is the Tape or a
Reproduction of the Tape

From the record of the hearing and the decision of the Appeals Examiner, it is undeniable that the words, "OK, I'm recording now", allegedly spoken by Ms. Chapman were critical in the Appeals Examiner's conclusions in this case. From the record and the decision, it can be ascertained that Ms. Leachman's testimony about the contents of the tape and Ms. Leachman's interpretation of what is on the tape was inexplicably given great weight by the Appeals Examiner.³ Although the Appeals Examiner can assign the weight the Appeals Examiner deems appropriate to the testimony of one witness over another, the Appeals Examiner must also consider all relevant evidence and weigh that evidence in light of the facts presented. In this case the Appeals Examiner failed in his duty.

Exhibit 15 is the DVD of the Tape provided by Ms. Chapman to Ms. Tamsen Leachman and was submitted as an evidentiary exhibit by Ms. Tamsen Leachman and Ms. Karen O. Sheehan, the attorneys representing the Employer NYK Lines (North America). There was no objection by any party to the admission of Exhibit 15. The best evidence of proving what exactly was said on the tape recording by the parties and the context in which it was said was the actual tape itself unless it was unavailable and a production of the original tape recording was submitted. In this case, the employer chose to submit

³ The record reflects that Mr. Michael Holt, Vice President, General Counsel and Compliance Officer for NYK was allowed to testify over the objection of Ms. Chapman. The objection was that Mr. Holt's testimony was not related to the central issue of the specific alleged misconduct of the unauthorized taping of Ms. Chapman's interview. Nevertheless, the Appeals Examiner, allowed Mr. Michael Holt to testify, which testimony in large measure was hearsay and dealt with bolstering the credibility of Ms. Tamsen Leachman, the correctness of NYK's actions and procedures, and his personal action in relation to Ms. Chapman.

Exhibit 15. Exhibit 15 is for the most part inaudible and distorted and is roughly fifteen (15) minutes in length as opposed to an expected thirty (30) minutes in length. Of critical importance is that the first five (5) minutes of the tape is pure distorted sound.

Assuming that the Appeals Examiner listened to Exhibit 15, the Appeals Examiner, was left with the testimony of Ms. Tamsen Leachman and the testimony of Ms. Chapman as to what was on the tape and in what context the alleged statement "OK I'm recording now" was made. Lacking any evidence that Ms. Tamsen Leachman was more credible than Ms. Chapman, and lacking any evidence that Ms. Chapman was more credible than Ms. Tamsen Leachman, the Appeals Examiner, erred in giving more weight to the testimony of Ms. Tamsen Leachman over the testimony of Ms. Chapman.

C. The Appeals Examiner, In Light Of All The Evidence Presented, To Include Appellant's Brief Supported By Affidavits Erred When He Concluded That Appellant Intentionally Taped The Proceedings.

Sections "A" and "B" herein, Exhibits 15 and 19, and specifically Sections I and III of Exhibit 19 taken together confirm that the Appeals Examiner was in error when he concluded that Ms. Chapman intentionally taped the proceedings. With no credible evidence to the contrary, and no evidence on the record that would impugn Ms. Chapman's credibility, the Appeals Examiner was left to weigh all of the evidence to determine if the Employer could meet the burden established by law to show that Ms. Chapman had engaged in misconduct. The specific misconduct was the alleged unauthorized taping of approximately thirty minutes of the interview in question. The record shows that:

1. Ms. Chapman's conduct was in compliance with NYK policy as she fully participated in the investigation and complied with the investigator.
2. The recording of a portion of the interview was inadvertent and unintentional and;
3. Ms. Chapman had a strong motive to comply with the investigation

The Appeals Examiner simply had no basis in fact or law to conclude that Ms. Chapman intentionally taped the proceedings.

D. The Appeals Examiner Erred In Concluding That Appellant's Inadvertent Actions Interfered With And Potentially Compromised The Investigation Especially In Light Of All The Evidence That Was Before The Appeals Examiner.

Sections "A" and "B" herein, Exhibits 15 and 19, and specifically Sections I and III of Exhibit 19 taken together confirm that the Appeals Examiner was in error when he concluded that Ms. Chapman's actions interfered with and potentially compromised the Employer's investigation. Exhibit 15 confirms that at most, fifteen (15) – eighteen (18) minutes of the interview was taped inadvertently; and it bears repeating that Exhibit 15 is distorted and inaudible. The interview lasted for three (3) hours. It was established that Ms. Chapman arrived for the interview on time, was courteous to the investigator, answered all questions, complied with the administrative directions given by the investigator, completed the interview and did not leave the interview until she was dismissed. Exhibit 14 shows that there were nine witnesses interviewed during the process. Given Exhibit 15 and the existing record, the Appeals Examiner's analysis that Ms. Chapman's fifteen (15) to possibly eighteen (18) minutes of inadvertent taping of the subject interview could potentially compromise the investigation was in error

IV

CONCLUSION

The conclusion contained in Exhibit 19, Section IV is specifically adopted in this section. It must also be added that the state of the record supports the conclusion that the hearing officer erred as delineated and discussed in this brief. Therefore, in light of the existing record and for the reasons set forth herein, it is asked that the decision of the Appeals Examiner be set aside, that the appeal of the Employer be denied, and that the Industrial Commission specifically find that Ms. Chapman is entitled to the original August 3, 2007 Idaho Department of Labor Determination that Ms. Chapman was eligible to receive benefits.

R. A. (Ron) Coulter
Idaho Employment Law Solutions
776 E. Riverside Drive, Suite 200
Eagle, Idaho 83616

DATED this 13th day of December, 2007.

IDAHO EMPLOYMENT LAW SOLUTIONS



R. A. (RON) COULTER
Attorney for Claimant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of December, 2007, I caused to be served a true and correct copy of the foregoing by the following method to:

INDUSTRIAL COMMISSION
ATTN: UNEMPLOYMENT APPEALS
317 WEST MAIN STREET 2ND FLOOR
P.O. BOX 83720
BOISE IDAHO 83720-0041

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APPEALS BUREAU
IDAHO DEPARTMENT OF LABOR
317 WEST MAIN STREET
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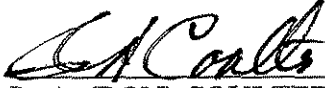
KAREN O. SHEEHAN
HALL FARLEY OBERRECHT & BLANTON PA
702 WEST IDAHO SUITE 700
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BOISE ID 83701

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NYK LINE NORTH AMERICA INC
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☐ Certified Mail, Return Receipt
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☐ Statehouse Mail

IDAHO EMPLOYMENT LAW SOLUTIONS



R. A. (RON) COULTER
Attorney for Appellant

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MERRIE E. CHAPMAN,

Claimant,

vs.

NYK LINE NORTH AMERICA, INC.,

Employer,

and

IDAHO DEPARTMENT OF LABOR.

IDOL #3700-2007

DECISION AND ORDER

FILED

JAN - 9 2008

INDUSTRIAL COMMISSION

Appeal of a Decision issued by an Appeals Examiner with Idaho Department of Labor denying benefits. AFFIRMED.

Claimant, Merrie E. Chapman, appeals to the Industrial Commission a Decision issued by an Appeals Examiner with Idaho Department of Labor (IDOL) finding her ineligible for unemployment insurance benefits. The Appeals Examiner found that (1) Employer discharged Claimant for misconduct connected with employment; and (2) Employer's account is not chargeable for experience rating purposes. Claimant has previously requested a new hearing before the Commission; however that request was denied on December 3, 2007.

The undersigned Commissioners have conducted a *de novo* review of the record as provided for in Idaho Code § 72-1368(7) and Idaho Supreme Court opinion. The Commission has relied on the audio recording of the hearing before the Appeals Examiner held on October 23, 2007, along with the exhibits [1 through 21] admitted into the record during that proceeding, as well as the Appeal filed by the Claimant. In accordance with Idaho Code § 72-1368(7), the Commission *AFFIRMS* the Decision of the Appeals Examiner.

DECISION AND ORDER - 1

Claimant filed a brief in support of appellant's appeal with the Commission on December 13, 2007. Pursuant to our Order Establishing Briefing Schedule, Employer had seven days in which to reply to Claimant's brief. Employer filed a reply in opposition to Claimant's brief on December 24, 2007, four days beyond the time permitted to file such brief. Accordingly, Employer's brief was untimely and not considered in our decision below.

FINDINGS OF FACT

Based on the testimony and evidence in the record, the Commission concurs with and adopts the Findings of Fact as set forth in the Decision of the Appeals Examiner.

DISCUSSION

Claimant was employed as a senior coordinator for Employer from 1988 to July 19, 2007, when she was discharged by Employer. (Audio Recording). Both parties agree that Claimant was discharged for failure to comply with an investigation that Employer was conducting based on complaints that Claimant had made in June 2007. (Audio Recording). Employer hired Tamsen Leachman an attorney with the law firm of Hall, Farley, Oberrecht and Blanton as an independent outside investigator to investigate Claimant's complaints. (Audio Recording). As part of the investigation, Ms. Leachman conducted an interview of Claimant on July 18, 2007. (Audio Recording).

An hour prior to the commencement of that interview, Claimant purchased a tape recorder and upon arrival asked Ms. Leachman if she could record the interview. (Audio Recording). Ms. Leachman denied this request and explained to Claimant the reasons why. (Audio Recording). During a break in the interview while Ms. Leachman left the room to retrieve documents, Employer alleges that Claimant turned on the tape recorder and recorded the next 30 minutes of the interview without Ms. Leachman's knowledge or consent. (Audio

DECISION AND ORDER - 2

Recording). After 30 minutes a BEEP was heard and Ms. Leachman inquired as to whether Claimant had recorded the interview. (Audio Recording). Claimant denied this and after some discussion eventually played the tape to Ms. Leachman which revealed the voices of Ms. Leachman and Claimant. Thirty minutes of the interview had been recorded. (Audio Recording). Additionally, at the beginning of the recording Claimant can be heard stating "Ok, I am recording now." (Exhibit 15). Ms. Leachman expressed her disappointment in Claimant and informed her that she felt as though Claimant had lied to her. (Audio Recording). Claimant offered Ms. Leachman the tape and Ms. Leachman took possession of it during the interview. (Audio Recording).

The interview was concluded approximately an hour and a half later and a report of the incident was drafted by Ms. Leachman and provided to Employer upon its request. (Audio Recording). On July 19, Sarah Stevens informed Claimant that she was discharged because she failed to comply with its investigation by tape recording part of the interview with Ms. Leachman. (Exhibit 16). Claimant represented to Ms. Leachman and Employer that she must have inadvertently activated the recorder when Ms. Leachman left the room during which time Claimant rummaged through her purse to retrieve a piece of chewing gum. (Audio Recording). Claimant asserts that the tape recorder has a very sensitive voice (noise) activation feature that must have been activated inadvertently and maintains the argument that the recording was an accident in her appeal to the Commission. (Claimant's Brief in Support of Appellant's Appeal filed December 13, 2007); (Claimant's Brief in Opposition to Employer's Appeal of Eligibility Determination made by IDOL filed October 22, 2007).

There is no material dispute about the essential facts above giving rise to Claimant's discharge. However, Employer asserts that Claimant intentionally recorded part of the interview

after agreeing not to do so; while Claimant asserts it was an accident, and not misconduct for the purpose of denying unemployment insurance benefits.

Idaho Code § 72-1366(5) provides that a claimant is ineligible for unemployment insurance benefits if that individual's unemployment resulted from the claimant's discharge for employment-related misconduct. What constitutes "just cause" in the mind of an employer for dismissing an employee is not necessarily the legal equivalent of "misconduct" under Idaho's Employment Security Law. The two issues are separate and distinct. In a discharge, whether the employer had reasonable grounds for dismissing a claimant is irrelevant. The only concern is whether the reasons for discharge constituted "misconduct" connected with the claimant's employment such that the claimant can be denied unemployment benefits. Beaty v. City of Idaho Falls, 110 Idaho 891, 892, 719 P.2d 1151, 1152 (1986).

The burden of proving misconduct by a preponderance of the evidence falls strictly on the employer. Appeals Examiner of Idaho Dept. of Labor v. J.R. Simplot Co., 131 Idaho 318, 320, 955 P.2d 1097, 1099 (1998). A "preponderance of the evidence" simply means that when weighing all of the evidence in the record, the evidence on which the finder of fact relies is more probably true than not. Edwards v. Independence Services, Inc., 140 Idaho 912, 915, 104 P.3d 954, 957 (2004).

The Idaho Supreme Court has established three grounds upon which to determine whether Claimant has engaged in "misconduct" as it applies to eligibility for unemployment benefits. Further, the Court requires the Commission to consider all three grounds in determining whether misconduct exists. Dietz v. Minidoka County Highway Dist., 127 Idaho 246, 248, 899 P.2d 956, 958 (1995). We have carefully considered all three grounds for determining misconduct and conclude the issue can be disposed of under either a deliberate

disregard of an employer's rule or the "standards of behavior" analysis without further unnecessary explanation of the other ground.

The "deliberate disregard of an employer's rule" theory requires a finding that the employee acted deliberately, violating a known rule. Wulff v. Sun Valley Co., 127 Idaho 71, 75, 896 P.2d 979, 983 (1995). Under the "standards-of-behavior" analysis, the employer must show by a preponderance of the evidence that it communicated its expectations to the claimant, or that its expectations "flowed normally" from the employment relationship and that those expectations were objectively reasonable as applied to the claimant. As the Idaho Supreme Court has pointed out, an "employer's expectations are ordinarily reasonable only where they have been communicated to the employee." Folks v. Moscow School District No. 281, 129 Idaho 833, 838, 933 P.2d 642, 647 (1997). Notably, there is no requirement that the employer must demonstrate that the employee's disregard of the employer's preferred standard of behavior was subjectively willful, intentional, or deliberate. Welch v. Cowles Publishing Co., 127 Idaho 361, 364, 900 P.2d 1372, 1375 (1995). An employee can only be held accountable for breaching those expectations that he or she understood, explicitly or implicitly, and was capable of satisfying. Puckett v. Idaho Department of Corrections, 107 Idaho 1022, 695 P.2d 407 (1985).

Employer discharged Claimant for failure to comply with an investigation as provided for in its written policy. The policy states that "Failure to comply with investigations" is prohibited conduct for which immediate termination may be appropriate. (Exhibit 13 p. 2). Claimant does not assert that she was unaware of this policy. Ms. Leachman testified for Employer that she does not allow interviews conducted in the course of her investigations to be tape recorded because of concerns about maintaining confidentiality of the investigation, compromising the investigation, and because the presence of a recorder impedes productive and effective

communication during the interview. (Audio Recording). We find these reasons and Ms. Leachman's policy to be reasonable. Ms. Leachman also testified that she explained this to Claimant and informed her that if she was to conduct the interview she would insist on it not being recorded. (Audio Recording). Claimant agreed to the terms of the interview and it proceeded. (Audio Recording).

Claimant accurately argues that Employer's policy regarding the failure to comply with an investigation lacks any definition of what acts might constitute such failure. However, we agree with Employer that recording the interview without authorization would be an act that constitutes a failure to comply with the investigation. Claimant repeatedly emphasized that in all other aspects she cooperated with the interview and the investigation. (Audio Recording). We have no reason to doubt that. However, secretly recording the interview after Claimant specifically agreed that she would not do so does jeopardize the integrity of the interview, and thus the investigation. It casts doubts about Claimant's veracity and ability to provide reliable information to the investigator, which is particularly troubling given that Claimant's complaints about her supervisor initiated the investigation. Claimant's conduct also could have breached the confidential nature of the interview had Claimant taken the tape away from the interview. But for the fact that the recording device made a noise which alerted the investigator to its operation, Claimant would have been able to take confidential information away from the investigator, potentially compromising the investigation or creating any number of unknown harmful consequences. The fact that the recording was only of 30 minutes of the interview is not relevant. It is the nature of the violation that is compelling in this instance.

Neither party disputes that 30 minutes of the interview were indeed recorded by the tape recorder that Claimant had in her purse during the interview. And as explained above, we

conclude that such conduct does constitute a failure to comply with the investigation; and thus is misconduct based on Employer's written policy. Similarly, in the case of In re Cincu, 43 A.D.3d 528, 529, 840 N.Y.S.2d 249, (N.Y.A.D. 3 Dept. 2007) the court held that "an employee's apparent dishonesty can constitute disqualifying misconduct." This holding was made specifically in the context of an employee providing information during an employer's investigation.¹ The only remaining question for us to decide is whether Claimant deliberately intended to record the interview.

Notwithstanding Claimant's appeal and brief in support of her appeal to the Commission, we agree with the Appeals Examiner's conclusion that Claimant has not provided a plausible explanation for why her voice can be heard at the beginning of the 30-minute recording stating "Ok, I am recording now." The only conclusion that can be drawn from such statement is that Claimant turned on the tape recorder and she knew she did so. Claimant admitted it was a brand new recorder and tape purchased only an hour prior to the interview, thus the tape was not one that had been previously used by her on other occasions. Coupled with the fact that the recording reveals the conversation between Claimant and Ms. Leachman, and that it could have only been turned on during the moment that Ms. Leachman left the room, the onus rests with Claimant to prove that she did not deliberately turn on an otherwise inactivated recording device.

Claimant offers the fact that the device has a voice (or noise) activation feature on it that could have been triggered when she made noise rummaging through her purse. (Audio Recording). However, inadvertently activating the device in such a manner is inconsistent with Claimant's prefatory statement "Ok, I am recording now" that can be heard on the tape. Additionally, the testimony indicated that in addition to noise, the device (the VOR slide button)

¹ Though Idaho does not have cases directly on point, employment security law is sufficiently similar from state to state that we can look to other jurisdictions for guidance.

also needed to be manually placed on the setting which would activate the recording device upon hearing noise. (Audio Recording). Although Claimant was unfamiliar with the device and asserts that the store clerk “set up” the device at the store, it is unclear why such a “very sensitive” noise-activated device was only activated at that moment and not at some point during the two hours prior while Claimant carried it around and ate lunch. (Audio Recording). Furthermore, the tape only *appears* to start recording one time, as opposed to multiple starts and stops as would be expected if it was continually being activated by outside noises.

Claimant offered only a confusing and fleeting explanation at the appeals hearing about what she may have said at the store while purchasing the device as the reason why her prefatory statement was recorded on the tape. (Audio Recording). Given the significance of the statement, her testimony is insufficient and not convincing. The Commission has a copy of the recording and has listened to it. Though it is difficult to understand what is said on the 30 minutes of tape, Claimant’s prefatory statement is one of the only clear statements heard on the tape. However, for the purposes of our decision, the remainder of the conversation between Claimant and Ms. Leachman is not relevant. The tape was only 30 minutes long. If Claimant made the prefatory statement that activated the device at the store at roughly 1:18 p.m., it is unclear why the tape didn’t run out before the interview even started at 2:00 p.m.

Ms. Leachman testified that it was her impression that when she questioned Claimant about the recording device she appeared to have a guilty expression, and that she did not believe Claimant when she told Leachman it was an accident. (Audio Recording). Additionally, Ms. Leachman specifically testified that she believed Claimant’s statement on the tape “Ok, I’m recording now” – to have been made during the time she left the room because of what Leachman observed when she returned to the room. (Audio Recording). Specifically, Leachman

testified that Claimant's conduct in returning her cell phone back to her purse when Leachman returned to the room was entirely consistent with the course of noises she later heard on the tape. (Audio Recording). We find Ms. Leachman's testimony credible.

Finally, Claimant's conduct in turning on the recorder at that moment is also consistent with her assertions that she became concerned during the course of the interview because it was apparent the focus of it was more about her own performance rather than the complaints she lodged against her supervisor. (Audio Recording).

Though Claimant repeatedly asserts that it is *possible* the recording could have accidentally occurred in the way in which she maintains, that fact is not persuasive. Merely because it is possible, does not necessarily mean it occurred that way, or that it is even probable. Based on the evidence presented, the testimony of the witnesses, and the totality of the circumstances, we are satisfied that it is more probable than not that Claimant deliberately recorded the interview despite being told that doing so was unauthorized.

We conclude that Employer communicated to Claimant its policy that employees were to comply with investigations that it conducted. We also conclude that Claimant was informed by Ms. Leachman, an authorized agent of employer conducting the investigation, that she was not allowed to record their interview on July 18, 2007. We find both this policy and this rule to be reasonable. Claimant obstructed the investigation and compromised the integrity of it by surreptitiously recording the interview without authorization. In so doing, she deliberately disregarded employer's rules. She also violated the standards of behavior that Employer has a right to expect from its employees. Therefore, we conclude that Employer has met its burden of demonstrating that it discharged Claimant for misconduct connected with her employment.

CONCLUSIONS OF LAW

The Commission sets forth its own Conclusions of Law as follows:

I

Based on our analysis above, we conclude that Employer discharged Claimant for employment-related misconduct.

II

We further conclude that Employer's account is not chargeable for experience rating purposes.

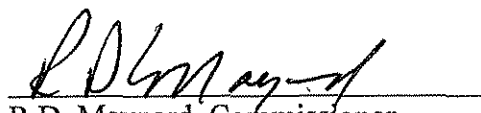
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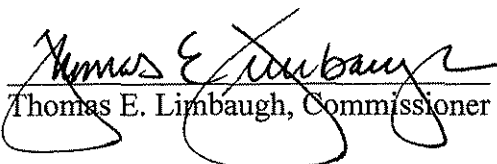
The Decision of the Appeals Examiner is *AFFIRMED* and Claimant is ineligible for unemployment benefits. This is a final order under Idaho Code § 72-1368(7).

DATED this 9th day of January, 2008.

INDUSTRIAL COMMISSION


James F. Kile, Chairman


R.D. Maynard, Commissioner


Thomas E. Limbaugh, Commissioner

ATTEST:


Assistant Commission Secretary



DECISION AND ORDER - 10

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of January, 2007 a true and correct copy of **Order Establishing Briefing Schedule** was served by regular United States mail upon each of the following:

RONALDO A COULTER
IDAHO EMPLOYMENT LAW SOLUTIONS
776 E RIVERSIDE DRIVE SUITE 200
EAGLE ID 83616

KAREN O SHEEHAN
HALL FARLEY OBERRECHT & BLANTON PA
PO BOX 1271
BOISE ID 83701-1271

and hand-delivered to:

DEPUTY ATTORNEY GENERAL
IDAHO DEPARTMENT OF LABOR
317 W MAIN STREET
BOISE ID 83735

ka

Kenna Andrew

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RECEIVED
INDUSTRIAL COMMISSION

49

1. The above-named appellant appeals against the above-named respondents to the Idaho Supreme Court from the Decision and Order entered in the above-entitled action on the 9th day of January 2008, rendered by the Idaho Industrial Commission
2. That the party has a right to appeal to the Idaho Supreme Court, and the decision and order described in paragraph 1 above is an appealable decision and order under and pursuant to I.C. 72-1368(9) and Idaho Appellate Rule (I.A.R.) 11(d).
3. A preliminary statement of the issues on review, which the Appellant asks the Commission to review at a minimum; and, which shall not prevent the Appellant from timely asserting other issues for review are:

Errors of Fact or Law by the Hearing Officer on Review:

4. The Industrial Commission erred in concluding that the Appellant did not provide a plausible explanation for a statement attributed to the Appellant "OK, I'm recording now."
5. The Industrial Commission abused its discretion in not granting a hearing requested by the appellant to receive additional evidence.

6. The Industrial Commission, in light of all the evidence presented, to include Appellant's briefs supported by affidavits erred when he concluded that Appellant intentionally taped the proceedings.
7. The Industrial Commission erred in concluding that Appellant's accidental taping of a 30 minute section of a 3 hour interview constituted misconduct on the part of the Appellant.
8. The Industrial Commission erred in concluding that Appellant's inadvertent actions interfered with and potentially compromised the investigation especially in light of all the evidence that was before the Industrial Commission.
9. The Industrial Commission erred in concluding that Appellant had engaged in misconduct and that Respondent had met its burden under the law.
10. As this petition involves questions of fact established by the record, the Appellant request that full transcripts of the proceedings before the Appeals Examiner be produced and included in the record on appeal. The appellant also requests that the following be made a part of the record if not included in the standard record submitted to the Court from the Industrial Commission:
 - a. All briefs submitted by the parties in this action;

- b. All exhibits submitted by the parties to this action; and
- c. All decisions and orders made in this action.

DATED this 19th day of February, 2008.

IDAHO EMPLOYMENT LAW SOLUTIONS



R. A. (RON) COULTER
Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 19th day of February, 2008, I caused to be served a true and correct copy of the foregoing by the following method to:

INDUSTRIAL COMMISSION
ATTN: UNEMPLOYMENT APPEALS
317 WEST MAIN STREET 2ND FLOOR
P.O. BOX 83720
BOISE IDAHO 83720-0041

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Statehouse Mail

Door of Larson
IDAHO INDUSTRIAL COMMISSION
317 WEST MAIN STREET
BOISE, IDAHO 83735-0720

- ☐ U.S. Mail
- ☒ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Statehouse Mail

KAREN O. SHEEHAN
HALL FARLEY OBERRECHT & BLANTON PA
702 WEST IDAHO SUITE 700
PO BOX 1271
BOISE ID 83701

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Statehouse Mail

NYK LINE NORTH AMERICA INC
PO BOX 6501
DIAMOND BAR CA 91765-8501

- ☒ U.S. Mail
- ☐ Hand Delivery
- ☐ Certified Mail, Return Receipt Requested
- ☐ Overnight Mail
- ☐ Facsimile
- ☐ Statehouse Mail

IDAHO EMPLOYMENT LAW SOLUTIONS

R. A. Coulter

R. A. (RON) COULTER
Attorney for Appellant

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CLERK OF APPEALS

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

2008 FEB 21 AM 8:53

MERRIE E. CHAPMAN,

Claimant / Appellant,

vs.

NYK LINE NORTH AMERICA, INC.,

Employer / Respondent,

and

IDAHO DEPARTMENT OF LABOR,

Respondent.

SUPREME COURT NO. 35014

CERTIFICATE OF APPEAL

Appeal From:

Industrial Commission,
James F. Kile, Chairman, presiding.

Case Number:

IDOL #3700-2007

Order Appealed from:

Decision and Order, filed January 9, 2008

Representative for Claimant:

Ronaldo A. Coulter
776 E. Riverside Drive, Suite 200
Eagle, ID 83616

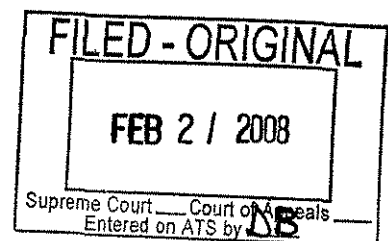
Representative for Employer:

Karen O. Sheehan
PO Box 1271
Boise, ID 83701-1271

Representative for IDOL:

Tracey K. Rolfsen
Deputy Attorney General
Idaho Department of Labor
317 West Main Street
Boise, ID 83735

CERTIFICATE OF APPEAL - 1



Appealed By:

Claimant/Appellant

Appealed Against:

Employer/Respondent
and
Idaho Department of Labor/Respondent

Notice of Appeal Filed:

February 19, 2008

Appellate Fee Paid:

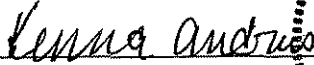
\$86.00

Transcript:

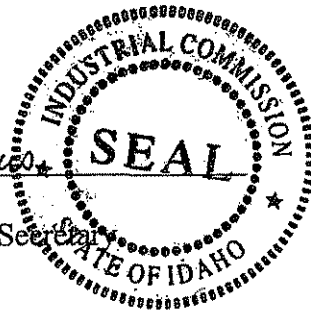
Transcript has been ordered

Dated:

February 20, 2008



Kenna Andrus
Assistant Commission Secretary



CERTIFICATION

I, Kenna Andrus, the undersigned Assistant Commission Secretary of the Industrial Commission of the State of Idaho, hereby CERTIFY that the foregoing is a true and correct photocopy of the Notice of Appeal filed February 19, 2008; and Decision and Order, filed January 9, 2008; and the whole thereof.

DATED: February 20, 2008

Kenna Andrus
Kenna Andrus
Assistant Commission Secretary



CERTIFICATION OF RECORD

I, Kenna Andrus, the undersigned Assistant Commission Secretary of the Industrial Commission, do hereby certify that the foregoing record contains true and correct copies of all pleadings, documents, and papers designated to be included in the Agency's Record on appeal by Rule 28(3) of the Idaho Appellate Rules and by the Notice of Appeal, pursuant to the provisions of Rule 28(b).

I further certify that all exhibits admitted in this proceeding are correctly listed in the List of Exhibits (i). Said exhibits will be lodged with the Supreme Court after the Record is settled.

DATED this 22nd day of April 2008.

Kenna Andrus
Kenna Andrus
Assistant Commission Secretary



BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

MERRIE E. CHAPMAN,)	
)	
Claimant / Appellant,)	
)	SUPREME COURT NO. 35014
v.)	
)	
NYK LINE NORTH AMERICA, INC.,)	NOTICE OF COMPLETION
)	
Employer / Respondent,)	
)	
and)	
)	
IDAHO DEPARTMENT OF LABOR,)	
)	
Respondent.)	

TO: STEPHEN W. KENYON, Clerk of the Courts; and
Ronaldo A. Coulter for Claimant / Appellant; and
Karen O. Sheehan for Employer / Respondents; and
Tracey K. Rolfsen for Idaho Department of Labor / Respondent.

YOU ARE HEREBY NOTIFIED that the Clerk's Record was completed on this date and,
pursuant to Rule 24(a) and Rule 27(a), Idaho Appellate Rules, copies of the same have been served
by regular U.S. mail upon each of the following:

Ronaldo A. Coulter
776 E. Riverside Drive, Suite 200
Eagle, ID 83616

Karen O. Sheehan
PO Box 1271
Boise, ID 83701-1271

NOTICE OF COMPLETION (S.C. 35014 CHAPMAN) - 1

and hand-delivered to:

Tracey K. Rolfsen
Deputy Attorney General
Idaho Department of Labor
317 W. Main Street.
Boise, ID 83735

YOU ARE FURTHER NOTIFIED that pursuant to Rule 29(a), Idaho Appellate Rules, all parties have twenty-eight days from the date of this Notice in which to file objections to the Clerk's Record or Reporter's Transcript, including requests for corrections, additions or deletions. In the event no objections to the Clerk's Record or Reporter's Transcript are filed within the twenty-eight day period, the Clerk's Record and Reporter's Transcript shall be deemed settled.

DATED this 22nd day of April, 2008.

Kenna Andrus
Kenna Andrus
Assistant Commission Secretary

