

9-3-2009

# Adams v. Aspen Water, Inc. Agency's Record Dckt. 36501

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**BEFORE THE SUPREME COURT OF THE STATE OF IDAHO**

MATTHEW S. ADAMS, )  
 )  
 Claimant/Appellant, )  
 )  
 vs. )  
 )  
 ASPEN WATER, INC., )  
 )  
 Employer/Respondent, )  
 )  
 and )  
 )  
 IDAHO DEPARTMENT OF LABOR, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

**SUPREME COURT NO. 36501**

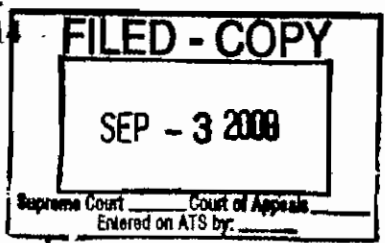
**AGENCY'S RECORD**

**LAW CLERK**

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

**For Claimant/Appellant:**

Matthew S. Adams, Pro Se  
 4932 N. Riverfront Pl.  
 Garden City, ID 83714



**For Respondent:**

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

**FILED COPY**

**36501**

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

MATTHEW S. ADAMS, )  
 )  
 Claimant/Appellant, )  
 )  
 vs. ) **SUPREME COURT NO. 36501**  
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 ASPEN WATER, INC., )  
 ) **AGENCY'S RECORD**  
 Employer/Respondent, )  
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 and )  
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 IDAHO DEPARTMENT OF LABOR, )  
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BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

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4932 N. Riverfront Pl.  
Garden City, ID 83714**

**For Respondent:**

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

 **COPY**

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## LIST OF EXHIBITS

Hearing Transcript taken on January 28, 2009, will be lodged with the Supreme Court.

### Exhibits admitted into record before Idaho Department of Labor

- |     |   |          |
|-----|---|----------|
| 1.  | Notice of Telephone Hearing, mailed January 16, 2008                            | 3 pages  |
| 2.  | Important Information about your Hearing Read Carefully                         | 2 pages  |
| 3.  | Employer Procedures of page 19 with emails<br>between John Russ and Brenda Ceja | 4 pages  |
| 4.  | Aspen Water faxed letter and job logs   | 14 pages |
| 5.  | Aspen Water's fax copy of procedure from employee handbook                      | 2 pages  |
| 6.  | Eligibility Determination Unemployment Insurance Claim                          | 2 pages  |
| 7.  | Request for Appeals Hearing   | 2 pages  |
| 8.  | Employers Data sheet dated 1/15/09  | 1 page   |
| 9.  | Letter submitted 1/27/08 by Matthew S. Adams                                    | 20 pages |
| 10. | Aspen Water of Idaho's Response to Matthew Adams's letter                       | 2 pages  |



## ISSUES

The issues before the Appeals Examiner are 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 *and* 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.

## FINDINGS OF FACT

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

1. The claimant worked as a water systems installer for this employer from September of 2007 until 11/3/2008.
2. 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 did any other.
3. The trigger for the claimant's separation from employment occurred on his last day. On the day, he did leave work after lunch, spending his time on personal business getting a driver's license renewal.
4. The employer maintains that the claimant voluntarily quit the job by leaving the work place after only working 1 ½ hours without notice or permission.
5. In fact, the claimant was discharged. He had no intention of quitting.
6. The claimant was on light duty restriction at the time, following a work related injury. The documentation submitted by the employer as proof that the claimant only worked 1 ½ hour that day were the logs used to track time spent driving a company vehicle and then time spent on installations themselves. The claimant's time that day was spent in the office, given his work restrictions.
7. The employer's policies (a copy of which were submitted by the claimant) detail that two consecutive days of no call/no show is considered to signal a voluntary quit. In response, the employer suggests that the policy manual given the claimant was only a "guideline" from the corporate office in Salt Lake City. (Exhibits 9,10)
8. He had no assigned work that afternoon. Although never before for an entire afternoon, the claimant gave unchallenged testimony that it was common practice for he and the other installer to take personal time off when there were no installations to do.
9. The policies also detail a "progressive" disciplinary process whereby, in most situations, employee performance and disciplinary issues are addressed through a series of steps of warnings and counselings.
10. Since the separation, the employer has "made adjustments" so that the business operates with only one, rather than two installers.



## AUTHORITY

The Idaho Supreme Court has indicated that when deciding whether an unemployment insurance claimant's unemployment is due to the fact that he left his employment voluntarily, the matter of the intent of the worker to sever the employment relationship is an essential consideration. (See Totorica vs. Western Equipment Co., 88 Idaho 534 (1965) and Coates vs. Bingham Mechanical & Metal Products, Inc., 96 Idaho 606 (1975) and Gray vs. Brasch & Miller Construction Co., 102 Idaho 14 (1981).)

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).

## CONCLUSIONS

Given that the accepted practice was for installers to take personal time in the afternoon if there was no installation work to do, the employer's stated policy that it takes two consecutive incidents of no call/no show to signal a voluntary separation, and the claimant's testimony that he was not intending to quit, the claimant's separation from this job is most accurately characterized as a discharge.

The claimant was discharged for reasons other than misconduct connected with employment. The employer's policies lay out a procedure to notify employees that performance or conduct issues are violations of policy or the best interests of the employer and jeopardize employment. Since the claimant had never been written up or warned that the informal time off practiced by him and the other installer, it is inappropriate to label the events of his final day as any kind of

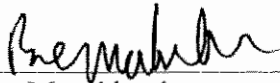
egregious policy violation that justified overriding the progressive disciplinary procedures in favor of immediate termination.

The facts that the claimant had recently suffered a work related injury and that the employer was able to adjust their operation to get the work done with half the number of installers, suggests the employer would be motivated to end the claimant's employment for reasons other than his purported resignation.

The claimant was discharged, but not for misconduct.

Benefits are allowed.

The employer's account must be charged on the claim.



Brent Marchbanks  
Appeals Examiner  
Examinador de Apelaciones

Date of Mailing 2-4-09  
Fecha De Envio

Last Day To Appeal 2/18/09  
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  
Judicial Division, IDOL Appeals  
P.O. Box 83720  
Boise, ID 83720-0041

Or delivered in person to: Idaho Industrial Commission  
700 S Clearwater Lane  
Boise, Idaho 83712

Or transmitted by facsimile to: (208) 332-7558

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 Department of Labor Local 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  
Judicial Division, IDOL Appeals  
P.O. Box 83720  
Boise, ID 83720-0041

O ser entregada en persona a:

Idaho Industrial Commission  
700 S Clearwater Lane  
Boise, Idaho 83712

O puede enviarla por fax a: (208) 332-7558.

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 más 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 debiera 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 FEB 04 2009, a true and correct copy of **Decision of Appeals Examiner** was served by regular United States mail upon each of the following:

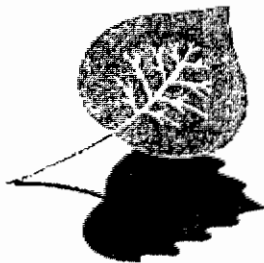
MATTHEW S ADAMS  
4932 N RIVERFRONT PL  
GARDEN CITY ID 83714

ASPEN WATER INC  
149 S ADKINS WAY STE 105  
MERIDIAN ID 83642

ASPEN WATER INC  
1960 S MILESTONE DR E  
SALT LAKE CITY UT 84104

cc: Idaho Department of Labor Meridian Local Office

  
\_\_\_\_\_



ASPEN WATER OF IDAO  
 149 S ADKINS WAY STE. 105  
 MERIDIAN, ID 83642  
 PHONE 208-343-7683  
 FAX 208-322-0461

FILED  
 FEB 18 2009  
 INDUSTRIAL COMMISSION

FACSIMILE TRANSMITTAL SHEET

TO: JUDICIAL DIVISION	FROM: TERRY SIDWELL
COMPANY: INDUSTRIAL COMMISSION	DATE: 2/17/09
FAX NUMBER: 332-7558	TOTAL NO. OF PAGES INCLUDING COVER: 5
PHONE NUMBER:	SENDER'S REFERENCE NUMBER:
RE: MATT ADAMS VS ASPEN WATER	YOUR REFERENCE NUMBER:

URGENT     FOR REVIEW     PLEASE COMMENT     PLEASE REPLY     PLEASE RECYCLE

NOTES/COMMENTS:

Aspen Water wishes to appeal the decision made by the Idaho department of Labor regarding Matthew S Adams vs. Aspen Water Inc. Docket number 1399-2009

It is our belief that the basis on which this claim was reversed is not accurate. Please review the facts below.

REBUTTAL OF FINDINGS OF FACT

2. Matt Adams was paid less than \$100.00 more per pay period than the other installer. That is not uncommon based on experience and time with the company.

3. On the claimant's last day, he left the office at 8:30am to for an eighteen minute service call, took his lunch break, and then went to the court house to change his address on his driver's license so that he could vote. Claimant returned to the office at 12:25 and then turned in his work from the previous Friday and that day; a few minutes later, he was gone.

4. The employer did terminate Matt for leaving work without proper notification. Whether it was voluntary or involuntary, Matt Adams left. Employee Handbook Section 3.7 States "If employees have unexpected personal business to take care of, they must notify their direct supervisor to discuss the time away from work and make arrangements as necessary. Personal business should be conducted on the employee's personal time. Employees who do not adhere to the break policy may be subject to disciplinary action, up to and including termination."

5. Ok, Matt Adams was fired for disrespectful conduct and insubordination.

6. The claimant was only in the office for about half of an hour in the morning. If he had been in the office that afternoon, work would not have been lost. He left for a service call, was gone all morning, returned his van, and then left for the day. The Mileage and Job log was not only to track time spent driving and time on installations, but also to keep track of the installers themselves, so that they have some accountability for their day. Matt Adams admitted to having gone to the courthouse in the company van, without permission, to take care of personal business, and then he came back to the office and parked the company van and left without notifying anyone that he was leaving for the day.

7. This decision was not based on policy (4.2). This is something that Matt Adams is claiming. The decision was based on policy 3.7 and Section 4 (please review).

8. What company is going to allow an employee to just leave unannounced for an entire afternoon? We strive for good customer service and calls come in daily for cooler service. If Matt Adams had been in the office, he would have had work to do. We occasionally allow employees to take care of personal business during the day, if it is only for a short period of time and does not interrupt the work day, if they get prior permission to do so. Example: run to the bank to deposit pay check, drop off homework to child's school, drop mail off at post office, etc.

9. According to Section 3.13 of our employee handbook we are a progressive company, however, some circumstances require immediate termination and this was definitely one of them. This kind of

INDUSTRIAL COMMISSION

FEB 18 2009

FILED

insubordination cannot be tolerated by anyone at any level of this company. That is why section 3.7 and Section 4, both state "which may result in corrective action, up to and including termination of employment."

10. We have been able to survive with only one installer, even though at times it is difficult. We would have preferred to keep Matt Adams with the company; however, we cannot be taken advantage of.



### 3.6 Lunch Periods

Employees are allowed a one-hour or a 30-minute lunch break. Lunch breaks generally are taken between the hours of 11:00 am and 2:00 p.m. on a staggered schedule so that your absence does not create a problem for co-workers or clients. A supervisor or Executive Staff member must approve long lunch requests. Part time employees are allowed to take a 10-minute break instead of a lunch break. Though any lunch break lasting more than 10-minutes in duration requires the employee to clock out and in.

Food is to be kept in the break room unless authorized by your immediate supervisor.

The fridge, microwave, coffee pot, etc. are available for your convenience. Maintaining these items and keeping them clean are up to each of us. Wash your own dishes, empty garbage, and remove your old food from the fridge on a daily basis.

### 3.7 Break Periods

Aspen Water Inc. provides breaks for employees during production activities at the following times: Day staff is provided with a 10-minute break at 10:00 am, 12:00 pm (lunch or break) and 2:00 pm. Nightshift staff is provided with a 10-minute break at 4:00 pm, 6:00 pm (lunch or break) and 8:00 pm. Any deviation from the allotted time frame, unless approved by your supervisor, is considered a violation of this policy, which may result in corrective action, up to and including termination.

*If an employee leaves the Aspen Water Inc. Premises, other than for work related business, they must clock out.*

If employees have unexpected personal business to take care of, they must notify their direct supervisor to discuss the time away from work and make arrangements as necessary. Personal business should be conducted on the employee's personal time.

Employees who do not adhere to the break policy may be subject to disciplinary action, up to and including termination.

### 3.8 Personnel Files

Employee personnel files include the following: job application, W-4, job description, resume, records of participation in training events, salary history, records of disciplinary action and documents related to employee performance reviews, coaching, and mentoring.

Personnel files are the property of Aspen water Inc. and access to the information is restricted. Management personnel of Aspen Water Inc. who have a legitimate reason to review the file are allowed to do so. (in compliance with HIPAA regulations)

Employees who wish to review their own file should contact the General Manger or Human Resources. With reasonable advance notice, the employee may review his/her personnel file in the Company's office in the presence of a member of the Executive Staff.

## Section 4

### **Standards of Conduct**

The work rules and standards of conduct for Aspen Water Inc. are important, and the Company regards them seriously. All employees are urged to become familiar with these rules and standards. In addition, employees are expected to follow the rules and standards faithfully in doing their own jobs and conducting the Company's business. Please note that any employee who deviates from these rules and standards will be subject to corrective action, up to and including termination of employment (See Section 3.12, Corrective Action).

While not intended to list all the forms of behavior that are considered unacceptable in the workplace, the following are examples of rule infractions or misconduct that may result in disciplinary action, up to and including termination of employment.

- Theft or inappropriate removal or possession of property;
- Falsification of timekeeping records (See Section 5.2, Timekeeping)
- Working under the influence of alcohol or illegal drugs (See Section 4.6, Substance Abuse).
- Possession of, distribution, sale, transfer, or use of alcohol or illegal drugs in the workplace, or at work related activities. (See Section 4.6, Substance Abuse).
- Fighting or threatening violence in the workplace;
- Boisterous or disruptive activity in the workplace;
- Negligence or improper conduct leading to damage of company-owned or customer-owned property;
- > • Insubordination or other disrespectful conduct;
  - Violation of safety or health rules;
  - Smoking in the workplace, or within 25 feet of the door (According to Utah Clean Air act).
  - Sexual or other unlawful or unwelcome harassment (See Section 4.3, Harassment, Including Sexual Harassment).
  - Excessive absenteeism or multiple absences without prior notice (See also, Section 4.1 Attendance/Punctuality and 4.2, Absence without notice);
  - • Unauthorized use of telephones, or other company-owned equipment (See Section 4.4, Telephone equipment for purposes other than business (i.e. playing games on computers or personal Internet usage); *VAN*
  - Unauthorized disclosure of confidential information;
  - Violation of personnel policies; and
  - Unsatisfactory performance or conduct.
  - Gossip, slanderous, or libel activities of any employee

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MATTHEW S. ADAMS, )  
SSN: [REDACTED] )  
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Claimant, )  
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vs. )  
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ASPEN WATER, INC., )  
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Employer, )  
 )  
and )  
 )  
IDAHO DEPARTMENT OF LABOR. )  
\_\_\_\_\_ )

IDOL # 1399-2009

**NOTICE OF  
FILING OF APPEAL**

FILED

FEB 23 2009

INDUSTRIAL COMMISSION

**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  
POST OFFICE BOX 83720  
BOISE IDAHO 83720-0041  
(208) 334-6024

**CERTIFICATE OF SERVICE**

I hereby certify that on the 23<sup>RD</sup> day of February, 2009, 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 the following:

MATTHEW S ADAMS  
4032 N RIVERFRONT PL.  
GARDEN CITY ID 83714

ASPEN WATER INC  
149 S ADKINS WAY STE 105  
MERIDIAN ID 83462

ASPEN WATER INC  
1960 S MILESTONE DR E  
SALT LAKE CITY UT 84101

DEPUTY ATTORNEY GENERAL  
IDAHO DEPARTMENT OF LABOR  
**STATE HOUSE MAIL**  
317 W MAIN STREET  
BOISE ID 83735


mcs



Assistant Commission Secretary



DATED this 26<sup>th</sup> day of February, 2009.

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

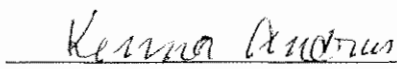
CERTIFICATE OF MAILING

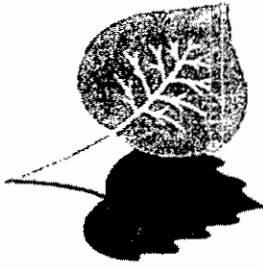
I HEREBY CERTIFY that a copy of the foregoing NOTICE OF APPEARANCE, was mailed, postage prepaid, this 26<sup>th</sup> day of February, 2009, to:

MATTHEW S ADAMS  
4932 N RIVERFRONT PL  
GARDEN CITY ID 83714

ASPEN WATER INC  
149 S ADKINS WY STE 105  
MERIDIAN ID 83642

ASPEN WATER INC  
1960 S MILESTONE DR E  
SALT LAKE CITY UT 84101

  
\_\_\_\_\_



ASPEN WATER OF IDAO  
 149 S ADKINS WAY STE. 105  
 MERIDIAN, ID 83642  
 PHONE 208-343-7683  
 FAX 208-322-0461

FACSIMILE TRANSMITTAL SHEET

TO:	FROM: TERRY SIDWELL
COMPANY: IDAHO INDUSTRIAL COMMISSION	DATE: 2/27/09
FAX NUMBER: 332-7558	TOTAL NO. OF PAGES INCLUDING COVER: 2
PHONE NUMBER: 334-6000	SENDER'S REFERENCE NUMBER:
RE: MATT ADAMS VS ASPEN WATER REQUEST FOR HEARING	YOUR REFERENCE NUMBER: IDOL # 1399-2009

URGENT     FOR REVIEW     PLEASE COMMENT     PLEASE REPLY     PLEASE RECYCLE

NOTES/COMMENTS

**FILED**  
**FEB 27 2009**  
**INDUSTRIAL COMMISSION**

Attention: Unemployment Appeals Division

Aspen Water is asking for a hearing on IDOL#1399-2009. We believe that based on all the facts that we have provided, there is no reason as to why Mr. Marchbanks should have made the decision that he did. We feel the decision was made based on a misunderstanding of what handbook policy our decision was made. Mr. Marchbanks has stated that he made his decision based on 4.2 of our handbook and that policy states that if an employee has two consecutive no call and no shows it will be considered a voluntary resignation. Matt did show up for work and then went to a service call for one hour and then walked off the job without notifying anyone he was leaving for the day at 12:25 p.m.

The actual policy we are going by is 3.7 which clearly states that if employees have unexpected personal business to take care of, they must notify their direct supervisor to discuss time away from work and make arrangements as necessary. Personal business should be conducted on the employee's personal time. Employees who do not adhere to the break policy may be subject to disciplinary action, up to and including termination. Mr. Adams was provided a company cell phone so he could have communication at any time. Please also see all the rebuttals for each finding of Mr. Marchbanks on his decision in the packet that was sent with the appeal.

Thank you,

Terry Sidwell

FILED  
FEB 27 2009  
INDUSTRIAL COMMISSION



BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MATTHEW S. ADAMS, )  
)  
Claimant, )  
)  
vs. )  
)  
ASPEN WATER, INC., )  
)  
Employer, )  
)  
and )  
)  
IDAHO DEPARTMENT OF LABOR. )  
\_\_\_\_\_ )

IDOL # 1399-2009

FILED  
MAR 03 2009

INDUSTRIAL COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that on the 3<sup>rd</sup> day of March, 2009 a true and correct copy of **Employer's request for a new hearing, filed February 27, 2009** was served by regular United States mail upon the following:


MATTHEW S ADAMS  
4032 N RIVERFRONT PL  
GARDEN CITY ID 83714

ASPEN WATER INC  
1960 S MILESTONE DR E  
SALT LAKE CITY UT 84101

DEPUTY ATTORNEY GENERAL  
IDAHO DEPARTMENT OF LABOR  
**STATE HOUSE MAIL**  
317 W MAIN STREET  
BOISE ID 83735

mcs

cc: ASPEN WATER INC  
149 S ADKINS WAY STE 105  
MERIDIAN ID 83462

  
Assistant Commission Secretary

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MATTHEW S. ADAMS, )  
 )  
 Claimant, )  
 )  
 vs. )  
 )  
 ASPEN WATER, INC., )  
 )  
 Employer, )  
 )  
 and )  
 )  
 IDAHO DEPARTMENT OF LABOR. )  
 )

**IDOL # 1399-2009**  
**ORDER DENYING REQUEST**  
**FOR A NEW HEARING**  
  
**FILED**  
**MAR - 5 2009**  
**INDUSTRIAL COMMISSION**

Employer, Aspen Water, Inc., appeals a Decision issued by an Appeals Examiner with Idaho Department of Labor (“IDOL” or “Department”). In that Decision, the Appeals Examiner ruled that: 1) Claimant is eligible for unemployment benefits; and 2) Employer’s account is chargeable for experience rating purposes. Employer has specifically requested a new hearing to clarify which policy section Claimant was discharged for violating. (Employer’s request, filed February 27, 2009).

Rule 8 of the Rules of Appellate Practice and Procedure Under the Idaho Employment Security Law (“RAPP”), effective as amended, February 1, 2001, mandates that employers, who are corporations, must be represented by an attorney licensed to practice in the State of Idaho in any proceedings other than filing the initial appeal. Representation of another person before a public agency or service commission constitutes the unauthorized practice of law where the proceedings before those tribunals are held for purposes of adjudicating the legal rights or duties of a party. Kyle v. Beco, Corp., 109 Idaho 267, 707 P.2d 378 (1985), Idaho State Bar Association v. Idaho Public Utilities Commission, supra, Weston v. Gritman Memorial Hospital, 99 Idaho 717, 587 P.2d 1252 (1978). The Idaho Supreme Court has ruled that the Industrial Commission is unable to permit third persons unconnected with the employer entity to act in a representative capacity for the corporate

employer. See Idaho State Bar Association v. Idaho Public Utilities Commission, 102 Idaho 672, 637 P.2d 1168 (1981).

Employer is incorporated. Its specific request for a new hearing was submitted by Terry Sidwell. (Employer's request). Mr. Sidwell is not listed as an active attorney with the Idaho State Bar. Therefore, Employer is not represented by legal counsel and Employer's request for a new hearing is not in compliance with RAPP Rule 8. As such, Employer's request for a new hearing is DENIED.

DATED this 3<sup>rd</sup> of March 2009.

INDUSTRIAL COMMISSION

Rebecca J. Ophus  
Rebecca J. Ophus, Referee

ATTEST:

[Signature]

Assistant Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on March 3, 2009, a true and correct copy of **Order Denying Request for a New Hearing** was served by regular United States mail upon each of the following:

MATTHEW S ADAMS  
4032 N RIVERFRONT PL  
GARDEN CITY ID 83714

DEPUTY ATTORNEY GENERAL  
IDAHO DEPARTMENT OF LABOR  
**STATE HOUSE MAIL**  
317 W MAIN STREET  
BOISE ID 83735

ASPEN WATER INC  
149 S ADKINS WAY STE 105  
MERIDIAN ID 83462

ASPEN WATER INC  
1960 S MILESTONE DR E  
SALT LAKE CITY UT 84101

mcs

[Signature]

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MATTHEW S. ADAMS, )  
 )  
 Claimant, )  
 )  
 vs. )  
 )  
 ASPEN WATER, INC., )  
 )  
 Employer, )  
 )  
 and )  
 )  
 IDAHO DEPARTMENT OF LABOR. )  
 \_\_\_\_\_ )

IDOL #1399-2009  
DECISION AND ORDER  
  
FILED  
MAR 31 2009  
INDUSTRIAL COMMISSION

Employer, Aspen Water, Inc., appeals to the Industrial Commission a Decision issued by the Idaho Department of Labor (“IDOL” or “Department”) ruling Claimant, Matthew S. Adams, eligible for unemployment insurance benefits. The Department’s Appeals Examiner concluded that: 1) Employer discharged Claimant for reasons other than employment-related misconduct; and, 2) Employer’s account is chargeable for experience rating purposes. Employer sought an opportunity for a new hearing before the Commission. We addressed this request in an Order issued on March 5, 2009.

The undersigned Commissioners have conducted a *de novo* review of the record as provided for in Idaho Code § 72-1368(7) and opinions issued by the Idaho Supreme Court. The Commission has relied on the audio recording of the hearing before the Appeals Examiner held on January 28, 2009, along with the Exhibits [1 through 10] admitted into the record during that proceeding.

**FINDINGS OF FACT**

Based on the testimony and the evidence in the record, the Commission adopts its own Findings of Fact as set forth below:

1. Employer's firm sells and services water softening systems. Claimant started working for Employer as an installer in September 2007.
2. Claimant was a salaried employee and generally worked the hours of 8:00 a.m. -- 5:00 p.m., Monday through Friday. Claimant spent his time making service calls as assigned and doing paperwork at the office.
3. Installers were expected to turn in their log sheets for the prior day to Mellissa Miller, the office manager, before the first service call of the new day. However, Claimant was usually late in turning in his log sheets.
4. Installers often ran personal errands between service calls. Employer expected installers to get permission before taking extended absences during the day, but not necessarily for short errands, such as trips to the bank.
5. In October 2008, Claimant sustained a workplace injury for which he was placed on light duty.
6. On November 3, 2008, Claimant made a service call at 9:30 a.m. After completing the service call, Claimant took a lunch break, followed by a trip to the "Court House Boise" and then back to the office, arriving at 12:35 p.m. (Exhibit 4, p. 3). Claimant did some paperwork and then turned in his log sheet to Ms. Miller for October 31, 2008, and November 3, 2008. Claimant spent the remainder of the day at the Division of Motor Vehicles getting his driver's license renewed. However, Claimant did not tell anyone that he was leaving and did not notify anyone that he would not be returning.
7. When Claimant reported to work on November 4, 2008, Terry Sidwell, Employer's owner, discharged Claimant for leaving work without permission and failing to notify anyone that he would not be returning. (Audio recording).
8. Employer paid Claimant the most wages in the first four of the five calendar quarters preceding the one in which Claimant applied for benefits. (Exhibit 5).

### **DISCUSSION**

Employer discharged Claimant for leaving work without contacting his supervisor. (Audio recording). The Idaho Employment Security Law provides unemployment insurance benefits to claimants who become unemployed due to no failure of their own. In the case of a discharge, as was the cause for the separation here, the issue is whether the claimant committed some form of employment-related misconduct that would render him or her ineligible for unemployment benefits pursuant to Idaho Code § 72-1366(5). 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). If the discharging employer does not meet that burden, benefits must be awarded to the claimant. Roll v. City of Middleton, 105 Idaho 22, 25, 665 P.2d 721, 724 (1983); Parker v. St. Maries Plywood, 101 Idaho 415, 419, 614 P.2d 955, 959 (1980).

There is no dispute that Claimant was away from work for several hours on November 3, 2008. Nor is there any dispute that Claimant left without telling his supervisor or anyone else that he was leaving for the day. Claimant maintains that he spent the afternoon at the Division of Motor Vehicles getting his driver's license renewed and that it took far longer than he had anticipated. (Audio recording). Terry Sidwell, Employer's owner, argues that Claimant should have at least called to let someone know that he would not be returning that day. Because Claimant did not return to work, Mr. Sidwell contends that Employer lost work that Claimant could have done. Therefore, Employer discharged Claimant on November 4, 2008. (Audio recording).

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 the "standards-of-behavior" analysis without further unnecessary explanation of the other two grounds.

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. Further, the employer must demonstrate

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 behavior was subjectively willful, intentional, or deliberate in his or her disregard of the employer’s expectations. Welch v. Cowles Publishing Co., 127 Idaho 361, 364, 900 P.2d 1372, 1375 (1995). Because the employer need not demonstrate some form of “malice” on the part of the employee, what communication did or did not take place between the employer and the claimant becomes a key element in these cases. 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).

In cases of absent employees, the Idaho Supreme Court has held that the employee has a duty to: 1) advise an employer of the reason for his or her absence; 2) seek a leave of absence; and 3) keep the employer informed of his or her intentions and prospects of returning to work. Doran v. Employment Security Agency, 75 Idaho 95, 267 P.2d 628 (1954). Since Doran, the Court has recognized that there may be extenuating circumstances to prevent a claimant from seeking a leave of absence or timely communicating the reason for an absence. Therefore, the standard we currently apply “is that ‘good faith on the part of the employee must always appear,’ and the employee must ‘act as a reasonably prudent person would in keeping in contact with his employer and in securing the permanence of his employment.’” Clay v. BMC West Truss Plant, 127 Idaho 501, 503, 903 P.2d 90, 93 (1995)(Citing Doran).

Claimant argues that it was common for installers to take time off during work to run personal errands and that they did not always get permission in advance. However, Claimant

concedes that he had never taken off three hours in a single day without talking to a supervisor, as he did on November 3, 2008. (Audio recording). Mr. Sidwell points out that Claimant took more than just the afternoon for personal business, noting that Claimant's morning call probably took no more than 30 minutes to complete. Therefore, between about 10:15 a.m. and 12:25 p.m., Claimant was on his lunch break, went by the "courthouse" to see about renewing his driver's license, and then returned to the office. Claimant testified that he was only at the courthouse long enough to realize the line was too long to renew his driver's license quickly. (Audio recording). We can take judicial notice of the fact that the Division of Motor Vehicles does not provide services through the Ada County Courthouse in Boise. The Barrister location where Claimant said that he went after leaving work that afternoon was the only location in Boise where Claimant could have accomplished that task. Therefore, Claimant's explanation for his whereabouts between the hours of 10:15 a.m. and 12:25 p.m. appears incomplete.

Nevertheless, the real issue here is whether Claimant's failure to contact his supervisor or anyone else when he left early in the afternoon on November 3, 2008, and did not call or return constituted misconduct. The Appeals Examiner concluded that it did not. The Appeals Examiner gave weight to Employer's concession that it was not necessary to replace Claimant after he was discharged. The Appeals Examiner was also persuaded by Claimant's contention that Employer was in financial distress and that Mr. Sidwell was not pleased that Claimant had filed a worker's compensation claim. In sum, the Appeals Examiner determined that Employer laid Claimant off, as Claimant contends, rather than discharged Claimant for employment-related misconduct. We disagree.

It may be true that Employer was in financial distress and that the business was able to continue functioning with two installers rather than three after discharging Claimant. It also may be that Mr. Sidwell was not pleased that Claimant filed a worker's compensation claim.



However, these conditions do not excuse Claimant from leaving work in the middle of the day without permission or other communication. Employers have a reasonable expectation that their employees will work the hours that they are scheduled. That expectation in this case did not “vanish” because Employer may have been having financial problems.

Claimant’s failure to report for work as expected without contacting his supervisor, regardless of the reason for his absence, fell below the reasonable standard Employer was entitled to expect. That behavior resulted in Claimant’s discharge. Therefore, we conclude that Employer discharged Claimant for employment-related misconduct. Claimant is ineligible for unemployment insurance benefits.

In this case, Employer paid the most wages to Claimant during the last four base quarters. (Exhibit 5). Idaho Code §72-1351(2)(a) provides that an employer’s experience rated account is chargeable for benefits paid to a claimant whose separation from employment resulted from discharge for reasons other than misconduct or a voluntary separation for good cause. Because we conclude that Employer discharged Claimant for reasons other than employment-related misconduct, we find that Employer’s account is chargeable for experience rating purposes.

## **CONCLUSIONS OF LAW**

### **I**

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.


## **ORDER**

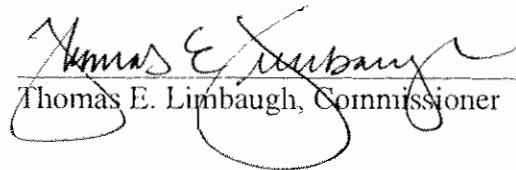
Based on the foregoing analysis, the Decision of the Appeals Examiner is REVERSED, and Claimant is ineligible for unemployment benefits. This is a final order under Idaho Code §

72-1368(7).

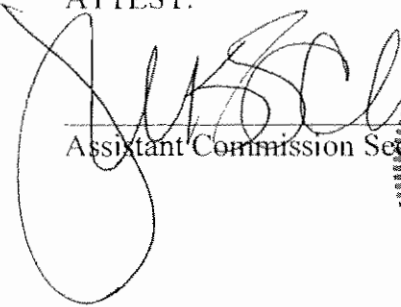
DATED this 31 day of March, 2009.

INDUSTRIAL COMMISSION

  
R.D. Maynard, Chairman

  
Thomas E. Limbaugh, Commissioner

ATTEST:

  
Assistant Commission Secretary



CERTIFICATE OF SERVICE

I hereby certify that on the 31 day of March, 2009 a true and correct copy of **Decision and Order** was served by regular United States mail upon each of the following:

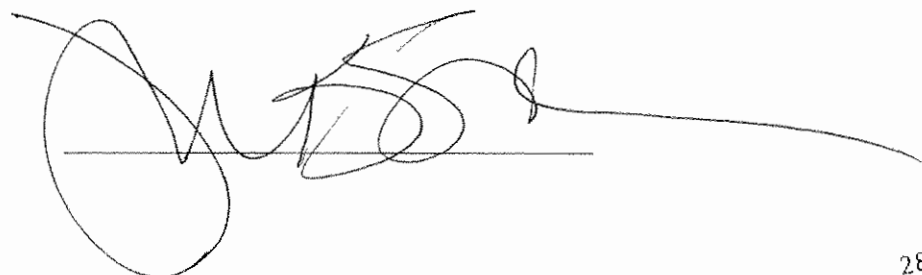
MATTHEW S ADAMS  
4032 N RIVERFRONT PL  
GARDEN CITY ID 83714

ASPEN WATER INC  
149 S ADKINS WAY STE 105  
MERIDIAN ID 83462

ASPEN WATER INC  
1960 S MILESTONE DR E  
SALT LAKE CITY UT 84101

DEPUTY ATTORNEY GENERAL  
IDAHO DEPARTMENT OF LABOR  
**STATE HOUSE MAIL**  
317 W MAIN STREET  
BOISE ID 83735

mcs



DECISION AND ORDER - 7

Merrily Munther (ISB #1908)  
**MUNTER GOODRUM, CHARTERED**  
The Mallard Building, Suite 354  
1161 West River Street  
Boise, Idaho 83702  
Telephone: (208) 344-4566  
Facsimile: (208) 344-9836  
Email: [mmunther@mgslegal.com](mailto:mmunther@mgslegal.com)

2009-04-07 10:00 AM  
COMMUNICATION

Attorneys for Claimant

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MATTHEW S. ADAMS, ) IDOL No. 1399-2009  
)  
Claimant, )  
vs. ) **NOTICE OF APPEARANCE**  
)  
ASPEN WATER, INC. )  
)  
Employer, )  
)  
and )  
)  
STATE OF IDAHO, )  
DEPARTMENT OF LABOR, )  
\_\_\_\_\_ )

TO: The above-named parties:

Please be advised that Merrily Munther, of the firm of **MUNTER GOODRUM, CHARTERED**, hereby enters her appearance as attorneys of record for the Claimant, Matthew S. Adams, in the above-entitled proceeding.

DATED this 6<sup>th</sup> day of April 2009.

**MUNTER GOODRUM, CHARTERED**

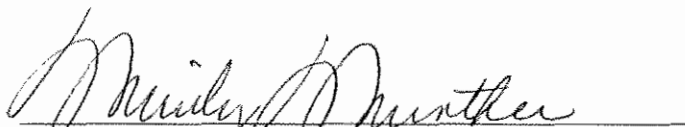
By: Merrily Munther  
Merrily Munther—Of the Firm  
Attorneys for Claimant

ORIGINAL

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on the 6<sup>th</sup> day of April 2009, I caused a true and correct copy of the foregoing **NOTICE OF APPEARANCE** to be forwarded, with all required charges prepaid, by the method(s) indicated below:

Mr. Terry Sidwell <b>ASPEN WATER, INC.</b> dba Aspen Water of Idaho 149 South Adkins Way, Suite 105 Meridian, ID 83642	Hand Delivery _____ U.S. Mail _____ <input checked="" type="checkbox"/> Facsimile _____ Email _____ Overnight Mail _____
Mr. Larry Sidwell <b>ASPEN WATER, INC.</b> dba Aspen Water Utah 1960 Milestone Drive #E Salt Lake City, UT 84014	Hand Delivery _____ U.S. Mail _____ <input checked="" type="checkbox"/> Facsimile _____ Email _____ Overnight Mail _____
Craig G. Bledsoe, Esq. Katherine Takasugi, Esq. Tracey K. Rolsfsen, Esq. Cheryl George, Esq. <b>IDAHO DEPARTMENT OF LABOR</b> 317 West Main Street Boise, Idaho 83735	Hand Delivery _____ U.S. Mail _____ <input checked="" type="checkbox"/> Facsimile _____ Email _____ Overnight Mail _____

  
 \_\_\_\_\_  
 Merrily Munther

LAWRENCE G. WASDEN  
ATTORNEY GENERAL

CRAIG G. BLEDSOE – ISB# 3431  
KATHERINE TAKASUGI – ISB# 5208  
**TRACEY K. ROLFSEN – ISB# 4050**  
CHERYL GEORGE – ISB# 4213  
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**

MATTHEW S. ADAMS,	)	
	)	
Claimant,	)	IDOL No. 1399-2009
	)	
vs.	)	<b>IDAHO DEPARTMENT OF</b>
	)	<b>LABOR'S MOTION TO</b>
ASPEN WATER, INC.,	)	<b>RECONSIDER</b>
	)	
Employer,	)	
	)	
and	)	FILED
	)	
IDAHO DEPARTMENT OF LABOR.	)	APR 10 2009
	)	
Respondent.	)	INDUSTRIAL COMMISSION
	)	

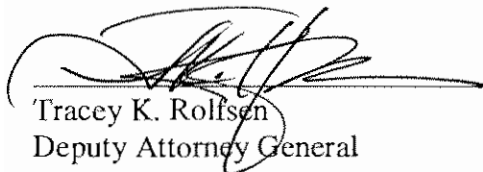
COMES NOW, the Idaho Department of Labor, by and through its attorney of record, Tracey K. Rolfsen, Deputy Attorney General, hereby moves the Industrial Commission of the State of Idaho to reconsider the Decision and Order filed in this case on March 31, 2009, as authorized by Idaho Code section 72-1368(7).

The Department of Labor (the "Department") does not seek to change the substantive issues decided by the Industrial Commission ("Commission"), but seeks to correct an inconsistency in the Commission's Decision and Order reversing the Appeals Examiner's Decision that appears to be in error. In its Conclusions of Law, the Commission concluded that Employer, Aspen Water, Inc., discharged Claimant, Matthew Adams, for employment-related misconduct and that Employer's account was not chargeable for experience rating purposes. (Decision and Order, p. 6) However, in its discussion, the Commission concluded, "Because we conclude that Employer discharged Claimant for reasons other than employment-related misconduct, we find that Employer's account is chargeable for experience rating purposes." (Decision and Order, p. 6).

This sentence appears to be a typographical error. Based on the foregoing, the Department respectfully requests the Commission to correct and amend the above excerpt of the Commission's Decision and Order.

DATED this 9th day of April, 2009.

IDAHO DEPARTMENT OF LABOR

  
Tracey K. Rolfsen  
Deputy Attorney General

CERTIFICATE OF MAILING


I hereby certify that on the 9th day of April, 2009, I served the foregoing MOTION TO RECONSIDER in the manner set forth below upon:

U.S. Mail:

MATTHEW S ADAMS  
4032 N RIVERFRONT PL  
GARDEN CITY ID 83714

ASPEN WATER INC  
149 S ADKINS WY STE 105  
MERIDIAN ID 83462

ASPEN WATER INC  
1960 S MILESTONE DR E  
SALT LAKE CITY UT 84101

  
Vicky L. Maxwell

ORIGINAL

Merrily Munther (LSB #1908)  
**MUNTER GOODRUM, CHARTERED**  
The Mallard Building, Suite 350  
1161 West River Street  
Boise, Idaho 83702  
Telephone: (208) 344-4566  
Facsimile: (208) 344-9836  
Email: [mmunther@mgslegal.com](mailto:mmunther@mgslegal.com)  
Attorneys for Claimant

2009 APR 20 P 4:42  
RECEIVED  
SACRAL COUNTY CLERK

**BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO**

MATTHEW S. ADAMS, ) IDOL #1399-2009  
 )  
 Claimant, )  
 vs. )  
 ASPEN WATER, INC. ) **CLAIMANT'S REQUEST**  
 ) **FOR RECONSIDERATION**  
 )  
 Employer, )  
 )  
 And )  
 )  
 IDAHO DEPARTMENT OF LABOR. )  
 )  
 )

COMES NOW the Claimant and moves this body for reconsideration of its Decision and Order dated March 31, 2009.

The burden of proving employment-related misconduct which would disqualify an employee from receiving unemployment compensation benefits lies with the employer. Idaho Code §72-1366(e). Folks v. Moscow School District No. 281, 129 Idaho 833, 933 P.2d 642 (1997).

What this case comes down to is whether the Claimant was guilty of employment-related misconduct when he failed to obtain prior permission to go to the DMV to renew his driver's license.



The Claimant testified that there was no one in the office when the Claimant left to go back to the DMV (he testified he had gone there in the morning and found it was too crowded to wait), so there was no one at the office to notify where he was going. He also knew that the owner/managers knew how to reach him, as they often did. Mrs. Sidwell, *nee* Miller, was unsure whether she was there at that time, but the Claimant said there was no one there and she did not deny it. The witness testified that she was sorting through papers on her desk and *when she saw the van was there*, she found his log sheets and realized the Claimant was gone. It is, therefore, obvious that Mrs. Sidwell was not at her desk in the office when the Claimant left. There is no other testimony to the contrary. Both Mr. and Mrs. Sidwell admitted that they knew how to reach the Claimant, as is apparent from the fact that Mr. Sidwell called the Claimant on his company-furnished cell phone at 2:41 o'clock p.m., approximately forty (40) minutes after the Claimant testified that he left the office. They, therefore, knew where he was at that time. There was no mention in that telephone conversation of work being available to the Claimant, or to his being needed, but even if there had been work available, both Mr. and Mrs. Sidwell knew how to reach him. Mr. Sidwell testified that employees [on the road...doing installations] were supposed to call in regularly "and, if I didn't hear from them, I would call them....(emphasis added)." He never indicated in his testimony that he ever admonished any employee who had not called in, so how was it that the Claimant should have known that prior permission was required if it had not been previously required? Indeed, the company's practice of allowing employees to do personal errands led the Claimant to believe that it was okay, since he knew he could be reached at any time.

Again, the Industrial Commission noted in its Decision and Order in this case, "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).” The Claimant testified that he and other installers took time during the work day to do personal errands because they were always available by telephone if needed for work. He also testified that sometimes they did not seek prior permission. Again, the installers could always be reached by phone. That testimony is unrefuted. The employer’s witnesses did not testify that employees always had prior permission to leave the office during the day, nor could they, because it was not true.

Within a relatively short time of the Claimant’s departure from the office, where no one was working from whom he could get permission, the Claimant’s employer contacted him while he waited in line at the DMV. Mr. Sidwell knew the Claimant was available for work at any time he was needed. His employer said nothing about needing him for work that day. It is undisputed that the Claimant was on work-related business, renewing his driver’s license, for the remainder of the day, but it is also unrefuted that he was available for work and his employer knew of his whereabouts for all but forty (40) minutes. Even during that forty (40) minutes it was admitted that he could be reached on the company’s phone.

The Claimant’s testimony that he was an exemplary employee is not disputed. He testified in Exhibit 9, page 1 of 20, that he “had an exceptional record at Aspen Water for attendance, adherence to company policies, performance and behavior,” but “these were not taken into consideration at the time of my termination as the employee handbook states they will be.”

#### Section 3.13 Corrective Action.

Aspen Water Inc holds each of its employees to certain work rules and standards of conduct (see Section 4). When an employee deviates from these rules and standards, Aspen Water Inc. expects the employee’s supervisor to take corrective action.

Corrective action at Aspen Water Inc. is progressive. The action taken in response to a rule infraction or violation of standards typically follows a pattern increasing in seriousness until the infraction or violation is corrected.

The usual sequence of corrective actions includes a verbal warning, a written warning, and finally termination of employment. In deciding which initial corrective action would be appropriate, a supervisor will consider the seriousness of the infraction, the circumstances surrounding the matter, and the employee's previous record. In the case of a serious infraction Aspen Water maintains the right to initiate any level of corrective action. ...Though committed to a progressive approach to corrective action, Aspen Water considers certain rule infractions and violations of standards as grounds for immediate termination of employment. These include but are not limited to: theft in any form, insubordinate behavior, abuse of a customer or co-worker, sexual discrimination or harassment, causing a hostile work environment, vandalism or destruction of company property, being on company property during non-business hours, the use of company equipment and/or company vehicles without prior authorization by Executive Staff, untruthfulness about personal work history, skills, or training, divulging Company business practices, and misrepresentations of Aspen Water Inc. to a customer, a prospective customer, the general public, or an employee.

The Claimant does not contend that the Industrial Commission requires employers to follow their own progressive discipline policy (The question is one of expectations and whether the employer's expectations were reasonable when employees had been allowed to run personal or business errands previously without obtaining prior permission.) The Claimant had never received any warning, verbal or written. He testified that

...it was not uncommon for employees to take care of personal matters (my driver's license, which is required for my driving of the company van) when they had no assignments so these would be completed when we received an assignment. I always had the company cell phone on my person. Aspen Water could have let me know there was work to do. The present installer, Corey Cook, would take extended lunches and take care of personal business when there was no work scheduled. Past employee, Blake Daniels, was able to do the same. *We were never questioned about personal time during the day and it was never hidden from management. In fact, it was openly talked about. As long as it did not interfere with scheduled installs or service calls it was a non-issue. Terry stated during the summer of 2008 that he understood the installers not being able to schedule time off in advance due to our scheduling and knew that we had to take care of personal business during the regular work week.*"

(Emphasis added.)

Mr. Sidwell acknowledged that this was a one-time incident. On at least one (1) prior occasion, the Claimant testified that Mr. Sidwell had seen him at the bank, presumably without obtaining prior permission, and Mr. Sidwell said nothing to him about not having permission.

This case is about reasonable expectations. The Claimant testified that he and other employee-installers did personal business during work hours on a regular basis, with the knowledge of management, and were encouraged to do this so these errands would be completed when they received an assignment. It was not reasonable for the company to terminate the Claimant for conduct for which he and other employees had not been previously disciplined, when management's actions condoned conduct that would otherwise have violated a company policy. Moreover, in this instance, although the Claimant referred to it as personal business, the renewal of his driver's license was a requirement of the Claimant's position and something he could not do on his own personal time. He was accessible by phone and available for work at any time, and management knew this.

Like the claimant in Folks, this was a *single incident* of comparatively nonserious action which should not disqualify the Claimant from receiving benefits. The Court said in Folks, "Although an employer's expectation that an employee will not engage in 'protracted argument' with his employer is objectively reasonable, a 'single incident of comparatively nonserious disrespect by complainant and arguing is not misconduct.'" Id. At 614-15, 549 P.2d at 273-74.

Because the employer had previously allowed employees to run personal errands without always obtaining prior permission, the employer's expectations as to the standards of behavior of obtaining permission in advance was not objectively reasonable, particularly where it was a single incident. Moreover, the errand was an essential requirement of the Claimant's position.

This is different than the facts in Doran v. Employment Security Agency, 75 Idaho 94, 267 P.2d 628 (1954), which the Commission cites in support of its decision. In Doran, the

claimant had been warned on prior occasions about his temporary absences in which he failed to return to work after running a personal errand at 10:30 in the morning and was found, at home, drunk. He returned to work the next day and was admonished. A week later he disappeared and did not contact his employer for a week. These facts are quite different from those here, where the Claimant left to go to the DMV to renew his driver's license, which he already knew would take several hours because of his stop that morning to try to do it in a short time. There was no one in the office to notify, and the employer had previously encouraged employees to do personal business when they did not have assignments. It was not like he could not be reached if an assignment had arisen. His employer contacted him while he was waiting in line at the DMV and said nothing to him about an assignment. He had typically been reached by his employer by telephone, since he was frequently driving his van on other assignments. The quote from the case of Clay v. BMC West Truss Plant, 127 Idaho 501, 503, 903 P.2d 90, 93 (1995), would seem to be inapposite since it involved the determination of benefits in a voluntary termination case.

More appropriate is Davis v. Howard O. Miller Company, 107 Idaho 1092, 695 P.2d 1231 (1985), in which the Supreme Court upheld the Industrial Commission's granting of unemployment benefits to a manager who temporarily absented himself without notifying the head office. The Court noted that absences were tolerated by the Company over a period of several months and evidently no manager was told that substitutions were against company policy. It was apparently "not unusual for station managers at other local stations owned by Mr. Miller to leave their scheduled shifts without official notice to the head office. Such absences appeared to be allowed without recrimination as long as a manager arranged for a replacement in his absence."

The Court in Davis acknowledged that "some expectations and duties 'flow normally from an employment relationship.' Other expectations however, do not 'flow naturally.' If

certain practices or expectations are not common among employees in general or within a particular enterprise, and have not been communicated by the employer to the employee, they cannot serve as a proper basis for a charge of employee misconduct.” In this instance, the expectation that employees would conduct personal business during working hours was not only common but specifically *encouraged* by the management. Terry Sidwell testified that he always expected employees to obtain permission, but at the same time said that if he did not hear from an employee, he would contact them. There was no testimony from Mr. or Mrs. Sidwell that the Claimant or other employees were admonished when they did not have prior permission, although Mr. Sidwell’s testimony implies that he was aware that this did occur. Although the Claimant testified that he and other installers had run errands without obtaining prior permission, Mr. Sidwell did not deny this and also did not provide evidence that employees who had done so previously had been admonished or sanctioned.

In its Decision and Order, the Commission concluded that the “Claimant’s failure to report for work as expected without contacting his supervisor, regardless of the reason for his absence, fell below the reasonable standard Employer was entitled to expect.” (But in this case, as in Davis, the employer had not communicated its expectations to its employees after allowing, and even encouraging, installers to run personal errands when they did not have appointments for installation. It was also undisputed that sometimes they did so without prior permission.)

In its Decision, the Commission, perhaps inadvertently, casts the Claimant in a bad light by its assumption of facts not in evidence. The Commission took judicial notice of the fact that “the Division of Motor Vehicles does not provide services through the Ada County Courthouse in Boise.” Nowhere in the hearing did the Claimant say that he went to the Ada County Courthouse. He said he went to the “courthouse” and to the “DMV”. This is how the Barrister public building is known to some people from the days that it housed the traffic court and then

the juvenile court. “The court house and DMV are the same,” according to the Claimant’s undisputed testimony. To suggest that he said he went to the Ada County Courthouse to renew his driver’s license casts a bad light on the Claimant.

Rule 201(b) of the Idaho Rules of Evidence provides that, “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.

It was not appropriate to take judicial notice of a fact when a witness could have been mistaken in his identification of a public building rather than being deceptive, which is how the opinion of the Industrial Commission made the Claimant sound. In this case “courthouse” meant one thing to the witness and another to the Commission, and neither was incorrect. Judicial notice is not appropriate where a fact is susceptible to more than one interpretation. To do so attributes inappropriate motives to the Claimant, who was merely trying to renew his driver’s license, which was a requirement of his position as an installer (Audio recording).

What the Commission should have taken judicial notice of is that the motor vehicle licensing bureau is only open on weekdays between 8:00 a.m. and 5:00 p.m. (see attached from Idaho Transportation Department website), the same hours that the Claimant ordinarily worked (Audio recording). The only way for the Claimant to renew his driver’s license was to take time from work, and when it is crowded, it could take several hours, as it did here. Indeed, the Claimant came back to the office in the morning after stopping at the DMV and determining that the renewal process was going to take longer than a short while. He worked until approximately 2:00 p.m. After checking to see whether there was installation work for him to do and, finding none, he left to take care of this matter, an essential one to his employment, while he had no assignments.

We believe that the Industrial Commission incorrectly stated that the Appeals Examiner had decided the Claimant was laid off. The Appeals Examiner did not so state in his opinion.

What the Appeals Examiner stated was, “The facts that the claimant had recently suffered a work related injury and that the employer was able to adjust their operation to get the work done with half the number of installers *suggests* the employer would be motivated to end the claimant’s employment for reasons other than his purported resignation.” (Emphasis supplied.) The decision states only, however, that, “The claimant was discharged, but not for misconduct.” All this means, of course, is that the employer failed in its burden of proof.

There are times when there is evidence of motives on the part of the employer other than the basis for the ultimate decision of the Commission or Supreme Court. In Davis, for example, there was evidence that the claimant was discharged as a result of the employer’s fears that the Claimant would quit his job without giving them notice. This, the Supreme Court noted, would not render the Claimant ineligible for unemployment insurance benefits. Similarly, if the Claimant here had been laid off — as the evidence suggested — he would have been eligible for unemployment benefits. However, in this case the examiner did not conclude that the Claimant was laid off but, rather, that he was discharged but not for misconduct within the meaning of the employment security laws.

The real question here is whether the employer’s expectations were objectively reasonable in light of all the facts presented at the hearing before the Appeals Examiner. We submit they were not, particularly because the Employer admitted that he encouraged employees to run personal errands and did not deny that sometimes they did so without prior permission.

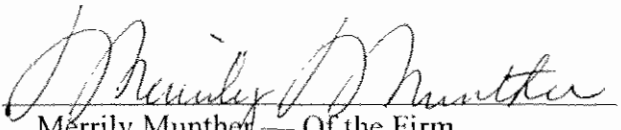
The Claimant submits that the Davis case is more appropriate than Doran, and that applying the principles enunciated by the Supreme Court in Davis, the employer’s expectations here were not reasonable in light of its practice of permitting employees to run personal errands,



sometimes without prior permission. That much evidence is not in dispute and, accordingly, it is appropriate that the Commission reconsider its Decision and Order, and allow benefits to the Claimant.

DATED this 20<sup>th</sup> day of April 2009.

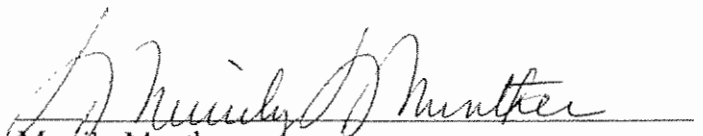
**MUNTHNER GOODRUM, CHARTERED**

By:   
 Merrily Munthner — Of the Firm  
 Attorneys for Claimant

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on the 20<sup>th</sup> day of April 2009, I caused a true and correct copy of the foregoing **CLAIMANT’S REQUEST FOR RECONSIDERATION** to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Rules of Civil Procedure, to the following person(s):

Mr. Terry Sidwell <b>ASPEN WATER, INC.</b> dba Aspen Water of Idaho 149 South Adkins Way, Suite 105 Meridian, ID 83642	Hand Delivery _____ U.S. Mail <u>✓</u> Facsimile _____ Email _____ Overnight Mail _____
Mr. Larry Sidwell <b>ASPEN WATER, INC.</b> dba Aspen Water Utah 1960 Milestone Drive #E Salt Lake City, UT 84014	Hand Delivery _____ U.S. Mail <u>✓</u> Facsimile _____ Email _____ Overnight Mail _____
Craig G. Bledsoe, Esq. Katherine Takasugi, Esq. Tracey K. Rolsfsen, Esq. Cheryl George, Esq. <b>IDAHO DEPARTMENT OF LABOR</b> 317 West Main Street Boise, Idaho 83735	Hand Delivery _____ U.S. Mail <u>✓</u> Facsimile _____ Email _____ Overnight Mail _____

  
 Merrily Munthner



# Idaho Transportation Department

ABOUT US | TRAVELER SERVICES | DMV PROJECTS | NEWS LINKS

DMV HOME | DOING BUSINESS WITH ID | CONTACT US

Printer Friendly Search

- DMV HOME
- ON-LINE SERVICES
- NEW TO IDAHO?
- DRIVER SERVICES
- VEHICLE SERVICES
- COMMERCIAL VEHICLE SERVICES
- DRIVER LICENSING OFFICES
- VEHICLE LICENSING OFFICES
- INFORMATION FOR IDAHO MILITARY PERSONNEL
- MANUALS
- LINKS
- RECENT LEGISLATION
- IDAHO MOTOR VEHICLE LAWS
- ADMIN. RULES
- VOTER REGISTRATION
- DMV HISTORY
- TRUCKING.IDAHO.GOV

Which County Do You Live In?  
 City-County Cross Reference

**-- Important Noticel --**  
 Ada/Canyon DMV Offices Moving  
 DMV HQ Counter Closed

## Idaho Driver's License Office Locations and Phone Numbers

Office hours vary at some locations and are subject to frequent changes.  
 Please call a specific location to inquire about current office hours.

COUNTY	CITY	ADDRESS	PHONE (208)	OFFICE HOURS	NON-CDL WRITTEN TESTS*	CDL WRITTEN TESTS*
ADA	Boise	7200 Barrister	577-3100	8 to 5	8 to 3:30	8 to noon
	Meridian	1769 N. Lakes Ave. Ste 100	577-4700 ext. 0	8 to 5	8 to 3:30	***BARRISTER ONLY***
ADAMS	Council	201 Industrial	253-4227	7 to 4:30	7 to 4	7 to 4
BANNOCK	Pocatello	624 E Center	236-7258	8 to 5	8 to 4	8 to 3
BEAR LAKE	Paris	50 N Main	945-2121	8:30 to Noon 1 to 4:30	8 to 4	9 or 1:00 by appt. only
BENEWAH	St Maries	701 College Ave	245-2555	8:30 to 4:30	8:30 to 3:30	8:30 to 3:30
BINGHAM	Blackfoot	501 N Maple	782-3041	8:30 to 5	8:30 to 4	8:30 to 3:00
	Shelley	101 S Emerson	357-3390	8 to 4:30	8:30 to 4	8:30 to 2:30
BLAINE	Hailey	219 1st Avenue S #109	788-5565	9 to 5	9 to 4:30	9 to 4
BOISE	Idaho City	3851 Highway 21	392-6059	9 to noon 1 to 4:30	9 to 11:30 1 to 4	9 to 11:30 1 to 4
	Horseshoe Bend	383 Highway 55	793-2262	9 to noon 1 to 5	9 to 4:30	9 to 4:30
BONNER	Sandpoint	215 S First Ave	265-1431	8:30 to 5	8:30 to 4	8:30 to 3
	Priest River	73 Eastside Road	448-2816	9 to 5	9 to 4	9 to 3
BONNEVILLE	Idaho Falls	254 "E" Street	529-1350 ext. 1313	8 to 5	8 to 4	8 to 3
BOUNDARY	Bonnors Ferry	6438 Kootenai St	267-3152	9 to 4:30	9 to 4	9 to 2
BUTTE	Arco	256 W Grand Ave	527-8553	9 to 5	9 to 4	9 to 4
CAMAS	Fairfield	119 W Willow St	764-2261	8 to 5	8 to 5	8 to 2
CANYON	Caldwell	6618 Cleveland Blvd, Suite C	454-7487	8 to 5	8 to 4	8 to 3:30

Matthew S. Adams  
4932 N Riverfront Pl  
Garden City, ID 83714  
(208) 409-9001

**THE IDAHO SUPREME COURT**

MATTHEW S. ADAMS, )  
)  
vs. )  
)  
ASPEN WATER, INC. )  
)  
)  
and )  
)  
STATE OF IDAHO, )  
DEPARTMENT OF LABOR )  
\_\_\_\_\_ )

**NOTICE OF APPEAL**

FILED

MAY 12 2009

INDUSTRIAL COMMISSION

I am requesting that my unemployment insurance case be taken to the Idaho Supreme Court. IDOL # 1399-2009 for Matthew S. Adams vs. Aspen Water, Inc. and Idaho Dept. of Labor.

A response concerning the Industrial Commissions decision was sent by my attorney on April 20, 2009. This request to review the reversal is still pending as of May 08, 2009. May 12, 2009 is the last day for me to request that the Idaho Supreme Court review and make a final decision on this matter.

Enclosed are two checks. \$50.00 to the Industrial Commission and \$86.00 to the Idaho Supreme Court.

As Mary at the Industrial Commission stated, I will receive any and all forms and requested information after the appeal has been processed.



Matthew S. Adams  
SSN [REDACTED]

**CERTIFICATE OF SERVICE**

I, the undersigned, certify that on the 12 day of May 2009, I caused a true and correct copy of the foregoing NOTICE OF APPEAL by the method indicated below, and addressed to each of the following:

Mr. Terry Sidwell  
**ASPEN WATER, INC.**  
dba Aspen Water of Idaho  
149 South Adkins Way, Suite 105  
Meridian, ID 83642

Hand Deliver \_\_\_\_\_  
U.S. Mail   X    
Facsimile \_\_\_\_\_  
Email \_\_\_\_\_  
Overnight Mail \_\_\_\_\_

Mr. Larry Sidwell  
**ASPEN WATER, INC.**  
dba Aspen Water Utah  
1960 Milestone Drive #E  
Salt Lake City, UT 84014

Hand Deliver \_\_\_\_\_  
U.S. Mail   X    
Facsimile \_\_\_\_\_  
Email \_\_\_\_\_  
Overnight Mail \_\_\_\_\_

Idaho Industrial Commission  
700 S. Clearwater Lane  
Boise, ID 83712

Hand Deliver   X    
U.S. Mail \_\_\_\_\_  
Facsimile \_\_\_\_\_  
Email \_\_\_\_\_  
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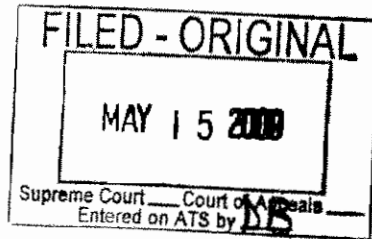
  
Matthew S. Adams

BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

MATTHEW S. ADAMS, )  
)  
Claimant/Appellant, )  
)  
vs. )  
)  
ASPEN WATER INC )  
Employer/Respondent, )  
)  
and )  
)  
IDAHO DEPARTMENT OF LABOR, )  
Respondent. )

SUPREME COURT NO. 36501

CERTIFICATE OF APPEAL



5:16 PM 5/15/09  
CLERK OF COURT

Appeal From: Idaho Industrial Commission,  
R.D. Maynard, Chairman, presiding.

Case Number: IDOL #1399-2009

Order Appealed from: Decision and Order filed March 31, 2009  
**Claimant filed a Reconsideration on April 20, 2009 which is pending before the Industrial Commission. Idaho Department of Labor filed a Reconsideration on April 10, 2009 which is pending before the Industrial Commission.**

Representative for Claimant: Matthew S. Adams/Pro Se  
4932 N. Riverfront Pl  
Garden City, ID 83714

Representative for Employers: Terry Sidwell  
Aspen Water of Idaho  
149 S Adkins Way  
Meridian Id 83642

Representative for IDOL: Tracey K. Rolfsen  
Deputy Attorney General  
317 W. Main Street  
Boise Idaho 83735

Adams, Matthew IDOL 1399  
**CERTIFICATE OF APPEAL - 1**

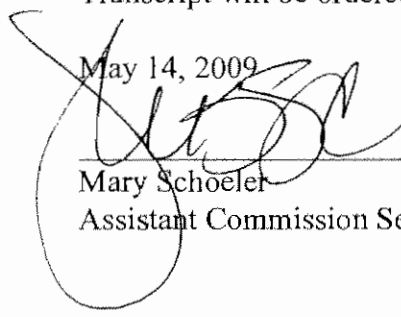
Appealed By: Matthew S. Adams/Appellant  
Appealed Against: Aspen Water, Inc./Respondents  
and  
Idaho Department of Labor/Respondent

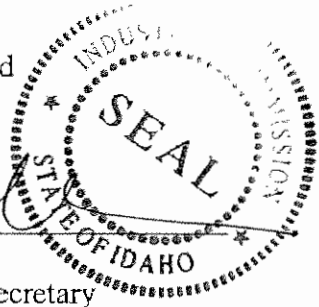
Notice of Appeal Filed: May 12, 2009

Appellate Fee Paid: \$86.00

Transcript: Transcript will be ordered

Dated: May 14, 2009

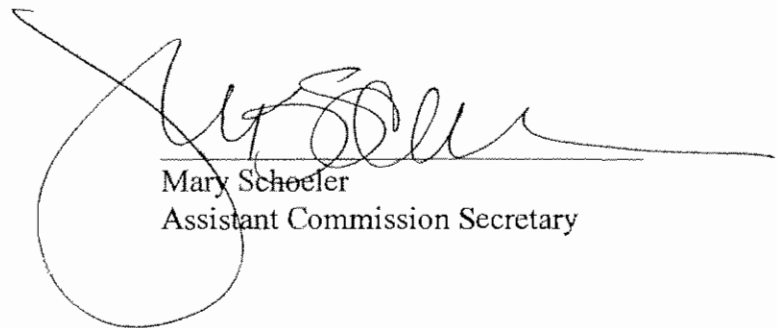
  
Mary Schoeler  
Assistant Commission Secretary



**CERTIFICATION**

I, Mary Schoeler, 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 May 12, 2009; Decision and Order, filed March 31, 2009; and the whole thereof. **Pending before the Industrial Commission is Claimant's Reconsideration, filed April 20, 2009 (copy attached), and the Idaho Department of Labor's Reconsideration filed April 10, 2009 (copy attached).**

DATED: May 14, 2009



Mary Schoeler  
Assistant Commission Secretary

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MATTHEW S. ADAMS, )  
 )  
 Claimant, )  
 v. )  
 )  
 ASPEN WATER, INC., )  
 )  
 Employer, )  
 and )  
 )  
 IDAHO DEPARTMENT OF LABOR. )  
 \_\_\_\_\_ )

IDOL # 1399-2009

ORDER REGARDING  
MOTIONS FOR  
RECONSIDERATION

FILED

MAY 26 2009

INDUSTRIAL COMMISSION

This order addresses two motions for reconsideration filed in the above entitled case. First, the Idaho Department of Labor (IDOL) filed a Motion to Reconsider seeking to correct an error in the discussion of the Industrial Commission’s Decision and Order filed March 31, 2009. Second, Claimant, through counsel, filed a motion requesting the Commission reconsider its decision and find that Employer’s expectations were not objectively reasonable in light of all the facts.

The Commission Decision and Order reversed the Appeals Examiner’s Decision. The Commission found that Employer discharged Claimant for employment-related misconduct and that Employer’s account is not chargeable for experience rating purposes.

Claimant worked as an installer of Employer’s water softening systems. Installers often ran personal errands between service calls. Employer expected installers to get permission before taking extended absences during the day, but not necessarily for short errands, such as trips to the bank. On November 3, 2008, Claimant made a service call at 9:30 a.m. After completing the service call Claimant took a lunch break, stopped by the Division of Motor Vehicles to renew his driver’s license, and then returned to the office at 12:35 p.m. Claimant was unable to renew his license



because the line was too long, so after completing some paperwork, Claimant returned to the DMV. Claimant did not tell anyone that he was leaving and that he would not be returning.

When Claimant arrived at the office the next morning, Terry Sidwell, Employer's owner, discharged Claimant for leaving work without permission and failing to notify anyone that he would not be returning. Claimant conceded that while it was common to run personal errands, he had never taken off three hours in a single day without talking to a supervisor, as he did on November 3, 2008.

The Commission found that Employer had a reasonable expectation that Claimant would work the hours that he was scheduled. Claimant's failure to report for work as expected without contacting his supervisor, regardless of the reason for the absence, fell below the reasonable standard Employer was entitled to expect. Therefore, the Commission concluded that Employer discharged Claimant for employment-related misconduct.

#### **IDOL's Motion to Reconsider**

The Commission will first address IDOL's motion to reconsider. IDOL argues that the last sentence in the discussion is a typographical error. IDOL is correct in pointing out the misstatements in the last sentence of the second full paragraph on page 6 of the Decision and Order. The incorrect sentence states, "Because we conclude that Employer discharged Claimant for reasons other than employment-related misconduct, we find that Employer's account is chargeable for experience rating purposes." That sentence is contradictory to the discussion and conclusions. Accordingly, the Commission grants IDOL's motion for reconsideration and orders that the following sentence be substituted for the last sentence in the discussion section on page 6 of the Decision and Order.

Because we conclude that Employer discharged Claimant for employment-related misconduct, we find that Employer's account is not chargeable for experience rating purposes.

**ORDER REGARDING MOTIONS FOR RECONSIDERATION- 2**

### Claimant's Request for Reconsideration

Next the Commission will address Claimant's request for reconsideration. Claimant first argues that applying the principles in the Davis case, Employer's expectations here were not reasonable in light of its practice of permitting employees to run personal errands. Davis v. Howard O. Miller Company, 107 Idaho 1092, 695 P.2d 1231 (1985).

In Davis, the Commission found, and the Supreme Court affirmed, that Davis was discharged as a result of employer's fears that Davis would quit his job without giving employer notice, after employer discovered that claimant had quit a previous job without giving notice, rather than for misconduct in failing to list prior employment on employment application. The Supreme Court further held that while the employer believed that Davis was absent from work without proper notice to the head office, the employer did not inform Davis of their expectations and therefore, there was no deliberate violation of the employer's rules. In Davis, the record established that "there was no violation of any rule or expectation that was the custom of this particular business, or any deviation from how 'managers' in general schedule their absences, or from [employer's] specific instructions to his managers." Id., at 1095.

Davis was a gas station manager. Davis occasionally took one to two hours a week off from his shift, substituting other personnel in his place. The employer alleged, but the evidence failed to support, that Davis was expected to let his employer know if he would be gone from work.

The Davis case is distinguishable from the present case because Davis was a manager and he was absent in a way that was not a deviation from how managers in general schedule their absences. When Davis was absent he scheduled another employee to work. Claimant was not a manager and did not have the authority to have another employee fill in for his absence. Further, Claimant admits

**ORDER REGARDING MOTIONS FOR RECONSIDERATION- 3**

that he had never taken off three hours in a single day without talking to a supervisor.

The record does not establish that Employer communicated its expectation that Claimant ask for permission before taking an extended absence, though Employer may have done so. Even so, the Commission finds that an employer has a reasonable expectation that an employee will show up for work and stay at work, and that such an expectation flows naturally from the employment relationship. Claimant left work in the middle of the day without permission and did not return. The afternoon absence by Claimant was not a short personal errand that was commonly allowed by Employer. Employers have a reasonable expectation that employee will work the hours they are scheduled and Claimant's afternoon off fell below that reasonable standard. Even Claimant acknowledged that his absence on the day in question was different in character from the brief absences tolerated by Employer.

Claimant also argues that he had typically been reached by Employer by telephone, since he was frequently driving his van on other assignments. While it may be true that Claimant was reached by telephone during his absence, being reached by phone is not the same as physically being present at work or being out on assignment for work.

Additionally, Claimant states that this was a single incident of non-serious action which should not disqualify Claimant from receiving benefits. The Supreme Court has stated that "although an employer's expectation that an employee will not engage in 'protracted argument' with his employer is objectively reasonable, a 'single incident of comparatively non-serious disrespect by complaining and arguing is not misconduct.'" Folks v. Moscow School Dist. No. 281, 129 Idaho 833, 837, 933 P.2d 642, 646 (1997). The Court has also stated that "although the existence of a pattern of conduct is certainly a factor to be considered, neither Folks nor Gatherer dictate that a

**ORDER REGARDING MOTIONS FOR RECONSIDERATION- 4**

pattern of conduct is necessary to determine that reasonable of the employer's expectations." Pimley v. Best Values, Inc., 132 Idaho 432, 436, 974 P.2d 78, 82 (1999). There is no requirement to prove a pattern of conduct in order to prove misconduct. The Commission's Decision and Order found that Employer had a reasonable expectation that Claimant not leave for three hours in the afternoon without notifying Employer.

There was some dispute over whether Claimant was at the courthouse or the DMV during the afternoon in question. The Commission took judicial notice that the Division of Motor Vehicles does not provide services through the Ada County Courthouse. Claimant avers that this casts Claimant in a bad light. Regardless of where Claimant was, the courthouse or the DMV, the relevant point is that he was not at work.

Claimant's arguments in his request for reconsideration do not persuade the Commission to alter its ruling. The Commission finds no reason to disturb the conclusions in the Decision and Order in this matter.

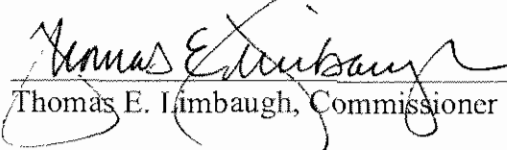
Based upon the foregoing reasons, IDOI's Motion to Reconsider is hereby GRANTED and the Commission's Decision and Order filed March 31, 2009, is modified as detailed above; Claimant's Request for Reconsideration is hereby DENIED.

IT IS SO ORDERED.

DATED this 26 day of May, 2009.

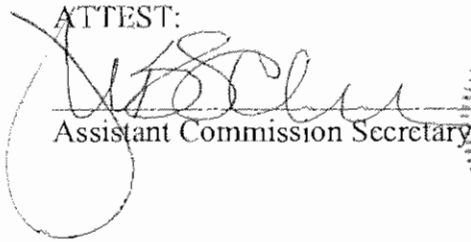
INDUSTRIAL COMMISSION

\_\_\_\_\_  
R.D. Maynard, Chairman

  
\_\_\_\_\_  
Thomas E. Limbaugh, Commissioner

**ORDER REGARDING MOTIONS FOR RECONSIDERATION- 5**

  
Thomas P. Baskin, Commissioner

ATTEST:  
  
Assistant Commission Secretary



**CERTIFICATE OF SERVICE**

I hereby certify that on 26 day of May 2009, a true and correct copy of the foregoing **ORDER REGARDING MOTIONS FOR RECONSIDERATION** was served by regular United States mail upon each of the following:

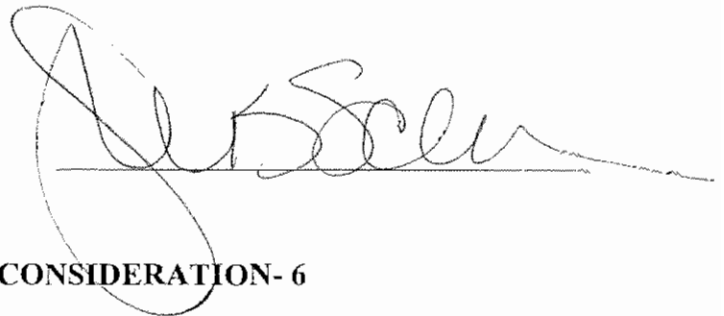
MERRILY MUNTHER  
1161 W RIVER ST STE 350  
BOISE, ID 83702

MATTHEW S. ADAMS  
4032 N RIVERFRONT PL  
GARDEN CITY ID 83714

ASPEN WATER INC  
149 S ADKINS WAY STE 105  
MERIDIAN, ID 83462

ASPEN WATER INC  
1960 S MILESTONE DR E  
SALT LAKE CITY, UT 84101

DEPUTY ATTORNEY GENERAL  
IDAHO DEPARTMENT OF LABOR  
**STATEHOUSE MAIL**  
317 W MAIN ST  
BOISE, ID 83735



**ORDER REGARDING MOTIONS FOR RECONSIDERATION- 6**

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

MATTHEW S. ADAMS, )  
SSN: [REDACTED] )  
 )  
Claimant, )  
 )  
vs. )  
 )  
ASPEN WATER, INC., )  
 )  
Employer, )  
 )  
and )  
 )  
IDAHO DEPARTMENT OF LABOR. )  
\_\_\_\_\_ )

IDOL # 1399-2009  
SUPREME COURT # 36501

FILED  
MAY 27 2009  
INDUSTRIAL COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that on the 27<sup>TH</sup> day of May, 2009 a true and correct copy of **Order Regarding Motions for reconsideration, filed May 26, 2009** was served by regular United States mail upon the following:

IDAHO SUPREME COURT  
STATEHOUSE MAIL  
PO BOX 83720  
BOISE IDAHO 83720-0101

mcs



Assistant Commission Secretary

cc: DEPUTY ATTORNEY GENERAL  
IDAHO DEPARTMENT OF LABOR  
**STATE HOUSE MAIL**  
317 W MAIN STREET  
BOISE ID 83735

MATTHEW S ADAMS  
4032 N RIVERFRONT PL  
GARDEN CITY ID 83714

ASPEN WATER INC  
1960 S MILESTONE DR E  
SALT LAKE CITY UT 84101

ASPEN WATER INC  
149 S ADKINS WAY STE 105  
MERIDIAN ID 83462

**CERTIFICATION OF RECORD**

I, Carol Haight, 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 22<sup>nd</sup> day of June, 2009.

Carol J. Haight  
Assistant Commission Secretary



**BEFORE THE SUPREME COURT OF THE STATE OF IDAHO**

MATTHEW S. ADAMS, )  
 )  
 Claimant/Appellant, )  
 )  
 vs. )  
 )  
 ASPEN WATER, INC., )  
 )  
 Employer/Respondent, )  
 )  
 and )  
 )  
 IDAHO DEPARTMENT OF LABOR, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

**SUPREME COURT NO: 36501**

**NOTICE OF COMPLETION**

TO: STEPHEN W. KENYON, Clerk of the Courts; and  
Matthew S. Adams, Pro Se, Claimant/Appellant; and  
Tracey Rolfsen, Idaho Department of Labor, Respondent.

YOU ARE HEREBY NOTIFIED that the Agency'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:

**For Claimant/Appellant:**

MATTHEW S. ADAMS, PRO SE  
4932 N. RIVERFRONT PL.  
GARDEN CITY, ID 83714

**For Respondent:**

TRACEY ROLFSEN  
DEPUTY ATTORNEY GENERAL  
IDAHO DEPT. OF LABOR  
317 W. MAIN STREET  
BOISE, ID 83735

**NOTICE OF COMPLETION - 1**



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 Agency's Record or Reporter's Transcript, including requests for corrections, additions or deletions. In the event no objections to the Agency's Record or Reporter's Transcript are filed within the twenty-eight day period, the Agency's Record and Reporter's Transcript shall be deemed settled.

DATED this 22<sup>nd</sup> day of June, 2009.

  
\_\_\_\_\_  
Carol J. Haight  
Assistant Commission Secretary

