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# Cheh v. EG & G Idaho, Inc. Appellant's Brief Dckt. 37081

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

UNTE CHEH, )  
 )  
 Claimant/Appellant, )  
 )  
 v. )  
 )  
 EG&G IDAHO, INC., dba IDAHO )  
 NATIONAL ENGINEERING )  
 LABORATORY, Employer )  
 )  
 and )  
 )  
 WAUSAU UNDERWRITERS )  
 INSURANCE COMPANY, Surety, )  
 )  
 Defendant/Respondents. )  
 )

**Supreme Court No. 37081**

**OPENING BRIEF OF APPELLANT UNTE CHEH**

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**Appeal from the Industrial Commission of the State of Idaho**

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**Chairman R.D. Maynard, Presiding**

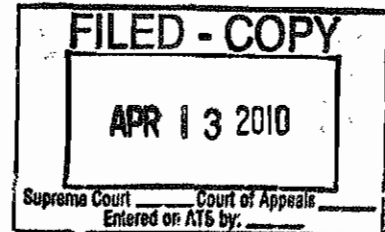
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## TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE.....	1
1. Nature of Case.....	1
2. Course of Proceeding Below.....	1
STATEMENT OF FACTS.....	1
STANDARD OF REVIEW.....	4
ISSUES:	
THE COMMISSION ABUSED ITS DISCRETION BY NOT STAYING BRIEFING, NOT PERMITTING CHEH TO UNDERTAKE DISCOVERY, AND NOT PERMITTING CHEH TO REOPEN THE HEARING DISCOVERY AND CLARIFY TESTIMONY.....	5
CONCLUSION.....	7

## TABLE OF CASES

	Page
Ball v. DAW Forest Products Co., 136 Idaho 155, 30 P.3d 933 (2001)....	7
Banzhaf v. Carnation Co., 104 Idaho 700, 662 P. 2d 1144 (1983).....	5
Goodson v. L.W. Hult Produce Co., 97 Idaho 264, 543 P. 2d 167 (1975)	5,6,7
Hagler v. Micron Technology, 118 Idaho 596, 798 P. 2d 55 (1990).....	4
Hattenburg v. Blanks, 98 Idaho 485, 567 P. 2d 829 (1977).....	4,6
Iverson v. Gordon Farming Co., Inc., 103 Idaho 527, 650 P. 2d 669 (1982)	5,6,7
Jones V. Morrison-Knudsen Co., 98 Idaho 458, 567 P. 2d 3 (1977).....	4,6
Medrano v. Neibaur, 136 Idaho 767, 40 P.3d 125 (2002).....	4
Pauley v. Salmon River Lumber Co., Inc., 74 Idaho 483, 264 P. 2d 466 (1953)	4,6
Sines v. Appel, 103 Idaho 9, 644 P. 2d 331 (1982).....	5,8
Smith v. University of Idaho, 67 Idaho 22, 170 P. 2d 404 (1946).....	5,6,7
Yeend v. United Parcel Service, 104 Idaho 333, 659 P. 2d 87 (1982).....	6

### STATUTES

Idaho Code 72-201.....	6
Idaho Code 72-708.....	5,8,9
Idaho Code 72-719 (c).....	9

## STATEMENT OF CASE

### 1. NATURE OF CASE

Unte Cheh, PhD, PE, (Cheh) appeals from the Industrial Commission's Findings of Fact, Conclusions of Law, and Order denying him benefits and the Industrial Commission's Order Denying Reconsideration.

### 2. COURSE OF PROCEEDINGS BELOW

After contacting twenty (20) attorneys who would not take his case Cheh located an attorney in Idaho Falls who agreed to help him. This attorney "forgot" about the claim and Cheh ultimately had to file a complaint and proceed to hearing on January 15, 2009, without legal counsel. After the hearing, while inquiring about a crime victims' fund, he was referred to the undersigned. Upon review the egregious nature of the problem became apparent to the undersigned and a Motion to Stay Briefing Schedule, Reopen Hearing, and Permit Discovery (R Vol VII, p. 1186) was filed along with affidavits of Cheh and his undersigned counsel. (R Vol. VI, p. 1175). The Referee exhibiting unacceptable impatience and frustration with (the until then unrepresented) Cheh denied the motion by stating "Enough is enough...(and) it would create manifest injustice to Defendants to allow Claimant to undo everyone's work on this matter..." (R Vol. VII, p. 1223). The Referee submitted Findings of Fact, Conclusions of Law, and Recommendation (see Additional Documents). The Commission entered its own Findings of Fact, Conclusions of Law, and Order. (R Vol. VII, p. 1275). Cheh filed a Motion for Reconsideration seeking the Commission to reconsider and rule on the Referee's denial of the Motion To Stay Briefing Schedule, Reopen the Hearing, and Permit Discovery. (R Vol. VII p. 1293). The Commission denied the Motion for Reconsideration. This appeal followed.

## STATEMENT OF FACTS

Cheh was employed by EG & G Idaho, Inc. (EG&G) from November 1976 to January 1978. (R Vol. VII, p. 1276). In the spring of 1977 he began to have dental problems, nausea, vomiting, and pain with deteriorating eye sight. He called 911 in October 1977. His employer

told him that he was sick and that he needed to see a psychiatrist. Hr. T. p. 13. Because of perceived psychological issues and depression which Cheh attributed to his relative isolation in Idaho Falls, he applied for other jobs. Hr. T. p. 14. 29-31. He continued working in the nuclear energy field with the Nuclear Regulatory Commission (NRC). In 1986-87 he began to develop lesions on his skin. The doctors couldn't tell him what was causing the lesions. They were just treating his symptoms. Hr.T. p. 14.

Cheh ultimately filed a federal claim for radiation sickness because of his many years of exposure to low radiation at Three Mile Island and 20 other operating reactors and storage sites in the eastern United States. R. Vol. VI, p. 1181. This claim was denied by the Federal DOL. It was determined that his illness and deteriorating condition was caused by "high dose" exposure and not "low dose" exposure. He had never been told of, and he did not know of, a "high dose" exposure(s) occurring at EG&G.

In January 2007, Cheh received a letter from the USW Worker Health Protection Program which advised him of screening for radiation exposure. R Vol. VII, p. 1197. He was not been previously told of, nor was he aware of, any exposure at EG&G. On January 16, 2007 Cheh contacted the EG&G human resources to file a worker's compensation claim. On January 22, 2007 Cheh received a letter from Dr. Chiodo, M.D., that made him aware that his psychiatric condition and his radiation disease were due to exposures at EG&G. R Vol. VII, p. 1199 that were unreported. On January 23<sup>rd</sup> after receiving no assistance from EG&G he filed a freedom of information request. R Vol. VII, p. 1198; R Vol. VII, p. 1181-82. He never received any follow up or assistance from EG&G. In March he attempted to obtain an attorney. After contacting about 20, an Idaho Falls attorney agreed to represent him in June 2007. However, this attorney advised Cheh that he had "forgotten" about his claim and told him that he wasn't going to represent him any further. R Vol. VI, p. 1182.

It was not until after the hearing before the Referee on January 15, 2009, merely by happenstance, that Cheh contacted an attorney that would even attempt to speak with him. Cheh had been inquiring about a crime victim compensation fund that he had heard of and he was

referred to the undersigned counsel (R Vol. VI, p. 1181). When he contacted the undersigned, despite the language difficulties, the confusing documents, and the “black and white” thinking of a nuclear scientist, the undersigned discussed, for hours, the facts of his situation, and reviewed various documents. R Vol. VI, p. 1177. It was obvious that Cheh had difficulty communicating because of his Korean ancestry and the complex nature of his illness. R Vol. VI, p. 1177. After many hours of difficult and trying conversation with Cheh and reviewing the documents Cheh provided, the undersigned submitted an affidavit to the Industrial Commission. It clearly states that further testimony and evidence could be brought out after document production and review, and depositions, that would clarify the record. This would then allow the Commission to fairly resolve the issues and that the Commission, based thereon, could reasonably conclude that the notice requirements had been fully complied with by Cheh. R Vol. VI, p. 1177.

The record is replete with documentation of Cheh’s poor mental and physical condition.<sup>1</sup> Cheh could not even attend the hearing because of his illness. He was “home-bound with colorectal pain/bleeding requiring frequent urination about every 30 to 45 minutes and water/soap enema every 3 to 4 hours to remove human waste, heart condition (left bundle branch block), shortness of breath and deteriorating eyesight...and depression. I can neither aboard a plane nor drive except a short distance to and from local drug stores, daily therapy and supermarkets.” R Vol IV, p. 577-78. Based on this information the Referee ordered that any party could attend the hearing by telephone. R Vol. V, p. 774. Cheh did not attend and needed help asking and understanding questions from a friend. The employer/surety’s attorney attended in person and called no witnesses. see Hr. T.

The Referee denied the motion to stay briefing, reopen the hearing, and permit discovery. He submitted his proposed Findings of Fact, Conclusion, and Order to the Commission. It entered its Order, based upon a convoluted record and minimal, and disjointed, testimony at hearing, holding that Cheh failed to comply with Idaho Code 72-448. R Vol. VII, p. 12. The

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<sup>1</sup> For example, John V. Wylie, M.D. in a letter dated November 6, 2001 discussing Cheh’s condition stated that “Unte Cheh has been under my psychiatric care since 1994. During this time, Dr. Cheh has suffered from an Adjustment Disorder with mixed anxiety and depression (309.28) and Post Traumatic Stress Disorder, chronic (309.81) manifested by preoccupation with and intrusive thoughts of his work place and intrusive thoughts concomitant severe bowel dysfunction including frequent bowel movements and rectal bleeding in direct response to work stress.” R Vol. VII [sic] 120, actually 1201. As Dr. Chido states in his letter of January 22, 2007, “Due to your visual deterioration and psychiatric condition you are disabled and this disability is likely to be permanent.” R Vol. VII, p. [sic] 120, actually 1202.

Commission then upon Cheh's Motion for Reconsideration affirmed the Referee's denial of his Motion to Stay Briefing, Reopen the Hearing, and Permit Discovery. R Vol. VII, p. 1318.

### STANDARD OF REVIEW

When reviewing Industrial Commission decisions, this Court exercises free review of the Commission's legal conclusions, but will not disturb findings of fact if they are supported by substantial and competent evidence. In reviewing a claimed abuse of discretion this Court determines (1) whether the Commission correctly perceived the issue as one of discretion; (2) whether the Commission acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the Commission reached its decision by an exercise of reason. *Medrano v. Neibaur*, 136 Idaho 767, 40 P. 3d 125 (2002)

The provisions of the workers' compensation law are to be liberally construed in favor of the employee. Liberal construction in favor of the worker is required to enable the act to serve the humane purposes for which it was promulgated. *Jones v. Morrison-Knudsen Co.*, 98 Idaho 458, 567 P. 2d 3 (1977); *Hattenburg v. Blanks*, 98 Idaho 485, 567 P. 2d 829 (1977).

Discretion should be exercised in a manner that tends to promote the decision of the controversy upon the merits. *Pauley v. Salmon River Lumber Co., Inc.*, 74 Idaho 483, 264 P. 2d 466 (1953).

The primary purpose of proceedings before the Industrial Commission is the attainment of justice in each individual case. The proceedings are to be conducted as far as possible in accordance with the rules of equity. The overriding purpose of Commission proceedings is to do justice in the given situation. The Commission is imbued with certain powers that specifically enable it to enhance the likelihood of equitable and just results. *Hagler v. Micron Technology*, 118 Idaho 596, 798 P. 2d 55 (1990)

"Manifest" has been defined to mean: capable of being easily understood or recognized at once by the mind; not obscure; obvious. "Injustice" has been defined to mean: absence of justice;



violation of right or of the rights of another; iniquity, unfairness; an unjust act or deed; wrong. *Sines v. Appel*, 103 Idaho 527, 650 P. 2d 669 (1982).

Without specific findings to support the Industrial Commission's conclusion that manifest injustice was not shown the Court can not review the issue adequately and must remand to the Commission to review their decision and to make specific findings in order that this Court can properly review the issue. *Sines v. Appel*, 103 Idaho 9, 644 P. 2d 331 (1982); *Banzhaf v. Carnation Co.* 104 Idaho 700, 662 P. 2d 1144 (1983)

The term "manifest injustice" as a ground for reopening must be construed broadly and doubtful cases resolved in favor of the humane purposes of the workers' compensation act. *Smith v. University of Idaho*, 67 Idaho 22, 170 P. 2d 404 (1946); *Iverson v. Gordon Farming Co., Inc.*, 103 Idaho 527, 650 P. 2d 669 (1982); *Goodson v. L. W. Hult Produce Co.*, 97 Idaho 264, 543 P. 2d 167 (1975)

The process and procedure under workers' compensation law is to be in accordance with the rules of equity. *Idaho Code 72-708*.

## ISSUE

THE COMMISSION ABUSED ITS DISCRETION  
BY NOT STAYING BRIEFING, NOT PERMITTING CHEH  
TO UNDERTAKE DISCOVERY, AND NOT PERMITTING CHEH  
TO REOPEN THE HEARING

Cheh, living in Maryland, unable to travel due to his disease, and with difficulty communicating because of his Korean ancestry, through no fault of his own was unable to obtain counsel to assist him in his occupational disease claim against EG&G until he obtained an attorney who "forgot" his case. The problem with the attorney led to all sorts of mistrust on the part of Cheh of the attorney in question, and ultimately distrust of Industrial Commission personnel. R Vol. VII, p. 1288. As painfully documented in the record, Commission personnel grew frustrated with him. Cheh was literally compelled to go to hearing, by telephone because he couldn't travel due to his illness, without any legal assistance. It was only after seeking help, regarding the crime victims fund, that the undersigned counsel was located and took the time to try to communicate with him and review documents regarding his claim.

Promptly upon counsel's review, before any briefing had been started, a Motion to Stay Briefing Schedule, Reopen Hearing, and Permit Discovery was filed, accompanied by affidavits and a Request for Production of Documents. R Vol. VI, p. 1176; R. Vol. VII, p. 1186; R. Vol. VI, p. 1171. The potential for manifest injustice, if the Motion to Stay Briefing, Reopen the Hearing, and Permit Discovery was not granted because of the total disarray of the record and testimony was obvious to the undersigned counsel, who has argued workers compensation law before this Court since *Yeend v. United Parcel Service*, 104 Idaho 333, 659 P. 2d 87 (1982). R Vol. VI, p. 1177.

The Referee in an overt display of frustration denied the motion stating, "Enough is enough." R Vol. VII, p. 1223. The Referee ignoring the clear record before the Commission that documents Cheh's difficulties in finding any attorney, and then finding an uninterested counsel, determined that Cheh had "for whatever reasons" tried to prosecute the case on his own. R Vol. VII, p. 1224. The obvious reason, based on the record, is that Cheh wasn't given the time of day by attorneys up until that time. Incredibly, the Referee and the Commission ruled in a manner turns the public policy of the workers' compensation act upside down. Workers' compensation matters are to be liberally construed in favor of the employee. *Jones v. Morrison- Knudsen Co.*, 98 Idaho 458, 567 P. 2d 3 (1977); *Hattenburg v. Blanks*, 98 Idaho 485, 567 P. 2d 829 (1977). The Referee went so far, and the Commission concurred, as to determine that "it would create manifest injustice to Defendants (the insurance company and its skilled attorney employees whose main focus of work is workers' compensation law) to allow Claimant to undo everyone's work on this matter..." R Vol. VII, p. 1224. "Everyone's (e.g. insurance company and it's attorney) work being "undone" suddenly takes priority over considering the merits of seriously ill workers, after a full and fair hearing with a clear record? Decisions should be based upon the merits and doubtful situations resolved in favor of the humane purposes of the workers' compensation act. *Pauley v. Salmon River Lumber Co., Inc*, 74 Idaho 483, 264 P. 2d 466 (1953); *Smith v. University of Idaho*, 67 Idaho 22, 170 P. 2d 404 (1946); *Iverson v. Gordon Farming Co., Inc.*, 103 Idaho 527, 650 P. 2d 669 (1982); *Goodson v. L. W. Hult Produce Co.*, 97 Idaho 264, 543 P. 2d 167 (1975).

Considering what Cheh had at stake in this claim, considering his mental and physical condition, considering that the employer/surety was represented by experienced legal counsel

who is an employee of one of the largest, if not the largest, workers' compensation insurance companies in the entire United States (R Vol. II, p. 342), considering that an experienced counsel in workers' compensation matters filed an affidavit that a clear presentation of evidence before the Commission could likely result in a favorable decision to Cheh, the denial of the Motion was not only questionable, it was unjust and an abuse of discretion. *see Ball v. DAW Forest Products Co.*, 136 Idaho 155, 30 P.3d 933 (2001). In this case, unlike *Ball*, the abusive ruling of the Referee was considered on reconsideration and upheld by the Commission.

The term "manifest injustice" as a ground for reopening must be broadly construed and doubtful cases resolved in favor of the humane purposes of the workers' compensation act. *Smith v. University of Idaho*, 67 Idaho 22, 170 P. 2d 404 (1946); *Iverson v. Gordon Farming Co., Inc.*, 103 Idaho 527, 650 P. 2d 669 (1982); *Goodson v. L. W. Hult Produce Co.*, 97 Idaho 264, 543 P. 2d 167 (1975).

It is apparent from the ruling of the Referee and the ruling of the Commission that they viewed the Motion as one of discretion. However, the denial of the Motion was outside even the outer boundaries of discretion and not consistent with the legal standards to workers' compensation matter. I.C. 72-201. A cursory look through the seven volumes of record consisting of 1,339 pages, the exhibits lodged separately with the Court, and the "Additional Documents" also separately lodged with the Court, reveals an extraordinarily ill and struggling claimant, with no legal help, floundering badly at every turn. Even experienced workers' compensation lawyers have difficulty in the arena of occupational diseases. Faced with skilled legal counsel in opposition to his efforts, on the best of days, Cheh had no chance to present his case and prevail.

The Commission's Order denying reconsideration while certainly more polished reveals disregard of the public policy and intent behind our workers' compensation act. It is inconceivable how the employer/surety would be subject to "manifest injustice" by having to defend a properly, and coherently, presented claim.

Yes, as the Referee notes, "Claimant had repeatedly filed inappropriate discovery and motions." R Vol. VII, p. 1318. Would anything other than "inappropriate discovery and motions" be expected of a person forced to proceed without an attorney in an area of practice and procedure that only a handful of attorneys venture into, of a person who is unable to travel, of a

person who has difficulty understanding and being understood, of a person who is extremely ill, and of a person who is losing his eyesight?

The Commission despite the clear and undisputed record pertaining to Cheh's inability to obtain any legal assistance, merely recited the Referee's comments and then, despite no evidence contrary to that of Cheh's futile search for legal counsel (R Vol. VI, p. 1182) cryptically held that Cheh had "ample time to retain counsel prior to the January 15, 2009 hearing." R Vol. VII, p. 1318. There are literally no required findings to support the Commission's conclusion. *Sines v. Appel*, 103 Idaho 9, 644 P. 2d 331 (1982).

"Manifest" has been defined to mean: capable of being easily understood or recognized at once by the mind; not obscure; obvious. "Injustice" has been defined to mean: absence of justice, violation of right or of the rights of another; iniquity, unfairness; an unjust act or deed; wrong. *Sines v. Appel*, 103 Idaho 527, 650 P. 2d 669 (1982). The refusal of first the Referee and then the Commission to permit the seriously ill and obviously confused Cheh, through counsel, to present his case can be viewed as nothing but a manifest injustice.

Undersigned counsel recalls with admiration the longstanding actions of former Commissions when confronted with manifest injustice. It was not so long ago that Will Defenbaugh, acting as a hearing officer, after the receipt of a full morning of testimony (far in excess of what occurred in this case) cleared the room of all but the respective counsel and informed those left, "We are going to forget that this morning occurred." He proceeded to instruct counsel for claimant to either go learn workers' compensation law or to associate counsel who already knew it. For those representing the defendants, he stated that he would record their respective objections but that was the way it was going to be. Then the claimant had counsel. Here Cheh, seriously ill and confused, was on his own. This was not because he wanted to be, but rather because he had no other choice at that time. Has the concept and applicability of equity changed so much over these few years that now the Commission is primarily concerned about huge insurance companies and attorneys, with special expertise, at the expense of our injured workers? The statute that provides for equity, I.C. 72-708, hasn't been changed.

For the Commission, after such an utter miscarriage of justice, called a hearing, after it's consideration of a complete jumbled mess of letters, medical records, and miscellaneous documentation in the record, to refuse to permit Cheh shortly after the "hearing" and before

briefing had even commenced, to Stay Briefing, Reopen the Hearing, and Permit Discovery (after all of his extensive trying he had finally contacted an attorney willing to help him) manifests an utter and complete failure to exercise appropriate discretion within the outer boundaries of discretion and outside the legal standards applicable to injured workers claims under the workers' compensation act. Indeed the Commission's Order denying Reconsideration is devoid of the exercise of any reason on its part. R Vol. VII, p. 1318, 1319. Rather than reflecting any consideration of the incredible hardships faced by Cheh in his lengthy and unsuccessful prehearing search to obtain an attorney, his severe radiation illness, his failing eye sight, his inability to travel, the total lack of any meaningful discovery of documents and records from EG&G, his compromised mental condition, the Commission in nothing more than a conclusory single sentence held "Claimant had sufficient time to prepare or find assistance in preparing for hearing as he saw fit." The Commission's Order does not even reflect any awareness or consideration of the contents of the undersigned's affidavit and Cheh's affidavit submitted in support of the Motion to Stay the Briefing, Reopen the Hearing, and Permit Discovery. There is literally no mention of the two affidavits. There is literally no discussion by the Commission of the public policy of the workers' compensation act or the equitable powers of the Commission. I.C. 72-719 (c); 72-708. There is literally no discussion by the Commission of the concepts of manifest injustice or equity. The Commission displayed, exercised, and evidenced no reasoning in denying Cheh's Motion for Reconsideration of the Motion to Stay Briefing, Reopen the Hearing, and Permit Discovery.

### CONCLUSION

Cheh, was a nuclear scientist in the service of his adopted country. He was at the Three Mile Island accident and he was there during it's restart. R Vol. VII, p. [sic] 120, 1202. He contracted an insidious disease, in his service to our country, as the result of exposures to radiation that went unreported by his employer. His failing health was shrugged off by his employer as "psychological" problems and he was sent to see a psychiatrist. Cheh was never told by his employer that he had been exposed to "high dose" radiation. When Cheh learned that he had been subjected to unreported "high dose" radiation exposure at EG&G he immediately

CERTIFICATE OF SERVICE: I certify that on the 12<sup>th</sup> day of April, 2010, a true and correct copy of this Opening Brief of Appellant Cheh was mailed, with postage prepaid thereon to:

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