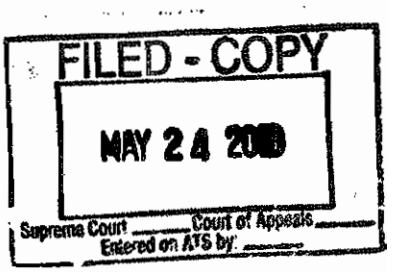
5-24-2010

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

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**



REPLY BRIEF OF APPELLANT UNTE CHEH

Appeal from the Industrial Commission of the State of Idaho

Chairman R.D. Maynard, Presiding

STARR KELSO
Attorney at Law, ISB#2445
1621 N. Third Street, Ste. 600
PO Box 1312
Coeur d'Alene, ID 83814-1312

Attorney for Appellant

E. SCOTT HARMON
Attorney at Law
Liberty Mutual Group
PO Box 6358
Boise, ID 83707-6358

Attorney for Respondents

TABLE OF CONTENTS

TABLE OF CASES

Page

STATUTES

STATEMENT OF FACTS

Respondents EG&G/WAUSAU'S statement of facts is nothing more than a one sided argument attempting to support the ultimate opinion of the Commission on the merits of the claim in an attempt to draw the Court's attention from the issue of reopening the hearing. In doing so, it carefully avoids mentioning the letter that Cheh received from the USW Worker Health Protection Program, in January 2007, that advised him, for the first time, that he had been exposed to high dose radiation at EG&G.

ISSUE

THE COMMISSION ABUSED ITS DISCRETION AND THE STANDARD FOR REOPENING A HEARING IS NOT THE SAME AS FOR GRANTING A NEW TRIAL

Respondents EG&G/ WAUSAU incorrectly argue that a party must support a motion to *reopen the hearing* with evidence from which the court concludes that "a retrial would produce a different result." They cite *Nepanuseno v. Hansen, 140 Idaho 942, 104 P. 3d 984 (2004)* which is actually an attorney malpractice case arising out of a workers compensation action.

This Court has clearly distinguished the *standard for granting a new trial from the standard applicable to reopening the hearing.* As this Court held in *Davison's Air Service, Inc., vs. Montierth, 119 Idaho 967, 968, 812 P. 2d 274, (1991)*, "Reopening a case to admit additional evidence is not analogous to granting a new trial."

The standard for reopening a hearing is one that requires a party to "show *some reasonable excuse*, such as oversight, inability to produce the evidence, or

ignorance of the evidence." *Idaho Power Co. v. Cogeneration, Inc., 134 Idaho 738, 9 P. 3d 1204 (2000).* In Idaho Power, the district court granted leave to reopen when a sophisticated party such as Idaho Power submitted evidence of legal confusion and legitimate misunderstandings surround the effect on the record.

The record is replete with Cheh's efforts to obtain an attorney, his location of an attorney who then forgot about the claim, his having to proceed pro se, a totally jumbled mass of documents and records, and painful examples of his inherent failure to grasp an understanding of the workers' compensation process. As if this was not enough, on its face, Cheh also was attempting to seek benefits despite his psychiatric condition, visual deterioration, and significant illness from radiation poisoning that prevented him from even travelling to the hearing. R. Vol. VII, p. [sic] 120, actually 1202. The Commission's decisions were based upon frustrations that arose from the confusion and misunderstandings that Cheh was operating under as reflected by the plethora of motions, requests, and irrelevant documents inundating the Commission's file.

A reasonable and detached view of the proceedings by the Commission which, over the past three decades have become more formalistic in its proceedings, would have shown a reflection by the Commission on the efforts of Cheh to obtain counsel, and the mishap that occurred after he had one for a short while, the manifest confusion reflected by the record in this matter, and the undersigned counsel's affidavit. These factors were not even discussed. Certainly the Commission's conclusion, coming after Referee Donohue's "Enough is Enough" outburst [R. Vol. VII p. 1123], that Cheh had "ample time to retain counsel prior to the January 15, 2009 hearing" [R. Vol. VII, p. 1318] is not supported by the record. Cheh contacted over twenty Idaho attorneys and finally one assisted him until that one "forgot" about the claim. R. Vol. VI, p. 1182.

Cheh's confusion over the process and his concerns about collusion between his former attorney, the IIC and the insurance adjuster are painfully abundant throughout the record. An illustrative example is found at R Vol. VI, p. 1064 in two emails from Cheh to Scott McDougal the IIC's Claims and Benefits Manager. This confusion is further revealed in Cheh's "REQUEST FOR A COPY OF MY IIC FILE AND THE IIC RULES, APPLIED FOR YOUR DENIAL OF SUMMARY JUDGMENT AND LANGUAGE PROBLEM, DEVELOPED WITH MR. SCOTT MCDOUGALL, IIC MANAGER, CLAIMS AND BENEFITS-MOTION." R. Vol. VI, p. 1072-1083. Cheh went so far as to complain to the Attorney General [R. Vol. IV p. 651], the Idaho Department of Insurance R. Vol. III, p. 531, and even Governor Otter. R. Vol. IV, p. 608-609. Cheh's convoluted attempt to venture into the legalize inherent in workers compensation is reflected by his 190 page "Claimant U. Cheh's REQUST for REVIEW and DECISION WHETHER 60dayS/1-YEAR IIC Rules met or not on his four MOTIONs filed 7/25/08, 7/30/08, 8/1/08 & 9/22/08, *Res Judicata* and the earliest telephone Hearing on or before 1/15/09 and clarification of the status of Unte Che's file at IIC, damage. and Non-availability of IIC consultants and concealment/deception by IIC and DOI senior management."

The total confusion of Cheh as to the process and what was occurring to him, was addressed in the "MOTION TO STAY BRIEFING SCHEDULE; REOPEN THE HEARING; AND PERMIT DISCOVERY TO THE EXTENT NECESSARY PURSUANT TO J.R.P.R. RULE 3(E), I.C. 72-719(C); I.C. 72-708; AND GENERAL EQUITABLE POWERS OF THE INDUSTRIAL COMMISSION TO CORRECT MANIFEST INJUSTICE" [R. Vol. VII, p. 1186] and the "AFFIDAVIT OF STARR KELSO." The standard of "some reasonable excuse" to reopen the hearing was certainly met. At the time of the filing of this motion the

case had not even been submitted on briefs. History reflects that the Commission has regularly reopened hearings, even after briefing is completed and a decision rendered in cases where the claimant has an attorney. *see Page v. McCain Foods, Inc., 145 Idaho 302, 179 P. 3d 265 (2008); Henderson v. McCain Foods, Inc., 142 Idaho 559, 130 P. 3d 1097 (2006); Mondragon v. A & L Reforestation, Inc., 130 Idaho 305, 939 P. 2d 1384 (1997).* Additionally, the Idaho Legislature specifically recognizes the fact that some cases will require a rehearing. I.C. 72-718.

It is respectfully submitted that the record in this matter establishes, without question, that a "reasoned" decision on the request to reopen the hearing would have granted Cheh the opportunity to present an orderly and fact based claim.

CONCLUSION

Cheh beset by insidious disease complications, failing eye site, and psychological problems, unable to travel, and unable to secure or keep an attorney via long distance communications, was fighting for his rights the only way that he was able to; by himself. As reflected by affidavit the undersigned became convinced after reviewing numerous faxes from Cheh, speaking with him for hours upon hours over the telephone, *and* despite the inherent communication problems that would be expected to exist between a person of Korean ancestry who processes information as a nuclear scientist of 2 + 2 must equal 4, and a north Idaho native graduate of Wallace High School with a legal education where 2 + 2 equals whatever a person wants it to equal on any given day, that "the actual factual history, that can be brought out with further testimony and evidence, reflects that Claimant provided timely notice." R. Vol. VI, p. 1177. The Commission's decision, holding what the undersigned foresaw as the result, can be viewed as nothing other than a manifest injustice.

The decision of the Commission should be reversed and this matter remanded to the Commission to permit the requested discovery and presentation of new evidence. The Commission should be reminded that Idaho's workers' compensation laws are to be liberally applied in favor of the employee, to enable the act to serve the humane purposes for which it was promulgated.

DATED this 19th day of May, 2010.

Starr Kelso, Attorney for Appellant Cheh

CERTIFICATE OF SERVICE: I certify that on the 19th day of May, 2010, a true and correct copy of the foregoing Reply Brief was mailed, with postage prepaid thereon, to:

E. SCOTT HARMON
Attorney at Law
Liberty Mutual Group
P.O. Box 6358
Boise, Idaho 83707-6358

Starr Kelso