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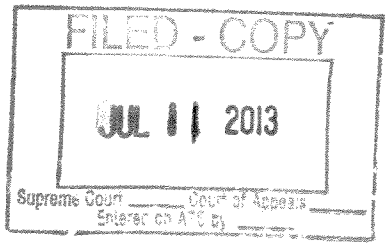
BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

MARCO ANTONIO FONSECA, Claimant/Appellant, vs. CORRAL AGRICULTURE, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants/Respondents.	) SUPREME COURT **No. 40578-2012** RESPONDENTS' BRIEF



BRIEF OF THE DEFENDANTS/RESPONDENTS

APPEAL FROM THE IDAHO INDUSTRIAL COMMISSION

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Thomas P. Baskin, Chairman
R.D. Maynard, Commissioner
Thomas E. Limbaugh, Commissioner

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Idaho Constitution and Statues

Other Authorities

I. STATEMENT OF THE CASE

A. PARTIES

Appellant in this matter (hereinafter referred to as Claimant) was the Claimant in a workers compensation proceeding before the Idaho Industrial Commission. In that proceeding, he sought benefits for a claim which had been denied by Respondents, Claimant's Employer, Corral Agriculture, Inc. (hereinafter Employer) and its Surety, the Idaho State Insurance Fund, (hereinafter Surety). Hereinafter, the Employer and Surety will be collectively referred to as Defendants. Claimant reportedly does not speak English, but an interpreter was present throughout the proceedings before the Industrial Commission. (Tr., p. 4, L. 25 - p. 5, L. 15.)

The Employer is a farm labor contractor who provides laborers to various farm operations. At hearing, the Employer estimated that, at the pertinent time, they would have employed 500 to 700 people. (Tr., p. 303, L. 15.) At the time of events giving rise to this matter, the Employer provided laborers to pick apples at Williamson Orchards, owned by John and Roger Williamson.

B. ALLEGED ACCIDENT

Claimant has alleged that on or about September 10, 2010, while working for the Employer, he suffered injuries when he fell 10 to 15 feet from a ladder, while picking apples at Williamson Orchards.

While Claimant has alleged that he reported his injury to the Employer when it occurred, the Employer has denied this. In fact, the Employer denied having any knowledge of this

alleged injury until December 10, 2010. (Tr., p. 297, L. 9 - p. 298, L. 13.) This would have been more than 90 days from the date of the alleged accident, well beyond the time allowed for giving notice of an industrial injury pursuant to Idaho Code § 72-701.[1]

C. PROCEEDINGS BELOW

Litigation commenced on May 4, 2012, when Claimant filed a complaint contesting the Defendants' denial of benefits for his alleged September 10, 2011, injury. This led to a hearing before the Industrial Commission. Due to issues regarding the availability of witnesses, the hearing was held in two parts. The first part took place on January 10, 2012, and is reported in the transcript, pages 1 through 151. The second part took place on March 2, 2012, and is reported in the transcript, pages 155 through 359.

At the January hearing, the Commission heard testimony from Claimant. At the March hearing, Claimant presented testimony from his daughter, Sarai Fonseca, and his wife, Ana Fonseca. In addition, Claimant called Roger and John Williamson, the owners of the orchard where the injury allegedly took place. Defendants presented testimony from Jorge Coronado, a supervisor for the Employer, and Roberto Corral, Jr. (aka "Tito"), one of the owners of Defendant Employer.

As Claimant's brief conspicuously and repeatedly points out, no testimony was received from Roberto Corral, Sr., Tito's father and the president of Corral Agriculture, Inc. While Claimant had attempted to subpoena this individual, at all times pertinent hereto, Mr. Corral, Sr.,

[1] That statute requires that the Employer must be given a notice of an injury "as soon as practicable, but not later than 60 days after the happening thereof."

was out of the country and beyond the reach of the Commission's subpoena power. (See Finding # 18, R., p. 57.)

In addition to the above-listed witnesses, over the objections of Defendants (Tr., p. 161, L. 25 - p. 164, L. 1), the referee admitted several written witness statements offered by Claimant from Nazario Marquez, Bruno Aguilar, and Feliciano Diaz. (Claimant's Exhibit 19.) These statements were written in Spanish and translated by Claimant's counsel's office staff.

Pursuant to the agreement of the parties, the hearing was held to decide two issues: first, whether Claimant suffered an accident in the course of his employment on or about September 10, 2012; and second, whether Claimant gave timely notice of any accident. (Tr., p.5, LL. 15 - 25.)

Following the hearing, the parties submitted briefs, and on November 8, 2012, the Commission issued its Findings of Fact and Conclusion of Law and Order (R., pp. 51- 66), wherein the Commission found:

1) Claimant had not proven that he suffered an accident while picking apples for Corral Agriculture and Williamson Orchard on or about September 10, 2010; and

2) All other issues are moot. (R., p. 65.)

Defendants respectfully submit that, based on the very same record, the Commission could just as easily have found the converse, i.e., (1) that Claimant had failed to give timely notice of the alleged accident (and, therefore, his claim was barred by Idaho Code § 72-701); and (2) the issue of whether Claimant suffered an accident as alleged is moot.

Under either scenario, the result would have been the same. The Claimant would not be entitled to any benefits. Similarly, under either scenario, the matter would boil down to a factual finding. As such, it cannot be disturbed or reversed on appeal, so long as it is supported by substantial and competent evidence. Talbot v. Ames Const., 127 Idaho 648, 904 P.2d 560 (1995); Olvera v. Del's Auto Body, 118 Idaho 163, 164, 795 P.2d 862 (1990).

Claimant apparently recognizes that the findings of the Commission were indeed supported by substantial, competent evidence. Thus, rather than attempting to challenge these findings directly, he has listed six specification of errors, wherein he alleges that the Industrial Commission "Erred as a matter of law or abused its discretion . . ." with respect to some procedural matters.

The errors alleged by Claimant pertain primarily to the Commission's decision not to admit a particular exhibit offered by Claimant (i.e., a medical record created in the Spanish language) and the Commission's **alleged** failure to enforce its own orders regarding various discovery matters.

In the arguments that follow, Defendants will demonstrate that the Commission did not err with respect to these matters. Nonetheless, to the extent any errors occurred, such errors were harmless and would not have changed the outcome of case. In any case, any such errors clearly do not rise to the level of "abuse of discretion" or error "as a matter of law," as Claimant has asserted.

By contrast, Claimant argues that, because he is a member of a "non-English speaking minority" (App. Brief, p. 13), the Commission's alleged errors amount, *ipso facto,* to

"fundamental and constitutional violations" of his rights to equal protection and due process. (App. Brief, pp. 12 - 15 and 19 - 22.) In so arguing, Claimant conflates the Commission's rulings on these routine procedural matters with violations of such fundamental rights as the right to marry (App. Brief, p. 13 and 20, citing Loving v. Virginia, 338 U.S.1 (1967)) or a criminal defendant's right to counsel. (App. Brief, p. 25, citing Gideon v. Wainwright, 372 U.S, 792 (1963).) As his remedy for these alleged errors, Claimant asks this Court to "reverse the decision of the Commission and find that Mr. Fonseca had an accident." (App. Brief, p. 39.)

II. ADDITIONAL ISSUES PRESENTED ON APPEAL

WHETHER SANCTIONS, IN THE FORM OF ATTORNEY'S FEES, SHOULD BE IMPOSED UPON CLAIMANT'S ATTORNEY PURSUANT TO RULE 11(a)(1) AND THIS COURT'S PREVIOUS RULING IN Talbot v. Ames Construction, 127 Idaho 648, 904 P.2d 560 (1995).

III. STANDARD OF REVIEW

A. SUBSTANTIAL AND COMPETENT EVIDENCE

This matter is an appeal from a factual finding by the Industrial Commission. Where the factual findings of the Industrial Commission are sustained by substantial and competent, albeit conflicting, evidence. This Court is "compelled to defer to the findings of the Industrial Commission [citation omitted] and will not reverse on appeal." Jensen v. Siemsen, 118 Idaho 1, 6, 794 P.2d, 271 (1990); Idaho Const. Art V § 9.

Substantial and competent evidence is more than a scintilla of proof, but less than preponderance; in short, it is relevant evidence, which a reasonable mind might accept to support a conclusion. Perkins v. Croman, Inc., 134 Idaho 721, 9 P.3d 524 (2000).

B. ABUSE OF DISCRETION

Claimant has made allegations the Industrial Commission abused its discretion. In reviewing whether a lower court (or, in this case, the Industrial Commission) abused its discretion, the sequence of this Court's inquiry is: (1) whether the [Industrial Commission] properly perceived the issue as one of discretion; (2) whether the [Industrial Commission] acted within the boundaries of discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the [Industrial Commission] reached its decision by an exercise of reason. Sun Valley Shopping Center v. Idaho Power Company, 119 Idaho 87, 94, 803 P.2 993, 1000 (1991).)

C. ERROR AS A MATTER OF LAW

Claimant has also made allegation that the Industrial Commission "erred as a matter of law." Error will not be presumed on appeal but must be affirmatively shown by an appellant. State v. Crawford, 104 Idaho 840, 841, 663 P. 2d 1142 (Ct. App. 1983). The appellate court will not search a trial record for unspecified errors. Id.

D. HARMLESS ERROR

Defendants assert that, to the extent any errors were committed by the Industrial Commission, such error were harmless. This Court will not reverse the decision of the Industrial Commission when evidentiary errors are harmless. Mazzone v. Texas Road House, Inc., 2013 Opinion No. 67 (filed June 4, 2013); Hagler v. Micron Technology, Inc., 181 Idaho 596, 798 P.2d 55 (1990).

IV. FACTS AND PROCEDURAL BACKGROUND

A. INTRODUCTION

Claimant in this matter is an agricultural worker who alleges that he suffered various injuries when he fell from a ladder while picking apples on September 10, 2010. The current proceeding is an appeal from the Industrial Commission decision of November 8, 2012, which found that Claimant had failed to prove the occurrence of this alleged accident. (R., pp. 63 and 65.) Also before the Commission in that proceeding was the question of whether the Claimant gave timely notice of the alleged accident, as would be required by Idaho Code § 72-701. (R., p. 51; Tr., p. 5, LL. 15 - 20.) However, the Commission did not reach this issue, holding that its finding regarding the occurrence (or non-occurrence) of the accident rendered the remaining issue moot. (R., pp. 63 and 65.)

In reaching his conclusion that Claimant had failed to prove the occurrence of the accident, the referee noted that "the credibility of witnesses is pivotal . . ." (Finding of Fact #29, R., p. 60.) In particular, he noted that Claimant's credibility was pivotal and that:

> The testimonies of all other individuals supposedly present at or near the time of Claimant's alleged accident do not support, but rather refute Claimant's account of an accident.

(Finding of Fact #36; R., p. 62.)

As the Commission's decision turned on a factual finding, the only appropriate issue on appeal is whether the Commission's findings are supported by substantial and competent evidence. In fact, in opening the argument section of his brief, Claimant expressly acknowledges this is the appropriate standard of review. (App. Brief, p. 8.)

Despite this acknowledgment, the remainder of Claimant's brief appears to tacitly admit that the Commission findings were supported by substantial and competent evidence, or at the very least, he does not make any serious contention to the contrary. Instead, he alleges six specification errors pertaining to some evidentiary and discovery matters.

Claimant's allegations regarding these procedural matters are discussed in section IV (C) and *infra.* However, before addressing those issues, the following section summarizes the facts which support the Commission's findings and provides the Court with citations to the portion of the record which supports those findings.

B. FACTS REGARDING ALLEGED ACCIDENT

Claimant devotes pages 2 - 8 of his brief to re-arguing the facts of the case. However, as noted above, the Commission's findings turned largely on the Claimant's credibility or lack thereof. Defendants submit that the facts supporting the Commission's findings were ample. However, rather than re-arguing those facts here, Defendants simply refer the Court to the Post-Hearing Brief of Employer and Surety Defendants which was filed with the Industrial Commission on July 16, 2012. (This, along with Claimant's briefs, is among the "Additional Documents" which the Commission submitted to the Court with the Agency Record.) As Defendants noted at page 2 therein:

> The legal analysis involved in this case is nothing more than a careful review of the facts provided to the referee. Therefore, Defendants' brief will be organized in an effort to set out for the referee the **constant and numerous inconsistencies** of the claimant's version of the facts, which when taken together, support a denial of this claim. (Emphasis added.)

As noted above, the referee, as affirmed by the Commission, agreed and found that Claimant had failed to prove that he suffered an accident at the time and in the manner he alleged. (R., pp. 63 and 65.)

Rather than reiterating the factual arguments previously presented to the Commission, the summary set forth in this section will focus on the specific factual findings which form the gravamen of the Commission's holding and will also provide citations to the portions of the record which support those findings.

As noted above, the Commission found that the credibility of witnesses was "pivotal" (Finding # 29, R., p. 60), and the referee explicitly found that Claimant's credibility was "suspect." (Finding # 37, R., p. 62.) The Commission aptly and accurately summarized Claimant's account of events in its Findings of Fact ## 7 -13 (R., pp.54-56).

As the Commission noted, beginning at Finding of Fact # 7 (R., p. 54), Claimant testified that, on September 10 while picking apples at Williamson Orchard, he was near the top of a 10-15 foot ladder when the ladder broke causing him to fall, grabbing tree branches as he fell. (Tr., p. 75, LL. 1-13.) He testified that five or six co-employees saw or heard the fall and that he lay on ground for about 30 minutes after the fall. (Tr., p.76, LL. 6 - 13.) As the referee noted, Claimant claims he reported this incident to one of the Williamson brothers and showed him the broken ladder. (R., p. 54; Tr., p. 78, LL. 5 - 11; p. 113, LL. 21 - 24.)

Both Roger and John Williamson testified at hearing. However, as both brothers testified, John handles hiring and organizing the crews (Tr., p. 217, LL. 15 - 18; p. 240, LL. 12 - 18) and Roger stated that any information he had concerning the supposed accident would have

come from his brother John. (Tr., p. 227, LL.13 - 16; see also Finding of Fact # 21, R., p. 57.) Thus, if Claimant had reported this to either brother, it clearly would have been John.

However, as the Commission found, John testified that the first he heard of Claimant's alleged accident was in February of 2011. He denied hearing anything about Claimant's alleged accident in the fall of 2010. He did not recall seeing Claimant on the ground, nor did he recall seeing a broken ladder anywhere near Claimant. (Finding of Fact # 21, R., p. 57 - 58; Tr., p. 245, LL. 20 - 24; p. 263, LL. 5 - 17; p. 267, L. 17 – p. 268, L. 10.) He further stated that, had such an incident occurred, there is no doubt he would have been told about it, and he would not have forgotten about it. (Tr., p. 263, L. 18; p. 265, L. 3.) John further testified that the orchard would have supplied ladders and other equipment for this job. (Tr., p. 261, LL. 21 - 24.) As he told the referee, the orchard had 15 to 20 ladders, and he was not aware of any ladders breaking in the fall of 2010. (Tr., p. 277, LL. 10 - 18.) As the referee noted in Finding # 34, "There is no indication in the record that the allegedly broken ladder was ever located." (R., p. 62.)

Similarly, as the Commission noted at Finding of Fact # 8 (R., pp. 54 - 55), Claimant also testified that he reported the incident to Tito about five times on the day of the accident (Tr., p. 113, LL. 16 - 20; p. 114, LL. 15 - 18) and that he told him again about a week after the accident. (Tr., p. 119, LL. 3 - 11.) By contrast, Tito testified that he knew nothing of the alleged accident prior to December 2010. (Tr., p. 297, L. 9; p. 298, L.15; see also Finding # 35, R., p. 12.)

As the referee noted at Finding # 19 (R., p. 57), Tito testified that, had a ladder been broken by one of his employees, he would have heard about it, as his company would be

required to replace any such broken equipment. (Tr., p. 302, LL. 17 - 23.) As the Commission found, Tito affirmed he was never notified of any broken ladder. (R., p. 57.)

As also noted in Finding # 8 (R., pp. 54 -55), Claimant testified that he reported the fall to Jorge Coronado before leaving work that day (Tr., p. 81, LL. 15 - 20) and that he told him again, week after week, at least 10 time over the ensuing 60 days. (Tr., p. 91, LL. 24.) Here again, Claimant's testimony is contradicted by the testimony of Coronado, who denied any knowledge of the accident. (Tr., p. 283, L. 21; p. 285, L. 15; see also Finding #35, R., p. 62.)

In addition, the Commission found that Claimant's account of events was inconsistent with medical records which were generated shortly after the alleged date of injury. As noted at Finding # 36 (R., p. 62), Claimant was seen at Terry Reilly Health Service on September 24, 2010, and October 11, 2010. These records, which can be found at pages 14 - 17 of Defendant's Exhibit 1 are discussed in further detail at the Commission's Findings ## 24 and 25. (R., p. 58 - 59.) As noted therein, these records pertain to treatment for stomach and intestinal problems and neither of these records make any mention of a reported fall or any back, hip, or neck pain. Despite this, as noted at Finding # 36 (R., p. 62), Claimant insisted that he had reported his accident to these providers. (Tr., p.131, L. 12 - p.132, L. 5; p. 132, L. 17 - p.133, L.10.)

As the referee noted in Finding # 26 (R., p. 59), the earliest medical documenting Claimant's alleged fall was dated December, 15, 2010. This would have been more than three months after the date Claimant alleges the injury occurred and apparently after Claimant retained or at least met with counsel. (R., p. 59.)

Defendants acknowledge that Claimant presented what could be construed as supportive testimony from his daughter, Sarai Fonseca, and his wife, Ana Fonseca. Their testimony is discussed in Findings ## 16 and 17 (R., pp. 56 - 67). While the referee clearly took their testimony into account, he did not find it sufficient to establish Claimant's claim of injury. At Finding # 30 (R. p. 60), the referee stated:

> Claimant's testimony of an accident is supported by the testimony of his wife and daughter who affirmed they saw him in pain on September 10, 2010, and heard his account of having fallen from a tree or ladder while picking apples. However, neither Claimant's wife nor daughter witnessed the accident, saw the allegedly broken ladder, or witnessed Claimant's conversations with John Williamson, Coronado, or Tito.

Similarly, contrary to Claimant's representation, in subheading VI(2) of his brief (App. Brief, p. 40), the Commission's decision clearly did take into account the translated written witness statements offered by Claimant (Claimant's Exhibit 19), which were admitted over the objections of defense counsel. (Tr., p. 161, L. 25 - p. 164, L. 1.) In Finding # 31 (R., p. 60), the Referee stated:

> Claimant submitted the translated signed statements of three Corral Agriculture employees, Nazario Marquez, Bruno Aguilar C., and Feliciano Diaz, who were Claimant's co-workers. Diaz's statement is a single sentence, does not claim to have witnessed any accident, and makes no mention of any date. Marquez's entire statement is two sentences long; Aguilar's statement is a single sentence. The statements of Marquez and Aguilar both assert that they were co-workers of Claimant and that they witnessed an accident on September 10, 2010. Neither contains even a single word describing the alleged accident and neither expressly identifies Claimant as the victim of the alleged accident. All of the statements are undated. Without opportunity to examine the authors of these statements, the weight afforded this evidence is less than that attributed to the testimony of the hearing witnesses.

C. CLAIMANT'S ALLEGATIONS REGARDING PROCEDURAL ERRORS

As noted in section IV(A) herein, Claimant does not appear to seriously contend the Commission's findings were not supported by substantial and competent evidence. Instead, he identifies six specifications of error wherein he alleges the Commission "abused its discretion" or "erred as matter of law" with respect to its rulings or actions regarding various discovery or evidentiary issues. Accordingly, a brief review of the facts surrounding these procedural matters is in order.

Claimant's specifications of err ## I through IV all pertain to the Commission's decision not to admit one specific exhibit offered by Claimant, consisting of a medical record written in Spanish. In addition, Claimant's specification of error #I asserts that the Commission erred when it declined his request to augment the record. His specifications ## V and VI pertain to various discovery matters.

The following sections provide a brief review of the procedural history related to these matters. It is also hoped that this review may aid the Court in discerning or deciphering the thrust of Claimant's arguments.

1. Spanish Language Medical Record

As noted above, Claimant's first four specifications of error all pertain to the Commission's decision not to admit an exhibit offered by Claimant consisting of a medical record written in Spanish. At pages 12 and 13 of his brief, Claimant describes the Commission's action in this regard as the adoption of a "new rule."

The record in question was offered as part of a compilation of medical records and bills which Claimant had offered as Claimant's Exhibit 6. The parties and the referee discussed the proposed exhibit beginning at Transcript, page 37, line 22. (See Tr., p. 37, L. 22 - p. 41, L. 15.) In the course of these discussions, defense counsel raised objections, not only based on the fact that the document was in Spanish but also on issues of relevancy. Specifically, defense counsel stated:

> Page 51 is in Spanish. I cannot read page 51. Fifty-two is in English, but I object on the grounds of relevancy as to the issues to be decided by the Commission. Pages 53 and 54 are in Spanish and they are illegible to me. They are also, in my opinion, Your Honor, irrelevant as to the issues to be decided by the Commission.

(Tr., p. 40, LL. 2 - 7.)

The referee proceeded to admit the bulk of Claimant's Exhibit 6, except for the pages which were in Spanish. The referee explained his ruling, stating:

> REFEREE TAYLOR: We have considered at length the proposed exhibits and I have just discussed briefly with counsel off the record, but let me indicate on the record that on further reflection as to the admissibility of Claimant's Exhibit 1, pages four, five and six and Claimant's Exhibit 6, page 54, a portion or in some cases all of those pages of claimant's exhibits are in Spanish and I have indicated to counsel that it is my conclusion that **those portions that are in Spanish of those named exhibits will not be admitted and the reason for that is that they are not – they are not readily decipherable to all the parties** in this proceedings and I have also indicated to counsel that my rule today is to the admissibility of those particular pages of those two exhibits, **would not preclude claimant from obtaining a translation of that information provided in preparation for our March 2nd continuation date in this proceeding**. So, let me just pause there and, **Counsel, if there is anything you'd like to place on the record** in response to my ruling as to those pages you may do so. Mr. Hammond?
>
> MR. HAMMOND: So, my understanding is that all records presented to the Commission as exhibits shall be in English. Is that in essence – as I understand it

> – I'm just trying to understand. If I have a document that I wish to be admissible it has to be in English or translated in English.
>
> REFEREE TAYLOR: I think that is a fair summary. Yes. We need **it in a form that the Commission can understand it and certainly all participants**, the parties. (Emphasis added.)

(Tr., p. 72, L. 15 - p. 73, L 17.)

Throughout his brief, Claimant argues that this requirement that exhibits be in a form that the Commission and "all participants" can understand amounts to a violation of his equal protection rights because "It places an unequal burden on minor (sic)[2] Claimants who do not speak English . . ." (App. Brief, pp.12, 13, 19, and 21.)

What Claimant's argument fails to consider is the unequal burden admission of such a record would have placed on parties or participants who do not speak or read Spanish. Though not part of the record, it is widely known that Claimant's counsel is fluent in Spanish. By contrast, it is part of the record that defense counsel was not.[3] As set forth above, defense counsel stated on the record, "Page 51 is in Spanish. **I cannot read page** 51... Pages 53 and 54 are in Spanish and **they are illegible to me.**" (Tr., p. 40, LL. 2 - 6, emphasis added.)

Contrary to Claimant's mischaracterization at section IV of his argument (App. Brief, pp. 22 - 25), the Commission did not "withdraw" the interpreter. The interpreter was present and available throughout the hearing. The Commission simply declined to admit an exhibit which could not be readily understood by "all participants." Clearly, both Claimant and his counsel had

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2 As Claimant in the matter is not a minor, Defendants presume that passage was intended to read "minority."

3 At the time of hearing, Defendants were represented by attorney Max Sheils. As set forth in the Notice of Substitution filed December 26, 2012, the undersigned substituted in for Mr. Sheils, following his retirement at the end of the year. The undersigned represents that he has recently spoken to Mr. Sheils and confirmed that he does not speak Spanish.

prior knowledge of the entire contents and meaning of the document in question, while defense counsel did not. Had the referee admitted the record and forced defense counsel to rely solely on the interpreter to ascertain its contents, this clearly would have served to his disadvantage and such an action would have indeed placed "an unequal burden" upon Defendants.

2. **Request to Augment Record**

As noted above, Claimant's specifications of error ## I through IV all pertain to the Spanish language medical record. In addition, however, his specification of error # I also alleges the Commission erred when it declined to augment the Agency Record. This aspect of Claimant's argument requires some further discussion and background.

In pp. 9 - 15 of his brief, Claimant asserts that the Commission erred in providing its Agency Record to this Court. As with the errors asserted in his arguments II through IV, he somehow relates this error to the Spanish language medical record.

Claimant devotes several pages of his brief to reciting or reprinting some of the Idaho Appellate Rules (IARs) related to the Agency Record. However, he fails to identify which of these rules the Commission supposedly violated. Furthermore, even after several readings of his brief, it is difficult to discern precisely what it is that Claimant contends is missing from the Agency Record.

Apparently, Claimant's grievance stems from the fact the Commission's Agency Record did not include a supposed "audio" of an off-the-record discussion between the parties and referee regarding the Spanish language medical record. At page 12 of his brief, Claimant asserts that "Claimant had the right to augment the record upon receipt of the **audio** to include the 'new

rule' and Claimant's objection to such 'new rule'. . ." Similarly, on page 13, Claimant asserts "The denial of access to **such audio** prevented and continues to prevent Claimant from augmenting the records with evidence of the Industrial Commission's 'new rule' and the above objections . . ." He goes on to say "Claimant has independently attempted to obtain **such audio** without success." (Emphasis added.)

Defendants respectfully submit that the likely reason that Claimant's attempts to independently obtain "**such audio**" have been "without success" is simply because "**such audio"** does not exist. The Commission has clearly informed Claimant to this effect long before Claimant submitted his brief. In the Commission's Order Denying Claimant Request to Augment the Record dated January 25, 2013 (R., pp. 89 - 92), the Commission stated:

> However, the Commission is unable to grant Claimant's request, because **Claimant has requested inclusion of documents that do not exist**. No hearings in this case were held on October 26, 2011 or December 30, 2011. On those dates, the Referee conducted telephone conferences with the parties. Motions and orders related to those conferences have been included in the agency record. **No additional documents related to those conferences are part of the Commission's legal file**. (Emphasis added.)

(R., p. 90.)

Defendants respectfully submit that, contrary to Claimant's assertion, he does not have "the right to augment the record" with non-existent documents or recordings, and the Commission did not "abuse its discretion" when it failed to produce such non-existent records.

Furthermore, Defendants submit that, whatever off-the-record discussion may have ensued, the referee provided an adequate **on-the-record** explanation of his ruling in the passage quoted at pp. 16 - 17 herein. (Tr., p. 72, L. 15 - p. 73, L 17.)

3. **Discovery Issues**

Claimant's fifth and sixth specifications of error pertain to discovery matters. His fifth specification of error (App. Brief, pp. 25 - 35) once again alleges that the Commission "abused its discretion or erred as matter of law" when it declined to grant the relief he requested in two separate motions for sanctions. (R., pp. 9 - 12 and 38 - 40). Notably, the relief requested included a request that "Defendants' pleadings be stricken and **default be entered . . .**"[4] (See Page 2 of Claimant's First and Second Verified Motions for Sanctions, R., pp. 11 and 39. (Emphasis added.)

In other words, Claimant argued to the Commission that, because of Defendants' **alleged** failure to comply with his discovery requests, he should simply win the case, and the Commission should simply enter judgment in his favor. He essentially makes the same argument to this Court. At page 39 of his brief, he asks the Court to "reverse the decision of the Commission and find that Mr. Fonseca had an accident."

What Claimant's argument fails to disclose is that the Commission expressly found that Defendants did indeed comply. In its order of January 6, 2012, the Commission denied Claimant's motion for sanctions, finding that "Defendants have produced all relevant information in their control or possession responsive to the Commission's November 4, 2011, Order." (R., p.49.) This order followed Defendants' Notification of Compliance, filed

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4 As alluded to at pages 28 and 33 of his brief, in his Second Verified Motion for Sanctions (R., pp. 38 - 43) as alternative relief, Claimant asked the "Commission to certify the facts to the District Court of Canyon County Idaho pursuant to Contempt Power under Idaho Code § 72-715. (R., p. 39.) That statute outlines the steps the Commission can or should take in the event a person "disobeys or resists any lawful order . . ." of the Commission. Such statute is clearly inapplicable here, since, as discussed above, the Commission expressly found that Defendants had complied with the order in question.

December 15, 2011, wherein defense counsel attested that he had indeed "hand delivered to Claimant attorney Hammond all of the records in the possession of the Defendant Employer relevant to the November 4, 2011, order. (R., p.48.) Defense counsel reiterated this representation at the time of the hearing. (Tr., p. 49, LL. 2 - 7.)

Notwithstanding the Commission's order, Claimant would apparently have this Court find that Defendants' compliance with discovery was somehow insufficient. Despite defense counsel's representation and the Commission's finding that Defendants had produced all relevant information which was in their "control or possession," Claimant continues to accuse Defendants of such things as "playing games and withholding evidence." (App. Brief, p.29) and "withholding vital information regarding potential eyewitness. . ." (App. Brief, p. 34.)

In reviewing pages 25 - 35 of his brief, it appears that Claimant's central grievance is that the Employer was unable to provide Claimant with a **current** addresses (see App. Brief, pp.28, 29, and 34) of co-employees who may have worked with Claimant on the day of the alleged injury.

In evaluating legitimacy of Claimant's grievance, it may aid the Court to have some background on the nature of the Employer's business. As the referee summarized at Finding of Fact # 2 (R., p. 53), the Employer's work assignments were "dynamic," employees generally worked periodically, and turnover among the work crews was high. (R., p.53.) However, testimony of Tito Corral explains this in a bit more detailed. He testified as follows:

> Q. I guess – and I don't know the industry that well, but could you explain to me how it works when you might have ten people show up one day to work in an orchard or in a hop field and the next day you might have another ten or 15 people

show up, but they are different people. They come and they go. Is that – I mean how does that work?

A. Yeah. It's just like some of them – you know, it's hard, because like say they don't – they don't all have vehicles, so they either get a ride from somebody or, you know, sometimes the guys gets – they only have a certain amount of time to get to a certain field or where ever they are working. So, if that guys – whose is ever giving them the ride gets to that house and either he honks or knocks or whatever he does for that purpose and he doesn't come out, he will leave them that day, you know. So, he's got to be ready for when he shows up, because he might give a ride to two or three guys. So, he's got to make a schedule. Like say if he's in Boise and he has got to pick up three people and drive all the way to Marsing, well, he doesn't have enough time sometimes to wait around, you know. So, that's how you miss a lot of people. The second – you know, like say another thing is we – a lot of people don't show up. Sometimes maybe, you know, like say maybe they don't want to go to work or maybe they got another job or maybe they have got an interview or maybe they have got to go – you know, any – sometimes you don't get the same amount of people. **That's why you don't know everybody, because you get different people all the time**. You know, like say – like on Jorge's crew, he might have 20 guys one day and the next day he might have ten guys. And I don't – I don't know everybody personally, you know, because they – say sometimes I got – you know, I have had 800 guys in one field. You know, I don't know every single person.

Q. So, how does it work when you have – Jorge has a crew that needs 20 people. The 20 people show up on Monday, but, then, Tuesday rolls around and he only has ten or 12, I mean how do you get a job done?

A. Well, like say if – like – usually like they don't specify exactly how many guys, you know. Sometimes they do and sometimes they don't, depending on what we are doing. Like I say like Jorge's crew, when we are working in the apples and he just needs ten guys. Well, if he doesn't have enough – if he doesn't have the ten guys, I will take a guy off another crew and, you know, take them over to Jorge's crew or whose ever crew, you know, because we have got a different foreman, so – and, then, I replace that guy with another guy. So, I mean it just – it can't – it doesn't stop because one guy doesn't show up for work or ten guys don't show up, you know. Everything keeps going as it – as we can.

Q. So, if Jorge realizes that he is short one or two or three or whatever number he is, he will give you a phone call and you will figure it out?

A. Yeah. Yeah. That's how it usually works.

Q. And so if you have a particular employee who shows up for work on Monday and Tuesday, but then, doesn't show up for work Wednesday and Thursday, but shows for work Friday, that's fine?

A. Yeah.

(Tr., p. 303, L. 21 – p. 306, L. 6.) (Emphasis added.)

Given the nature of the Employer's business, recreating the makeup of any given crew several months after the fact would be no easy task. Given the itinerant nature of its workforce, providing current addresses for such individuals would be even harder.

Nonetheless, as defense counsel represented, and as the Commission found, Defendants did indeed produce all such relevant information which they had in their control or possession and control. (R., pp. 48 and 49.) If Claimant had reason to believe that Defendants had additional relevant documents within their "possession or control," Defendants respectfully submit that is an issue he should have raised with the Commission, prior to hearing, and not with this Court, for the first time on appeal.

Claimant's arguments ## V and VI also complain about the lack of testimony from the Employer's president, Roberto Corral, Sr. As noted previously, this is because Mr. Corral was out of the country. As set forth in the Commission's Finding # 18 (R., p. 57), the reasons for his absence was clearly not voluntary. Thus, contrary to the implication of Claimant's argument, his absence was clearly not procured or intended for the purpose of thwarting Claimant's efforts to bring a claim.

Notably, Claimant's brief makes no suggestion as to how or why he believes the testimony of Roberto Corral, Sr., would have contravened that of the other witnesses, including Tito Corral, Jorge Coronado, or John Williamson. Nonetheless, in section VI (1) of his argument (App. Brief, p. 36), he rather boldly asserts that the witnesses who were not heard would have "likely altered the outcome of his trial." (See also App. Brief, p. 39.)

Finally, Defendants note that, in section VI (2) of his brief (App. Brief, p. 40), Claimant makes a rather blatant misrepresentation to the Court stating:

> The decision of the Commission is not supported by substantial and credible (sic) evidence because it **did not account for** the witness statements presented by Mr. Fonseca . . . (Emphasis added.)

He then proceeds to explain that the statements to which referred were the written statements of Nazario Marquez and Bruno Aguilar. However, as discussed, the Commission clearly did take these into account but simply found that they were not persuasive. (See Finding # 31, R., p. 60, as quoted at p. 14 herein.)

V. ARGUMENT

A. THE FINDINGS OF THE INDUSTRIAL COMMISSION ARE FIRMLY SUPPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE

As noted previously, this matter boils down to factual findings by the Industrial Commission. Claimant had made no contention to the contrary. Where the factual findings of the Industrial Commission are sustained by substantial and competent, albeit conflicting, evidence, this Court is "compelled to defer to the findings of the Industrial Commission [citation omitted] and will not reverse on appeal. Jensen v. Siemsen, 118 Idaho 1, 6, 794 P.2d, 271 (1990); Idaho Const. Art V § 9. As this Court has often stated, "It is not our role on appeal to retry the case, to weigh the evidence as a trier of the facts or to determine the facts of the case." Id.

Similarly, as this Court stated in Talbot v. Ames Const., 127 Idaho 648, 904 P.2d 560 (1995):

> [T]he law is well established that this Court does not scrutinize the weight and credibility of the evidence relied upon by the Commission and will only disturb the Commission's findings as to weight and credibility only if they are clearly erroneous.

While there may have been conflicting evidence in this case, there can be little doubt that the evidence relied upon by the Industrial Commission met the standard of substantial and competent evidence.

Substantial and competent evidence is more than a scintilla of proof, but less than preponderance; in short, it is relevant evidence, which a reasonable mind might accept to support a conclusion. Perkins v. Croman, Inc., 134 Idaho 721, 9 P.3d 524 (2000). In reviewing

a decision from the Industrial Commission in a worker's compensation case, all facts and inferences are viewed in light most favorable to the party who prevailed before the Commission. Id. See also Taylor v. Soran Restaurant, Inc., 131 Idaho 525, 527, 960 P.2d 1254, 1256 (1998).

The record in this case clearly contains much more than a scintilla of proof to support the Industrial Commission's conclusion that Claimant had failed to prove that he was injured at the time and in the manner he has alleged. As noted previously, the Commission found the credibility of the witness was "pivotal" in deciding this case and that Claimant's credibility was suspect. (R., pp. 60 and 62.)

While the referee commented on what this Court has described as "observational credibility" (see Finding of Fact # 37, R., p. 52), Claimant's "substantive credibility" is highly suspect as well. As this court recently noted in Harris v. Independent School Dist. No.1, 2013 Opinion No. 65, p. 10, 11 (filed May 24 2013), "substantive credibility" can be judged grounds of numerous inaccuracies or conflicting facts.

As set forth in section II B herein, like the claimant in Harris, Claimant's credibility in this matter can be judged on numerous inconsistencies and conflicting facts. For example, Claimant testified that he reported the incident to both Jorge Coronado and Tito Corral on the day it occurred and multiple times thereafter. Each of these individual have denied this. Claimant also testified the he reported the injury to John Williamson on the day occurred. Mr. Williamson denied this. Claimant also testified that he showed Mr. Williamson the broken ladder. Mr. Williamson denied this and denied knowledge of any broken ladders during the period in question.

Claimant also testified that he reported the injury to the medical providers at Terry Reilly Health service where he was seen on September 24, 2010, and October 11, 2010. The records from Terry Reilly contradict this. (See Finding # 36, R., p. 62.)

Clearly, these "constant and numerous inconsistencies" provide sufficient support for a reasonable mind to conclude that Claimant was being less then truthful about the alleged accident.

As the court noted in Harris:

> It is the role of the Industrial Commission, not this Court, to determine the weight and credibility of testimony and to resolve conflicting interpretations of testimony. On appeal, this **Court will not conduct a de novo review** of the evidence or consider whether it would have reached a different conclusion from the evidence presented. (Emphasis added.)

Harris at page 10.

Notwithstanding the well-established principle, Claimant's entire appeal is, in effect, asking this Court to conduct precisely such a *de novo* review of the evidence. In fact, he goes beyond that. He is not merely asking this court to re-weigh the evidence that was previously presented. He is asking the Court to reverse the Commission based upon his own self-serving assumptions about evidence that was not presented. (See App. Brief, p. 39.)

For the reasons outlined above, it is clear that the findings of the Commission were well supported by substantial, competent evidence, and therefore, this Court should affirm the same.

B. CLAIMANT HAS FAILED TO DEMONSTRATE ANY ERRORS OR ABUSE OF DISCRETION ON THE PART OF THE INDUSTRIAL COMMISSION

As set forth in the preceding section, the Commission's findings were well supported by substantial, competent evidence and should be affirmed. In fact, Claimant's brief makes no serious contention to the contrary. Instead, he raises six specifications of error, each of which alleged that, in some way or another, the Commission "erred as a matter of law" or "abused their discretion." In fact, it is not until Claimant's sixth and final specification of error where he even mentions the substantial, competent evidence standard. Even then, he raises this issue only in the context of yet another allegation that the Commission "abused its discretion."

1. The Commission Did Not Abuse Its Discretion

At page 36 of his brief, Claimant correctly recites the appropriate standard review for determining whether a court or agency abused its discretion. As Claimant noted, "This court determines (1) whether the court properly perceived the issue as one of discretion; (2) whether the trial court acted within the boundaries of discretion and consistently with the legal standards applicable to the specific choices available to it; and (3) whether the trial court reached its decision by an exercise of reason. (See Claimant's brief, p. 36, citing Sun Valley Shopping Center v. Idaho Power Company, 119 Idaho 87, 94, 803 P.2 993, 1000 (1991).)

While Claimant has correctly quoted the appropriate standard of review, what he has failed to do, **with respect to each of his alleged specifications of error**, is identify which leg of

this three-legged test the Commission failed to meet. Instead, Claimant apparently asks this Court to find that, because the Commission did not give Claimant what he desired, it therefore abused its discretion.

As discussed previously in section(s) IV(C)2 herein, with respect his specification of error # I (App. Brief, pp. 9 - 15), Claimant would have this Court find that the Commission abused its discretion when in failed to produce an audio recording which simply did not exist.

Similarly, in his specification of error # I - IV (App. Brief, pp. 15 - 25), Claimant would have this Court find that the Commission abused its discretion when the referee required that exhibits be "readily decipherable" and "in a form that the Commission [and all participants] can understand it." (See Tr., p. 72, L. 15 – p. 73, L. 17.

With respect to his specification of error # V, Claimant would have this Court find that the Commission "abused its discretion when it believed defense counsel, when he represented to the Commission that he had provided to Claimant's counsel "all records in the possession of defendant employer" relevant to the Commission's order of November 4, 2011. (R., p. 48 and 49.)

Finally, Claimant's specification of error # VI (App. Brief, pp. 36 - 41) would have this Court find that the Commission abused its discretion when it declined enforce a subpoena across international borders.

2. The Commission did not "err as a matter of law

As with his assertions of "abuse of discretion," virtually all of Claimant's specifications of error allege (in very non specific way) that the Commission somehow "erred as a matter of

law." As with his use of the phrase "abuse of discretion," Claimant appears to utilize this phrase as if it were some sort of magical invocation which somehow would enable him to avoid application of a standard (substantial and competent evidence), under which, he clearly could not prevail.

The problem with Claimant's assertions in this regard is that he has failed to identify which law the Commission supposedly "erred as a matter of . . ." As the Court of Appeals noted in State v. Crawford, 104 Idaho 840, 663 P. 2d 1142 (Ct. App. 1983), "Error will not be presumed on appeal but must be affirmatively shown by an appellant." Id at 841. The appellate court will not search a trial record for unspecified errors. Id.

For the most part, Claimant has failed to identify any specific law or rule which he believed the Commission violated. However, one possible exception is his Argument # II (App. Brief, pp. 15 -18) wherein he asserts that the Commission violated its own rule. Specifically, he refers to "The Idaho Judicial Rules of Practice and Procedure G." (App Brief, pp. 15 and 17.) He appears to assert that this rule would have mandated admission of the Spanish language medical record.

The problem with this argument is twofold. First, there is no such rule, and secondly, the rule which Claimant apparently intended to cite does not stand for the proposition which he asserts. In fact, Claimant's argument in this regard would appear to be an attempt to mislead the Court.

Based on the partial quotation set forth at page 15 of his brief, the undersigned has been able to discern that Claimant is apparently referring to Rule **10 (G)** of the Industrial

Commission's Judicial Rules of Practice and Procedure (J.R.P.). These rules can be found on the Industrial Commission website at www.iic.idaho.gov. However, to aid the Court's review, a copy this rule 10(G), J.R.P., is attached as addendum A to this brief.[5]

At pages 15 - 18 of his brief, Claimant apparently argues that Rule 10(G), J.R.P., mandates the admission of the Spanish language medical record. However, this is clearly not the case. At page 15 of his brief, Claimant provides a selectively edited partial quotation of Rule 10(G), J.R.P. However, when read in its entirety, the rule provides:

> G. Medical Reports.
> Any medical report(s) existing prior to the time of hearing, signed and dated by a physician, or otherwise sufficiently authenticated, **may be offered** for admission as evidence at the hearing. **The fact that such report(s) constitutes hearsay shall not be grounds for its exclusion from evidence.** (Emphasis added.)

As Claimant suggests at a page 16 of his brief, "the Court must give effect to all the words in the provisions of the statute so that none will be void." (App. Brief, p. 16, citing to Ameritel Inns, Inc., v. Pocatello Chubbuck Auditorium District, 146 Idaho 202, 204, 192 P.3d 1026, 1028, (2008).) This reasoning would certainly extend to the bold faced words, as quoted above, which Claimant has conveniently omitted from his selectively edited version of the rule.

In discussing the Commission's alleged violation of this rule, Claimant devotes pages 16 and 17 of his brief to an extensive recitation of this Court's prior pronouncements on the issue of statutory construction. He includes quotes from no less than seven decisions, each of which stands for the general proposition that, when possible, a court or a tribunal should give the words of a statute their plain meaning.

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[5] It should be noted that the Commission has recently amended these rules effective May 8, 2013. However, Rule

Claimant relies on these authorities for the proposition that "all means all" and "any means any." (App. Brief, p. 17.) In this regard, the parties have no dispute. Nonetheless, contrary to Claimant's assertion, the above-quoted rule does not mandate that "any" such medical record be admitted. It merely states that such a record "may be offered" and may not be excluded on the grounds that "such report(s) constitute hearsay."

In this case, the record was offered. While it was excluded, it was not excluded on grounds that it constituted hearsay. Therefore, contrary to Claimant's assertion, the Commission did not violate this rule and, thus, did not abuse its discretion in excluding the exhibit.

3. To the extent the Commission committed any errors, such errors were harmless

As set forth above, Defendants firmly assert that Claimant has failed to demonstrate any errors on the part of the Industrial Commission. However, to the extent this Court disagrees and finds that errors were committed, Defendants respectfully submit that any such errors would have been harmless and would not have altered the outcome of the case. As this Court recently noted in Mazzone v. Texas Road House, Inc., 2013 Opinion No. 67 (filed June 4, 2013), this Court will not reverse the decision of the Industrial Commission when evidentiary errors are harmless. Id. at p. 12, citing Hagler v. Micron Technology, Inc., 181 Idaho 596, 798 P.2d 55 (1990).

At page 39 of his brief, Claimant rather boldly asserts that witnesses who "were not heard would likely have changed the outcome . . ." However, he presents absolutely nothing to support such an assertion.

10(G) was not altered by these recent amendments.

By contrast, as set forth in sections IV (B) and V (A) herein, the Commission's decision turned on the issue of Claimant's substantive credibility (or lack thereof), which can be judged on the grounds of numerous inconsistencies or conflicting facts.

As discussed in those sections, the referee found that Claimant's account of events conflicted with that of several other witnesses, including John Williamson, Tito Corral, and Jorge Coronado. Even if additional actions by the Commission led Claimant to a witness who supported his account of events, such testimony would not have cured or eliminated the conflicts between Claimant's account and the accounts of these witnesses.

Similarly, as set forth in the Commission's Findings ## 24 - 26 (R., pp. 58 - 59), the referee found it significant that the earliest medical record documenting Claimant's alleged injury was dated December 15, 2010, more than three months after the alleged date of injury. By contrast, more contemporaneous medical records (i.e., records from Terry Reilly Clinic, dated September 24 and October 11, 2010) made no mention of such injury, even though Claimant testified that he reported the injury to these providers. (See Finding #36, R., p. 62.) Even if the Commission had admitted the Spanish language medical record (which apparently is also dated December, 15, 2010), this would not have cured or eliminated this discrepancy.

To put it another way, even if Claimant had presented additional conflicting evidence, the findings of the Industrial Commission would still be supported by substantial and competent evidence.

C. CLAIMANT'S COUNSEL SHOULD BE HELD LIABLE FOR ATTORNEY'S FEES PURSUANT TO RULE 11 (a)(1) IRCP AND THIS COURT'S PRIOR RULING IN TALBOT V. AMES CONSTRUCTION

For reasons detailed in the preceding sections, Defendants assert that his appeal is neither "well grounded in fact" nor is it "warranted by existing law," or even a "good faith argument "for the extension or modification of existing law. As such, Defendant's respectfully request that the Court impose sanctions against Claimant's attorney, as it did in Talbot v. Ames Const., 127 Idaho 648, 904 P.2d 560 (1995).

The present case is directly on point with Talbot in many respects. Talbot, like the present case, involved a workers compensation claimant who appealed an Industrial Commission decision which denied him benefits. Like the present case, the Commission's decision in Talbot, boiled down to a factual determination which turned on the relative credibility of the various witnesses. Nonetheless, in Talbot, as in the present case, the claimant asked the Court to "reconsider the testimony and evidence and call into question and review the credibility determinations of the Industrial Commission." (See Talbot at 650.) Similarly, in Talbot, as in the present case, the Claimant asked the Court to "engage in a re-weighing of the facts, contrary to the long-established rule that this Court does not re-weigh the findings of the Commission." Id.

In Talbot, the Court imposed sanctions (in the form of attorney's fees), personally and individually, against Claimant's attorney, pursuant to Rule 11(a)(1). Defendants urge that the Court should do the same here.

Rule 11 (a)(1), IRCP, provides in pertinent part:

> Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one (1) licensed attorney of record of the state of Idaho, in the attorney's individual name, whose address shall be stated before the same may be filed . . . **The signature of an attorney** or party **constitutes a certificate that the** attorney or party has read the pleading, motion or other paper**; that to the best of the signer's knowledge, information, and belief after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law,** and **that it is not interposed for any improper purpose,** such as to harass or to cause unnecessary delay or needless increase in the cost of litigation... **If a pleading, motion or other paper is signed in violation of this rule, the court,** upon motion or upon its own initiative, **shall impose upon the person who signed it**, a represented party, or both, **an appropriate sanction**, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee. (Emphasis added.)

Defendants submit that it indisputable that this appeal is not "warranted by existing law." Instead, as in Talbot, this appeal was brought "contrary to the long-established rule that this Court does not re-weigh the findings of the Commission."

Similarly, Claimant's brief does not articulate any "good faith argument" for extension or modification of existing law. Instead, Claimant arguments appear to urge the Court to simply ignore the existing law. In so doing, Claimant has actually misrepresented what transpired, below. For example, Claimant has represented to the Court that the Commission "withdrew" the Commission's interpreter, even though the interpreter was present throughout the proceedings. (See Claimant's Brief, pp. 22 - 25.)

Perhaps more significantly, as discussed at pages 14 through 24 herein, in section VI(2) of his brief (App. Brief, pp. 40 and 41), Claimant asserts to this Court that the Commission's decision was not supported by substantial, competent evidence "because it did not account for . .

. the written witness statements he presented. This is plainly incorrect. The Commission clearly did account for these statements at Finding #31. (R., p. 60.) For Claimant's attorney to represent otherwise means that either he has not read the decision or he is deliberately attempting to mislead this Court regarding its contents.

Alternatively, Defendants submit that attorney fees can be properly awarded pursuant to Rule 54(e)(1), I.R.C.P. in conjunction with Idaho Code § 12-121.

Idaho Code § 12-121 provides:

> Attorney's fees. In any civil action, the judge may award reasonable attorney's fees to the prevailing party or parties, provided that this section shall not alter, repeal or amend any statute which otherwise provides for the award of attorney's fees. The term "party" or "parties" is defined to include any person, partnership, corporation, association, private organization, the state of Idaho or political subdivision thereof.

Rule 54(e) (1) IRCP provides:

> In any civil action the court may award reasonable attorney fees, which at the discretion of the court may include paralegal fees, to the prevailing party or parties as defined in Rule 54(d)(1)(B), when provided for by any statute or contract. Provided, attorney fees under section 12-121, Idaho Code, may be awarded by the court only when it fines, from the facts presented to it, that the case was brought, pursued or defended frivolously, unreasonably or without foundation; but attorney fees shall not be awarded pursuant to section 12-121, Idaho Code, on a default judgment.

For reasons outlined above, Defendants submit that this appeal was brought frivolously, unreasonably, and without foundation. Therefore, attorney fees would be properly awarded pursuant to the above-quoted provisions.

VI. CONCLUSION

For reasons set forth in the foregoing arguments, there is little doubt that the findings of the Industrial Commission are supported by substantial and competent evidence. Accordingly, Defendant's respectfully request that this Court affirm the Commission's Decision.

In addition, Defendants assert Claimant's appeal was neither warranted by existing law nor was it supported by a good-faith argument for modification of existing law. To the contrary, Defendants assert that this appeal was brought frivolously, unreasonably, and without foundation. Accordingly, Defendants respectfully request that the Court impose sanctions, in the form of attorneys fees against Claimant's attorney, pursuant to Rule 11(a)(1), I.R.C.P., Rule 54(e)(1), I.R.C.P., Idaho Code § 12-121, or other applicable statute or rule.

DATED this 10 day of July, 2013.

IDAHO STATE INSURANCE FUND

By: _____
David J. Lee
Attorney for Defendants – Respondents

CERTIFICATE OF SERVICE

I hereby certify that on this 11 day of July, 2013, I caused to be served a true and correct copy of the foregoing RESPONDENT'S BRIEF by placing a copy thereof in the United States Mail, postage prepaid, addressed to:

Richard L. Hammond
Hammond Law Office, PA
811 East Chicago Street
Caldwell, ID 83605

David J. Lee

JUDICIAL RULES OF PRACTICE AND PROCEDURE

Under the Idaho Workers' Compensation Law

Effective May 8, 2013

IDAHO INDUSTRIAL COMMISSION
700 South Clearwater Lane
PO Box 83720
Boise, ID 83720-0041
(208) 334-6000 – FAX (208) 332-7558
1-800-950-2110
www.iic.idaho.gov

ADDENDUM

RULE 10.

HEARING PROCEDURE

A. Presiding Officers.

Hearings are held before one or more Commissioners or a Referee appointed by the Commission. The presiding officer in each case is designated by the Commission.

B. Stipulations.

The parties may stipulate to the facts of any case in writing and the Commission may make its order or award thereon.

C. Exhibits.

1. Unless good cause is shown to the contrary at least 10 days prior to a hearing, each party shall serve on all other parties complete, legible, and accurate copies of all exhibits to be offered into evidence at hearing, including, but not limited to, medical records. The proposed exhibits shall be arranged in chronological order with the first exhibit as the earliest date: proceeding to the last as the latest date. All pages within each exhibit shall be numbered in consecutive order. Each party shall file a notice with the Commission that service of such exhibits has been completed.

2. In the event that the existence of a proposed exhibit is discovered in good faith and with due diligence less than 10 days before the date of hearing, the party discovering the same shall immediately notify all other parties of the existence of the exhibit. The party shall also serve a complete, legible and accurate copy of the exhibit on all other parties, and file with the Industrial Commission a notice indicating the proposed exhibit has been served.

3. All parties are encouraged to present the Commission, at hearing, with an electronic copy (in .pdf format) of all exhibits to be offered. Each exhibit within the electronic copy shall be clearly identified by its exhibit letter or number. An electronic copy shall not substitute for the requirement to provide a paper copy of exhibits at the hearing.

D. Depositions.

Generally - The testimony of any witness or witnesses may be presented by deposition prior to the conclusion of the hearing, provided that the party offering the deposition testimony provides reasonable notice prior to the taking of the deposition that the deposition may be used for testimonial purposes. The deposition testimony of any witness also may be presented prior to

the conclusion of the hearing by agreement of the parties. Absent such notice or agreement, a deposition may be used only to the extent allowed by the Idaho Rules of Civil Procedure.

E. Post-hearing Depositions.

1. At the conclusion of a hearing, unless the parties agree to a shorter time, the record shall remain open for the submission of expert testimony through post-hearing deposition. Notice of all depositions to be taken pursuant to this subsection must have been be filed with the Commission and served on all other parties not later than 10 days prior to the hearing. The original of all post-hearing depositions shall be filed with the Commission.

2. A party who has given notice of a deposition under this subsection may vacate the deposition only by serving reasonable written notice on all other parties and giving them an opportunity to respond. Any party who objects to vacating a post-hearing deposition must serve reasonable written notice of its objection on all other parties. If any party serves a notice of objection as provided herein, the deposition shall not be vacated; provided, however, that the service of a notice of objection shall constitute a certification that the party or parties objecting to vacating the deposition will bear the costs of the deposition.

3. All depositions to be submitted on behalf of a claimant must be taken no later than 14 days after the conclusion of the hearing; all depositions to be submitted on behalf of a defendant must be taken no later than 28 days after the conclusion of the hearing. The Commission may alter the time limits within which to notice or take post-hearing depositions upon the filing of a motion showing good cause for such modification: Provided, however, that any stipulation or motion to enlarge the period for post-hearing depositions must be submitted to the Commission for its approval prior to the expiration of the original period and must set forth reasonable grounds for such enlargement and the extent of the enlargement sought.

4. Unless the Commission, for good cause shown, shall otherwise order at or before the hearing, the evidence presented by post-hearing deposition shall be evidence known by or available to the party at the time of the hearing and shall not include evidence developed, manufactured, or discovered following the hearing. Experts testifying post-hearing may base an opinion on exhibits and evidence admitted at hearing as well as on expert testimony developed in post-hearing depositions. Lay witness rebuttal evidence is only admissible post-hearing in the event new matters have been presented and the Commission so orders.

F. Evidence.

The filing of a document, including a pre-hearing deposition, does not signify its admission in evidence, and only those documents which have been admitted as evidence shall be included in the record of proceedings of the case.

G. Medical Reports.

Any medical report(s) existing prior to the time of hearing, signed and dated by a physician, or otherwise sufficiently authenticated, may be offered for admission as evidence at the hearing. The fact that such report(s) constitutes hearsay shall not be grounds for its exclusion from evidence.

H. Hearing Transcript and Deposition Procedure.

1. All requests for copies of hearing transcripts shall be in writing and filed directly with the Commission. The Commission will provide the requesting party with one copy of the hearing transcript. Oral requests will not be honored.

2. The Commission will not honor any request for a transcript made directly to the court reporter. The requester will be responsible for any costs charged by the court reporter for any documents the court reporter provides to the requester. Invoices sent to the Commission for such costs will be returned.

3. Parties that notice a deposition will be responsible for its costs, including the court reporter.

4. The Commission will not provide or pay for copies of pre- or post-hearing depositions.

I. Video Hearings.

The Commission may, *sua sponte* or on a motion made by a party, order the holding of a hearing utilizing video conferencing equipment and facilities available to the Commission under such terms and conditions as the Commission may provide.

COMMENTS: *Subsection C.1 provides a system of organization of exhibits presented to the Commission for its consideration in resolving issues. Bates stamping is encouraged. Although the rule requires service of the exhibits 10 days before the hearing, the Commission would encourage the parties to make every effort for each party to receive the exhibits 10 days before the hearing.*
Subsection E.4 addresses the use of expert testimony and lay witness rebuttal testimony. Subsection H memorializes the Commission's policy to provide hearing transcripts, but not deposition transcripts, upon a party's written request.