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Fonseca v. Corral Agriculture, Inc. Appellant's Reply Brief Dckt. 40578

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BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

MARCO ANTONIO FONSECA, Claimant/Appellant v. CORRAL AGRICULTURE, INC., Employer, and IDAHO STATE INSURANCE FUND, Surety, Defendants/Respondents.	SUPREME COURT No: 40578-2012

REPLY BRIEF OF THE CLAIMANT/APPELLANT

APPEAL FROM THE IDAHO INDUSTRIAL COMMISSION

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ISSUES PRESENTED IN RESPONDENTS' BRIEF

I. ARE ATTORNEY FEES AWARD FOR THE DEFENDANT APPROPRIATE UNDER *Rivas v, K. C. Logging*, 134 Idaho 603, (July 25, 2000) WHEN NO EVIDENCE OR ARGUMENTS ARE PRESENTED TO ESTABLISH BAD FAITH OR IMPROPER PURPOSE

II. COULD THE COMMISSION JUST AS EASILY HAVE FOUND THAT APPELLANT FAILED TO GIVE TIMELY NOTICE OF THE ACCIDENT

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I. DID THE REFEREE AND THE INDUSTRIAL COMMISSION ERR AS A MATTER OF LAW OR ABUSE THEIR DISCRETION WHEN THE CLAIMANT WAS REFUSED TO PROVIDER A COMPLETE COPY OF THE AGENCY RECORD TO CLAIMANT AND REFUSED TO AUGMENT THE RECORD?

II. DID THE REFEREE AND THE INDUSTRIAL COMMISSION ERR AS A MATTER OF LAW OR ABUSE THEIR DISCRETION WHEN THEY DENIED ADMISSION OF CLAIMANT-APPELLANT'S MEDICAL RECORDS, WHICH WERE CREATED IN THE HIS NATIVE LANGUAGE, IN VIOLATION OF IDAHO JUDICIAL RULES OF PRACTICE AND PROCEDURE 10 G AND IDAHO RULES OF EVIDENCE?

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IV. DID THE REFEREE AND THE INDUSTRIAL COMMISSION ERR AS A MATTER OF LAW OR ABUSE THEIR DISCRETION WHEN THEY WITHDREW CLAIMANT'S COURT APPOINTED TRANSLATOR AND REFUSED TO ALLOW THE COURT INTERPRETER TO ORALLY TRANSLATE THE REMAINDER EXHIBITS AFTER CLAIMANT WITHDREW VARIOUS RECORDS TO LIMIT THE NUMBER OF DOCUMENTS TO TRANSLATE IN VIOLATION OF CLAIMANT'S STATE AND FEDERAL

SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS?

V. DID THE REFEREE AND THE INDUSTRIAL COMMISSION ERR AS A MATTER OF LAW OR ABUSE THEIR DISCRETION WHEN THEY FAILED TO GRANT THE RELIEF REQUESTED IN CLAIMANT-APPELLANT'S FIRST AND SECOND VERIFIED MOTION FOR SANCTIONS WHICH REQUESTED SANCTIONS OR AN ORDER TO COMPEL FILED ON OR ABOUT THE FIRST OF SEPTEMBER 2011 AND THE ASSOCIATED ORDERS ON MOTION DATED NOVEMBER 4, 2011 AND FILED ON OR ABOUT THE 23RD OF NOVEMBER 2011?

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ISSUES PRESENTED IN RESPONDENTS' BRIEF

I. ATTORNEY FEES SHOULD NOT BE AWARDED FOR THE DEFENDANT APPROPRIATE UNDER *RIVAS V. K. C. LOGGING*, 134 Idaho 603, (July 25, 2000) WHEN NO EVIDENCE OR ARGUMENTS ARE PRESENTED TO ESTABLISH BAD FAITH OR IMPROPER PURPOSE

A. Idaho Law Regarding Attorney Fees in Workers Compensation

The court addressed the standards it would apply in determining whether or not to award attorney's fees against a Claimant in the case of *Rivas v, K. C. Logging*, 134 Idaho 603, (July 25, 2000) where the court stated:

> Generally, this court does not award attorney's fees in appeals by Claimants from decisions of the Industrial Commission. Idaho Code §72-1375(2) ("No individual claiming benefits shall be charged fees or costs of any kind in any proceeding under this Chapter...by any court or any officer thereof, except that a court may assess costs if the court determines that the proceedings have been instituted or continued without reasonable ground."); *Teevan v. Office of the Attorney General,* 130 Idaho 79, 34-55, 936 P.2d 1321, 1326-27 (1997).
> ...
>
> Where legitimate issues exist, this court has declined to award attorney's fees in Claimant's appeal from the Industrial Commission. See *Bullard v. Sun Valley Aviation, Inc.*, 128 Idaho 430, 435, 914 P.2d 564, 569 (1996). Even where substantial and competent evidence exists and the Claimant mounts a factually-based appeal, **this court imposes sanctions pursuant to Idaho Appellate Rule 11.1 only if the appellants' arguments are "made in bad faith" or "interposed for any improper purpose."** *Tupper v. State Farm Insurance*, 131 Idaho 724, 731, 963 P.2d 1161, 1168 (1998). [emphasis added]

Respondents are of the position that they are entitled to fees due to the allegation that Appellant's brief was merely a request to, "reconsider the testimony and evidence and call into question and review the credibility determinations of the Industrial Commission." (Respondents' Brief, p. 34). Respondents interpreted *Rivas* incorrectly as the

Respondents' arguments imply that attorney's fees are awarded for any and all cases if Appellant's brief addresses the credibility determinations. The court in *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325 (2008) not only denied claims for fees and costs by the Respondent regarding *McAtee's* appeal regarind a request to reconsider the testimony and evidence and call into question and review the credibility determinations of the Industrial Commission, the Court even reversed the ruling and finding of the referee decision regarding credibility IN FAVOR of the Claimant when it found that the Commission's findings on *McAtee's* substantive credibility were not supported by substantial and competent evidence.

Respondents' claim for attorney's fees also fails as there is no evidence, records, or arguments on what grounds are used to establish that the Appeal herein was made "in bad faith" or "interposed for any improper purpose".

Respondent did allege that Appellant, "misrepresented what transpired" regarding withdrawal of the translator. (Respondent's Brief, pp. 35). The record is supportive of Appellant's argument that the Industrial Commission withdrew the translator when it refused to allow Appellant the use of the translator to translate of the medical records in violation of Idaho Court Administrative Rule 52 and Idaho Code 9-205.

Respondents also interpreted Appellant's appeal incorrectly. Appellant does not merely ask the Supreme Court to reweigh substantial evidence of various witnesses or

direct evidence that contradicted Appellant's evidence. Appellant's case presents substantial questions of law, policy, and Constitutional issues including:

1. The Industrial Commission's failure to honor the Order to Compel previously granted and or to grant Appellant's relief regarding discovery and sanctions against the Respondent for withholding and failing to provide discovery before the hearing, including, but not limited to the current address, current i-9, current employment records of the employees that were working with Appellant during the week of the accident.
2. The Industrial Commission's failure to grant Appellant's relief regarding Respondent Employer's failure to appear at their first deposition and failure to appear at the hearing in letter, via telephone, or in person after receiving a Subpoena Issued by the Industrial Commission.
3. The Industrial Commission's disregard for Idaho Judicial Rules of Practice and Procedure 10 G by disallowing Appellant's medical records because they were created in Spanish, despite Rule 10 G allowing the admissibility of "Any medical report(s)" without any exclusions.
4. The Referee and Industrial Commission's requirement that the cost and burden to provide the certified translation of his medical records of Appellant that were created in Spanish, the native language of the Appellant.

5. The temporary withdrawal of the court appointed Spanish Translator by not allowing the translator to translate the medical records.
6. The violation of the United States Constitution, Amendments 5 and 14; and Idaho State Constitution, Article 1, Sections 13 and 18 by expressly and or impliedly creating an unnecessary burden or treatment of minorities.
7. The Industrial Commission's decision to refuse to provide Appellant a copy of the exhibits and obtain such at his individual cost and time in violation of Idaho Appellate Rules 28- 29.
8. The Industrial Commission's decision to refuse to provide Appellant a copy of access to the audio recording of the hearings on the 10th of January 2012 and the 2nd of March 2012 in violation of Idaho Appellate Rules 28-29 which prevented Appellant to augment the record and provide additional transcripts of the Industrial Commission's "New Rule" created at the hearing to require medical records only in English. Rule 10 H(1) of JRP requires the parties to request hearing transcript, and arguably the hearing audio, directly from the Commission; thereby preventing direct access from the court reporter. prohibits the parties from requesting the transcript, and arguabley also, the audio, from the

B. An Award of Attorney Fee is Inappropriate Because the Elements of Idaho Rules of Civil Procedure 11(a)(1) and 54(e)(1) are not met.

Respondent further states that Counsel for Appellant violated Idaho Rules of Civil Procedure Rule 11(a)(1) which requires four elements namely that 1: Appellant's Appeal is not well grounded in fact, 2: is not warranted by existing law, 3: is not for a good faith argument for the extension, modification, or reversal of existing law, AND 4: that it is interposed for an **improper purpose**. Respondent also argues Appellant violated Idaho Rule of Civil Procedure 54(e)(1) which alleges that the Appeal was brought, pursued or defended frivolously, unreasonably or without foundation. (Respondent's Brief, pp. 34-36).

Respondent's Brief did not specifically address how all the four elements above were violated, if any at all, by Counsel for the Appellant. The only insight into the concerns found is when Respondent argued that Counsel for Appellant should pay Respondent's attorney fees because Appellant is merely asking the Supreme Court to merely, "reconsider the testimony and evidence and call into question and review the credibility determinations of the Industrial Commission" under *Talbot v. Ames Const.*, 127 Idaho 648 (1995) (Respondent's Brief, p. 34); however, such standard misapplies the law and four elements required above and clarified in *Rivas v, K. C. Logging*, 134 Idaho 603, (July 25, 2000). Therefore, counsel herein is unable to address in detail and with any additional specificity that was outlined above.

First, Appellant incorporates the arguments made above and in Appellants opening brief that the factual assertions made herein are based on the record, support the claims of

the Appellant, and warrant the appeal herein. Second, the law cited and provided herein and Appellant's opening brief supports the claims made in the Appeal. Third, Appellant has the right and is exercising his right to modify or reverse the Industrial Commission's "New Rule" of only admitting medical records provided in English despite the statute allowing "Any" medical records. Fourth, Counsel herein certifies under penalty of perjury that no motive was present other than to correct the findings and rulings made by the Industrial Commission that affected the Appellant and will affect hundreds of current and future clients of Counsel herein. The Respondents' Brief, again, does not clarify what "improper purpose" is alleged by Respondent herein.

Counsel for the Respondent is in-house counsel and therefore the Respondent will not incur any additional costs and therefore is in axiomatic to imply that Counsel for Appellant is pursuing this matter for any delay or to increase costs for the Respondent.

Respondent finally specifically alleged that Appellant, "misrepresented what transpired" regarding withdrawal of the translator. (Respondent's Brief, pp. 35). The record is supportive of Appellant's argument that the Industrial Commission withdrew the translator when it refused to allow Appellant the use of the translator to translate of the medical records in violation of Idaho Court Administrative Rule 52 and Idaho Code 9-205.

C. *Talbot v. Ames Const.*

Talbot is not applicable and distinguished from the Appellant. *Ames Construction* presented three doctors who testified against *Talbot* and *Talbot* presented one doctor that

testified in his favor. The Supreme Court explained the grounds for attorney fees against *Talbot* and stated that Talbot's single argument on appeal is to reweigh the credibility of the three doctors who disagreed with his single doctor and that,

> No argument is made by Talbot that the Commission's findings are not supported by substantial, competent evidence in the record. **In fact, at oral argument before this Court, the attorney for Talbot admitted without exception that the record contains substantial, competent evidence to support the Commission's findings.** [emphasis added]

Talbot v. Ames Const., 127 Idaho 648, 650 (1995).

The Supreme Court further clarified the holding for the attorney fees award as the evidence reflected because,

> Three of the four physicians who examined Talbot concluded that there was no causal connection between the September 1991 incident and Talbot's condition. The one physician who believed that it was probable that the September 1991 injury was the cause of Talbot's condition was found to be less credible by the Commission. The Commission relied upon the opinions of the three physicians who testified that there was no causal connection between the September 1991 incident and Talbot's condition.
> *Id.*

"The Commission concluded that while some incident did occur, the preponderance of the medical evidence established that the event did not cause an injury nor did it cause or aggravate Talbot's condition." *Id.*

Unlike *Talbot*, the Appellant here is not asking the court to discount the testimony of three medical professionals who disagreed with Appellant's one doctor. Appellant's case herein is to address the legal issues outlined above. The sole issue decided by the Industrial Commission herein was whether Appellant suffered a work related injury on or

about the 10th of September 2010. Appellant provided direct evidence that was not contradicted by any direct evidence namely:

1. Appellant underwent Physical Therapy wherein Mark Colin, LPT, gave the opinion letter on the January 4, 2012 that Mr. Fonseca's condition and treatment was "highly likely" caused by his fall from the ladder on September 10, 2010, and that Mr. Fonseca's work restrictions continued from December 15, 2010 to the date of the letter. (C9:114 - 117).
2. Appellant underwent an MRI on the February 24, 3011 due to low back pain extending into the lower extremities, which demonstrated disk bulging at L5 and L4 - L5. (C5:46 – 47).
3. Appellant was working for the Respondent on September 10, 2010 picking apples from a ladder as reflected in Mr. Fonseca's drawing documented in his deposition exhibit and C16 and C17; fell off a ladder while picking apples; landing on his gluteus, and hurt his feet, hip, and back to his neck (T.H. 74:17 – 76:5).
4. That that there were approximately five or six people present when he fell; (T.H. 76:10 – 13);
5. Roberto "Tito" Corral, Jr. did not perform any investigation into Mr. Fonseca's accident. (T.H. 318:13 – 319:1); (Deposition of Roberto Corral, Jr. 29:14 - 25).

6. Mr. Corral did not attempt to contact any of the witnesses that were working on the September 10, 2010 even though about half of them remained in his employ. (T.H. 321:1 – 18)
7. The Respondent employer failed to locate and present testimony of coworkers that were working on the September 10, 2010 to contradict the signed letters provided by Nazario Marquez and Bruno Aguilar that supports Appellant's testimony. (C19:1 - 6).
8. Respondent employer, Mr. Coral did not attempt to contact Nazario Marquez or Bruno Aguilar after receiving thir signed letters witnesses. (T.H. 322:4 – 15)
9. Appellant notified Respondent employer Roberto Corral Sr. (President) of the accident who relocated the Appellant to light duty work due to the accident. (T.H. 85:21 – 86:20).
10. Respondent employer Roberto Corral Sr. advanced Appellant for medical costs associated with the accident that occurred on or about the 10th of September 2010. (T.H. 83:13-16).
11. Respondent employer Mr. Coronado did not start working at the Williamson Orchard until the September 17 or 18, 2010, one week after the accident. (T.H. 291:1 – 13)(C15;5:10 - 18)

12. Appellant's coworkers continued working for various days at the site of the accident. However, Mr. Fonseca did not work at the Williamson Orchard after September 10, 2010. (Claimant's Exhibit 12 Deposition page 13 lines 3 – 20), (hereinafter "C12; 13:3 - 20"); (C20; 1 - 12 of Deposition of Roger Williamson).

13. Mr. Fonseca reported to the Emergency Room on visits after December 2010 including January 7, and June 27, 2011, and presented continuing complaints of pain regarding the work injury of September 2010. These complaints included hip pain down to the bottom of his foot and issued pain medication. (C7:82 - 84; C8:97 - 112)

14. Appellant's medical records on February 2, 2011 reflect a diagnosis of low back pain with left radiculopathy status post falling from a ladder. Mr. Fonseca demonstrates symptoms consistent with a lumbar derangement with unilateral or asymmetrical symptoms below the knee. Mr. Fonseca also demonstrated complication with the low back, foot, calf, thigh, buttock etc. (C6:58) and such symptoms and complications despite treatment for over two weeks (C6:52, 54 - 62, 64 - 66).

15. Sarai and Ana Fonseca's testimony that Appellant notified them of the accident the day it happened and experienced and demonstrated symptoms consistent

with the fall starting the 10th of September 2010 (T.H. 167:18 - 170:25) and (T.H. 175:20 - 176:16; TH 187:15 - 17).

16. Mr. Roger Williamson, the President of the orchard and the contractor of Respondent employer herein, recalled being notified on the September 10, 2010 by John Williamson, the Vice President, regarding an accident that month which involved a worker of Corral who slipped off the ladder, that the worker didn't want to work on the ladder anymore, that there was no more work available, and the worker's supervisor sent him somewhere else. (T.H. 206:14 - 22; 213:4 - 15: 214:16 - 23); During a conversation with the vice president, he recalled speaking telephonically with John Williamson regarding a worker who was likely Hispanic that had an accident in September 2010. (T.H. 207:16 - 209:5). Mr. Williamson further testified that John Williamson told him this worker was injured on the foot and was instructed to go home to see if he would get better and return if he felt better the next day. (T.H. 210:1 - 211:5). Williamson Orchard records reflect that Mr. Fonseca worked up until September 10, 2010 and did not work after September 10, 2010 (C12; 13:3 - 20).

17. Mr. Williamson stated that an Hispanic person from Mr. Corral's crew was injured in September 2010 by slipping off a ladder and was instructed to go

home to see if he would get better. (C12; 16:1 - 16) (C12; 20:3) (C12; 24:21 - 25).

18. John Williamson testified that was the co-owner and manager of the field operations of Williamson Orchard and responsible to supervise crews; (T.H. 239:12 - 15). Further, Mr. Williamson testified that he was present during his brother Roger Williamson's testimony and that such testimony was truthful. (T.H. 239:22 - 240:2).

Appellant therefore asks this court to deny Respondents' request for fees and costs and grant Appellant fees and costs to Appellant, under the same law cited by Respondent, as the case law cited above does not support the arguments made by Respondents incurring additional time and resources to protect Appellant and his counsel herein.

II. THE COMMISSION COULD NOT JUST AS EASILY HAVE FOUND THAT APPELLANT FAILED TO GIVE TIMELY NOTICE OF THE ACCIDENT

Respondents herein argue that timely notice was lacking and therefore any error was de minimus as the Industrial Commission would have denied the claim anyways; however, Respondents failed to provide evidence or testimony to contradict or refute Appellant's evidence of the following:

1. Appellant gave oral notice to Roberto Corral, Sr. (President) and Luisa Corral (Secretary) within two weeks of the accident (T.H. 81:21 – 83:4), who then transferred Appellant to another site to perform lighter duty work throwing leaves into a grinder for a couple weeks (T.H. 85:21 – 86:20). Oral notice is sufficient for

workers' compensation purposes to provide the employer actual notice of the injury. I.C. § 72-701. *Tonahill v. LeGrand Johnson Const. Co.*, 1998, 963 P.2d 1174, 131 Idaho 737

2. Roberto Corral, Sr. gave Mr. Fonseca $200.00 cash for medical expenses due to the accident; (T.H. 83:13-16) therefore, pursuant to IC 72-701, the notice requirement is waived due to voluntary payment and acknowledged the accident and notice thereof. Mr. *Facer* received previous payments for benefits prior to the insurer and adjuster obtaining the case. The Court held that the previous, "[p]ayment was compensation for injuries for which claimant's employer admits liability and must be considered, in substance, as compensation paid by the employer. By making this payment claimant's employer through its surety tolled the statute of limitations and bound the appellant to his act. *Facer v. E. R. Steed Equipment Co.*, 95 Idaho 608, 613 (Idaho 1973)

3. Appellant, approximately one month after the accident, also gave written notice to Roberto Corral, Sr. (T.H. 83:23 – 84:4).

4. Respondents admitted that no prejudice occurred by the lack of notice as they failed to or attempt to investigate or locate witnesses to the accident. Roberto Corral, Jr. did not perform any investigation into Mr. Fonseca's accident and would not have done any different investigation if Mr. Fonseca had notified him of the accident on November 1, 2010. (TH 318:13 – 319:1; Deposition of Roberto

Corral, Jr. 29:14 - 25). Additionally, Mr. Corral, Jr. did not attempt to contact any of the witnesses that were working on the September 10, 2010 even though about half of them still work for him. (TH 321:1 – 18). After notice was acknowledged by Robero Corral, Jr. he did not attempt to contact these witnesses. (TH 322:4 – 15). Finally, Mr. Coral testified that he did not believe any witness had disappeared because the Mr. Fonseca allegedly waited 30 days and that the company was not harmed by the alleged extra 30 days. (T.H. 345:24 – 346:1; 347:24 – 348:1). Therefore, notice was sufficient under Idaho Code 72-704 even if it was given after 60 days as no prejudice existed. See also *McCoy v. Sunshine Mining Co.*, 97 Idaho 675 (1976)

Appellant asks this Court to find that the errors made by the Industrial Commission were not de minimus and deny the Respondent's requests above.

ISSUES PRESENTED ON APPEAL BY APPELLANT

VII. THE COMMISSION ERRED AS A MATTER OF LAW OR ABUSED ITS DISCRETION WHEN IT REFUSED TO PROVIDE THE CLAIMANT WITH A COMPLETE COPY OF THE AGENCY RECORD AND REFUSED TO AUGMENT THE RECORD.

The Industrial Commission, after the commencement of the formal hearing for the Appellant on the 10th of January 2012, took a recess, and in response to Appellant's medical records being produced in their original form from the doctor in Spanish, introduced a new rule that required all medical records to be in English or be attached by a translation into English by a certified translator, at cost to the Appellant, and not performed by a party or their counsel.

Appellant wished to augment the record of such New Rule by obtaining the audio of the hearing, provide a transcript and augment the record with such "New Rule" for this court. Unfortunately, Counsel was unable to obtain such audio directly from the court reporter and the Industrial did not produce a copy of any of the audio of the hearing to allow Appellant to augment the record.

Idaho Appellate Rule IAR 28(C) states that, "The clerk's or agency's record shall also include all additional documents requested by any party in the notice of appeal, notice of cross-appeal and requests for additional documents in the record." Appellant requested that the audio and the exhibits be included and withheld. Idaho Appellate Rule 29(a) states

> Upon the receipt of the reporter's transcript and upon completion of the clerk's or agency's record, the clerk of the district court or administrative agency shall serve copies of the reporter's transcript and clerk's or agency's record upon the parties by serving one copy of the transcript and record on the appellant and one copy of the transcript and record on the respondent.

Despite Appellant incurring and paying for the copy of the transcript and copies of the entire record for the appeal, Appellant was also refused a copy of the exhibits presented and admitted at the hearings. Appellant was required to incur the costs to travel and the fees at the Idaho Supreme Court building on the 22nd of May 2013. Appellant asks this court to take judicial notice of such fees and transactions.

VIII. THE REFEREE AND THE COMMISSION ERRED AS A MATTER OF LAW OR ABUSED THEIR DISCRETION WHEN THEY DENIED ADMISSION OF THE CLAIMANT/APPELLANT'S MEDICAL RECORDS WHICH WERE CREATED IN HIS NATIVE LANGUAGE IN VIOLATION OF IDAHO JUDICIAL RULES OF PRACTICE AND PROCEDURE 10 G AND IDAHO RULES OF EVIDENCE.

Respondents' interpretation of 10 G is not correct. Statutory interpretation must be interpreted in conjunction with statutes and prior decisions. Idaho Code 72-708 states the,

> Process and procedure under this law shall be as summary and simple a reasonably may be and as far as possible in accordance with the rules of equity.

Industrial Commission proceedings have been informal and designed for simplicity; further, the primary purpose of these proceedings being the attainment of justice in each individual case. *Hagler v. Micron Technology, Inc.*, 118 Idaho 596 (1990). "Proceedings under the Workmen's Compensation Law are designed to afford employees a speedy, summary and simple remedy for the recovery of compensation for injuries sustained in industrial accidents..." *Duggan v. Potlatch Forests, Inc.*, 92 Idaho 262, 263-

64 (1968) *see Brooks v. Duncan*, 96 Idaho 579 (1975), *see Hogaboom v. Econ. Mattress,* 107 Idaho 13 (1984). The humane purposes which it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Further, the provisions of the Idaho Workers' Compensation Law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990).

Idaho law and policy regarding workers compensation has long held the position to err on the side of the employee and to admit evidence. Rule 10 G of the JRP should be interpreted in conjunction with the policy and law cited above and below and should not be interpreted to construe that the employee should bear the additional burden and costs of retaining a certified interpreter to present evidence at hearing.

Rule 10 G of the JRP clarified that medical records are not excluded because they are hearsay. At the time of the passage of Rule 10 G, medical records were not admissible in civil trial unless foundation and authenticity were established through a witness and therefore 10 G clarified that not authenticity and or foundation were required to save costs to the Claimant. Further, Administrative law allowed additional flexibility to allow additional evidence not normally admissibility in a civil trial.

Also, Rule 10 G of the JRP does not allow for the hearing officer to refuse allowing the translator to translate the limited remaining medical records especially when Appellant withdrew records to limit the time to translate the remaining medical records.

The hearing offer disallowed the translation by Counsel for the Appellant and the appointed translator and therefore refusing the Appellant and Respondents to make informed decisions on whether the records were relevant.

Finally, the inclusion of only Claimants, and most applicable herein, the inclusion of only Minority Claimants for additional costs, are not the proper party to be the recipients of additionally burdens of costs and expenses. Claimants, especially Minority Claimants, are injured workers, unemployed, in debt for past medical bills, in collections and or facing outside litigation, are without income to pay for the daily necessities and needed treatment, let alone additional costs of translation of medical records. The case herein involved the hearing officer's refusal to withdraw the appointed translator to translate the remaining records in Spanish for a few minutes at the expense of the Claimant and under the creation of the New Rule.

IX. THE REFEREE AND THE COMMISSION ERRED AS A MATTER OF LAW OR ABUSED THEIR DISCRETION WHEN THEY DENIED THE ADMISSION OF THE CLAIMANT/APPELLANT'S MEDICAL RECORDS WHICH WERE CREATED IN HIS NATIVE LANGUAGE UNLESS HE COULD AFFORD A CERTIFIED TRANSLATION IN VIOLATION OF THE CLAIMANT/APPELLANT'S STATE AND FEDERAL EQUAL PROTECTION AND DUE PROCESS RIGHTS.

As cited above, Idaho Code 72-708 states that the

> Process and procedure under this law shall be as summary and simple a reasonably may be and as far as possible in accordance with the rules of equity.

Further, the provisions of the Idaho Workers' Compensation Law are to be liberally

liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). Therefore, in the event of the necessity to incur a burden when a Claimant does not speak English, would be to liberally construe such policy in his favor and not place the burden of translation upon him.

The Industrial Commission denied the Admissibility of Medical Records created by Claimant's treating physician on the grounds that the treating physician created the language in Claimant's native language of Spanish (January 10, 2012 Hearing: 72:16 – 73:18. See also Claimant's Exhibit 1, pages 4, 5, 6; Exhibit 6, page 54). The Referee and Industrial Commission required the cost and burden to provide the certified translation shall be borne by the claimant not the Commission (January 10, 2012 Hearing 73:19-24). This ruling was made despite previously stating that the Spanish Medical records were admissible and acknowledging that the Referee and Industrial Commission appointed a Spanish Translator who was present at the hearing, namely a Mercedes Lupercio. (Hearing 4:6-13); January 10, 2012 Hearing: "I will make note also that while we have the benefit of our interpreter present today, I might have the interpreter interpret for us those portions...." (January 10, 2012 Hearing 24:4-6); However, Appellant's request for Mr. Lupercio to translate the remaining records was denied.

The Equal Protection Clause proclaims that "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. XIV, Sec. 1. This rule of equal treatment does not depend on the existence of an underlying property

right. *Reserve, Ltd. v. Town of Longboat Key*, 17 F.3d 1374, 1381 (11th Cir.1994), cert. denied, --- U.S. ----, 115 S.Ct. 729, 130 L.Ed.2d 633 (1995).

When a classification involves a "suspect class" or a minority, then a strict scrutiny standard is used *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439-42, (1985). The United States Supreme Court in *Gratz v. Bollinger,* 539 U.S. 244 (2003) recently upheld the above standards and clarified that an equal protection case can be held and deemed unconstitutional when there is an denial of equal treatment that results from the imposition of a barrier, but does not result in the ultimate inability to obtain benefits.

> It is by now well established that "all racial classifications reviewable under the Equal Protection Clause must be strictly scrutinized." *Adarand Constructors, Inc.* v. *Peña,* 515 U.S. 200, 224 (1995). This " 'standard of review ... is not dependent on the race of those burdened or benefited by a particular classification.' " *Ibid.* (quoting *Richmond* v. *J. A. Croson Co.,* 488 U.S. 469, 494 (1989) (plurality opinion)). Thus, "any person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest of judicial scrutiny." *Adarand,* 515 U.S., at 224.

Id. (See also *Shaw* v. *Hunt,* 517 U.S. 899, 908 and *Gomillion* v. *Lightfoot*, 364 U.S. 339, 343—344). The standards of equal protection analysis have been recognized in Idaho. *Leliefeld v. Johnson,* 104 Idaho 357 (1983). The United States Supreme Court in *Grutter v. Bollinger*, 539 U.S. 306 (2003) clarified that all government racial classifications must be analyzed by a reviewing court under strict scrutiny, that race based actions must be necessary to further a compelling governmental interest, that such actions

and violate the Equal Protection Clause unless it is narrowly tailored to further that interest, and that context matters when reviewing such action.

The requirement of the additional costs of non English speaking minorities also would have a disparate impact upon all minorities. The Supreme Court of the United States *Village of Arlington Heights v. Metropolitan Housing Development Corp*, 429 U.S. 252 (1977) clarified that rule would be unconstitutional if it disproportionately impacted one race, if the background of the official action involved prior decisions about race, the sequence of events leading up to the decision and legislative history.

Claimant and other similarly situated minority non-English speaking Claimants' rights are violated by the "new rule" in violation of both the state and federal constitutional rights to substantive and procedural due process and equal protection when they adopted the new policy of refusing to admit any medial records if it is in the language of the Claimant's Spanish language or was unable to afford the additional cost and burden to provide a certified translation of such. This is especially true in following the recent decision by the Industrial Commission in *Serrano v. Four Season Framing*; IC NO 2004-507845 to disallow permanent disability benefits for those who refuse to answer question regarding their immigration status.

As previously cited, "The most certain test by which we judge whether a country is really free is the amount of security enjoyed by minorities." *-Lord Acton (John E. E. Dalberg Acton) English historian, statesman (1834-1902).* "Our courts are the great levelers." *Roughly paraphrased from the movie, "To Kill a Mockingbird"*

X. THE REFEREE AND THE COMMISSION ERRED AS A MATTER OF LAW OR ABUSED THEIR DISCRETION WHEN THEY WITHDREW THE CLAIMANT/APPELLANT'S COURT-APPOINTED TRANSLATOR AND REFUSED TO ALL THE COURT INTERPRETER TO ORALLY TRANSLATE EXHIBITS WRITTEN IN HIS NATIVE LANGUAGE IN VIOLATION OF THE CLAIMANT/APPELLANT'S STATE AND FEDERAL SUBSTANTIVE AND PROCEDURAL DUE PROCESS RIGHTS.

Respondents did not address the Industrial Commission's decision to temporarily withdraw the court appointed translator and not allow him to translate the records herein, therefore not additional arguments are cited here other than to incorporate the arguments made above.

XI. THE REFEREE AND THE COMMISSION ERRED AS A MATTER OF LAW OR ABUSED THEIR DISCRETION WHEN THEY FAILED TO GRANT THE RELIEF REQUESTED IN THE CLAIMANT/APPELLANT'S FIRST AND SECOND VERIFIED MOTIONS FOR SANCTIONS WHICH REQUESTED SANCTIONS OR AN ORDER TO COMPEL FILED ON OR ABOUT SEPTEMBER 1, 2011 AND THE ASSOCIATED ORDERS ON MOTION DATED NOVEMBER 4, 2011 AND FILED ON OR ABOUT NOVEMBER 23, 2011.

Respondents allege that the Industrial Commission does not have jurisdiction over the Respondent and was therefore not subject to the Subpoena and or Notice of Deposition served upon his attorney of records as he was outside the State of Idaho. If this argument is the prevailing argument, then the Respondent's briefs and answer should be stricken as he is no longer subject to the jurisdiction. Respondent can not have his cake by not appearing and to eat it to have his attorney appear and argue his case. This especially unfair and unjust to the Appellant when the burden is on the Appellant to prove his case

and the information and testimony in the possession of the Respondent who refuses to appear telephonically or otherwise. The arguments of the Respondent that he is not subject to the jurisdiction supports Appellant's claim that default should be entered and Respondent's briefs be stricken.

However, if this court believes that default should not be entered against the Respondent, the Respondent should not be able to avoid jurisdiction under grounds of public policy and established law. First, allowing a party from refusing to appear, testify, provide records or otherwise participate in the workers compensation because they have left the state of Idaho would be against public policy as it would lead to employers intentionally leaving the state to avoid claimants from obtaining records and testimony necessary for the claimant.

Second, Idaho State 5-514 clarifies that Respondent employer voluntarily subjected himself to the jurisdiction to the state of Idaho by transacting business and ensuring the Appellant in the state of Idaho. Idaho Statute 5-514 states as follows:

> **§ 5-514. Acts subjecting persons to jurisdiction of courts of state.**
> Any person, firm, company, association or corporation, whether or not a citizen or resident of this state, who in person or through an agent does any of the acts hereinafter enumerated, thereby submits said person, firm, company, association or corporation, and if an individual, his personal representative, to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts:
>
> The transaction of any business within this state which is hereby defined as the doing of any act for the purpose of realizing pecuniary benefit or accomplishing or attempting to accomplish, transact or enhance the business purpose or objective or any part thereof of such person, firm, company, association

or corporation;

The commission of a tortious act within this state;

The ownership, use or possession of any real property situate within this state;

Contracting to insure any person, property or risk located within this state at the time of contracting;

...

See also, *Schneider v. Sverdsten Logging Co.*, 657 P.2d 1078 (Idaho 1983)

Respondent Employer further subjected himself to the jurisdiction of the court by appearing and defending the case through his attorney; had the court not obtained jurisdiction over the Respondent employer, the Industrial Commission's decision would be Void. Idaho Rules of Civil Procedure 5(b)(F) allows service upon a party by service upon the attorney of the party via fax.

The most important key to a contested case is the testimony of disinterested witnesses to establish whether Appellant was injured on the job on the 10th of September 2010 or not. Appellant sought in discovery and the Respondent Employer failed and refused to answer discovery and failed and refused to appear at his deposition wherein the hearing officer Ordered the Respondent Employer to provide the current address, i-9 and contact for the employees that were working with the Appellant the week of his injury. Defendants acknowledged in Defendants' Response to Claimant's Second Verified Motion for Sanction (Agency Record, 45) that "These responding defendants do acknowledge the fact that, to date, the list of employees working for the defendant employer during the time period of September 5-26, 2010 have not yet been provided."

Notwithstanding the assertions and productions by the Respondents in discovery by counsel, the record is replete from any assertions from the Respondent Employer at the hearing, through affidavit or otherwise that they provided the records requested in Discovery and Ordered. Further, the record clarifies that the Respondent Employer failed and refused to attempt to locate and or tender the current address, i-9 and employment records for the employees that were working the week of Appellant's accident.

Respondent employer Roberto Corral, Sr. (President), Corral Agriculture, Inc (Records Custodian), Jorge Coronado (Supervisor) failed to timely answer discovery and failed and refused to appear at the time set for deposition set for the 1st of September 2011 and the Defendants Roberto Corral Sr (President) and Luisa Corral (Secretary) failed to appear at trial despite subpoenas being issued signed by the Industrial Commission on the 23rd of January 2012. (Claimant's Exhibit 23-24, Hearing Transcript 355) (Agency Record, 8-18, 38-43). Roberto Corral, Jr. even admitted at the hearing that Roberto Corral, Sr. would have been one of the best employees to find out and provide evidence of which employees were actually there working with Appellant during the time of the accident. (Hearing Transcript 335:8-22)

Roberto Corral, Jr. was the vice president of Corral Agriculture, Inc. (Hearing Transcript, 340:16-17) and Roberto Corral, Sr. was the president of Corral Agriculture, Inc. at the time of accident herein; Roberto Corral, Sr. was incarcerated and deported and Corral Agriculture, Inc. was administratively dissolved January 13, 2012 wherein Roberto

Corral, Jr. incorporated "Corral AG Labor, Inc" and at his deposition admitted that employees that were working with the Claimant in 2010 returned to work for Roberto Corral, Jr. at Corral AG Labor, Inc, the new business, and that he had not requested the payroll records from his agent "Ashmead and Associates in Nampa" to locate or obtain the updated current address or contact information of the employees. (Deposition of Roberto Corral Jr., 5:21 – 6:3) (Claimant's Exhibit 17) (See also Idaho Secretary of State, Business Entity) (Hearing Transcript offer of proof, 337:2 - 340:6)

Roberto Corral, Jr. also admitted at the hearing that even as of the date of the hearing he had failed and refused to investigate his telephone records to determine communications with the Appellant after the accident to prove or disprove notice or whether the line was disconnected. (Hearing Transcript 327:12-25; 332: 19-25)

Defendant's incomplete and untimely disclosure on the 15th of December 2011 with outdated I-9 addresses of the employees did not contain any current address in the possession of Defendant and the vice president of the company

Due the inaction of the Respondent Employer and the decision of the hearing officer, Appellant was left at trial without the most important key to meet his burden, the current address of the half dozen workers that were present on the 10th of September 2010. Appellant was able to obtain letters from two workers, but the workers refused to provide Appellant their address to serve subpoenas.

Therefore, the Respondent should have either been sanctioned for not appearing and withholding testimony and records that Appellant needed, or default should have been entered as he was not subject to its jurisdiction.

XII. THE COMMISSION DID NOT HAVE SUBSTANTIAL AND COMPETENT EVIDENCE TO DENY MR. FONSECA'S CLAIM BECAUSE IT ABUSED ITS DISCRETION WHEN IT FAILED TO ENFORCE ITS ORDER TO COMPEL DISCOVERY AND THE COMMISSION DID NOT ACCOUNT FOR EVIDENCE PRESENTED.

The court in *Stevens-McAtee v. Potlatch Corp.*, 145 Idaho 325 (2008) reversed the ruling and finding of the referee decision regarding credibility of the Claimant. Because the Court found that the Commission's findings on *McAtee's* substantive credibility were not supported by substantial and competent evidence, the Court was not bound by those findings on appeal and may review the factual record in a light independent of those findings. *McAtee* clarified that an element to support of lack of credibility when the claimant's testimony contradicts with it self and improves or enhances over time substantially and will be upheld if the facts support such.

While recognizing that the referee and the Industrial Commission regularly make determination of credibility when there is conflicting testimony from two witnesses; the Appellant provided testimony and evidence that was not conflicted or changed over time. Appellant consistently testified that he was working picking apples on a ladder at the orchard with half a dozen employees which was substantiated by the employment records and such testimony was supported by his medical provider to support his contention of the

accident, that he was injured when he fell from the ladder, and that he went home early. (See citations above which are incorporated herein from Appellant's Final Reply Brief, pp 8-12.)

The Respondents allege that Appellant's substantive credibility is highly suspect due to "inaccuracies or conflicting facts" without providing any conflicting testimonies that are relevant or substantive to the case at hand. Further, the Respondents allege that Appellant must not be credible because his testimony differed from those of the Respondent and their contractor who had a relationship and bias in favor of the Respondent.

The Respondent and the Industrial Commission discount the testimony of the Appellant because his testimony regarding facts that occurred after the accident differs from the memory of the Respondent employer. However, the record is vacant of any contradictory testimony of Appellant regarding being injured and when being injured. Respondent allege that Appellant was untruthful when his testimony differed from Jorge Coronado without accounting for the fact that Jorge Corondao finally admitted, contrary to his previous testimony under oath, that Mr. Coronado did not start working at the Williamson Orchard until the September 17 or 18, 2010, one week after the accident. (T.H. 291:1 – 13)(C15;5:10 - 18)

The referee and Industrial Commission failed to address the fact that Roberto Corral Jr. was the vice president of the company over finances when Roberto Corral Sr.

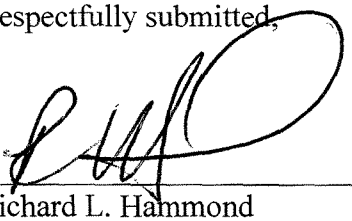
lost his legal permanent residence and was deported due to a felony conviction after tax problems (TH 335:23 – 336:1; 339:8 – 340:6); and that the referee disallowed any further testimony regarding such despite allowing testimony regarding criminal history of the Appellant to be admitted.

CONCLUSION

For the foregoing reasons, Mr. Fonseca respectfully requests that this Court either reverse the order of the Commission, or remand his case to the Commission with instructions to reopen his case to consider evidence consistent with Appellant's herein. Appellant further request costs and fees for the Appeal Reply Brief herein as previously requested and under IRCP 54(e)(1) and Idaho Code 12-121.

DATED this 5nd day of August.

Respectfully submitted,



Richard L. Hammond

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of August 2013 I delivered a true and correct copy of the foregoing BRIEF OF THE CLAIMANT/APPELLANT to the following via hand delivery and facsimile:

David J. Lee
Idaho State Insurance Fund
1215 W State Street
Boise, ID 83720

Fax No.: 208-332-2225

By: _____
Richard L. Hammond