IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

IN THE MATTER OF THE REQUEST FOR INDIGENCY MEDICAL ASSISANCE FOR S.B., **Kootenai County Assitance Reqeust No. 2018-260**	**Case No. CV28-19-1247** **MEMORANDUM DECISION AND ORDER ON JUDICIAL REVIEW OF ADMINISTRATIVE DECISION OF KOOTENAI COUNTY BOARD OF COMMISSIONERS**

I. PROCEDURAL HISTORY AND FACTUAL BACKGROUND.

The matter before the Court is a petition for judicial review filed by Petitioner Kootenai Health (KH), arising from the decision of the Respondent Kootenai County Board of Commissioners (BOCC) to deny payment for medical services rendered to patient, S.B. This Court finds the decision of the BOCC was not supported by substantial evidence on the record as a whole, was in excess of its statutory authority, and was arbitrary, capricious, and an abuse of its discretion.

The statement of facts presented in KH's Brief on Appeal have been stipulated to by BOCC. Br. Of Resp't., 2. BOCC further stipulates that S.B. received necessary medical services, as defined by the Idaho Medically Indigent Act (the Act). *Id.* On July 12, 2018, S.B. was admitted to KH following a severe psychiatric episode. Petitioner's Br. On Appeal, 1–2. S.B. was diagnosed with major depressive order, alcohol use disorder, alcohol withdrawal, and agoraphobia. *Id.* at 2. She was treated in the KH

psychiatric unit, and discharged six days later, on July 18, 2018. *Id.* S.B. did not have health insurance at the time, and her total charge for treatment amounted to $26,672.31. *Id.*

On July 17, 2018, S.B. signed and submitted an application for county assistance under the Act. *Id.* KH signed the application as the third party, and it was filed with the Idaho Department of Health and Welfare on August 2, 2018. *Id.*

The application was denied, and thereafter forwarded to Kootenai County Assistance on August 7, 2018. *Id.* at 3. On August 30, 2018, S.B. attended an interview where she was asked about her income and expenses. *Id.* She withdrew her application at that time, but shortly thereafter received a phone call from a representative of KH, who explained the application process to her. *Id.* After receiving that information, S.B. chose to continue with the application process. *Id.* Kootenai County Assistance refused to reschedule the interview and instead issued a Clerks Statement of Findings and Recommendation of Initial Denial for County Assistance. *Id.*

KH appealed the decision of Kootenai County Assistance on October 4, 2018. *Id.* A second interview was conducted with S.B., where S.B. answered all questions asked of her and provided all requested documentation. *Id.* On January 22, 2019, a full appeal hearing if the initial denial was held before the BOCC. *Id.* The BOCC imputed income to S.B. to a level where she no longer qualified for county assistance, and thereafter voted unanimously to uphold the initial denial of county assistance. *Id.*

On February 18, 2019, KH filed the present Petition for Judicial Review. *Id.* KH filed Petitioner's Brief on Appeal on April 22, 2019. On May 20, 2019, the BOCC filed Brief of Respondent KH filed Petitioner's Reply Brief on June 6, 2019. Oral argument

was held on July 23, 2019, at the conclusion of which this Court took the matter under advisement.

II. STANDARD OF REVIEW.

Judicial review of a final determination of denial of medical indigency benefits by a board of county commissioners is to be made in the same as that of any administrative determination or order, in accordance with the Idaho Administrative Procedures Act, Title 67, Chapter 52, Idaho Code (IDAPA). *See* I.C. §§ 31-1506, 31-3505G. Thus, the board of county commissioners is the "agency" for purposes of judicial review under IDAPA. The scope of judicial review of administrative decisions is as follows:

> (1) The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact.
> [...]
>
> (3) When the agency was required by the provisions of this chapter or by other provisions of law to issue an order, the court shall affirm the agency action unless the court finds that the agency's findings, inferences, conclusions, or decisions are:
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> (a) in violation of constitutional or statutory provisions;
> (b) in excess of the statutory authority of the agency;
> (c) made upon unlawful procedure;
> (d) not supported by substantial evidence on the record as a whole; or
> (e) arbitrary, capricious, or an abuse of discretion.
>
> If the agency action is not affirmed, it shall be set aside, in whole or in part, and remanded for further proceedings as necessary.
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> (4) Notwithstanding the provisions of subsections (2) and (3) of this section, agency action shall be affirmed unless substantial rights of the appellant have been prejudiced.

I.C. § 67-5279. Judicial review of an order issued by a board of county commissioners is limited to the record. *In re Application of Ackerman*, 127 Idaho 495, 496, 903 P.2d 85, 85 (1995). The board's findings of fact are to be upheld if they are supported by substantial and competent evidence. *Id.* at 496–97, 903 P.2d at 85–86.

III. ANALYSIS

As set forth below, this Court finds the decision of the BOCC was not supported by substantial evidence on the record as a whole, was in excess of its statutory authority, and was arbitrary, capricious, and an abuse of its discretion. As a preliminary note, the interests of S.B. and KH are aligned, and both are adversarial to the BOCC. This is because KH takes the facts which would prove or disprove S.B.'s indigency. KH would obtain funds from the medical indigency fund for services it rendered to S.B. if the criteria are met, and KH obtains no funds if those criteria are not met. Conversely, BOCC holds on to those funds if those criteria are met, and loses monies from that fund if KH and S.B. meet the criteria for medical indigency. Not only are KH and S.B. adverse to the BOCC, but the BOCC is also the judge and jury, as the BOCC hears the evidence and makes the decision as to whether KH and S.B. have met that criteria.

A brief description of the statutory framework and case law regarding policy for that statutory scheme is in order. The Idaho Medically Indigent Act is found in Idaho Code § 31-3501 et. seq.

> It is the policy of this state that each person, to the maximum extent possible, is responsible for his or her own medical care and that of his or her dependents and to that end, shall be encouraged to purchase his or her own medical insurance with coverage sufficient to prevent them from needing to request assistance pursuant to this chapter. However, in order to safeguard the public health, safety and welfare, and to provide suitable facilities and provisions for the care and hospitalization of persons in this state, and in the case f medically indigent residents, to provide for the payment thereof, the respective counties of this state, and the board and the department shall have the duties and powers as hereinafter provided.

I.C. § 31-3501. "The intent of the county medical assistance program...is to extend broad coverage to those who, due to calamitous circumstances are faced with medical costs they cannot hope to meet." *Carpenter v. Twin Falls County*, 107 Idaho 575, 582, 691 P.2d 1190 (1984). "Medically indigent" is defined as follows:

"Medically indigent" means any person who is in need of necessary medical services and who, if an adult, together with his or her spouse, or whose parents or guardian if a minor or dependent, does not have income and other resources available to him from whatever source sufficient to pay for necessary medical services. Nothing in this definition shall prevent the board and the county commissioners from requiring the applicant and obligated persons to reimburse the county and the catastrophic health care cost program, where appropriate, for all or a portion of their medical expenses, when investigation of their application pursuant to this chapter, determines their ability to do so.

I.C. § 31-3502(17). "Resources" is defined as follows:

"Resources" means all property, for which an applicant and/or an obligated person may be eligible or in which he or she may have an interest, whether tangible or intangible, real or personal, liquid or nonliquid, or pending, including, but not limited to, all forms of public assistance, crime victims compensation, worker's compensation, veterans benefits, medicaid, medicare, supplemental security income (SSI), third party insurance, other insurance or apply for section 1011 of the medicare modernization act 0f 2003, if applicable, and any other property from any source. Resources shall include the ability 0f an applicant and obligated persons to pay for necessary medical services, excluding any interest charges, over a period 0f up to five (5) years starting on the date necessary medical services are first provided.

I.C. § 31-3502(25). Counsel for KH correctly notes:

In broad strokes, the Act requires the county clerk to interview the patient and investigate their income, assets and allowable expenses in order to determine whether they have sufficient discretionary income to pay the hospital bill over a five year period. If they have sufficient discretionary income then they are not medically indigent.

Conversely, if they do not have sufficient discretionary income then they are declared medically indigent. If the patient is medically indigent, then the county where the patient resides will pay the medical provider the first $11,000.00 of the medical charges and any excess amount will be paid directly to the medical provider out 0f the Idaho Catastrophic Fund in Boise (hereinafter referred to as "CAT Fund" or "CAT Board").

The patient will then enter into a repayment program with the county.

Petr's Br. on Appeal, 7, 8. As to this last concept of "reimbursement", Idaho Code § 31-3510A (1) defines "Reimbursement" as follows:

(1) Receipt of financial assistance pursuant to this chapter shall obligate an applicant to reimburse the obligated county and the board for such reasonable portion of the financial assistance paid on behalf of the

> applicant as the county commissioners may determine that the applicant is able to pay from resources over a reasonable period of time. Cash amounts received shall be prorated between the county and the board in proportion to the amount each has paid.
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> * * *
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> (6) The county commissioners may require the employment of such of the medically indigent as are capable and able to work and whose attending physician certifies they are capable of working.

While this statute deals with "reimbursement", that is, the duty of the claimant to repay the county for medical indigency funds expended on their behalf (and the concept of "reimbursement" is not at issue in S.B.'s case), this statute defining "reimbursement" was used by the Idaho Supreme Court in *St. Luke's Magic Valley Regional Medical Center, Ltd. V. Board of County Com'rs of Gooding County*, 149 Idaho 584, 237 P.3d 1210 (2010), as the lynchpin or starting point in coming up with the concept of "imputed income." The concept of "imputed income" is not found in the Medically Indigent Act, but is a creation by the Idaho Supreme Court in *St. Lukes*. Before discussing *St. Luke's*, the Court will discuss two other cases cited to the Court.

In *Carpenter v. Twin Falls County*, 107 Idaho 575, 691 P.2d 1190 (1984), the county commissioners found Clarence Carpenter was not medically indigent at the time his wife incurred hospital expenses in a hospitalization that eventually resulted in her death. 107 Idaho at 578, 691 P.2d at 1193. The district court reversed the decision of the county commissioners, and the commissioners appealed. The Idaho Supreme Court affirmed the district court's decision which reversed the county commissioners' decision. Clarence Carpenter was employed by a farmer who earned $750 per month plus the farmer provided Clarence housing. 107 Idaho at 579, 691 P.2d at 1194. After his wife's death, Clarence quit his job because his daughter did not want him living alone and his son-in-law needed help on his farm. *Id.* The Idaho Supreme Court held the county commissioners were not bound by the fact that Clarence had virtually no income,

they could consider all the facts, including that Clarence was a healthy individual who had voluntarily quit his job. 107 Idaho at 585, 691 P.2d at 1200. *Carpenter* did not deal with imputation because even if the $750 per month were taken into consideration, Clarence was still medically indigent. *Id.* However, *Carpenter* certainly paved the way for "imputation" to be created.

In *Application of Ackerman*, 127 Idaho 495, 903 P.2d 94 (1995), the Idaho Supreme Court found Ackerman presently has the ability to pay off his medical expenses in a reasonable time...but for his lifestyle choices. 127 Idaho at 497-98, 903 P.2d at 86-87. Those lifestyle choices were Ackerman's discretionary expenditures of satellite television service, cell phone service and credit card debt. 127 Idaho at 498, 903 P.2d at 87.

Most pertinent to S.B.'s case is *St. Luke's.* In that case, Megan Freeman incurred emergency medical expenses from St. Luke's hospital. The board of county commissioners determined she was not medically indigent, as they imputed income to Freeman because she was voluntarily unemployed outside of her home. 149 Idaho at 586, 237 P.3d at 1212. Freeman testified that she was "able-bodied and able to work." 149 Idaho at 590, 237 P.3d at 1216. The district court affirmed the board of county commissioners and the Idaho Supreme Court affirmed the district court. In doing so, the Idaho Supreme Court stated, "as a matter of first impression, a patient's potential income may properly be imputed as a resource, for purpose of determining whether the patient is medically indigent." 149 Idaho at 584, 237 P.3d at 1210. "We do not criticize Freeman's choice not to work outside her home; we are simply unable to agree with St. Luke's contention that the taxpayers of Gooding County are required to provide financial assistance in support of that choice." 149 Idaho at 590, 237 P.3d at 1216.

As mentioned above, Idaho Code § 31-3510A (1), the definition of

"Reimbursement" was the lynchpin for the Idaho Supreme Court's creation of the "imputation of income" doctrine. That analysis is as follows:

> Our starting point is the Legislature's express declaration found in I.C. § 31–3501 [now 31-3501(1)]: "It is the policy of this state that each person, to the maximum extent possible, is responsible for his or her own medical care ...." Consistent with this policy, I.C. § 31–3510A, entitled "Reimbursement," requires anyone who receives financial assistance for medical expenses from a county to reimburse the county "for *such reasonable portion* of the financial assistance paid on behalf of the applicant as the board may determine that the applicant *is able to pay from resources* over a reasonable period of time." I.C. § 31–3510A(1) (emphasis added). Idaho Code § 31–3510A(6) further provides that in seeking reimbursement, "[t]he board may require the employment of such of the medically indigent as are capable and able to work and whose attending physician certifies they are capable of working." St. Luke's argues that because this provision is the only one that expressly mentions potential income, the Legislature must have intended that the Board consider potential income when determining how much a person is required to reimburse the County, but not when considering whether a person is indigent in the first place.
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> When I.C. §§ 31–3510A(1) and (6) are read together, it is clear that the Legislature intended for the potential income of an able-bodied person to be considered as a "resource" from which that person may be obligated to reimburse the county. We do not view the Legislature as having intended the word "resources" to have different meanings within Chapter 35, Title 31. Indeed, I.C. § 31–3502 declares that "[a]s used in this chapter, the terms defined in this section shall have the following meaning, unless the context clearly indicates another meaning ...." This declaration is consistent with long-standing rules of statutory interpretation. " 'Other portions of the same act or section may be resorted to as an aid to determine the sense in which a word, phrase, or clause is used, and such phrase, word, or clause, repeatedly used in a statute, will be presumed to bear the same meaning throughout the statute, unless there is something to show that there is a different meaning intended, such as a difference in subject-matter which might raise a different presumption.' " *Kerley v. Wetherell,* 61 Idaho 31, 41, 96 P.2d 503, 508 (1939) (quoting *Sprouse v. Magee,* 46 Idaho 622, 631, 269 P. 993, 996 (1928)).
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> In view of the explicit mandate that the terms defined in I.C. § 31–3502 are to be consistently afforded the same meaning throughout the chapter, if the Board should consider potential income as a resource under I.C. § 31–3510A for purposes of reimbursement, it should also consider potential income as a resource under I.C. § 31–3502(1), regarding medical indigency. This conclusion is in keeping with the definition of "medically indigent" which considers both income and other resources.

The dissent, focusing heavily on Freeman's *present* inability to pay for the cost of her medical care and relying on our decision in *Univ. of Utah Hosp. and Med. Ctr. v. Twin Falls Cnty.*, 122 Idaho 1010, 842 P.2d 689 (1992), asserts that "the hardship of any waiting period for payment must fall on the counties, not hospitals." It is true that this Court stated in that case that "[t]he more reasonable interpretation is that 'available' in I.C. § 31–3502(1) denotes *currently* or *immediately* obtainable income or resources and a corresponding *present* ability to pay, rather than a future ability to pay, or a potential future ability to pay." *Id.* at 1015, 842 P.2d at 694 (emphasis original). However, in 1996, the Legislature rejected this Court's view of a "more reasonable interpretation," defining "resources" to "include the ability of an applicant and obligated persons to pay for necessary medical services over a period of up to three (3) years." 1996 Idaho Sess. Laws ch. 410, § 3, p. 1360. Evidently satisfied with the hospitals' ability to wait for payment, in 2005 the Legislature extended the period to five years. 2005 Idaho Sess. Laws ch. 281, § 1, p. 917. In view of these actions, we are unable to reach the dissent's conclusion regarding the allocation of hardship. Our conclusion that a patient's potential income may properly be considered as a "resource" is also consistent with previous decisions from this Court.

In 1984, when this Court decided *Carpenter v. Twin Falls County,* 107 Idaho 575, 691 P.2d 1190 (1984), I.C. § 31–3502(1) defined "medically indigent" as "any person who is in need of hospitalization and who, if an adult, together with his or her spouse, ... does not have income and other resources available to him from whatever source which shall be sufficient to enable the person to pay for necessary medical services." *Carpenter,* 107 Idaho at 583, 691 P.2d at 1198. Idaho Code § 31–3502 did not yet contain an express definition of "resources." 1984 Idaho Sess. Laws ch. 99, § 1, p. 227. Against this statutory backdrop, Carpenter applied for county assistance for medical bills incurred in connection with his wife's terminal illness. *Carpenter,* 107 Idaho at 577, 691 P.2d at 1192. He quit his job after making the application. *Id.* at 579, 691 P.2d at 1194. On appeal, it was claimed that he "clearly was medically indigent because at the time of the hearing before the [Board] he had virtually no income." *Id.* at 585, 691 P.2d at 1200. This Court ultimately held that "[e]ven if we assume that Carpenter was capable of earning the income he was receiving at the time his application was filed ... the facts set forth above demonstrate that Mr. Carpenter" is indigent. *Id.* The Court also stated, however, that it was proper for the commission "to consider all the facts, including that Mr. Carpenter was a healthy individual who had voluntarily quit his job." *Id.*

This Court later decided *Application of Ackerman,* 127 Idaho 495, 903 P.2d 84 (1995). At that time, the act defined "medically indigent" just as it had in *Carpenter* and did not yet expressly define "resources." 127 Idaho at 497, 903 P.2d at 86; 1993 Idaho Sess. Laws ch. 112, § 1, p. 283. The appellant in *Ackerman* argued that he met the definition of "medically indigent" because he did not have a reserve of funds to pay off his medical bills all at once. 127 Idaho at 497, 903 P.2d at 86. The Court

> disagreed, stating that "Ackerman presently has the ability to pay off his medical expenses in a reasonable time ... but for his lifestyle choices." *Id.* at 497–98, 903 P.2d at 86–87. The lifestyle choices the Court was referring to were Ackerman's discretionary expenditures, including satellite television service, cell phone service, and credit card debt. *Id.* at 498, 903 P.2d at 87.
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> In view of the statutory framework and these two decisions, we find no legal error in the Board's determination that it was proper to impute income to Freeman as a "resource." We do not criticize Freeman's choice not to work outside her home; we are simply unable to agree with St. Luke's contention that the taxpayers of Gooding County are required to provide financial assistance in support of that choice.

149 Idaho at 588-90, 237 P.3d at 1214-16 (footnote omitted).

The pivotal fact in *St. Luke's* is that Megan Freeman was "able bodied." There was no dispute about that fact, Freeman admitted she was "able-bodied." In the present case, the BOCC never made a finding that S.B. was "able-bodied." While such a finding might be implicit in the BOCC's ultimate decision to deny S.B. medical indigency status, the BOCC never made such a finding. For that reason alone, the BOCC's decision must be reversed. Even if the BOCC had made the finding that S.B. was "able-bodied", such a decision would not be supported by substantial evidence.

While Idaho Code § 31–3510A was the starting point for the Idaho Supreme Court in creating "imputation of income", the next pivotal statutory piece was Idaho Code § 31-3510A(6), where the Idaho Supreme Court in *St. Luke's* wrote, as noted above:

> Idaho Code § 31–3510A(6) further provides that in seeking reimbursement, "[t]he board may require the employment of such of the medically indigent as are capable and able to work and whose attending physician certifies they are capable of working."

149 Idaho at 588-90, 237 P.3d at 1214-16. This concept of a "doctor's note" found its way into the BOCC's decision, when Commission Chairman Fillios closed S.B.'s hearing as follows:

> So in this case—this is a very, very—it's a—your situation is certainly challenging um—my inclination at this point, and especially absent a

> doctor's note indicating that you –your unable to work and unable to work a 40 hour week—uh—I would be inclined to deny, but as a Chairman, I cannot make the motion.

Tr. p. 16, Ll.11-15. In doing so, Commission Chairman Fillios, and the BOCC (since they all voted in favor of denying S.B.'s claim for medical indigency), made two incredibly huge errors of law and fact.

First, the error of law. A plain reading of the "doctor note" concept from *St. Luke's* shows that two things are needed under Idaho Code § 31–3510A(6); one, that S.B. is capable and able to work, and two, the applicant's attending physician certifies they are capable of working. In making his finding, that it was up to S.B. to come up with a doctor's note that says "you are unable to work and unable to work a 40 hour week" in order to avoid the imputation of income, Chairman Fillios clearly put the burden on S.B. to come up with a doctor's note which says she can't work. *Id.* That is not what *St. Luke's* and Idaho Code § 31–3510A(6) require. In order to apply the "imputation of income" doctrine, it is the BOCC's burden to come up with the "doctor note" because the statue, Idaho Code § 31–3510A(6), as noted by the Idaho Supreme Court in *St. Luke's*, reads: "[t]he board may require the employment of such of the medically indigent as are capable and able to work *and whose attending physician certifies they are capable of working.*" 149 Idaho at 588-90, 237 P.3d at 1214-16. (emphasis added). *St. Luke's* and Idaho Code § 31–3510A(6) make it clear that in order for "imputation of income" to be used by the BOCC, the applicant must be a) capable and able to work, *and* b) have a doctor's note to that effect, ie., that she can work. Neither of those exist in S.B.'s case. First, there is no testimony, no evidence of any kind, that S.B. can work at any other job or work at her current job any more than she is presently working. Second, no such doctor's note is present in this case. At the end of this decision, this Court will discuss in

more detail why the burden of proof, both the burden of production and burden of persuasion of proving "imputation", is at all times on the BOCC.

Second, there is an error in fact. Even if the burden of proving she could not work at a job all year round were foisted upon S.B., S.B. has proven that she cannot work at her current job all year round, and there is no proof that a similar additional job exists with similar accommodations where she could work the rest of the year. That is the uncontradicted testimony in S.B.'s case. Those are the only facts. There is a "doctor's note" in S.B.'s case, but that doctor's note corroborates all of S.B.'s testimony. The "doctor's note" in this case adds to the uncontradicted fact that S.B. is working as much as she can within her limitations. The doctor's note does not "certify [S.B.] is capable of working." *Id.* Instead, the "doctor's note" pertaining to S.B. simply notes her physical and mental health limitation as they relate to work. The only evidence is the medical record which discusses her physical limitations and mental health limitations. On January 8, 2019, Erika Mikles, Physician Assistant for Heritage Health, wrote:

> [SB] is a patient that has been known to my practice for 6 years. [patient] is requesting paperwork for her disability, on 01/08/2019. I have enclosed a copy of the office evaluation for your records. Once again, thank you for allowing me to participate in the care of this patient.
>
> She has chronic back pain, teriology unknown because she has not been able to afford imaging to work this up. Her back pain limits prolonged standing, sitting. It also limits how much she can lift. She also has chronic depression and anxiety and has been on medication for years for this. Her depression has caused some social isolation and problems with motivation and communication with others.

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S.B. testified before the board of county commissioners. S.B. verified that her medical records show she has chronic back pain which limits prolonged standing, sitting, and how much she can lift. Tr. p. 6, Ll. 10-14. She verified those records show "She also has chronic depression and anxiety and has been on medication for years for this.

Her depression is caused from social isolation and problems with motivation and communication with others." *Id.* Ll. 14-16. She testified she hasn't worked a full 40 hour week in about fifteen years due to her back pain. *Id.* at 6, Ll 18-20. She testified that due to her back pain she can't sit or stand that long and can only work for about three hours doing projects. *Id.* p. 7, Ll. 1-5. S.B. testified she needs to take breaks, and is allowed to take breaks, even doing the very sedentary activity of bookkeeping for her accountant employer. S.B. testified:

> Commissioner Duncan: Do you enjoy the work you do book keeping?
> S.B.: Um—sometimes it's very stressful but—I want to work around that—you know—learn my tools—this will be my first year of sobriety to do taxes so—uh it gets overwhelming you know—I try to push through, I take breaks, I you know—we work out of our home—some days fortunately I can go down to my room and take a break for a while.

Id. p. 12, Ll. 10-15. The *only* evidence is that S.B. works less than full time when she is working, and that she can't work full time due to her physical limitations alone. Additionally, S.B. has limitations as a result of her mental health, as mentioned in the medical report from her Physician's Assistant, above. S.B. was asked at her hearing:

> Chairman Fillios: So if you could work—if the job were a combination were a combination where you had the flexibility to both sit and stand—would that enable you to work a 40 hour week?
> S.B.: I don't think I could handle it. It makes me nervous working a 40 hour week. It's real intimidating to me.

13, Ll. 3-7. Additionally, S.B. does not work all year around, but the *only* evidence is that SB isn't choosing to work only six months out of the year, rather it is her employer that chooses to employ her only half of the year. S.B. testified she works approximately six months a year "Depending on our workload. I finish up easy by the first of the year." Tr. p. 5 Ll. 14-16.

A plain reading of *St. Luke's* is the Idaho Supreme Court allowed "imputation of

work" to be used in medical indigency cases, but only as follows: "[t]he board may require the employment of such of the medically indigent as are capable and able to work *and whose attending physician certifies they are capable of working.*" 149 Idaho at 588-90, 237 P.3d at 1214-16 (emphasis added). The Idaho Supreme Court did not state that "imputation of work" can be used in medical indigency cases when the claimant is working, but the commissioners "feel" the claimant could be working more hours or at a better paying job. At oral argument, counsel for the BOCC argued that S.B. was "voluntarily seasonally unemployed" not underemployed. The Idaho Supreme Court did not state that "imputation of work" can be used in medical indigency cases where the claimant was "voluntarily seasonally unemployed" or where they were underemployed. The Idaho Supreme Court only allowed imputation when the person was unemployed (not working at all) and physically able to work as verified by a doctor's note. In the present case, the BOCC has taken *St. Luke's* and turned it on its head. Through a misreading of St. Luke's. this BOCC has contorted the facts and the law to deny S.B. medical indigency, when they (or a different set of BOCC) had approved her in the past. The only thing that changes was the misreading of *St. Luke's*; the facts have not changed because S.B.'s situation has not changed. There is no reason for this Court to expand *St. Luke's* to the BOCC's wholly unsupported interpretation. *St. Luke's* was a split decision by the Idaho Supreme Court in 2010. The only remaining justice on the Idaho Supreme Court at the present time is Justice Burdick, and he *dissented* in *St. Luke's*. Justice Burdick and Justice Warren Jones dissented, finding that future income should not constitute a resource for medical indigency, because it is too speculative, and because the statutory interpretation in the majority opinion is incorrect. 149 Idaho at 592-96, 237 P.3d at 1218-22. Justice Burdick is correct on both counts. Justice Burdick

points out the speculation by the majority in *St. Luke's* because, "[t]he fact that the Board in this case arbitrarily found that, given the correct circumstance, Freeman would be able to pay her medical costs in no way means that such circumstantial speculation will come to fruition." 149 Idaho at 594, 237 P.3d at 1220. The point is, why is St. Luke's being penalized for being able to access the medical indigency fund for Freeman's medical expenses, when there is no way of knowing whether Freeman will ever go back to work during the next five years? As to statutory interpretation, Justice Burdick is absolutely correct in pointing out:

> The majority's use of the reimbursement provision to illustrate that speculative future income constitutes a resource for determining eligibility for medical indigency benefits is improper. The title of I.C. § 31–3510A, "Reimbursement," indicates that any power granted to the counties by the reimbursement provision is only applicable *after* the county has found that the individual is medically indigent and has also provided her with indigency benefits.
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> Although future income is a "resource" with respect to an individual's ability to reimburse the county for medical assistance under I.C. § 31–3510A(1), it is not a "resource" for the purposes of determining whether an individual qualifies for medical indigency benefits in the first place. Until a person is found to be medically indigent and has received benefits, there can be no reimbursement and I.C. § 31–3510A cannot be applied. Therefore, I.C. § 31–3510A(6) cannot be read in conjunction with I.C. § 31–3510A(1), as the majority suggests, to expand the scope of what constitutes a "resource" for purposes of determining eligibility for medical indigency benefits. Rather, for a form of capital to constitute a "resource" for the purpose of determining eligibility for medical indigency benefits, authority must be found in the language of I.C. § 31–3502(17), which, in this case, does not exist.

149 Idaho at 594, 237 P.3d at 1220. This Court finds there is a very real possibility that the imputation of income doctrine found in *St. Luke's* is no longer good law. At the very least, there is absolutely no reason for this Court to expand upon the *St. Luke's* decision and countenance the BOCC's bastardized interpretation of that case.

There was no finding by the BOCC that S.B. was not credible. Thus, S.B. was implicitly found to be credible. The Commission even noted that on other prior

occasions going back to 2011, the Commissioners had approved S.B. as being medically indigent, where the Commission did not impute income on those prior occasions. Tr. 4, Ll. 2-4. If nothing has changed for S.B. in the last nine years, then it is relevant that she was approved for county assistance these other times. The only thing that changed is this set of Commissioners imputed income. The problem is they did it without any basis, without any evidence supporting that decision, and by entirely misreading *St. Luke's*.

As a matter of law, the Commission misunderstood the doctrine of "imputation". Perhaps that was because at the beginning of the hearing, the three commissioners were misinformed by their County Assistance Interviewer, Deanna Gosselin, who said at the hearing: "Per Idaho Code §31-3502(25) potential income of an able-bodied person must be considered as a resource from which a person is obligated to pay for his or her own medical care over a reasonable period of time." Tr. p. 3, Ll. 12-14. That is not what Idaho Code § 31-3502(25) says. Nothing in that subsection of that statute breathes a word about an "able bodied person." As mentioned above, that subsection of that statute reads:

> (25) "Resources" means all property, for which an applicant and/or an obligated person may be eligible or in which he or she may have an interest, whether tangible or intangible, real or personal, liquid or nonliquid, or pending, including, but not limited to, all forms of public assistance, crime victims compensation, worker's compensation, veterans benefits, medicaid, medicare, supplemental security income (SSI), third party insurance, other insurance or apply for section 1011 of the medicare modernization act of 2003, if applicable, and any other property from any source. Resources shall include the ability of an applicant and obligated persons to pay for necessary medical services, excluding any interest charges, over a period of up to five (5) years starting on the date necessary medical services are first provided. For purposes of determining approval for medical indigency only, resources shall not include the value of the homestead on the applicant or obligated person's residence, a burial plot, exemptions for personal property allowed in section 11-605(1) through (3), Idaho Code, and additional exemptions allowed by county resolution.

I.C. § 31-3502(25). It is the *St. Luke's* case which discussed the concept of being "able-bodied." Megan Freeman testified that she was "able-bodied and able to work." 149 Idaho at 590, 237 P.3d at 1216. That being the case, imputation of income was allowed by the majority of the Idaho Supreme Court. In the present case, S.B. is not "able-bodied." The Commissioners did not find her to be "able-bodied", there was no discussion at all by the Commissioners about her being "able-bodied." Had they made such a finding, such would not have been supported by substantial evidence. The only evidence is that S.B. is not "able-bodied." That being the case, as a matter of law, imputation of other work is not allowed under the *St. Luke's* case. As a matter of fact, imputation of other work (that being the Qualfon position) is not supported by any evidence, let alone substantial evidence.

Any "facts" regarding "imputation" was also introduced to this case by the County Assistance Interviewer, Deanna Gosselin, who stated at the beginning of the hearing:

> Qualfon is hiring and starts at the very least $9.25 per hour with generous incentives to make much more per hour. If she made $9.25 per hour that would give her $1,603.33 per month. Based on the imputation of income set forth above, she would have discretionary income in the amount of %529.83 per month. The medical bills of $26,672.31 divided by 60 [months] equals $444.54. [S.B.] has had other approved applications with the County Assistance Program going back to 2011 where at that time we did not impute income. The approved applications have gone to collections and there has never been any attempt by [SB], to pay them prior to being turned over to collections. This concludes my summary.

Tr. p. 3, L. 28—p. 4, L. 6. "Imputation" was not discussed by the BOCC in its conclusion at the end of the hearing. Tr. p. 15, l. 18—p.17, L. 5. However, without "imputation", there is no way the BOCC could have reached its decision denying her claim. The record contains Exhibit R, which is a job description for "Customer Service Representative" at Qualfon. AR 93, 94. One of the requirements is the "Ability to

efficiently navigate and multi-task computer systems such as email, and client computer programs." *Id. 94.*

S.B. was asked, "How are your computer skills?" to which she replied, "I have none." Tr. p. 12, Ll. 16-17. S.B. was asked if she was going to learn computer skills, and she answered:

> Uh—sure I just had not. It's something that hasn't really applied. I've had to learn to apply for my unemployment and things like that—I'm kind of against all that technology so—but I know it's good for me to learn—I got a tablet from a friend so I'm trying to learn how to use it.

Tr. p. 13, Ll. 3-7. She also testified:

> Um—I don't have a lot of other skills but labor so that's been a real struggle for me. The work world is way different trying to get in to like learning the computers and dressing professional and presenting myself differently, different job sites are a lot different—and all the boys...so I'm trying to learn new skills and better my life.

Tr. p. 15, Ll. 12-17. The only evidence is that SB does not have computer skills. Trying to learn how to use a friend's tablet does not equate to the "Ability to efficiently navigate and multi-task computer systems such as email, and client computer programs" which Qualfon requires. *Id.* at 94. Having to learn to apply for unemployment via a computer also does not equate to the "Ability to efficiently navigate and multi-task computer systems such as email, and client computer programs" which Qualfon requires. *Id.* The imputation of the potential job at Qualfon is not supported by substantial evidence.

In addition to her lack of computer skills, when one looks at Qualfon's other requirements and compares them to the only evidence of record as to SB's abilities, the ability of S.B. to do the job at Qualfon is all the more preposterous:

> **As an agent representative you will:**
> Handle and respond to inbound phone calls via telephone and occasional email inquiries
> Upsell products and services based on customer needs
> Maintain and promote a positive attitude while meeting productivity goals
> Demonstrate the ability to create, add, edit and troubleshoot within the

client computer system
What You Will Need to Succeed:
Amazing customer service and insights
Ability to accept inbound calls and apply empathetic customer service support
Experience in a customer support environment is preferred (retail, hospitality, restaurants, etc.)
Ability to communicate effectively via telephone and email by using active listening and clearly speaking to the customer
Ability to efficiently navigate and multi-taks computer systems such as email, and client computer programs
Ability to attend 100% of our paid training program, without absences. Depending on the department, training is 2-4 weeks long.

AR, 94. S.B. essentially has none of those qualities or abilities which are either required or preferred by Qualfon. S.B. testified that, "I'll be 60 this year so...you know I have done labor all my life—a house painter by trade." Tr. p. 13, Ll. 9-11. SB has no customer service background. The only evidence is that SB struggles to perform bookkeeping part time for half of the year, in a job where her employer allows her to work at home and take breaks whenever she wants. The imputation of the potential job at Qualfon is not supported by substantial evidence.

As mentioned above, this Court must return to a discussion on the burden of proof. The BOCC clearly put the burden of proof on S.B. to prove a negative, that she can't work more than she currently is working. Even with that shifted burden, the only evidence is that S.B. cannot work more than she currently is working. Because the majority opinion of the Idaho Supreme Court in *St. Luke's* did not address who bears the burden of its newly created doctrine of "imputation", this Court will address who bears the burden of proof. "Imputation" of work is analogous to the concept of the "doctrine of avoidable consequences" or the "failure to mitigate" damages in a personal injury case. In a personal injury case, if a person can work they have a duty to mitigate their lost income damages, past and future, through a calculation of what that person used to make before the injury, less what that person could make after the injury based on their

remaining ability to work. Also, damages would be reduced to the extent the plaintiff did something to make his or her injuries worse and his or her damages greater. While the plaintiff has the "duty" to mitigate if possible, it is the defendant who bears the "burden" of proving the plaintiff's failure to mitigate. As to mitigation of damages, the burden of production of evidence and the burden of persuasion of evidence, is always on the defendant. *Preston v. Keith*, 584 A.2d 439, 444, 217 Conn. 12, 21 (Conn. 1991). In *Preston*, the Connecticut Supreme Court explained:

> The rationale for this rule is well established. A defendant claiming that the plaintiff has failed to mitigate damages " 'seeks to be benefited by a particular matter of fact, and he should, therefore, prove the matter alleged by him. The rule requires him to prove an affirmative fact, whereas the opposite rule would call upon the plaintiff to prove a negative, and therefore the proof should come from the defendant. He is the wrongdoer, and presumptions between him and the person wronged should be made in favor of the latter. For this reason, therefore, the onus must in all such cases be upon the defendant.' " 1 T. Sedgwick, Damages (9th Ed.1912) § 227, p. 448.
>
> To claim successfully that the plaintiff failed to mitigate damages, the defendant "must show that the injured party failed to take reasonable action to lessen the damages; that the damages were in fact enhanced by such failure; and that the damages which could have been avoided can be measured with reasonable certainty." 2 M. Minzer, supra, § 16.10, p. 16–18.

584 A.2d at 444, 217 Conn. at 21. The BOCC is the party which "seeks to be benefitted" by imputation; Kootenai County does not have to pay out of the medical indigency fund if they can legally impute income to S.B. However, the BOCC has the burden of production of evidence and the burden of persuasion with that evidence; to do otherwise would require S.B. to prove a negative...she must prove that she cannot do the job at Qualfon (which she proved anyway). This is also the law in Idaho:

> The doctrine of avoidable consequences, or the duty to mitigate, is an affirmative defense that provides for a reduction in damages where a defendant proves that it would have been reasonable for the plaintiff to take steps to avoid the full extent of the damages caused by the defendant's actionable conduct. *Davis v. First Interstate Bank of Idaho, N.A.*, 115 Idaho 169, 170, 765 P.2d 680, 681 (1988). Where an injured

> party takes steps to mitigate the damages caused by another, she is entitled to the costs she reasonably incurs in avoiding those damages. *Casey v. Nampa & Meridian Irr. Dist.,* 85 Idaho 299, 305, 379 P.2d 409, 412 (1963) (citing *Christensen v. Gorton,* 36 Idaho 436, 211 P. 446 (1922); 15 Am.Jur. Damages § 27; 25 C.J.S. Damages § 35). The doctrine of avoidable consequences seeks to "discourage even persons against whom wrongs have been committed from passively suffering economic loss which could be averted by reasonable efforts...." *Indus. Leasing Corp. v. Thomason,* 96 Idaho 574, 577, 532 P.2d 916, 919 (1974) (quoting *Wright v. Baumann,* 239 Or. 410, 398 P.2d 119, 121 (1965)). Whether it is reasonable to expect a plaintiff to perform specific acts of mitigation is a question of fact. *Casey,* 85 Idaho at 307, 379 P.2d at 413.
>
> The defendant bears the burden of proving that the proposed means of mitigation were reasonable under the circumstances, could be accomplished at a reasonable cost, and were within the plaintiff's ability. *Id.* Proof of the latter of these three requires more than a mere suggestion that a means of mitigation exists. *Clark v. Int'l Harvester Co.,* 99 Idaho 326, 347, 581 P.2d 784, 805 (1978). Thus, where a plaintiff-farmer sought damages in the form of lost profits related to a tractor that did not perform as anticipated, this Court concluded that although the plaintiff could have rented a substitute tractor, the defendant was not entitled to a reduction in damages because the defendant had failed to demonstrate any mitigating effects would have flowed from such a rental. *Id.* Similarly, where a defendant refused to rescind a contract for the sale of a broodmare which, subsequent to the sale, was found to be infertile, the Court of Appeals held that the defendant's mere assertion that plaintiffs could have engaged veterinary services to assess the mare's fertility was insufficient. *Whitehouse v. Lange,* 128 Idaho 129, 136, 910 P.2d 801, 808 (Ct.App.1996). Since the defendant in that case did not present evidence that such conduct would have resulted in a cure, or that the retention of such services would be cost effective, its mitigation defense failed. *Id.*
>
> Thus, when advancing a claim that the plaintiff failed to mitigate damages, the defendant must prove both that a means of mitigation existed and that the proposed course of mitigation would, in fact, have resulted in a reduction of the plaintiff's damages.

McCormack International USA, Inc. v. Shore, 152 Idaho 920, 924, 277 P.3d 367, 371 (2012). This is precisely what the BOCC has done in the instant case, provide a "mere suggestion that a means of mitigation exists." *Id.* In this case, it was not even a "mere suggestion"; the entire issue of S.B. being able to perform a full time job at Qualfon was made up out of whole cloth by the BOCC. The only "evidence" was a job advertisement; there was no proof, no evidence that an opening even existed at Qualfon at the time of

the hearing. No one from Qualfon testified on that point. No one testified what the physical, mental and emotional requirements of any job at Qualfon were. No one testified what accommodations Qualfon could make for a person's physical or emotional limitations. No one from Qualfon testified whether a person with essentially no computer skills could perform the job.

Finally, when it imputed income, the BOCC failed to take into consideration the fact that S.B. lived at her employer's business, and bartered rent in lieu of pay for her ability to live there. The BOCC did not take into consideration, nor did it elicit any testimony, as to what S.B. would have to pay for rent if she left her current job to take a job at Qualfon.

Unlike *St. Luke's*, this is not a case where S.B. chose to make herself indigent by not working. The record shows S.B. did all she could to earn what she was capable of earning, given her physical and mental health limitations. The BOCC's finding that S.B. is not indigent at the present time when on prior occasions it consistently found her to be indigent, is disingenuous.

From an appellate review standpoint, under I.C. § 67-5279(3), this Court finds the decision of the BOCC was; (a) in violation of constitutional or statutory provisions (misreading the Medical Indigency Act and *St.Luke's*); (b) in excess of the statutory authority of the agency (misreading the Medical Indigency Act and *St. Luke's*); (c) made upon unlawful procedure (shifting the burden of proof to KH and S.B.); (d) not supported by substantial evidence on the record as a whole (disregarding the facts and the law); and (e) arbitrary, capricious, or an abuse of discretion (it is all three, based on the reasons set forth above). Only one of those subsections was needed under I.C. § 67-5279, but the BOCC violated all five subsections. Additionally, this Court finds under I.C. § 67-5279(4), that substantial rights of the appellant KH (and S.B.) have been

prejudiced by the BOCC's decision.

IV. CONCLUSION AND ORDER.

For the reasons stated above, the decision of the BOCC denying medical indigency determination for amounts incurred in KH's treatment of S.B. is reversed. This matter is remanded to the BOCC for proceedings consistent with this memorandum opinion and order.

IT IS HEREBY ORDERED the decision of the BOCC denying medical indigency determination for amounts incurred in KH's treatment of S.B. is REVERSED. Under I.C. § 67-5279(3), this Court finds the decision of the BOCC was; (a) in violation of constitutional or statutory provisions; (b) in excess of the statutory authority of the agency; (c) made upon unlawful procedure; (d) not supported by substantial evidence on the record as a whole; and (e) arbitrary, capricious, or an abuse of discretion. Additionally, this Court finds under I.C. § 67-5279(4), that substantial rights of the appellant KH (and S.B.) have been prejudiced by the BOCC's decision.

IT IS FURTHER ORDERED that S.B. is medically indigent.

IT IS FURTHER ORDERED this matter is remanded to the BOCC for proceedings consistent with this memorandum opinion and order.

Entered this 31st day of July, 2019.

John T. Mitchell, District Judge

CERTIFICATE OF MAILING

I hereby certify that on the 31 day of July, 2019 a true and correct copy of the foregoing was mailed, postage prepaid, or sent by interoffice mail or facsimile to:

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By Jeanne Clausen, Secretary