3-21-2008

Henderson v. Eclipse Traffic Control Appellant's Reply Brief Dckt. 34526

IN THE SUPREME COURT OF THE STATE OF IDAHO

RAYMAJEAN HENDERSON,	)	
	)	
Claimant/Appellant,	)	**DOCKET NO. 34526**
	)	
vs.	)	
	)	
ECLIPSE TRAFFIC CONTROL & FLAGGING, INC., Employer, and IDAHO DEPARTMENT OF COMMERCE AND LABOR,	)	
	)	
Respondents.	)	
	)	

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REPLY BRIEF OF APPELLANT HENDERSON

* *

Appeal from the Industrial Commission
of the State of Idaho

* *

Chairman James F. Kile, Presiding

* *

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INTRODUCTION

The essence of the 'new issues' raised by Respondent Department of Commerce and Labor (DOL) are the same as raised by Appellant Henderson. The rewording of the respective issues casts them in a light that DOL believes is favorable to it. The results are the same regardless. This Reply Brief will endeavor to avoid repetition of argument.

COURSE OF PROCEEDINGS BELOW

DOL misstates a portion of the course below at pages 1 and 2 of it's brief. It states that "Based upon new information she received, Ms. Ackerman changed the Department's work search classification" and cites to a portion of the Hearing transcript.

This is not a correct statement.

Ms. Ackerman did not change anything based upon 'new information' she received. Pages 22 and 23 of the hearing transcript reflect that it was a computer issue because of the changed program. She testified that the way the computer system was "unfortunately" set up on the 'current sequence' she was coded as a B2. She further explained that although the computer listed Henderson as a B2 that in fact Henderson, in all 3 series is considered to be job attached. The standard applicable to Henderson, as

explained by Ms. Ackerman, in all three 3 claims, was and remained at all times, 'job attached.'

Additionally, DOL states that the claimant changed her mailing address from St. Maries to Hawaii. Respondent's Brief, p. 5. Actually as explained by Ms. Ackerman, the actual change of address on the computer was done by a staff member, for Henderson. Hr. T. p. 9, L. 12-16.

Finally it is inferred that Henderson 'redacted' information from the Appendix. Respondent's Brief p. 5. 'Redacted' generally refers to information blocked out by magic marker. The pages relevant to the appeal were put in rather than inundating the Court with numerous pages of fire starter.

REPLY TO RESPONDENT'S ARGUMENT NO. 1 WHICH IS ESSENTIALLY HENDERSON'S NO. 2 ELIGIBILITY UNDER I.C. SECTION 72-1366(4)(a)(b)

The statutory requirement established by the Legislature for eligibility for unemployment benefits is set forth at I.C. section 72-1366 (4) (a) and (b).

No where in subsections (a) and/or (b) is there any statement of intent that a 'job attached' employee (or a non-attached employee) "must remain at all times in their respective labor market area." Indeed the clear and unequivocal requirement is *not* that a claimant must live in their 'respective labor market' but rather the requirement is that the person must reside in a state that is *included in the interstate benefit plan.* There is no

dispute that Hawaii is a state and that it is included in the interstate benefit plan program.

DOL attempts to support the untenable position taken by Ms. Ackerman the DOL representative at the hearing and the one involved in the initiating of the process, that Henderson was 'not available for work,' because she could not be at work in an hour or even the very next day. She testified that her understanding of the requirement was,

> "...available for work in an hour or even the very next day."
> Hr. T. p. 11, L. 15-17.

The standard despite the DOL argument contrary to the express wording of the statute is *not* that a person must sit by the telephone, with car running, just in case the highly unlikely and improbable telephone call may come and tell the 'attached' employee to be at work in an hour, or even the very next day. Real life in 'seasonal' jobs does not work that way. Indeed the only requirement, even under Ms. Ackerman's interpretation that Henderson could not meet was to be at work in a hour. As Henderson testified, she could have been back to be ready for work within 5 hours and certainly within 24 hours after her receipt of a telephone call. Hr. T. p. 14, L.4-5.

A standard that would require a 'seasonal' employee to be back at work within an hour would be patently unreasonable. In the winter, the 'off-season' a person could not drive from St. Maries to Coeur d'Alene, let alone Spokane, because it takes at least an hour–on a good day with clear roads to travel back from Coeur d'Alene to St. Maries, let alone get work clothes on

and then make it to the place of business or job site location. Certainly reason must prevail at some point, and under the most extreme circumstances it is not unreasonable to allow a 'seasonal' employee on 'lay-off' at least 24 hours notice to allow them to get their affairs in order and be at work. Under that reasonable requirement, Henderson is undisputedly qualified.

DOL attempts to support it's argument with two 'non-job attached' cases (*Claim of Sapp, 75 Idaho 65, 266 P.2d 1027 (1954) and Kirkbride v. Department of Employment, 91 Idaho 658, 429 P.2d 390 (1967)).* The Industrial Commission, from whence this appeal arises, did not believe that these two cases were relevant. If it had, it would not have reached out to Florida and California for the cases it relied upon for support. Indeed, the status of a 'job attached' employee is far different than the status of a 'non-attached' employee. This difference is steeped in sound public policy that Idaho's seasonal employers must be able to count upon a returning skilled workforce in order to compete in the marketplace.

At page 16 of it's brief, DOL, pulls the curtain back and reveals that it's argument, and actually the position taken by the Industrial Commission, is based simply on the fact that Henderson spent her 'lay-off' time as a 'job attached' employee, in Hawaii.

As the DOL argued,

> "Wintering in Hawaii is not the sort of compelling personal circumstance for which the California Court or Idaho law could make an allowance." Respondent's Brief, p. 16.

As the Industrial Commission held,

> "We note that no one forced Claimant to seek unemployment benefits while she spent her winters in Hawaii. Claimant did so on her own free will." R. p. 22.

Obviously, the state in which 'job attached' claimant lives during the seasonal lay-off should have no impact on eligibility so long as the person can return to work in a reasonable time frame, after notice to do so, and so long as the state is an 'interstate' participant. Henderson's living in Hawaii during the seasonal lay-off meets all of those requirements. Would wintering in Northern Minnesota, North Dakota, or Northern Wisconsin be more palatable from a personal circumstance point of view? These are all states under I.C. section 72-1366(4) and their respective winters really put the 'winter' into wintering. Should they be? Obviously, the answer to these rhetorical questions should be no. So long as the person is 'job attached', capable of returning to work within a reasonable time after notice, and living in an 'interstate' state, the person should be entitled to the unemployment benefits.

The facts are undisputed that Henderson was job attached, could have and was ready to return to work upon very short and reasonable notice, and was residing in an interstate benefit state. Henderson meets the requirements of I.C. section 72-1366 (4) (a) and (b).

REPLY TO RESPONDENT'S ARGUMENT NO. II WHICH IS ESSENTIALLY HENDERSON'S ARGUMENT 4 REGARDING WAIVER UNDER I.C. SECTION 72-1369(5)(a)

DOL's argument regarding 'waiver' *in response to Henderson's reason for answering the reporting question in the manner in which she was told* is, essentially, as reflected at page 27, L. 15-17 of the Hr. T.,

> "And I do want to say that as manager of the local office we never instruct our claimant to falsify on a weekly report when they file their claim."

Truth or falseness are not issues in this case. Both the Hearing Examiner and the Industrial Commission found that Henderson's receipt of unemployment benefit payments were "not the result of a false statement or misrepresentation made by Claimant." T. p.6. If Henderson's reports were not false nor misrepresentations then by definition they must have been true and made with no intent to deceive or be unfair.

Henderson testified that she was told how to answer the question by the DOL local representative when she notified *them* to change her address for her from St. Maries to Hawaii. Henderson also testified that she based her answer to the question upon what she thought that the question meant. She answered the same question consistently the same for the same reasons. Since it was a finding of act that Henderson did not make a 'false statement or misrepresentation' it is likewise true, and consistent with Ms. Ackerman's testimony, that she was not instructed by DOL staff to falsify

her answers on a report. *Neither* of the two, (1) what she was told to do when answering, and (2) what she answered, are untrue, false or misrepresentations.

Given the express finding that Henderson did not falsify or misrepresent it is difficult to appreciate how she could be deemed at fault for giving an answer that she felt was correct, that she has given consistently over the years, and that she was told to give. It is also disconcerting, given this finding of fact of no falsity or misrepresentation, that the Hearing Examiner and the Industrial Commission by inference could adopt a position that the "only accurate answer" that Henderson could have given was not the one that she gave. Certainly if it were truly the " *only* " accurate answer Henderson's giving of a different answer, such as she did, would be falsifying or misrepresenting on it's face.

With regards to the Industrial Commission it wasn't a question of credibility as DOL argues in its brief, at page 22. Rather the Industrial Commission refused the waiver for the novel reason that Henderson went to Hawaii. The Industrial Commission held on this point, "no one forced Claimant to seek unemployment benefits while she spent her winters in Hawaii. Claimant did so on her own free will. Therefore Claimant is entirely responsible for the information she provided when she sought those benefits." R. p. 22. The Industrial Commissions holding that Henderson went to Hawaii while laid off makes any error solely of her own doing , after

Henderson reported her change of address to the DOL local office who changed it for her on the computer, and when Henderson responded to the weekly reporting questions in exactly the manner that she was told by the local DOL representative to do, is untenable. There is no showing how Henderson going to Hawaii makes her culpable for any perceived wrong answer especially in light of the undisputed facts of this case. Indeed, while Ms. Ackerman the local manager testified that her office does not instruct claimants to falsify reports, the fact is that the DOL could have produced the person who changed Henderson's address on the computer and told her how to fill out the weekly reporting form, but it failed to do so and failed to contradict Henderson's testimony, which given the finding of no falsity or misrepresentation is not rebutted.

RESPONDENT'S ARGUMENT III WHICH IS ESSENTIALLY HENDERSON'S ARGUMENT 1–JURISDICTION

The Court will consider a question of jurisdiction on appeal. The statutory requirements governing appeals are mandatory and jurisdictional. *Lufkin v. Department of Employment, 100 Idaho 584, 602 P.2d 947 (1979); Dunlap v. Cassia Memorial Hospital Medical Center, 134 Idaho 233, 999 P.2d 888 (2000).*

DOL argues that either (1) no determination of eligibility was ever made on Henderson's unemployment claims for December 12, 2004 through February 26, 2005 or December 4, 2005 through April 1, 2006, during which

Henderson received unemployment benefits, or (2) that each weekly report results in a new determination and is a new event that triggers a new appeal time or statute of limitations. It is difficult to conceive that no determination of eligibility was ever made on Henderson's claims during these two periods of time, although payments were made to her, and that a 'determination' can be made without the presence of a non-disclosure or a misrepresentation at *any* subsequent time.

Nonetheless, even under DOL's argument the March 30, 2007 'determination' with regards to the weekly claim reporting periods of December 12, 2004 through February 26, 2005 are all outside of the I.C. section 72-1368(3), 14 day appeal time. They are also outside of the one (1) year "special redetermination" (which by definition implies that a determination has been already made) time period. With regards to the weekly claim reporting periods from December 4, 2005 through April 1, 2006, all weekly periods, except the last three of March 12th through March 31st are also outside the 14 day appeal period and outside the one (1) year "special redetermination" period of time. Beyond these three week reporting periods, under DOL's own argument there would be no jurisdiction in the DOL or the Industrial Commission because there is no allegation, nor finding, of nondisclosure nor misrepresentation involved. The DOL does use terms in this argument, and elsewhere in it's brief, such as "failed to report accurately" and "answers to this question were inaccurate." However the

express finding of fact by the Hearings Examiner and adopted by the Industrial Commission was that the "overpayment was not the result of a false statement or misrepresentation made by claimant." R. p. 6.

At most, even under DOL's proposed analysis, only three (3) weeks of benefits in the total amount of $975.00 would be at issue on this appeal.

RESPONDENT'S ARGUMENT IV WHICH IS ESSENTIALLY HENDERSON'S ARGUMENT 3–IDAPA

The gravaman of the issue raised by Henderson during the entire length of her pro se, and now represented, journey through this nightmare she tried so hard to avoid, is the question of her entitlement to unemployment benefits pursuant to I.C. section 72-1366(4)(a) and (b). The validity of IDAPA 09.01.30.175.04.23 is inherently a part of that question. The Court will no more enforce an illegal transaction than it will enforce a regulation that in effect rewrites a clear and unambiguous statute. *Moses v. Idaho State Tax Commission, 118 Idaho 676, 799 P.2d 964 (1990).* The validity of the IDAPA rule was raised by Henderson's responses to DOL's action below and her appeal to the Industrial Commission which placed the rule squarely at issue.

I.C. section 72-1366(4)(b) clearly and unequivocally provides that she must (and) live in a state that is included in the interstate benefit plan. There is no dispute that Hawaii is such a state and indeed that is how Henderson processed her last claims was through that plan. Subsection (b)

makes no mention whatsoever about any requirement that a claimant live in the state of Idaho, let alone the even more restrictive "local labor market." The statute clearly uses the wording "a state".

DOL argues that the 'intent' is to require that a person be "genuinely attached to a labor market," and that IDAPA 09.01.30.175.23 is the DOL's attempt to insure that attachment. What this argument does not take into account is the undisputed finding of fact that Henderson was classified as "job attached" to her respective specific employer, and returned to her respective "attached" employer each and every time. R. p. 2-3.

It is difficult to conceive of how a person could be more "attached to a labor market" than to be a "job attached" employee who returns regularly each year to the respective employer. IDAPA may be a good faith effort to insure that "non-job attached" workers remain genuinely attached to the labor market, but that intent can not run afoul of the clear statutory language and, in Henderson's specific situation, the undisputed finding of fact of her strong attachment to the labor market as a "job attached" worker, who only needs to remain in contact with his/her respective and specific employer.

Henderson was "attached" as closely to her labor market at all times as any unemployed worker could possibly be as a "job attached" employee, and she lived at all times in "a state....that is included in the interstate benefit

payment plan." Henderson not only meets the letter of the law but the intent of the law.

CONCLUSION

The DOL's arguments, if anything, serve to strength and galvanize the position of Henderson that she at all times fully complied with statutory requirements to receive unemployment benefits. Her situation represents the practicalities of the inherent need of Idaho's many seasonal employers to maintain a skilled workforce and the practicalities of a "job attached" employee. Henderson's consistent history of seasonal lay-off and then return to work to the respective "job attached" employer when called and her ability to return to that respective employer on the most minimal of reasonable notice are reflective that the system as designed by the Idaho Legislature works as it was intended. The Court should reverse the Decision of the Industrial Commission.

RESPECTFULLY SUBMITTED, this 19 day of March, 2008.

Starr Kelso, Attorney for Appellant Henderson

CERTIFICATE OF SERVICE

I hereby certify that on this 19 day of March, 2008, I caused to be served two true and correct copies of the foregoing by First Class Postage via the United States Post Office to

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