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Bringman v. New Albertsons Respondent's Brief Dckt. 40232

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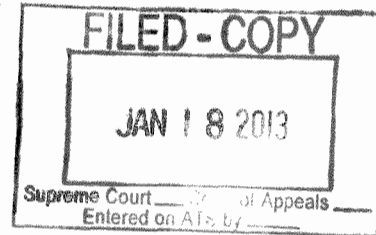
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IN THE SUPREME COURT OF THE STATE OF IDAHO

BILLY J. BRINGMAN,)
)
 Claimant/Appellant,)
)
 vs.)
)
 NEW ALBERTSONS, INC.,)
)
 Employer/ Respondent,)
)
 and)
)
 IDAHO DEPARTMENT OF LABOR,)
)
 Respondent.)

SUPREME COURT NO. 40232
BRIEF OF RESPONDENT
IDAHO DEPARTMENT OF LABOR



ON APPEAL FROM THE INDUSTRIAL COMMISSION
STATE OF IDAHO
THOMAS P. BASKIN, CHAIRMAN

CLAIMANT BILLY J. BRINGMAN

BY: C. TOM ARKOOSH
802 W. Bannock Street, Suite 900
Boise, ID 83701

EMPLOYER NEW ALBERTSON'S, INC.

c/o TALX UC Express
P. O. Box 173860
Denver, CO 80217-3860

IDAHO DEPARTMENT OF LABOR

BY: LAWRENCE G. WASDEN
ATTORNEY GENERAL
Tracey K. Rolfsen, ISB No. 4050
Deputy Attorney General
Idaho Department of Labor
317 W. Main Street
Boise, ID 83735
ISB No.: 4050

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Reference Material

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STATEMENT OF THE CASE

(1) Nature of the Case:

When New Albertsons, Inc., (Employer) disciplined Billy J. Bringman (Claimant) by giving him the option of either taking a demotion or leaving, he left. Then, Claimant filed for unemployment benefits with the Idaho Department of Labor (Department) and reported that Employer laid him off due to a lack of work. Because the Industrial Commission (Commission) concluded Claimant's statement was willfully false, he was statutorily ineligible for a waiver of the requirement to repay benefits and was statutorily liable for a 25% civil penalty. R. p. 43. The Commission also concluded Claimant quit his employment with good cause and Employer's account was chargeable for experience rating purposes. R. p. 43

Claimant appeals the Commission's Decision and Order to this Court only to the extent the Commission concluded that Claimant willfully made a false statement or willfully failed to report a material fact to the Department, which resulted in a civil penalty and a finding that he was ineligible for a waiver of the requirement to repay the benefits he received. Claimant does not appeal the Commission's conclusions that he voluntarily quit his employment with good cause, that Employer's account was chargeable for experience rating purposes, or its conclusion that he received adequate due process.

(2) Course of the Proceedings Below:

On December 8, 2010, Claimant filed a claim for unemployment benefits after he ended his employment with Employer. Exhibit 3-A, pp. 1, 5; Tr. p. 18, Ll. 16-20. In his online application for unemployment benefits, Claimant reported to the Department that Employer laid

him off due to a lack of work. Exhibit 3-A, p. 1; Tr. p. 18, L. 25; p. 19, L. 2. There is no evidence in the record Employer responded to or contested Claimant's first claim for benefits.

When Claimant's benefit year ended on December 3, 2011, he filed a second claim for benefits on December 12, 2011.¹ Exhibits 3, pp. 1, 5 and 3-A, p. 1. On December 28, 2011, the Department sent Employer a second Chargeable Determination informing Employer of Claimant's second claim for benefits filed on December 12, 2011, and the maximum amount potentially chargeable to Employer.² Exhibit 5, p. 3. This time Employer did respond by appealing the Chargeable Determination on January 11, 2012. Exhibit 5, pp. 2-5.

Based on new information Employer provided in its appeal, the Department conducted an investigation into Claimant's separation from employment and issued two Eligibility Determinations on February 8, 2012. Exhibits 8 and 9. In one of the Eligibility Determinations the Department found Claimant was not eligible for benefits because he voluntarily quit without good cause and that Employer's experience rated account was not chargeable for benefits paid to Claimant. Exhibit 8. In the other Eligibility Determination, the Department found Claimant was not eligible for benefits because he willfully made a false statement or failed to report a material fact on his claim in order to obtain benefits. Exhibit 9.

¹ A claimant's eligibility for benefits extends only through his benefit year. A benefit year is defined as a period of fifty-two (52) consecutive weeks beginning with the first day of the week in which an individual files a new valid claim for benefits. Idaho Code § 72-1308. In order to become eligible for benefits after his benefit year ends a claimant must file a new claim.

² Pursuant to Idaho §72-1351(2) benefits paid to a claimant are charged to the account of the covered employer who paid the largest individual amount of base period wages. Pursuant to IDAPA 09.01.30.425.09 and IDAPA 09.01.30.425.10, when a claim for unemployment benefits is filed, the Department is required to notify and request separation information from the claimant's last employer and each next preceding employer until the wages received by the claimant from his employer or employers equal fourteen (14) times his weekly benefit amount.

On February 8, 2012, the Department mailed a determination of overpayment and documents explaining the improper payments to Claimant detailing the weeks overpaid, the amount overpaid and the penalties imposed. Exhibits 10, 11.

On February 22, 2012, Claimant filed a timely appeal of the Determinations to the Department's Appeals Bureau. Exhibit 12. On March 12, 2012, an appeals examiner held a telephone hearing in the matter. Exhibit 1; Tr. p. 1. In a Decision filed March 23, 2012, the appeals examiner affirmed all of the determinations and the imposition of a civil penalty. R. pp. 1-6. In addition, the appeals examiner concluded Claimant was not eligible for a waiver of the requirement to repay benefits overpaid to Claimant as a result of Claimant's willful false statement or failure to report a material fact. R. pp. 1-6.

Claimant filed a timely appeal to the Commission. R. 7-8. In a Decision and Order filed July 6, 2012, the Commission concluded Claimant willfully made a false statement or failed to report a material fact, was not entitled to a waiver of the requirement to repay overpaid benefits, and was subject to a 25% civil penalty. The Commission also concluded that Claimant received due process, voluntarily quit his job with good cause, and that Employer's account was chargeable for experience rating purposes. R. pp. 31-45. On August 1, 2012, Claimant filed a Notice of Appeal with this Court. R. pp. 46-51.

(3) Statement of Facts:

Claimant began working for Employer in 2004. Tr. p. 5, L. 25, p. 6, Ll. 1-3. Over the years, he was promoted from the freight crew to assistant store director. Tr. p. 7, Ll. 11-25. As

assistant store director, Claimant was in charge of every aspect of the store when the store director was absent. Tr. p. 14, Ll. 4-14, p. 16, Ll. 20-25.

Claimant was assistant store director for approximately two years when he received a written warning from the store director for showing poor leadership and management style over an incident with a customer in October of 2010. Tr. p. 7, Ll. 7-25; 8, Ll. 1-2; p. 9, Ll. 18-25. Claimant told the store director that he would not sign Employer's write up of this incident. Tr. p. 10, Ll. 12-15. As a result, Employer placed Claimant on leave and three weeks later offered him two choices—he could either accept a demotion and continue working for Employer as a fourth key person, or he could leave his employment with a severance package. Tr. p. 11, Ll. 12-14; 12, Ll. 1-25; p. 13, Ll. 1-7. On December 3, 2010, Claimant chose to leave his employment because he thought he would be leaving Employer in good standing, he would be rehireable after six months, and his claim for unemployment benefits would not be contested by Employer. Exhibits 3A, p.1 and 6, pp. 2, 6; Tr. p. 12, Ll. 24-25; p. 13 Ll. 1-2, p. 17, Ll. 10-18; p. 18, Ll. 12-15.

When Claimant applied for unemployment benefits on December 8, 2010, it was not the first time he had applied for benefits. Exhibit 3-A, pp. 1, 5; Tr. p. 18, Ll. 16-20. Claimant had applied for benefits in 2003. Tr. p. 18, Ll. 16-24. During the online application process on December 8, 2010, Claimant viewed an instructional slide presentation. Exhibit 6, p. 3; Tr. 51, Ll. 19-22. The first slide of the presentation told Claimant if he had questions after viewing the presentation or after reading the pamphlet, he was to contact the Department. Tr. p. 51, Ll. 23-25; p. 52 L. 1. Slide 15 of the presentation told Claimant that the Department would consider it

fraud if he indicated that he was laid off due to a lack of work when he actually quit. Tr. p. 52, Ll. 6-10. That same slide also told Claimant he would be responsible for the information in the “Unemployment Insurance Claim Benefit Rights, Responsibilities and Filing Instructions” pamphlet (pamphlet). Tr. p. 52, Ll. 10-19. Although Claimant said he could not recall getting the pamphlet, he did acknowledge that he was “absolutely” responsible for knowing and understanding the information in the pamphlet. Tr. p. 52, L. 16; p. 54, Ll. 1-5.

The pamphlet explained the unemployment insurance program. Exhibit 2-B, p. 4. Information in the pamphlet told Claimant he would not be eligible for benefits unless he had been either laid off due to a lack of work; voluntarily quit with good cause connected with employment; or discharged, but not for misconduct. Exhibit 2-B, p. 4. The pamphlet also explained that if Claimant quit a job or was fired from a job, the Department was required to suspend the payment of benefits, investigate the claim and make a decision on the Claimant’s eligibility based on the results of the Department’s investigation. Exhibit 2-B, p. 13.

During the application process on December 8, 2010, the Department gave Claimant three (3) different options to describe how he ended his employment with Employer. The three (3) options were either “quit”, “terminated/discharged” or “laid off due to a lack of work.” Tr. p. 19, Ll. 2-14; p. 27 Ll. 18-21. Claimant knew that selecting the option “quit” or selecting the option “terminated/discharged” would give him a drop down box to describe the circumstances of his separation. Tr. p. 27, Ll. 21-25; p. 28, Ll. 1-3. The Department does not provide a drop down box for the option “laid off due to lack of work.” Tr. p. 58, Ll. 15-18. Instead of choosing

“quit” or “terminated/discharged” to describe how his employment with Employer ended, Claimant chose “laid him off due to a lack of work.” Exhibit 3A, p 1; Tr. p. 18, L. 25, p. 19.

Claimant filed weekly claims for benefits and received unemployment benefits or waiting week credit from December 5, 2010 through December 3, 2011. Exhibits 4 and 15. Claimant’s benefit year ended on December 3, 2011, and on December 12, 2011, Claimant filed another claim for benefits. Exhibits 3, p.1 and 3A, p. 1. Claimant continued to file weekly claims and receive benefits from December 11, 2011 through January 14, 2012, Exhibits 4 and 15.

On December 28, 2011, the Department sent Employer a Chargeable Determination informing Employer Claimant filed a claim for benefits on December 12, 2011, and informing Employer of the maximum benefits potentially chargeable to Employer on that claim. Exhibit 5, p. 3. Employer appealed that chargeable determination on January 11, 2012. Exhibit 5, pp. 2-5. In that appeal, Employer indicated Claimant voluntarily quit. Exhibit 5, p. 4.

ISSUES ON APPEAL

I.

Is there substantial and competent evidence in the record to support the Industrial Commission's findings and conclusion that Claimant willfully made a false statement or willfully failed to report a material fact in order to obtain unemployment benefits?

II.

Did Claimant's failure to cite authority and present argument on appeal bar the Court from considering whether there was substantial and competent evidence in the record to support the Industrial Commission's findings and conclusion that Claimant was not eligible for a waiver and subject to a 25% civil penalty as a result of his false statement or failure to report a material fact?

III.

Should Claimant be awarded attorney fees on appeal?

STANDARD OF REVIEW

In appeals from decisions of the Industrial Commission, the Court's review is limited to questions of law. Idaho Const. Art. V, § 9; *Pimley v. Best Values, Inc.*, 132 Idaho 432, 434, 974 P.2d 78, 80 (1999). This Court has held that the burden of establishing statutory eligibility in cases where a claimant is alleged to have willfully made a false statement or willfully failed to report a material fact rests with the claimant. *McNulty v. Sinclair Oil Corporation*, 152 Idaho 582, 272 P.3d 554, 557 (2012); *Cahoon v. Employment Security Agency*, 82 Idaho 224, 231, 351

P.2d 477, 481 (1960); *Steffen v. Davison, Copple, Copple & Copple*, 120 Idaho 129, 132, 814 P.2d 29, 32 (1991). The Commission's determination that a claimant willfully failed to report a material fact must be based on substantial evidence. *Gaehring v. Department of Employment*, 100 Idaho 118, 119, 594 P.2d 628, 629 (1979).

This Court does not reweigh the evidence or consider whether it would have reached a different conclusion from the evidence presented. *Current v. Haddons Fencing, Inc.*, 152 Idaho 10, 13, 266 P.3d 485, 488 (2011). While conflicting evidence may exist in the record, the Court will not disturb the Commission's factual findings unless they are clearly erroneous. *Ginther v. Boise Cascade Corporation*, 150 Idaho 143, 244 P.3d 1229, 1233 (2010). The factual findings of the Commission will be upheld provided they are supported by substantial and competent evidence. *Uhl v. Ballard Medical Products, Inc.*, 138 Idaho 653, 657, 67 P.3d 1265, 1269 (2003). "Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion." *Id.* "Substantial evidence is more than a scintilla of proof, but less than a preponderance." *Painter v. Potlach Corporation*, 138 Idaho 309, 312, 63 P.2d 435, 438 (2003), citing *Zapata v. J.R. Simplot Co.*, 132 Idaho 513, 515, 975 P.2d 1178, 1180 (1999).

It is for the Commission to determine the credit and weight to be given to the testimony admitted. *Bullard v. Sun Valley Aviation, Inc.*, 128 Idaho 430, 432, 914 P.2d 564, 566 (1996). The Commission's conclusions regarding the credibility and weight of evidence will not be disturbed unless the conclusions are clearly erroneous. *Oxley v. Medicine Rock Specialties, Inc.*, 139 Idaho 476, 479, 80 P.3d 1077, 1080 (2003). In reviewing a decision of the Commission, the

Court views all facts and inferences in the light most favorable to the party who prevailed before the Commission. *Current*, 152 Idaho at 13, 266 P.3d at 488.

Appellate court review is limited to the evidence, theories, and arguments that were presented below. *Obenchain v. McAlvain Construction, Inc.*, 143 Idaho 56, 137 P.3d 443, 444 (2006). The Court will not consider arguments raised for the first time on appeal. *Excell Construction, Inc. v. State Department of Labor*, 141 Idaho 688, 693, 116 P.3d 18, 23 (2005). This Court will not consider issues on appeal not supported by propositions of law, citation to legal authority, or argument. *Huff v. Singleton*, 143 Idaho 498, 500, 148 P.3d 1244, 1246 (2006). An issue cited on appeal is waived if either authority or argument is lacking, not just if both are lacking. *Gem State Insurance Company v. Hutchison*, 145 Idaho 10, 16, 175 P.3d 172, 178 (2007).

ARGUMENT

I.

There is substantial and competent evidence in the record to support the Industrial Commission's findings and conclusion that Claimant willfully made a false statement or willfully failed to report a material fact in order to obtain unemployment benefits.

When the Department discovered that Claimant opted to leave his employment rather than take a demotion, Claimant had already received fifty-three (53) weeks of unemployment benefits because he told the Department that he was laid off due to a lack of work. When filing a claim for benefits, a claimant is required to provide the Department with all necessary information pertinent to his eligibility, including the reason for his separation from employment. IDAPA 09.01.30.425.07.e; Idaho Code §72-1366(1). In *Meyer v. Skyline Mobile Homes*, 99

Idaho 754, 589 P.2d 89 (1979), this Court held that the Department should be able to assume claimants “are reporting all the information solicited from them fully and accurately.” *Meyer*, 99 Idaho at 760, 589 P.2d at 95. In *Current*, this Court concluded a claimant who misstates the reason for his separation can be found to have made a willful false statement. *Current*, 152 Idaho at 13-14, 266 P.3d at 488-489;

To promote accurate reporting, Idaho Code § 72-1366(12) makes a claimant ineligible for benefits and subject to penalties when he makes a willful false statement of a material fact or willfully fails to report a material fact to the Department in order to obtain benefits. I.C. §§ 72-1366(12) and 72-1369(2). Pursuant to § 72-1366(12), a claimant is not entitled to unemployment benefits for a period of fifty-two (52) weeks, he is ineligible for waiting week credit and he must repay any sums received for any week for which he received waiting week credit or benefits as a result of having willfully made a false statement or having willfully failed to report a material fact. I.C. § 72-1366(12).

An allegation that a claimant is ineligible for benefits under Idaho Code § 72-1366(12) does not rise to the level of an allegation of fraud, but rather is a “lesser willful standard.” *Cox v. Hollow Leg Pub*, 144 Idaho 154, 159, 158 P.3d 930, 935 (2007). The burden of establishing statutory eligibility in these cases rests with Claimant. *McNulty*, 272 P.3d at 557. Claimant must demonstrate that his failure to accurately report the nature of his separation did not render him ineligible under Idaho Code § 72-1366(12). The Commission concluded Claimant did not meet his burden. R. pp. 39-42. It concluded Claimant made a willful false statement of a material fact

in order to obtain benefits when he indicated to the Department that he was laid off due to a lack of work. R. p. 42.

The Commission concluded that Claimant provided information about his separation for the purpose of obtaining benefits. R. p. 39. Substantial and competent evidence supports that conclusion. There is no evidence in the record that Claimant filed a claim for any reason other than obtaining benefits.

The Commission also concluded that the information Claimant provided about his separation from employment was material. R. p. 39. A fact is material if it is relevant to the determination of a claimant's right to benefits, it need not actually affect the outcome of the determination. *Current*, 152 Idaho at 13, 266 P.3d at 488, citing *Meyer*, 99 Idaho at 760, 589 P.2d at 95. "Complete and unqualified disclosure can best be promoted by defining materiality to include any information that is relevant to the determination of a Claimant's right to benefits. *Current*, 152 Idaho at 13, 266 P.3d at 488 (2011).

In *Current*, as in this case, the claimant reported to the Department that he was laid off due to a lack of work. *Current*, 152 Idaho 12, 266 P.3d 487. The Court concluded in *Current*, that the claimant's description of his separation was material. *Current*, 152 Idaho at 13-14, 266 P.3d at 488-489. Under Idaho's Employment Security law a claimant is only eligible for benefits if his unemployment is "not due to the fact that he left his employment voluntarily without good cause connected with his employment, or that he was discharged for misconduct in connection with his employment" I. C. §72-1366(5). In order to determine whether a claimant is eligible

for benefits under §72-1366(5) the circumstances surrounding a claimant's separation are clearly relevant and an accurate accounting of those circumstances must be obtained from the claimant.

Substantial and competent evidence supports the Commission's conclusion that Claimant's description of his separation was material. The Commission's conclusion that Claimant had good cause to leave his employment does not make the circumstances of his separation any less material. In *Meyer*, the claimant argued that his failure to report an offer of work was not material because the work was not suitable and he had good cause to refuse it. *Meyer*, 99 Idaho at, 760, 589 P.2d at 95. The Court rejected the claimant's contention stating that even if the Commission ultimately agreed the work was not suitable it does not preclude a finding that the concealment was material. *Id.* Exhibit 5, p. 3;

In this case, there is no dispute that Employer removed Claimant from his position as an assistant store manager and gave him two options. Tr. p. 12, Ll. 1-25. Employer offered Claimant a demotion and continued employment as a fourth key person, or the option of leaving the company with a severance package. Tr. p. 12, Ll. 23-25; p. 13, Ll. 1-6. Claimant decided to leave his employment. Tr. p. 17, Ll. 11-18. Claimant filed an online application for unemployment benefits and indicated to the Department in his application that Employer laid him off due to a lack of work. Tr. p. 18, Ll. 16-25; p. 19, Ll. 1-3.

Claimant argues his selection was not willful because when an employer takes a person's work away "it is splitting hairs to say" that it is so materially different from a lay off due to a lack of work that a "lay person" would know the difference. Appellant's Brief p. 9. Substantial

and competent evidence in the record supports the Commission's conclusion Claimant knew the option he chose was not accurate. R. p. 41.

The plain and ordinary meaning of the terms used by the Department, "quit," "discharged/terminated" and "laid off due to a lack of work," are not ambiguous or confusing. The dictionary defines "discharge" as "to dismiss from employment," "terminate" as "to discontinue the employment of" and "quit" as "to leave a job." WEBSTER'S II NEW COLLEGE DICTIONARY, pp. 323, 910, 1138 (2001) Boston, MA, New York, NY: Houghton Mifflin Company. A "lay off" is defined as the "dismissal or suspension of employees." WEBSTER'S II NEW COLLEGE DICTIONARY, p. 623 (2001) Boston, MA, New York, NY: Houghton Mifflin Company. "Lack" is defined as "a deficiency or absence" and "work" is defined as "employment: job." WEBSTER'S II NEW COLLEGE DICTIONARY, pp. 614, 623, 1271 (2001) Boston, MA, New York, NY: Houghton Mifflin Company.

As an assistant store director, Claimant was hardly a "lay person" and the plain ordinary meaning of these terms could not have been foreign to him. Appellant's Brief p. 9; Tr. p. 14, Ll. 4-24. Whether the Claimant quit as the Commission concluded, or he was constructively discharged as Claimant argued in his Brief, there is no evidence in the record Employer let Claimant go because there was a "lack of work" for him to do as it is ordinarily defined. Appellant's Brief, pp. 8-9.

The Commission was not required to accept Claimant's explanation. *Cox v. Hollow Leg Pub*, 144 Idaho 154, 158, 158 P.3d 930, 934 (2007). It was an issue of credibility. The fact

finder can and did consider Claimant's explanation unworthy of belief. *Cox*, 144 Idaho at 158, 158 P.3d at 934. *Id.* R. p. pp. 40-41.

Claimant's own statements indicate that he understood the difference. When Claimant was initially contacted by the Department's representative on January 24, 2012, she asked him about his separation and he told her that he did not quit, he was discharged. Exhibit 6, p. 1; Tr. p. 47, Ll. 10-12. At the hearing, Claimant described the choice Employer's vice president of human resources gave him as "above and beyond an actual honest disciplinary action." Tr. p. 16, Ll. 20-24. When Claimant's counsel asked him at the hearing if during his meeting with Employer's vice president of human resources he had the impression Employer had more of "his work" available, Claimant answered, "[t]hey did." Tr. p. 19, Ll. 18-20.

Despite understanding that his separation was the result of a disciplinary action, not a lay-off and that Employer had more work for him, Claimant testified that he chose "laid off due to a lack of work" because "it was the best closest fit." Tr. p. 19 Ll. 11-14. When Claimant explained why he selected "laid off due to a lack of work" he indicated that it was not because he had a lack of work. He testified, "I picked laid off and now on there there was only one option for laid off and it was laid off due to a lack of work." Tr. p. 19, Ll. 5-13. Later in the hearing, Claimant testified "if there was an option on there that said laid off without due to lack of work, I would definitely have put that one." Tr. p. 33, Ll. 10-12. Claimant's testimony alone supports the Commission's conclusion that Claimant knew laid off due to a lack of work" was not "the best closest fit" to describe his separation from employment. Tr. p. 19, L. 13.

Claimant also argues that he could not have known what the questions were really asking him because the Department's representative used the word "separation" at the hearing and because the Department failed to use the language of §72-1365 in the options it gave Claimant to describe his separation. Appellant's Brief, p. 11. There was no testimony that at the time Claimant filed his application, he was confused by the word "separation" or because the options did not talk about good cause. Claimant never mentioned the problem with the word "separation" when the Department's representative called him and he explained to her why he selected laid off due to a lack of work on February 2, 2012. Exhibit 6, p. 3. There is no evidence Claimant was confused by the Department's failure to reference the language of §72-1365 until his counsel asked him about it. Tr. p. 20, Ll. 2-4.

Claimant went on to suggest that his options were confusing because the Department never offered him a place to explain what happened. He testified that there was no place to "tell the story of what was going on" and all he could do was "pick the best situation and go on to the next question." Tr. p. 20, Ll. 12-16.

However, after he was questioned by the Department's representative later in the hearing, Claimant had to acknowledge that he had the opportunity to go in and type in "the story of what was going on." Tr. p. 20, L. 8. Claimant had to acknowledge that he knew clicking terminated/discharged or quit "would have given me an option to type in what the circumstances were." Tr. p. 55, Ll. 20-25; p. 56, L. 1.

Finally, Claimant explained the options were so clear that he never felt the need to contact the Department for clarification. Tr. p. 33 Ll. 16-25; p. 34, Ll. 1-11. At the hearing

Claimant's counsel asked him, "[s]o on this form, having felt you knew the answer to the question, it was a clear form, did you feel the need to ask for further help?" Tr. p 34, Ll. 8-10. Claimant answered, "I really didn't." Tr. p. 34. L. 11. Given Claimant's ever shifting explanation for indicating he was laid off due to a lack of work, the Commission's conclusion that Claimant's explanation was unworthy of belief is supported by substantial and competent evidence in the record. R. p. 41

The Commission also concluded that Claimant's failure to accurately describe the reason he left his employment was willful. R. p. 41. Claimant testified at the hearing he had no intent to defraud or deceive the Department. Tr. p. 20, Ll. 17-25; p. 21, L. 1. However, this Court has defined willful in a manner that does not require a demonstration of evil intent on the part of a claimant to reach a conclusion that his conduct was willful. *Meyer*, 99 Idaho at 761, 754 P.2d at 96. Willful implies simply a purpose or willingness to commit the act or make the omission, not an intent to violate the law. *Current*, 152 Idaho at 13, 266 P.3d at 488. "Willful" as it is used in this context implies something more than an accident. *Meyer*, 99 Idaho at 761, 586 P.2d at 96. In *Meyer*, the Court stressed that the mere assertion by the claimant that there was a communication gap of some kind does not preclude a finding that a claimant did in fact willfully fail to report a material fact to obtain benefits. *Meyer*, 99 Idaho at 762, 589 P.2d at 97.

The Commission could infer from the facts in the case that Claimant's conduct was willful and not accidental. *Cox v. Hollow Leg Pub*, 144 Idaho 154, 158, 158 P.3d 930, 934 (2007). "A claimant's mental state need not be established by expert testimony; it can be

inferred from the claimant's conduct and from the circumstances." *Cox*, 144 Idaho at 158, 158 P.3d at 934.

The Commission did not "blur the line" between what Claimant understood when he was completing his application for benefits and what he understood at the hearing. Appellant's Brief, p. 10. Claimant understood the value of receiving unemployment benefits. When he opted to leave his employment, Claimant secured Employer's agreement not to challenge his claim for unemployment benefits. He was also familiar with the options offered by the Department because he had previously filed for unemployment benefits in 2003. Tr. p. 18, Ll. 16-24.

The Commission found Claimant watched the Department's slide show presentation when he filed his application for benefits and was instructed to review the pamphlet. R. p. 40. Claimant acknowledged reviewing the slide show. Exhibit 6, p. 3; Tr. 51, Ll. 19-22. Specifically, the Commission found he viewed the warning in one slide that making false statements such as reporting he was laid off when he quit would be considered fraud. R. p. 40. Claimant did not dispute that he viewed that slide, nor did he dispute that same slide told him he would be responsible for the information in the "Unemployment Insurance Claim Benefit Rights, Responsibilities and Filing Instructions" pamphlet. Tr. p. 52, Ll. 6-19.

The Commission concluded Claimant received the pamphlet. R., p. 40. The front cover of the pamphlet told Claimant he was legally responsible to know the information in the pamphlet. Exhibit 2-B. Claimant agreed "absolutely" that he was responsible to know and understand the information in the pamphlet. Tr. p. 52, L. 16; p. 54, Ll. 1-5. Claimant knew the information he gave the Department had to be true and accurate. The pamphlet told claimant

that making false statements or failing to report material facts when you file your initial claim would be considered fraud and could be considered a felony in Idaho. Exhibit 2-B, p. 15. The Commission noted that the pamphlet told Claimant failing to notify the Idaho Department of Labor when you quit or are discharged from work would be considered fraud. Exhibit 2-B, p. 15; R. p. 40.

The pamphlet also told Claimant if there was anything he did not understand to ask someone in the local office. Exhibit 2-B, p. 3. Claimant maintained that he did not seek help because he was never confused and he answered to the best of his ability. Tr. p. 33, Ll. 16-25; p. 34, Ll. 1-13. The Commission did not find Claimant's explanation that he was not confused credible because he acknowledged picking "laid off due to a lack of work" when there was no lack of work. R. pp. 41-42; Tr. p. 33, Ll. 10-12.

The pamphlet Claimant acknowledged he was responsible for reading and knowing also told him he would only receive benefits if he was laid off due to a lack of work, voluntarily quit with good cause, or was discharged, but not for misconduct. Exhibit 2-B, p. 4. The pamphlet told him the payment of benefits would be paid based on the information he provided. Exhibit 2-B, p. 14. Claimant was forced to acknowledge that he knew he could have described the circumstances surrounding his separation from employment if he selected either the quit or the discharged option. Tr. p. 20, Ll. 9-16; p. 27, Ll. 21-25; p. 28, Ll. 1-3.

Claimant selected the one option that required no explanation and after reading the pamphlet, he knew it was the one option that would not stop or deny his benefits. Tr. p. 53, Ll. 6-8. The pamphlet gave Claimant this information:

What could stop or deny my benefits?

Situations arise that require the Idaho Department of Labor to stop payment while investigating claims and issue decisions that may deny benefits. Some of these issues are:

- *quitting a job*
- *being fired*
- being unable to work
- being out of the labor market
- attending school
- being incarcerated
- missing or refusing suitable work
- failing to provide requested information
- making a false statement or withholding information to obtain benefits
- becoming self-employed as your principal occupation

Exhibit 2-B, pp. 13-14 (emphasis added).

Noticeably absent from that list is being laid off due to a lack of work. The Department does not provide an option for adding information in a drop down box for “laid off due to a lack of work” because no additional explanation is necessary. Tr. p. 58, Ll. 15-25; p. 59, Ll. 1-2. By reading the pamphlet Claimant knew that if he indicated he was laid off due to a lack of work he would not have to describe the circumstances surrounding his separation from employment and the Department would not investigate his claim unless the Department received contradictory information about his separation from Employer. Claimant acknowledged there was no lack of work, yet he made that selection anyway. Tr. p. 19, Ll. 7-11. Claimant testified more than once that Employer agreed not to challenge his claim for benefits. Tr. p. 13, Ll. 1-2; p. 18, Ll. 14-15; p. 32, Ll. 24-25; p. 33, L. 1. Consequently, Claimant felt free to characterize his separation in a way that would not cause the Department to look into it.

When Claimant filed his claim for benefits on December 8, 2010, the Department was obligated by law to notify Employer it would be chargeable on the claim and give Employer the opportunity to appeal. I.C. §72-1351(2); IDAPA 09.01.30.425.09; IDAPA 09.01.30.425.10. There is no evidence in the record that Employer appealed the Chargeable Determination it received after Claimant filed for benefits on December 8, 2010, or in any way responded to that notification. When Employer failed to offer any contradictory information, the Department relied on Claimant's assertion that he was laid off due to a lack of work and paid him benefits.

However, the pamphlet warned Claimant "an overpayment may occur if the [D]epartment receives additional or contradictory information relating to your eligibility after benefits have been paid to you." Exhibit 2-B p. 14. Timely truthful information is vital in determining whether a claimant is eligible for unemployment benefits. Federal law requires the Department to pay unemployment benefits when payments are first administratively feasible as allowed after a preliminary interview by the Department of which both the claimant and the employer have notice. 42 U.S.C. 503(a)(1); *Java v. California Department of Human Resources and Development*, 402 U.S. 121, 91 S.Ct. 1347, 1355, 28 L.Ed.2d 666 (1971).

The Department must act on conflicting information when it uncovers it. Idaho's Employment Security Law contemplates situations where the Department might receive information that would impact a claimant's eligibility for benefits long after they have been received. It gives the Department five years from the week ending date for any week in which benefits were paid to investigate a claim and issue a determination allowing or denying benefits. I. C. §72-1368(3)(b). Further, the Legislature has taken a dim view of any party providing false

statements by making it a felony when anyone, claimant or employer, makes a statement he knows to be false, or when he willfully fails to disclose a material fact in order to obtain or increase benefits for either himself or another person. I. C. § 72-1371(1).

The conflicting information about Claimant's separation led the Department and the Commission to conclude Claimant made a willful false statement. Claimant wanted unemployment benefits and was not willing to risk the chance that he might be denied benefits if the Department looked into his separation from employment. He elected to conceal the circumstances of his separation. When a claimant knows what information the Department is soliciting, but nevertheless deliberately chooses to respond without clarification, this Court has held it supports a finding of willful falsehood or concealment. *Cox*, 144 Idaho at 158, 158 P.3d at 934. Substantial and competent evidence indicates Claimant knew the consequences of indicating he was "laid off due to a lack of work" rather than indicating he "quit" or was "discharged/terminated" when he filed his application for benefits.

The Commission could infer from the facts in the case that Claimant was aware that he had an obligation to report accurately, but nevertheless acted intentionally with complete disregard for this obligation. *Cox*, 144 Idaho at 158, 158 P.3d at 934. It was not required to accept Claimant's testimony that he was so sure that "laid off due to a lack of work" was the best option that there was no need to seek help from the Department. Nor was the Commission required to accept his assertion that because the Department did not use the language of § 72-1365 the options the Department offered him were confusing.

The Department respectfully asserts that the Commission's assessment of Claimant's credibility is based on the evidence in the record and is not clearly erroneous. Claimant's false statement was material, willful and made in order to obtain benefits. Claimant's conduct meets the definition of "willful." The Commission's conclusion that Claimant's conduct was the type Idaho Code § 72-1366(12) was meant to discourage is supported by substantial and competent evidence. R. p. 42.

II.

Claimant's failure to cite authority and present argument bars the Court from considering whether there was substantial and competent evidence in the record to support the Industrial Commission's findings and conclusion that Claimant was not eligible for a waiver and subject to a 25% civil penalty as a result of his false statement or failure to report a material fact.

Under Idaho's Employment Security Law, an overpayment occurs when a claimant receives benefits to which he is not entitled and overpayments must be repaid to the Department. Idaho Code § 72-1369(1). In addition the Department must assess the following civil penalties: a 25% penalty for the first determination in which the claimant is found to have made a false statement, misrepresentation or failed to report a material fact; a 50% penalty for a second such determination; and a 100% penalty for a third determination. Idaho Code § 72-1369(2).

The Department issued a Determination finding Claimant was not eligible for benefits because he willfully failed to report a material fact in order to obtain benefits. Exhibit 9. The Department's Determination that Claimant willfully failed to report a material fact was affirmed by both an appeals examiner and the Commission. R. pp. 1-6, and 31-45. Because this was Claimant's first determination in which he was found to have willfully made a false statement or

failed to report a material fact in order to obtain benefits, he was assessed the statutorily required 25% penalty.

Further, the Decision to grant a waiver is discretionary, but limited. To be eligible for a waiver the overpayment sought to be waived must be one “other than one resulting from a false statement, misrepresentation, or failure to report a material fact.” Idaho Code § 72-1369(5). For the reasons set forth above, substantial and competent evidence support the Commission’s conclusion Claimant willfully made a false statement, and pursuant to Idaho Code § 72-1369, he was statutorily ineligible for a waiver.

Claimant has not presented any argument in his opening brief on the issue of the waiver or the civil penalty. In his Notice of Appeal to this Court, Claimant listed as an issue “[w]hether the Industrial Commission erred in finding Appellant not entitled to a waiver under the circumstances of this case.” R. p. 47. In his Brief, Claimant listed the issue, but did not address it.

Idaho Appellate Rule 35 sets forth the requirements for the content and arrangement of an appellant's brief on appeal to this Court. It provides, in part, “[t]he argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefore, with citations to the authorities, statutes and parts of the transcript and record relied upon.” Employer's brief fails to comply with this rule. When issues cited on appeal are not supported by propositions of law, authority or argument, they will not be considered. *Huff*, 143 Idaho at 500, 148 P.3d at 1246. “A party waives an issue cited on appeal if either authority or argument is

lacking, not just if both are lacking.” *Gem State*, 145 Idaho at 16, 175 P.3d at 178. Claimant failed to cite authority and present argument on these issues.

The Department asks the Court to find the Commission’s conclusions that Claimant was not eligible for a waiver and subject to a 25% civil penalty were supported by substantial and competent evidence, or in the alternative that Idaho Appellate Rule 35 bars the Court's consideration of these issues.

III.

Claimant should not be awarded attorney fees on appeal.


Counsel for Claimant requests attorney fees on appeal citing Idaho Code § 12-117(1). This code section allows attorney fees and costs to the prevailing party in an administrative proceeding involving a state agency if the Court “finds that the nonprevailing party acted without a reasonable basis in fact or law.” I.C. §12-117(1) (Supp. 2012). The Department has not acted without a reasonable basis in fact or law. The Department’s determination that Claimant made a willful false statement was upheld by the appeals examiner and the appeals examiner’s decision was affirmed by the Commission. Claimant has not shown a basis for an award of attorney fees and the Department respectfully asks that his request be denied.

CONCLUSION

There is substantial and competent evidence in the record to support the Industrial Commission’s findings and conclusions that Claimant was ineligible for benefits because he willfully failed to a report material fact while claiming unemployment insurance benefits in order to obtain benefits. As a result, Claimant is statutorily ineligible for a waiver of the requirement

to repay them and subject to the civil penalties that were imposed. The Department asks the Court to affirm the Commission's Decision.

Respectfully submitted,



TRACEY ROLFSEN
Deputy Attorney General
Idaho Department of Labor

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 18th day of January, 2013, I served two true and correct copies of the foregoing Brief of Respondent Department of Labor upon each of the following by depositing said copies in the United States mail, first class, postage prepaid:

C. Tom Arkoosh
Attorney at Law
802 W. Bannock Street, Suite 900
P.O. Box 2900
Boise, ID 83701

New Albertson's, Inc.
c/o TALX UC Express
Attn: Frank Eckert
P.O. Box 173860
Denver, CO 80217-3860

Karen Rask