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BEFORE THE SUPREME COURT OF THE STATE OF IDAHO

JIMMY L. CHRISTY, JR., Claimant-Appellant v. GRASMICK PRODUCE, Employer; CONSOLIDATED ELECTRICAL, Employer; MR. MUDD CONCRETE CORPORATION, Major Base Employer; IDAHO STATE PENITENTIARY, Cost Reimbursement Employer; and IDAHO DEPARTMENT OF LABOR Respondents	**SUPREME COURT NO. 43968** **BRIEF OF APPELLANT**

Appeal from the Industrial Commission of the State of Idaho,

Chairman R.D. Maynard Presiding

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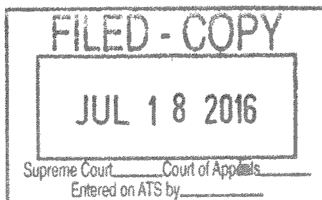

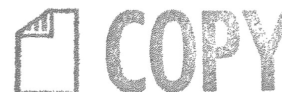

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STATEMENT OF THE CASE

1. NATURE OF THE CASE: Appellant, Jimmy L. Christy, Jr., ("Christy") has appealed from the Decision and Order of the Industrial Commission, filed January 7, 2016 ("Commission Order" or "Com. Ord."). The Commission Order was itself issued on an appeal from the Decision of Appeals Examiner Judge Richmond, dated September 18, 2015 ("Examiner's Decision" or "Ex. Dec.").

2. COURSE OF PROCEEDINGS: Prior to the entry of the Examiner's Decision, there were two hearings conducted by Judge Richmond: the first on July 28, 2015 and the second on September 16, 2015. The first hearing was terminated because the Claims Investigator, Jennifer Roop, had not previously considered all of the earnings records from Grasmick (Christy's previous employer), nor had she received or reviewed Christy's information and position.[1] Judge Richmond then terminated the first hearing to allow Ms. Roop to review the information she did not have previously, *with any new hearing based upon a new record* (Tr 7.28.15, p. 54). His Order of Remand dismissed the appeal and remanded the matter back to Ms. Roop "for further evaluation and adjudication." The hearing was never completed, and all parties were clearly advised that after the new determination and any new appeal would be based on a new record. (Tr. 7.28.15, p. 54, L. 9-18).

---

[1] There were problems with service of all of the materials on Christy due to his relocation. Mr. Christy had moved and did not receive the requests for information from Ms. Roop.

Ms. Roop made a second Eligibility Determination (Ex. Finding of Fact # 13)[2] from which Request for Appeals Hearing was submitted, (Exhibit pp. 81-85). This resulted in the second hearing of September 16. The Notice of that hearing is also an essential part of the record before this Court, as it contains the exhibits admitted and used at the hearing, including Ms. Roop's various determinations. They are not marked with traditional exhibit numbers/letters, but rather are referred to by page in the Notice of Hearing itself. The Eligibility Determination of August 12, 2015, for example, is "Exhibit pp. 75-79."

Ms. Roop determined that the Claimant "wilfully failed to accurately report his gross earnings each week when he filed his claims." (Exhibit, p. 75; Ex. Finding of Fact #20). Her Summary of Facts (Exhibit p. 75) asserted that Christy "reported what he had been paid even though the instructions on the weekly claim reporting states to report gross earnings before any deductions." She concluded that Christy "withheld this information in an attempt to obtain unemployment insurance benefits for which he was not eligible." Ms. Roop therefore assessed a penalty of $1,244.75 and an overpayment of $4,987.00, for a total due of $6,231.75. Christy was also barred from submitting further unemployment claims until the overpayment, penalties and interest were paid.

3. STATEMENT OF FACTS: The only witnesses were Roop and Christy. Since there are two hearing transcripts, they will be designated by date; i.e., "Tr 7.28.15" or "Tr. 9.16.15."

[2] The Examiner and the Commission both entered Findings of Fact and Conclusions of Law. They will be differentiated by "Ex." for Examiner, and "Com." for Commission.

<u>Jennifer Roop testimony:</u>

A. JULY 28 HEARING: Judge Richmond conducted the direct examination of Ms. Roop. She conducted a "cross-match audit" (Tr. 7.28.15, p. 20, L. 3-11). She mailed a letter to Christy but receiving no response (see footnote 1), she proceeded to enter her determination on June 24, 2015. (Tr. 7.28.15, p. 20, L. 15-20). Her decision (Tr. 7.28.15, p. 21, L. 6-10) was that earnings were not reported in full, and benefits "were I guess fraudulently overpaid . . ."

She then confirmed that it was <u>gross</u> earnings they wanted reported, and was asked how the applicant would know which was sought (Tr. 7.28.15, p. 21, L. 25, p. 22, L. 1-2). She responded by referring to Exhibit p. 13 (Tr. 7.28.15, p. 22, L. 24 to p. 23, L. 1-4), and stating that "down towards the bottom on the left, hopefully down there it says reporting work and earnings." She also stated at p. 23, L. 12-16, that "the question when it pops out if you say yes when it asks you your earnings, it also says on there before deductions." That was admittedly not on the Exhibit, which was page 17.

On cross-examination, she was asked about Exhibit page 17; specifically, "where does it say gross?" (Tr. 7.28.15, p. 26, L. 3) and replied that it doesn't show it on the exhibit (p. 26, L. 4-5). She admitted that the document was not part of the record (p. 26, L. 10-11).

She was then asked about her determination that the "claimant willfully made a false statement" and specifically, "What false statement did he willfully make?" (Tr., 7.28.15, p. 27, L. 23 through p. 28, L. 2). She considered that he failed to "fully report his earnings" which was "failing to report a material fact." (Tr. 7.28.15, p. 28, L. 7-12). Yet she conceded she never got a

chance to actually talk to Christy (p. 28, L. 13-18). This was before she ever received any correspondence from, or spoke with, the undersigned (p. 28, L. 23 through p. 29, L. 3).

B. SEPTEMBER 26 HEARING: On her direct examination conducted by Judge Richmond, she reviewed the records provided by the employer, and recalculated the weekly earnings based on the "Sunday through Saturday calendar" used by the Department. (Tr 9.16.15, p. 11, L. 19-23). She then made the new decision on August 12, 2015. (Tr 9.16.15, p. 12, L. 1-3).

On cross-examination, however, she confirmed that she had still never spoken with Christy. (Tr 9.16.15, p. 14, L. 5-8) Yet she admitted that she made a decision that there was fraud involved. (Tr 9.16.15, p. 14, L. 9-25). Interestingly, she also confirmed "I'm not saying that he willfully – or that he maliciously did that . . ." (Tr 9.16.15, p. 14, L. 19-20). Moreover, she stated it was her standard that fraud occurs when "failing to provide accurate information as far as the department is concerned." (Tr 9.16.15, p. 15 L. 9-10).

The exhibits include a pamphlet, "Idaho Labor Unemployment Insurance Claimant Benefit Rights, Responsibilities, and Filing Instructions." It begins on Exhibit page 3 of 88 and continues (in English) to page 7 of 88, and is reduced to four pages per page (the page number on the pamphlet is at the bottom center). The exhibits also include portions of a slide show which covers Exhibit pages 12-14 of 88.

Ms. Roop remembered Christy's July 28, 2015, testimony. In that hearing, he testified that he went to the Department's "Water Tower Office" in Meridian concerning the reporting of

his income during the unemployment period. He testified that he was told to "report what he got." (Tr 9.16.15, p. 15, L. 13-24). She confirmed that the recipients are advised in several places in the pamphlet that if they had problems with the required reporting, the claimants are supposed to go to the Department or to the local office. See Tr 9.16.15, pp. 15-17.

Ms. Roop's notes also confirm that on June 3, 2015, Christy had received her first letter asserting a potential overpayment, and his response to her by a phone message was that "he doesn't understand because he had people in the office help him." In her testimony (Tr 9.16.15, p. 20, L. 4-14) she assumed he was referring to the Water Tower office.

Beginning on Tr 9.16.15, p. 21, L. 23, Ms. Roop was asked where Mr. Christy committed *fraud* on the Department. On the next page (p. 22), beginning at line 6, she then disavowed that definition; it wasn't really "fraud," but was more "basically failing to provide accurate information or misrepresenting on the facts that are material to – to the claim." (Tr 9.16.15, p. 22, L. 6-11).

However, when asked what evidence in the record showed that Mr. Christy *wilfully submitted false information*, she could not do that. While she said that the questions "repeatedly" told them to report their gross earnings, the word "gross" did not appear in the exhibits. (Tr 9.16.15, p. 22, L. 12-25). Rather, she contends that the missing "pop out" was the item which did that. She testified to the "pop out" in her June 28 testimony, as discussed infra.

But amazingly, the "pop out" was <u>still</u> not present in the record. She was asked the same question as in June–"Where is the word gross?" (Tr., 9.16.15, p. 22, L. 24) and again confirmed

that it was not in the record (p. 22, L. 25 through p. 23, L. 8. She conceded she should have obtained a copy of the pop out for the record (L. 7-8).

Ms. Roop was asked about Mr. Christy's consistent position that he believed he was doing what he was told to do, and confirmed that was the position. (Tr. 9.16.15, p. 23, L. 11-21). While she claims she did not disregard that position, she simply felt that "there is plenty of information available' to provide proper information (L. 19-21).

She also reviewed and authenticated notes from the Department's IUS system (Tr 9.16.15, p. 18, L. 10-25; p. 19, L. 1-13.). The notes themselves are located at Exhibit page 40-41. The notes show that Christy did contact the department in mid-December concerning issues with reporting and calculation of his earnings as well as his claim status. (Exhibit p. 40, date 12/19/14)

When Ms. Roop was asked if she discounted any possibility that Mr. Christy simply made a mistake, (Tr 9.16.15, p. 25, L. 13-25) she said that she did not discount it. In fact, she confirmed it, stating "I do believe that," but then said that in her opinion there was plenty of information to tell him the contrary. She then stated that he should have checked every week, (Tr 9.16.15, p. 26, L. 1-3) . And again, albeit reluctantly, she confirmed that Mr. Christy did make a mistake and that a mistake was not fraudulent. (Tr 9.16.15, p. 26, L. 14–p. 27, L. 4)

Jimmy Christy Testimony:

A. JULY 28 HEARING: On direct by Judge Richmond, Christy confirmed that he opened his claim on or about December 10, 2014 (Tr, 7.28.15, p. 43, L. 21 through p. 44, L. 6).

At that time, he confirmed that he did not understand the website, and a "male that assisted me with the programming." (Tr., 7.28.15, p. 44, L. 7-16). He testified at length about the discussions with the "employee at Idaho Labor;" Christy had his pay stubs from Grasmick, and "the time period was off." (Tr., p. 45, L. 2-15).

From the start of the claims procedure, he testified as to his confusion with the website and the instructions. He was originally confused about the difference in the dates used by Grasmick for its pay period (p. 45, L. 24 to p. 46, L. 2). Judge Richmond reviewed the contact notes, and saw the Department's notes about conversations with Christy on December 19. (Tr., 7.28.15, p. 46, L. 8-24). He also confirmed that he did not recall the "drop down" menu (p. 48, L. 22 through p. 49, L. 1). The record of his testimony was consistent that he simply was "just confused with it" (the website) and was confused "every time I read the website" (Tr. 7.28.15, p. 47, L. 25 through p. 48, L. 7.)

At this juncture, Grasmick's representatives interjected, pointing out that they had just emailed the judge and the undersigned a document showing "when Mr. Christy clocked in and clocked out" showing that he regularly worked on Sundays. (Tr., 7.28.15, p. 49, L. 13-21). Judge Richmond then suggested to all that this hearing be terminated to allow Ms. Roop to review all of the new evidence and make a new determination.

B. SEPTEMBER 16 HEARING: Again, Christy first testified about the trip to the Department's Water Tower office between Christmas and New Years, 2014. (Tr 9.16.15, p. 30, L. 19–p. 32, L. 15) He had questions about the method of reporting and the pay periods, and met

with "John" at the Water Tower location. Mr. Christy identified him as being in his mid-50's. The original purpose of the visit was to resolve the confusion about the time frames to be used; Grasmick's pay period was not the same as that used by the Department. (Tr 9.16.15, p. 32, L. 8-13)

However, Christy and "John" discussed about <u>what</u> he was to report. (Tr 9.16.15, p. 32 L. 16--p. 33, L. 5) .Christy understood John's advise to be to report <u>what he received.</u> After that date, he reported "what my check was" because that's what he thought he was supposed to do. (Tr. 9.16.15, p. 33, L. 17-25) He further confirmed that he never intended to misrepresent his earnings.

Concerning the information in the handbook, Christy had questions about its meaning. He testified that he has problems with numbers and words, akin to dyslexia (Tr 9.16.15, p. 34, L. 11-25). He has lifelong reading difficulties. (Tr 9.16.15, L. 1-8). He took a zero hour special class called "RR Studies" to help his comprehension when his family lived in Chicago (Tr 9.16.15, p. 35, L. 7-18). His native language, he said, is "Tagalog," a Phillipine language. He did not learn to speak English until age 7 (Tr 9.16.15, p. 35, L. 19–p. 36, L. 3).

<u>Judge Richmond's Decision</u>:

On September 18, 2015, Judge Richmond entered his written Decision of Appeals Examiner, containing findings of fact and conclusions of law which held that Christy willfully made a false statement or willfully failed to report a material fact in order to obtain benefits. His Findings included:

(4) Christy was mailed the Claimant Benefit Rights Booklet;

(9) Department issued the first eligibility determination after Christy did not respond to the Department's return call (8);

(12) Grasmick provided time records to the Department and the case was remanded back for further review and a new eligibility determination;

(16) Christy did contact the Department requesting direction on how to report his wages;

(18) Christy testified he was told by a Department employee that he is to report what he receives in wages;

(20) Department determined Christy willfully failed to accurately report his gross earnings each week when he filed his claim;

(21) Christy was told how to report when he spoke with the Department on December 19, 2014;

(22) Christy thought he was reporting accurately and to the best of his ability.

Judge Richmond cited Meyer v. Skyline Mobile Homes, 99 Idaho 77, 589 P.2d 89 (1979):

> "Willfully" implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law, in the sense of having an evil or corrupt motive or intent. It does imply a conscious wrong, and may be distinguished from an act maliciously or corruptly done in that it does not necessarily imply an evil mind, but is more nearly synonymous with "intentionally," "designedly," and therefore not accidental.

He then concluded that Christy did seek clarification from the Department on how to report his wages, but still, he willfully made false statements or representations in order to receive his benefits. He therefore upheld the initial determination. Christy, especially in light of that bizarre conclusion from the facts and law cited, appealed to the Industrial Commission.

Industrial Commission Decision:

After the matter was submitted on the record and briefs to the Commission, its Decision and Order was issued on January 7, 2016. The Commission conducted a de novo review of the record (Com. Ord. P. 2), and thereafter entered their own findings of fact and conclusions of law:

(1) Christy started working for Grasmick part-time on December 11, 2014. He worked Sunday, Thursday and Friday.

(2) His pay period with Grasmick was Monday through Sunday, with paychecks on Friday.

(3) Christy went to the Department's office in Meridian (which is the "Water Tower" office) to file his claim. A consultant assisted him "in navigating the process over the computer."

(4) Christy returned to the Water Tower office to complete his resume. While there, he "purportedly" asked for clarification about how to report his income, and maintains he was instructed to report "what he got."

(5) On December 19, 2014, the Claimant Specialist told Christy had he had to figure his earnings for Sunday-Saturday as a work week, rather than the Monday-Sunday period.

The Commission then determined that Christy "wilfully" made a false statement or failed to report a material fact. (Com. Ord., p. 4). This determination was made even though they cited the standard from Meyer v. Skyline Mobile Homes, 99 Idaho 754 (1979) that the Idaho Legislature "intended to disqualify those claimants who purposely, intentionally, consciously or knowingly fail to report a material fact, *not those whose omission is accidental because of*

negligence, misunderstanding or other cause." (Emphasis added). (Com. Ord., p. 5) They seemingly tried to avoid this by asserting that Christy "knew or should have known" what information was sought and did otherwise, relying on the "slide show" and the "pamphlet." They then make the unwarranted and unsubstantiated assumption that there was a "probability that, given the information available to Claimant, he did not know what IDOL was asking, and then, deliberately elected not to seek clarification." (Com. Ord., p. 5)

To the point on Christy's "trouble with numbers and words," they disregard them because, in their opinion, it should have been "brought to the forefront at the inception of these proceedings." (Com. Ord., p. 6). The opinion continues on in this vein, to be discussed in more detail infra.

The Commission then concluded that Christy had "wilfully misstated" his earnings "for the weeks ending January 10, 2015, January 17,2015, January 31, 2015, and February 14,2015 through March 28, 2015." They then asserted he had to repay for the weeks from January 3, 2015 through March 28, 2015.

ISSUES PRESENTED ON APPEAL

In the Notice of Appeal, several issues were designated. They can be condensed and restated.

A. The Decision wrongfully determined that claimant "willfully made a false statement or willfully failed to report a material fact in order to obtain benefits. The evidence fails to show that Appellant "purposely, intentionally, consciously or knowingly" failed to report

facts accurately instead of doing so by "negligence, misunderstanding or other cause." The Commission's findings in this case are not supported by substantial, competent evidence as required by law. In fact, as they drafted their Findings of Facts, the Commission basically imposes strict liability, which is contrary to the decisions of this Court.

B. There is no evidence whatever in the record to show that Christy had a motive to falsely report "in order to obtain benefits."

C. The Decision wrongfully determined that Claimant-Appellant was provided written instructions on how to complete his claim reports "in the form of a slide show he reviewed before he completed his application for benefits."

D. The Decision erroneously disregarded Appellant's learning disability, which was not in dispute. Rather, the Commission somehow felt "that evidence should have been brought to the forefront at the inception of these proceedings."

E. The Judge found that Claimant thought he was reporting accurately and to the best of his ability. Therefore, the Commission's Conclusions found are erroneous.

F. Claimant's testimony upon which the Judge made the determination that Claimant was told how to report when he spoke with the Department on December 19, 2014, is unimpeached. Therefore, the Conclusions found are erroneous. The corollary, the determination by the Judge that the "Claimant's assertion that he was reporting his net wages is not supported by the record," is likewise erroneous when considering the uncontradicted testimony in the record.

G. The determination that the Claimant "willfully made false statements or representations" and the conclusions that this was determined by the preponderance of the evidence completely fails to recognize that Claimant has learning disabilities, is not a native English speaker/writer/reader, and was confused by the instructions on the website from the start.

H. The determination that Claimant had a "purpose or willingness to commit the act or make the omission referred to" is not supported by the record.

ATTORNEYS' FEES ON APPEAL

Christy asserts that reasonable attorneys' fees are awardable in this case under Idaho Code §12-117(1) and (2). This will be discussed in detail infra.

ARGUMENT:

A. STANDARD OF APPELLATE REVIEW

Before proceeding with the other points of analysis, Christy suggests that this separate topic is extremely applicable to this appeal and should be discussed.

1. "Substantial, Competent Evidence:" There are innumerable cases where the Supreme Court has announced that it "will not disturb the factual findings if they are supported by substantial and competent evidence. Laundry v. Franciscan Health Care Ctr., 125 Idaho 279, 281, 869 P.2d 1374, 1376 (1994). *Substantial and competent evidence* consists of relevant evidence a reasonable mind might accept as adequate to support a conclusion." The appellate body "exercises free review over questions of law. Id.; Idaho Const. art V, §9." Qualman v. State, 129 Idaho 92, 922 P.2d 389 (1996).

But that does not end the discussion. Rather, *this* Court must review the Commission's decision to see if that test was actually met. In Local 1494 v. City of Coeur d'Alene, 99 Idaho 630, 586 P.2d 1346 (1978), the Supreme Court discussed the test for determining what constitutes "substantial, competent evidence" in the appeal of an administrative agency's action. This Court noted that:

> The "substantial evidence rule" is said to be a "middle position" which precludes a de novo hearing but which nonetheless requires a serious review which goes beyond the mere ascertainment of procedural regularity. Id. at 633, 586 P.2d at 1349. Such a review requires more than a mere "scintilla" of evidence in support of the agency's determination, id. at 634, 586 P.2d at 1350, though "something less than the weight of the evidence." Consolo v. FMC, 383 U.S. 607, 620, 86 S.Ct. 1018, 1026, 16 L.Ed.2d 131 (1966). "Put simply," we wrote, "the substantial [competent] evidence rule requires a court to determine 'whether [the agency's] findings of fact are reasonable.' 4 Davis, *Administrative Law Text* § 29.01-02 at 525-530." Local 1494, supra, 99 Idaho at 634, 586 P.2d at 1350; see also Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477, 71 S.Ct. 456, 459, 95 L.Ed. 456 (1951) (Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.' Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229, 59 S.Ct. 206, 217, 83 L.Ed. 126.") (cited with approval in Local 1494, supra).

This Court expanded and clarified its position in Idaho State Ins. Fund v. Hunnicutt, 110 Idaho 257, 715 P.2d 927 (Idaho 1985), in which it held that:

> In deciding whether the agency's findings of fact were reasonable, reviewing courts should ***not*** *"read only one side of the case and, if they find any evidence there," sustain the administrative action and ignore the record to the contrary.* Universal Camera, supra, 340 U.S. at 481, 71 S.Ct. at 460; quoted in Local 1494, supra, 99 Idaho [261] at 634, 586 P.2d at 1350. Certainly reviewing courts should not "displace the [agency's] choice between two fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo." Universal Camera, supra, 340 U.S. at 488, 71 S.Ct. at 464; accord, Swisher, supra, 98 Idaho at 570, 569 P.2d at 915; Ajax Paving Industries, Inc. v. National Labor Relations Board, 713 F.2d 1214, 1217

> (6th Cir. 1983) ("In conducting its review for substantial evidence the appellate court is not to substitute its own view of the evidence for that of the [agency]. . . ."); cf. I.C. § 67-5215(g) ("The court shall not substitute its judgment for that of the agency as to the weight of the evidence on questions of fact."). *Nevertheless, reviewing courts should evaluate whether "the evidence supporting that decision [under review] is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the [agency's] view."* Universal Camera, supra, 340 U.S. at 488, 71 S.Ct. at 464; quoted in Local 1494, supra, 99 Idaho at 634, 586 P.2d at 1350; accord, Local One, Amalgamated Lithographers v. National Labor Relations Board, 729 F.2d 172, 175 (2d Cir.1984). (Emphasis added)

In examining the "substantial" and "competent" evidence test, using the guidelines given us, Christy asserts that the Commission had a dearth of evidence to support the conclusions that they wanted. Rather, the "substantial" and "competent" evidence shows the contrary.

Christy requests that the Court look at the evidentiary record, the legal authorities, and the Standard of Appellate Review with regard to **each** of the Issues Presented on Appeal. Doing so, Christy believes that the Commission's Order simply cannot stand. It is supported by neither substantial nor competent evidence.

This Court set down the standard in Watson v. Joslin Millwork, Inc., 243 P.3d 666, 149 Idaho 850 (Idaho 2010):

> "In fact, this Court may only set aside an order of the Industrial Commission on one of the following four grounds:
>
> (1) The commission's findings of fact are not based on any substantial competent evidence;
>
> (2) The commission has acted without jurisdiction or in excess of its powers;
>
> (3) The findings of fact, order or award were procured by fraud; [or]

(4) The findings of fact do not as a matter of law support the order or award.

Stoddard v. Hagadone Corp., 147 Idaho 186, 190, 207 P.3d 162, 166 (2009)"

Watson v. Joslin Millwork, Inc., 149 Idaho 850, 243 P.3d 666 (2010).

Christy submits that factors (1) and (4) are clearly present, and this Court should reverse.

B. ANALYSIS:

2. Testimony of Witnesses: There were only two witnesses in this case, Ms. Roop and Mr. Christy. Their testimony is consistent. And in evaluating that testimony, the Commission was reminded that Idaho law is now, and for many years has been, that "In Idaho we have determined that uncontradicted testimony of a credible witness must be accepted by the trier of fact unless the testimony is inherently improbable or impeached in some way. Casey v. State, 129 Idaho 13, 19, 921 P.2d 190, 196 (Ct. App. 1996)." State v. Miller, 131 Idaho 288, 955 P.2d 603 (Idaho Ct. App. 1997). See also Farber v. State, 107 Idaho 823, 824, 693 P.2d 469, 470 (Ct. App. 1984), citing Dinneen v. Finch, 100 Idaho 620, 626-27, 603 P.2d 575, 581-82 (1979); Pierstorff v. Gray's Auto Shop, 58 Idaho 438, 447-48, 74 P.2d 171, 175 (1937).

The Commission, however, ignored this standard. Rather, it appears that they were looking instead for ways to justify their desired result. Please consider:

A. The Commission's rejected Christy's assertions concerning his learning difficulties or his confusion about the website because he supposedly did not bring them up at the first hearing. There is no legal requirement that Christy follow some order of proof; it is not in any rules of procedure or evidence. Such approach is fallacious for several reasons.

First, his lack of understanding was "brought to the forefront at the inception of these proceedings." The Commission simply overlooked the substantial discussions about Christy's lack of understanding of the website and the instructions, discussed in his testimony in response to Judge Richmond's questions. Secondly, the "first appeal" or "first hearing" was ceased, so the case could be remanded back to Jennifer Roop, the hearing officer, to allow her to complete "further evaluations and adjudications." Judge Richmond clearly intended and understood, as he stated, that further discussion of these issues would occur at the subsequent hearing, if any.

And the Commission was entirely inconsistent with this "theory," even if it were valid. If this is the standard, then should not the failure of the Department to put the "pop out" page in the record for the second hearing an admission that it does not exist, or if it does, that it does not say what was represented?

Christy believes the Commission was trying to justify its position under some sort of attempt to use the "adverse influence rule." See International Union, United Auto., etc. v. NLRB, 459 F.2d 1329, 148 U.S. App. D.C. 305 (D.C. Cir. 1972), where the concept was discussed. The Court of Appeals conducted a scholarly analysis of the rule, stating that "the rule provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." The decision traces that rule from 1722, reciting Wigmore's treatise and many cases nationwide, holding it to have a "a vital role in protecting the integrity of the administrative process."

But that rule does not cut against Christy–his testimony at the first hearing, although obviously ignored, was clear that he had substantial issues with understanding the forms and the website, which led him to seek help from the Department's offices. The rule, however, does cut against the Department for not having the "pop out" and other items which they state Christy should have understood but which were not present for anybody's analysis at two different hearings. If this Court considers the "adverse influence rule" to have any validity (which itself is a topic of discussion in more recent cases), then it should be applied both ways.

Either way, however, there simply is no competent evidence in the record showing what the "pop out" really said, or to rebut Christy's testimony of his confusion and his language comprehension issues. It was error to so disregard it, especially on such specious grounds.

3. Mistake or Intentional?: Even though the Commission prepared their own Findings of Fact, both Ms. Roop and Judge Richmond specifically stated their belief that *Christy simply made a mistake.* Ms. Roop so stated (Tr 9.16.15, p. 26), and Judge Richmond specifically found that "Claimant thought he was reporting accurately and to the best of his ability." (Finding of Fact #22). Even if the Commission simply chose to completely ignore Christy's testimony (which they apparently did) there is simply NO evidence in this record to show that Christy did not simply make a mistake as both Ms. Roop and Judge Richmond specifically determined. Rather, their findings on this regard are based wholly on conjecture, and not "subtantial, competent" evidence. Idaho law is clear that a decision **cannot** be based on conjecture. Thomas Helicopters, Inc. v. Santan Ranches, 102 Idaho 567, 570, 633 P.2d 1145, 1148 (1981);

Chisholm v. J.R. Simplot Co., 94 Idaho 628, 632, 495 P.2d 1113, 1117 (1972). To be upheld on appeal, there must be "substantial evidence, which this Court has held to mean "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Idaho State Insurance Fund v. Calvin J. Hunnicutt, 110 Idaho 257, 260, 715 P.2d 927, 930 (1985).

Yet that is clearly what was done. First, the Commission based their decision on the "slide show," including the drop-down menus that were not in the record. They then stated that he was instructed to provide 'accurate information.' However, they ignore the logical concept that if the report is made on a mistake, that Christy thought he was providing accurate information. Judge Richmond found that Christy "thought he was reporting accurately and to the best of his ability." That is based on actual evidence; the Commission, rather, made up their conclusions out of air.

A point that was never contradicted was that Christy was told to "report what he got." But that could clearly mean two things to two different people. "John" at the Water Tower office could well have thought he meant "what he got GROSS," while Christy thought he meant "what he got NET." Both of those figures are on the paystub that Christy gave him to review.

The situation was exacerbated by the difference in the pay weeks. Nobody disputes that there was confusion about that–the Department uses Sunday-Saturday, while Grasmick uses Monday-Sunday. The Commission and Judge Richmond, as well as Ms. Roop, all noted problems in that regard and so found (see Com. Ord., p. 3, par. 5). All of the parties

involved–Ms. Roop, Judge Richmond, and the Commission–recognize that error, yet strangely, only Ms. Roop and Judge Richmond recognize Mr. Christy's honest mistake in interpretation.

See Exhibit p. 41, where Ms. Roop confirms that "he got my letter but he doesn't understand because he had people in the office help him." Similarly, on Exhibit p. 40, there were more contemporaneous notes that "clmt didn't understand question" (12/19/2014). Contemporaneous business records corroborate Mr. Christy's testimony, which is undoubtedly why both Ms. Roop and Judge Richmond found that a mistake occurred. The Commission simply relied on conjecture and ignored the possibility of a mistake.

This case is dissimilar to Watson v. Joslin Millwork, Inc., 149 Idaho 850, 243 P.3d 666 (2010). The primary issue in that case was the difference in medical opinions, of which one was claimed by the Appellant to be based on conjecture. The Supreme Court rejected that contention, noting that the Commission had two relevant conflicting medical opinions. While the Court noted that "Dr. Frizzell offered very little explanation as to the bases for his opinions in either of his letters, these opinions still constituted a prima facie case for occupational disease, if the Commission had not been presented with conflicting evidence. In his IME Report, Dr. Weiss stated, with greater elaboration than Dr. Frizzell, that he did not find on a more likely than not medical basis that Watson's condition was caused by his occupation." The Court would not overrule the Commission's reliance upon the one medical opinion over the other; they were both relevant, though conflicting.

Watson was clearly a proper application of the "substantial evidence rule" that this Court will not overrule. But there were two differing opinions by competent witnesses. In this case, there is **no** evidence showing that Christy simply did not make a mistake. Ms. Roop, Judge Richmond, all admitted that it was a mistake that occurred.

On the one hand, the Commission recognized the legal standard of Meyer v. Skyline Mobile Homes, 99 Idaho 754 that the legislature "intended to disqualify those claimants who purposely, intentionally, consciously or knowingly fail to report a material fact, not those whose omission is accidental because of negligence, misunderstanding or other cause." 99 Idaho 754, at 761. However, the Commission concluded that he "knew or should have known" better. Yet the evidence is uncontradicted that he did not. Their conclusion, such as it was, is conjectural at best.

Perhaps more importantly, though, the law does not state that the legislature "intended to disqualify those claimants who should have known better." And that was their reason in concluding that this entire situation was caused by a mistake. That is not a recognizable, legal standard.

4. "Willfully:" This is the "flip side" of the point of "mistake." McNulty v. Sinclair Oil Corp., 152 Idaho 582, 272 P.3d 554 (2012) held that "Willfully implies simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate law, in the sense of having an evil or corrupt motive or intent. *It does imply a conscious wrong, and may be distinguished from an act maliciously or corruptly done*, in that it does not

necessarily imply an evil mind, but is more nearly synonymous with 'intentionally,' 'designedly,' 'without lawful excuse,' and therefore not accidental."

There is specifically no finding in this case of "a conscious, wilful act." To the contrary, the finding was that Claimant thought he was doing it right. Ms. Roop corroborated this finding in her testimony. When asked, as discussed above, she testified that she believed that this was a mistake.

Cox v. Hollow Leg Pub & Brewery, 144 Idaho 154, 158 P.3d 930 (2007), made it clear that "The term "willfully" refers to those claimants who "purposely, intentionally, consciously, or knowingly fail to report a material fact or make a false statement, not those whose omission or false statement is accidental because of negligence, misunderstanding or other cause." The Claimant's failure to properly report his earnings is admittedly due to negligence or misunderstanding. Indeed, Appellant's testimony upon which Judge Richmond made the determination that Claimant was told how to report when he spoke with the Department on December 19, 2014, is unimpeached. Therefore, the Conclusions found are erroneous.

"The determination that the Claimant 'willfully made false statements or representations' and the conclusions that this was determined by the preponderance of the evidence completely fails to consider the evidence presented. Claimant has learning disabilities. He is not a native English speaker or reader. He never spoke English until he was 7 years of age; his native tongue was a Philippine dialect. He has dyslexia with numbers and words. He was confused as to the

website. None of this is contradicted. There is no evidence that Christy did any of these statements "Wilfully" as the term is properly defined and repeatedly stated by this Court.

5. Eligibility: The Commission determined that Christy had "the burden of proving his eligibility for benefits by a preponderance of the evidence whenever the claim is questioned," citing Guillard v. Dept. of Employment, 100 Idaho 647, 603 P.2d 981 (1979). But this Court has also held in Hudson v. Hecla Mining Co., 86 Idaho 447, 452, 387 P.2d 893, 896 (1963): that there is "No hard or fast rule definitive of elements of proof of those requirements of benefit eligibility 'should be or perhaps could be adopted; it must depend, at least in part, upon the particular facts and circumstances as developed in each case.'"

In this regard, Appellant has shown that he satisfied the *eligibility requirements* for the award of unemployment. Indeed, *eligibility* was not questioned. That term is defined in Idaho Code §72-1366. What the issues on appeal were and are pertains to events that occurred thereafter. The only point of "eligibility" that could apply is that in §72-1366(12), in which a person may be disqualified for *future benefits.*

6. Penalty: The penalty imposed, while statutory and believed by the Commission and the decision-makers as non-discretionary, has as its predicate that there be made a false statement, misrepresentation or failure to report a material fact. Idaho Code §72-1369(2). Since there can be no wilfully false statement or misrepresentation, the penalty was inappropriate.

The *penalty* is different than the *overpayment* which is governed by §72-1369(1). While both the overpayment and the penalty may be compromised under §72-1369(7), the standards for

waiver of the overpayment per se are listed in subsection (5) and seem far more limited. The Commission, Judge Richmond and Ms. Roop failed to recognize that the imposition of the penalty was more discretionary than was the requirement to repay an overpayment. They abused their discretion in not waiving or compromising the penalty.

A trier of fact "does not abuse its discretion if it (1) correctly perceives the issue as discretionary, (2) acts within the bounds of discretion and applies the correct legal standards, and (3) reaches the decision through an exercise of reason." Nield v. Pocatello Health Servs., Inc., 156 Idaho 802, 332 P.3d 714 (2014). The problem with the decisions in this case is that they did not perceive the issues as discretionary in the first place. Instead, they were both far more absolute.

Both Ms. Roop and Judge Richmond felt the Claimant made a mistake. In the imposition of the penalty, they ignored that the Claimant was dyslexic; they ignored his admitted confusion; they ignored his comprehension issues with language and the websites. Instead, they imposed a "wilful failure" standard and penalty--after the specific findings of "mistake."

The Idaho case law does not allow that result; rather, if the situation was due to *negligence* or *mistake*, then by definition it is not *willful*.

7. Attorneys' Fees: "I.C. § 12-117 is not a discretionary statute. I.C. § 12-117 provides that the court shall award attorney fees upon a finding that the state agency did not act with a reasonable basis in fact or law. Thus we review whether there is substantial and competent evidence to support the court's finding that the state agency acted without a reasonable basis in

fact or law." Idaho Dept. of Law Enforcement v. Kluss, 873 P.2d 1336, 125 Idaho 682 (Idaho 1994).

Kluss fits this case perfectly. The decision states that " . . . the policy behind I.C. § 12-117 is: '1) to serve as a deterrent to groundless or arbitrary agency action; and 2) to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies never should ha[ve] made.' Bogner v. State Dep't of Revenue & Taxation, 107 Idaho 854, 859, 693 P.2d 1056, 1061 (1984)." In this case, Judge Richmond, after making specific findings of mistake, ruled instead that Christy made wilfully false misstatements. There was no substantial, competent evidence to justify the finding of "wilfully false." The Commission went even further, coming up with a decision that there was no substantial or competent evidence to support at all. All this was argued previously. The statute was intended to make it possible for people in straits such as those suffered by Christy to defend their rights against the arbitrary decisions entered so far in this case.

Judge Richmond made a mistake in making the findings of fact that he did and then making erroneous conclusions of law in spite of his own findings. An anecdotal phrase to describe this is "you can't get there from here."

The Commission, however, simply ignored the evidence altogether. It came up with a decision that it wanted to reach and then justified it in any way possible.

CONCLUSION:

Christy recognizes that there are undoubtedly a great deal of false claims that come before the Department, and that the Department has a duty to protect the public purse for the benefit of those who are properly entitled. But the Commission and the Appeals Examiner also failed to recognize and apply the legal standard *properly.*

The Idaho law is far from absolute in these cases. As stated in Meyer v. Skyline, supra, the difference is that the Legislature "intended to disqualify those claimants who purposely, intentionally, consciously or knowingly fail to report a material fact, not those whose omission is accidental because of negligence, misunderstanding or other cause." 99 Idaho 754, at 761. This Brief has explored the various Idaho cases on these points.

Christy made a mistake, based on his lack of understanding, his confusion, his learning and language issues. But there is **no** evidence that he "purposely, intentionally, consciously or knowingly" presented "false" information to the Department, Ms. Roop, or anybody else. He made a mistake. In the decisions of this Court, a mistake does not lead to a determination of liability. But it seems to be a conclusion which to the Commission is impossible.

Judge Richmond listened to the testimony at the first hearing. He then dismissed it so Ms. Roop could do her job, review all the evidence before her and make a new determination. She did that within a very few days, again without ever discussing this matter with Christy. She heard his testimony at the first hearing, considered the presentation made by the undersigned to her in writing, and looked at nothing else in making her determination. And she made her

conclusion that Christy purposely, intentionally, consciously or knowingly fail to report a material fact, while at the same time finding, and admitting, that he did not intentionally make false statements but was mistaken. That conclusion is contrary to law and logic. One cannot make a "willfully false" statement under a "mistake."

Judge Richmond fell into the same trap. He made specific findings, which on their face should have absolved Christy from liability in this case. Again, the conclusion of law made simply cannot stand based on the facts and his findings.

The Commission made its findings on a de novo basis, and in so doing failed completely in the proper application of well established rules of law applicable to the situation. They circumvented Christy's testimony about his learning disability by holding that he had to bring it up in the first hearing, when in fact he did so. The Commission, as did Judge Richmond, based their decisions in part on documentation that is not in the record before the Court and therefore does not exist. The Commission based its decision on pure conjecture and in contravention of well established legal principles.

Under the "substantial, competent evidence" standard it is clear that the Commission Order and Judge Richmond's Decision cannot stand and must be reversed.

Dated this 15th day of July, 2016.

LAW OFFICE OF D. BLAIR CLARK, PC

by ______________________
D. Blair Clark

CERTIFICATE OF SERVICE

I hereby certify that on the 15th day of July, 2016, I caused to be served by US Mail, postage prepaid, a true and correct copy of the within and foregoing, to the following:

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