10-19-2016

# Christy v. Grasmick Produce Appellant's Reply Brief Dckt. 43968

**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**

**APPELLANT'S REPLY BRIEF**



Appeal from the Industrial Commission of the State of Idaho,

Chairman R.D. Maynard Presiding

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This is Appellant's Reply Brief, in response to the Respondent's Brief filed by the Department of Labor (IDOL). Per IAR 35, this Brief will contain additional arguments to those made by Respondent in its Respondent's Brief filed on September 13, 2016.

**COURSE OF PROCEEDINGS:** Appellant does not dispute the filing date of his application for unemployment benefits, nor does he dispute the original IDOL determination. The IDOL does not dispute that the original determination of timeliness of the filing of the appeal from this first determination was proper,[1] so Appellant will not discuss this further.

As IDOL now concedes, the first determination was vacated and the appeal dismissed, so that a new determination could be made with the correct figures (IDOL Respondent's Brief, p. 1). This point was a factor addressed in Appellant's original brief.

After the new Determination was made on August 12, 2015, Appellant appealed from that determination and a second hearing was held on September 16, 2015. Judge Richmond heard the case to its conclusion and ruled that Appellant had "wilfully misrepresented his weekly earnings" and was thereby ineligible for unemployment benefits. The determination also ordered reimbursement of the overpayment. Appellant filed his appeal to the Commission.

The Commission reviewed the record de novo, including Appellant's brief in support of his appeal to the Commission. There was no other evidence requested or submitted.

IDOL and Appellant are not in dispute as to the procedural record or the course of proceedings. They are in dispute as to the facts that were found, and the effect of the "substantial, competent evidence" test.

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[1] Appellant had moved and did not receive the first determination in a timely manner; this was discussed in the first appeal hearing and resolved in Appellant's favor.

**FACTS PRESENTED AND ARGUMENT:** Appellant believes it may clarify the points to show the differences between the evidence as contended by the parties, and the proof supporting the same:

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| Christy's testimony about an IDOL employee, "John," advising him to report his net earnings is not supported by notes of the IDOL. | In Christy's July 28, 2015, testimony, 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"* as discussed with Ms. Roop in the second hearing, Tr 9.16.15, p. 15, L. 13-24.<br><br>The mistake is twofold, and the IDOL simply refuses to recognize the distinction. "Report what he got" could mean EITHER "gross" OR "net." The IDOL representative and Mr. Christy clearly could have understood the term differently. | The IDOL notes do not discuss this topic, nor do they have a place to do so. Please consider the exhibits attached to the Notice of Telephone Hearing of 9/3/2015, which are the written exhibits. The "Notes" begin on Exhibit page 27 of 85 and run through page 39 of 85. There is no question ever asked, nor any place to make such a note by the IDOL representative. In fact, those are the Claimant's weekly reports.<br><br>Also look at the notes on p. 40 0f 85 for 12/19/14 and 1/2/15. A review of those notes show that Appellant was confused about what he was to report and whether he understood the questions properly. |
| "During his second appeal, Christy asserted for the first time that he has problems with numbers and doesn't read well." | The exhibits–the department's own records–show that Mr. Christy is and was confused by several things in the instructions. | Christy should not be penalized for bringing this up on his "second" appeal. The first appeal was dismissed and never completed. Moreover, his testimony at the first appeal was never completed.. Judge Richmond terminated that hearing and dismissed the appeal so that Ms. Roop could review the new information and |

| IDOL POSITION | APPELLANT POSITION | FURTHER COMMENTS |
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| | | documentation and make a new determination, from which a NEW appeal would be taken. |
| "The Commission did not find Christy's explanation for his errors to be credible." | In all candor, the Commission, in its de novo review, never made that statement expressly or impliedly. Rather, the Commission's review centered on the written instructions and the internet based system for the weekly report. The Commission asserted that "the issue in this case comes down to assessing the probability that, given the information available to Claimant, he did not know what IDOL was asking, and, then, deliberately elected not to seek clarification. Meyer, 99 Idaho at 762, 589 P.2d at 97." | **The Commission asserted that "the issue in this case comes down to assessing the probability that, given the information available to Claimant, he did not know what IDOL was asking, and, then, deliberately elected not to seek clarification. Meyer, 99 Idaho at 762, 589 P.2d at 97."** |
| "The Commission observed that Christy was apprised on multiple occasions during the unemployment benefits application process that he was to report his gross earnings" specifically including a Power Point presentation. | The PowerPoint presentation simply is not all there. This is a substantial issue to Appellant. There is a great amount of emphasis in the decisions of all concerned about the slide show but a great deal of it is missing. And with a de novo review, there is no place for Appellant to object to consideration of the incompetent hearsay evidence. | This "PowerPoint" presentation starts on Exhibit page 12 of 85 and continues to page 14. Nowhere on this PowerPoint presentation does the phrase "gross earnings" or any synonym therefore appear at all. Rather, it was asserted that there was a drop-down menu to this effect, but that was never cured between the exhibits from the first to second appeal, or at any time thereafter. *The Commission, apparently, relied on evidence that was not* |

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| | | *anywhere in the record.* |
| "Claimant also received a booklet . . . This booklet includes a section describing how earnings affect a claimant's weekly benefits. The provision included the statement that a claimant 'must report all amounts earned, even if gross earnings are less than half the claimant's weekly benefits payment." | Again, this mentions 'gross earnings' in an entirely different context. The booklet does <u>not</u> say that the applicant is to report his <u>gross</u> earnings at all; it makes one comment about gross earnings but does not say that it is gross, rather than net, earnings that are to be reported. | |
| "To illustrate how Christy's claimed excuse failed to explain the discrepancies for most of the reporting weeks, . . ." the IDOL sets forth yet another table, similar to that in the Commission's Decision and Order. | The Commission's table is used to support its findings that the "excuse" would only apply for January 3, January 24, February 7. Yet neither the Respondent's Brief nor the Commission's Decision and Order explain the breakpoint they used to determine that the "excuse" is or is not applicable. This is not discretionary; this table is as arbitrary as the Commission's decision. | The highlighted portions are those that the Commission allowed but it is impossible to see what standard they used. January 2, for example, is 5 cents difference; the next week is $4.56. January 23 is 25 cents and February 6 is 15 cents. February 20, though, is only $4.36 difference and January 16 $16.53. What is the standard for this "discretion?" There is NO standard that can be deduced from either table. |
| "The Commission, in what arguably was a factual and legal stretch, gave Christy the benefit of the doubt with regard to three reporting weeks." | As stated in the prior topic, why those three? Just as valid an argument can be made that the 'substantial, competent evidence,' without being arbitrary, would only support finding *against* Christy for 2/28, 3/14 and 3/21. Those dates are where the variance would exceed $40. | |

| IDOL POSITION | APPELLANT POSITION | FURTHER COMMENTS |
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| "Christy creates another straw man argument when he lambasts testimony concerning a "pop-up" in the slide presentation about gross earnings that he would have viewed, and the fact that there was no documentary evidence of the actual slide or image of the pop-up admitted to support the testimony. What Christy fails to mention, though, are the other slides, the booklet and the confirmation page that all were admitted without objection, which all apprised Christy of his duty to report his gross wages -- that is, his earnings before deductions." | This is far from a 'straw man' argument. The phrase is defined as "a weak or imaginary argument or opponent that is set up to be easily defeated." Merriam-Webster's Dictionary. That phrase, however, is misleading. The point is that the "popup" was on the claimant- employee's weekly report–that online form which Appellant filled out every week as required. We don't know what it said because it does not exist in this record. The significance of that popup was that it was relied on by the Department in both of the appeals hearings. | The failure to have that popup in the record was addressed in the first appeals hearing of 7.28.15, p. 21, l. 14-24; p. 23, l. 12-18. The Department, in these hearings, put great weight on this popup as reminding Appellant weekly that he was to report gross earnings. Yet it is conspicuously absent. Moreover, that absence was not corrected in the hearing of 9.16.15, where it was discussed at p. 22, l. 12-25–p. 23, l. 1-10. There was no way to examine that popup, or cross-examine based on its wording, or even ask Appellant about his understanding of it because it doesn't exist. |
| "Christy also has no answer to the reasoning of Commission's decision and, in particular, the questions it raised concerning his credibility, other than, perhaps, the weak and essentially unsubstantiated claim that he suffers from mental infirmities relating to his math skills and English comprehension." | The Commission's de novo review was supposedly based on the existing record. If it had these so-called "questions," then why did the Commission not perform its obligations under its own Rules of requesting further evidence or testimony on this point? | The Commission clearly went into this appeal with the predilection to make sure that the Appellant would not prevail. This is discussed more fully in the next topic below. |

One major issue, not addressed by the IDOL, is the violation by the Commission of its own procedural regulations and the statutory framework governing "de novo" review of the record.

STATUTORY AUTHORITY AND DE NOVO REVIEW: The Commission, in its Decision and Order, p. 2, cites Idaho Code §72-1368(7) and Super Grade v. Idaho Dept. Of Commerce and Labor, 144 Idaho 386 (2007) for its authority to conduct a de novo review. However, these authorities do not quite go as far as the Commission believes.

Idaho Code §72-1368(7) reads as follows (emphasis added):

> (7) The commission shall decide all claims for review filed by any interested party in accordance with its own rules of procedure not in conflict herewith. The record before the commission shall consist of the record of proceedings before the appeals examiner, unless it appears to the commission that the interests of justice require that the interested parties be permitted to present additional evidence. In that event, the commission may, in its sole discretion, conduct a hearing or may remand the matter back to the appeals examiner for an additional hearing and decision. On the basis of the record of proceedings before the appeals examiner as well as additional evidence, if allowed, the commission shall affirm, reverse, modify, set aside or revise the decision of the appeals examiner or may refer the matter back to the appeals examiner for further proceedings.

In the Brief of Appellant dated 10.26.15 to the Commission from the decision of the Examiner, the Appellant cited the Commission's own Rules of Appellate Practice and Procedure (RAPP), pursuant to the above statute. As stated, there was no request for a further evidentiary hearing because the briefs were to "be based upon the evidence as established in the evidentiary record. Any inclusion of, or comment on, evidence not contained in the record as admitted by the Appeals Examiner will not be considered by the Commission." Yet the Commission did exactly that.

Amazingly, at least to Appellant, the term "de novo" is not contained anywhere in the RAPP. Rather, the rules state specifically that the review would be based on the existing record unless the Commission, in its discretion, either allowed for a new hearing, a limited hearing on some specific points or issues, or remanded to the examiner. This is in the 'discretion' of the Commission.

RAPP 7© provides that the Commission shall review the record upon receipt "to determine whether the interests of justice require the presentation of additional evidence." There was no such request here, and no notice that it was doing anything else than an appellate review of the existing record. The Commission did grant Appellant the right to file a brief, which Appellant did.

This Court has had recent occasion to construe 'abuse of discretion' when applied to the Commission. See Boyd-Davis v. Macomber Law, 342 P.3d 661 (Idaho, 2015), holding that there is a "three-part test is used when reviewing whether the Commission abused its discretion. Flowers v. Shenango Screenprinting, Inc., 150 Idaho 295, 297, 246 P.3d 668, 670 (2010). This Court determines: " (1) whether the Commission correctly perceived the issue as one of discretion, (2) whether it acted within the outer boundaries of its discretion and consistently with the legal standards applicable to the specific choices available to it, and (3) whether it reached its decision by an exercise of reason." Id. (quoting Super Grade, Inc. v. Idaho Dep't of Commerce & Labor, 144 Idaho 386, 390, 162 P.3d 765, 769 (2007)).

Rather than the Super Grade decision, however, which was not a case involving unemployment compensation, Appellant request this Court compare two similar decisions involving unemployment benefits with disparate results and the teachings therefrom: Small v. Jacklin Seed Co., 109 Idaho 541, and Jensen v. Siemsen, 118 Idaho 1. Both were unemployment cases where the applicant resigned due to alleged sexual harassment. Small resulted in a remand to the Commission, while Jensen was affirmed. The reasons for the distinction were outlined in the Jensen decision, where this Court stated that "In Small v. Jacklin Seed, 109 Idaho 541, 709 P.2d 114 (1985), the underlying claim was sexual harassment, however the sole issue presented was whether the findings of the Industrial Commission were supported by substantial evidence.

Id. at 541, 709 P.2d at 114. In Small we remanded because the Commission had not considered all the evidence and several key exhibits were not contained in the record." The Court then explained that the question in Jensen was the applicable standard, and the Court held that the definition of "sexual harassment" was not a term of which Idaho had ever defined; therefore, in looking at the "various guidelines, standards and cases defining sexual harassment," the Court could not conclude that the Commission erred as a matter of law in its findings.

In this case, however, the Commission did not properly exercise its discretion. It gave Appellant credit for weeks and failed to do so for other weeks based on what appears to be no standards whatever. It did not request, as it had discretion to do, additional evidence on the Appellant's language and mathematical difficulties. Rather, they "wilfully" disregarded the uncontradicted testimony because it was not presented at the first hearing–even though that hearing was terminated by the Hearing Officer.

The *uncontradicted* evidence, which was simply disparaged by the Commission due to the timing of the testimony, is that Appellant has dyslexia in numbers and letters (Tr., 9.16.15, p. 34, l. 21-25). He has reading difficulties and always has (p. 35, L. 1-12). And he is not a native English user; rather, Tagalog (native Filipino) is his native language (p. 35, l. 19-25). The Commission did not have the discretion to ignore that testimony under Idaho law; if they had questions or wanted to examine him over that point, then their discretion should have called for a hearing on that point as required by Idaho Code §72-1368(7).

**ATTORNEYS' FEES ON APPEAL**

The IDOL requests that attorneys' fees and costs be awarded to the Department. The IDOL states that attorneys' fees on appeal are all that are awardable. At this juncture, Appellant has not requested attorneys' fees for the hearings before the Appeals Examiner or the

Commission, so that is not before this Court. First of all, he was not the prevailing party in the prior matters. Secondly, it could not be said prior to this appeal that the State acted "without a reasonable basis in fact or law." This was a disputed matter on both sides.

Rather, the IDOL claims that this appeal "does nothing more than ask this Court to reweigh the evidence." That position ignores the issues presented. Appellant asserts that the Commission violated several well-defined precepts of law, its own rules in the RAPP, and failed to properly exercise its discretion in various manners discussed above. This appeal is not without a reasonable basis in fact or law; rather, the Commission's ruling is itself clearly erroneous and cannot stand. Attorneys' fees for this appeal are appropriate.

Dated this 14th day of October, 2016.

LAW OFFICE OF D. BLAIR CLARK, PC

by_____
D. Blair Clark

## CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of October, 2016, I caused to be served a true and correct copy of the within and foregoing, to the following:

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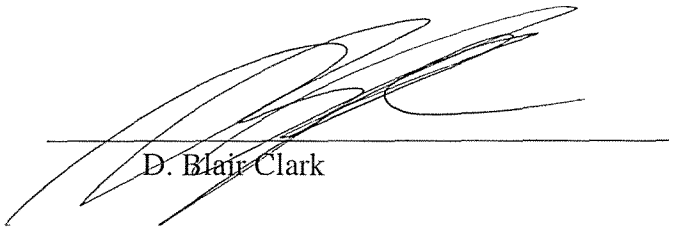

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