

5-23-2017

Current v. Wada Farms Partnership Respondent's Brief Dckt. 44683

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IN THE SUPREME COURT OF THE STATE OF IDAHO

DENNIS B. CURRENT,)

Claimant/Appellant,)

vs.)

WADA FARMS PARTNERSHIP,)

Employer/Respondent,)

and)

IDAHO DEPARTMENT OF LABOR,)

Respondent.)

SUPREME COURT NO. 44683

BRIEF OF RESPONDENT
IDAHO DEPARTMENT OF LABOR

ON APPEAL FROM THE INDUSTRIAL COMMISSION
STATE OF IDAHO
R.D. MAYNARD, CHAIRMAN

IDAHO DEPARTMENT OF LABOR

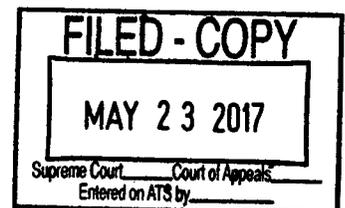
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BLACKFOOT, ID 83221

EMPLOYER

WADA FARMS PARTNERSHIP
326 S 1400 W
PINGREE, ID 83262



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STATEMENT OF THE CASE

A. Nature of the Case

Claimant-Appellant Dennis B. Current (“Current”) appeals from the decision of the Idaho Industrial Commission (“Commission”) finding him ineligible for unemployment benefits based upon his willful underreporting of earnings to the Idaho Department of Labor (“IDOL” or the “Department”).

B. Course of the Proceedings

On April 26, 2016, IDOL mailed to Current – an unemployment benefits recipient – a letter outlining a discrepancy discovered during a routine audit of the wages he reported compared with those reported by his employer, Wada Farms Partnership. Exhibit, p.34 of 47; Tr., p.17, l.20 – p.18, l.18. The letter invited Current to explain the discrepancy. *Id.*

On May 10, 2016, after receiving no response from Current, IDOL determined that Current willfully misrepresented his weekly earnings for weeks ending March 5, 2016 and March 12, 2016. Exhibit, pp.40-42 of 47. That same date, IDOL mailed to Current its overpayment determination which set forth overpayment amounts and civil penalties. Exhibit, pp.43-44 of 47. As a consequence, Current became ineligible for unemployment benefits for a period of one year beginning May of 2016. Exhibit, p.40 of 47.

On May 19, 2016, Current appealed the determinations. Exhibit, pp.45-46.

An Appeals Examiner of the Department's Appeals Bureau held a telephonic hearing on Current's appeal on June 6, 2016. Tr., p.4, ll.6-12.

On June 7, 2016, the Appeals Examiner issued his decision finding that Current willfully made false statements or willfully failed to report material facts in order to obtain unemployment benefits. R., p.3. The overpayment and penalty determinations, as well as the year-long disqualification for benefits, were affirmed. R., pp.1-6.

On June 14, 2016, Current timely appealed to the Commission. R., p.7.

Shortly thereafter, Current requested to reopen the proceedings before the Appeals Examiner to present additional evidence, R., p.12, which was denied by order dated June 23, 2016. R., pp.13-17.

On June 24, 2016, Current filed a request that his employer's correspondence dated June 9, 2016 (two days after issuance of the Appeals Examiner's decision) be added in the record. R., pp.18-21.

IDOL entered its notice of appearance. R., pp.23-24.

On July 7, 2016, Current untimely requested an extension of time to file his brief, R., p.25, which was denied by Commission order dated July 12, 2016. R., pp.27-28.

On July 18, 2016, the Commission changed course and issued an Order Establishing Briefing Schedule. R., pp.31-32.

Current filed his brief on August 1, 2016. R., pp.35-43.

The Commission conducted a *de novo* review of the record, and on October

21, 2016, entered its decision finding Current had willfully failed to report material facts or made false statements to IDOL in his weekly earnings reports for the weeks ending March 5, 2016 and March 12, 2016. R., p.45-54. Current was found ineligible for unemployment benefits for each of the weeks in which earnings were willfully misrepresented, and assessed civil penalties. R., p.53.

On November 30, 2016, Current timely filed a notice of appeal to the Idaho Supreme Court. R., p.55.

C. Statement of the Facts

During the period Current was receiving unemployment benefits, as part of a routine cross-match audit, an unemployment claims investigator with IDOL sent a Weekly Earnings Request to Current's employer, Wada Farms Partnership. The request sought employer's weekly gross earnings paid to Current from the week ending November 7, 2015 through the week ending with March 19, 2016. Wada Farms Partnership completed the request and returned it to IDOL. Exhibit, p.35 of 47. For the weeks ending March 5, 2016, and March 12, 2016, Current's employer reported gross earnings of \$397.51 and \$313.59, respectively. *Id.* The records of IDOL showed that Current reported different gross earnings: \$330.00 for the week ending March 5, 2016, and \$231.00 for the week ending March 12, 2016. Exhibit, pp.30-31 of 47..

These discrepancies were pointed out to Current in a letter sent by IDOL dated April 26, 2016, that asked him to "explain all wage differences and supply any records or evidence available that will support the earnings you reported."

Exhibit, p. 34 of 47.¹ Current was warned in this letter that “failure to explain adequately the differences, could result in an overpayment requiring repayment and disqualification from receiving unemployment benefits for up to one year.”
Id.

Current did not respond to the letter of April 26, 2016. Tr., p.18, ll.1-3. IDOL then issued eligibility and overpayment determinations based on Current’s underreporting of his gross earnings for the weeks ending March 5, 2016, and March 12, 2016. Exhibit, pp.40-44 of 47. Current appealed from those determinations. Exhibit, p.46 of 47.

The Appeals Examiner found that Current willfully underreported his earnings and upheld the Department’s determinations. R., pp.1-6.

Current timely appealed to the Commission. R., p.7. The Commission made certain findings and framed the issue before it as follows:

The Department provided Claimant with written instructions on how to complete his weekly claim reports in the form of a pamphlet he received. (Exhibit: pp. 3-11.) The Internet-based Claimant Portal Claimant used to complete his application for benefits and his weekly claim reports reminded Claimant of the importance of providing accurate information. (Exhibit: p. 15.) Therefore, 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.

R., p.49 (citation omitted).

¹ There also was a discrepancy between reported earnings for the week ending March 19, 2016. Exhibit, p.34 of 47. However, because Current overreported his earnings for that week, no penalties were assessed for that week and no findings were made pertinent to this appeal. Tr., p.19, ll.9-17; Exhibit, p.44 of 47.

This question was answered by Current's testimony at the June 6, 2016, hearing. In his testimony, Current candidly admitted that for the weeks at issue he "guestimated" his earnings; he also admitted that he was made aware by the Department that he was required to go back and correct his earnings, and that he never corrected his "guestimated" earnings. Tr., p.12, l.16 – p.13, l.6.

The Commission found Current's explanations wanting and that he had willfully underreported his earnings for the weeks ending March 5, 2016, and March 12, 2016. R., p.52.

Current appealed to this Court. R., p.55.

ISSUES ON APPEAL

- I. Whether Current's assertions of error and arguments fail to meet the requirements of I.A.R. 35(a) and thus are waived for purposes of appellate review?
- II. Does substantial and competent evidence support the Commission's finding that Current willfully misrepresented material facts when he underreported his earnings in weekly reports to the Idaho Department of Labor?
- III. Should this Court award the Idaho Department of Labor its attorney fees and costs on appeal pursuant to I.C. § 12-117(1)?

ARGUMENT

I.

Current's Assertions of Error and Arguments Fail To Meet the Requirements of I.A.R. 35(a) and Thus Are Waived for Purposes of Appellate Review

The requirements of an appellate brief are delineated in I.A.R. 35(a), and include, *inter alia*:

(4) *Issues Presented on Appeal*. . . . The issues shall fairly state the issues presented for review. The statement of issues presented will be deemed to include every subsidiary issue fairly comprised therein.

. . . .

(6) *Argument*. The argument shall contain the contentions of the appellant with respect to the issues presented on appeal, the reasons therefor, with citations to the authorities, statutes and parts of the transcript and record relied upon.

I.A.R. 35(a) (emphasis added).

Consistent with this rule, this Court has repeatedly held that

[w]here an appellant fails to assert his assignments of error with particularity and to support his position with sufficient authority, those assignments of error are too indefinite to be heard by the Court. . . . A general attack on the findings and conclusions [below], without specific reference to evidentiary or legal errors, is insufficient to preserve an issue.

Bach v. Bagley, 148 Idaho 784, 790, 229 P.3d 1146, 1152 (2010). *Accord*, Wolford v. Montee, 161 Idaho 432, 387 P.3d 100, 111 (2016).

Stated another way, this Court “will not search the record on appeal for error,” and “to the extent that an assignment of error is not argued and supported in compliance with the I.A.R., it is deemed to be waived.” Bach v.

Bagley, 148 Idaho at 790, 229 P.3d at 1152.

These rules apply equally to all parties, whether represented by counsel or appearing *pro se*. LeBow v. Commercial Tire, Inc., 157 Idaho 379, 384, 336 P.3d 786, 791 (2014).

Current lists five issues in his brief. Appellant's Brief, p.1. Issues 1, 2 and 5 assert that the following are vague and/or "overreaching": I.C. § 72-1257(a) [sic]; the Court's definition of "willful"; and I.C. § 72-1366(12). Current's fourth issue simply asks rhetorically how I.C. §§ 72-1366(12) and 72-1371 differ with regard to their use of the word "willful." No argument and no authority is advanced in support of any of these issues. Consequently, Current's issues numbered 1, 2, 4 and 5 should be deemed waived and not heard on appeal.

Current frames his third issue as follows:

Did Claimant willfully make a false statement or willfully fail to report a material fact in order to obtain insurance benefits.

Appellant's Brief, p.1.

Current cites no caselaw in his brief to support his third issue. He simply references several dictionaries and makes general reference to "areas of law" including criminal law. Appellant's Brief, p.3. This appears insufficient to meet the requirements of I.A.R. 35(a) inasmuch as there is no citation to legal authorities and no real argument, but rather only conclusory statements. For these reasons, it is respectfully submitted that Current's third issue also should be deemed waived for failure to comply with I.A.R. 35(a).

This appeal should be dismissed because Current has waived all the

issues listed in his brief.

II.

Substantial and Competent Evidence Supports the Commission's Finding that Current Willfully Misrepresented Material Facts When He Underreported his Earnings in Weekly Reports to the Idaho Department of Labor

If this Court concludes that Current has not waived all of the issues listed in his brief as argued above, then it becomes necessary to address whether substantial competent evidence supports the Commission's finding that he willfully made a false statement in order to obtain unemployment benefits.²

A. Standard of Review

In appeals from the Commission, the Idaho Supreme Court's jurisdiction is limited "to questions of law." Idaho Const., Art. V, § 9.

This Court has observed that is "constitutionally compelled to defer to the Commission's findings of fact where supported by substantial and competent evidence." Locker v. How Soel, Inc., 151 Idaho 696, 699, 263 P.3d 750, 753 (2011), *quoting* Teffer v. Twin Falls School Dist. No. 411, 102 Idaho 439, 439, 631 P.2d 610, 610 (1981).

Commission findings must be upheld if based on "substantial competent evidence," which is relevant evidence that a reasonable mind might accept to

² In the proceedings before the Appeals Examiner and the Commission, Current did not dispute the earnings he reported to IDOL, nor did he dispute the amounts that were reported by his employers. No argument has been made on appeal that the earnings amounts were not material. That leaves only the "willfulness" element as a basis for challenging the Commission's findings and conclusions.

support a conclusion. Bringman v. New Albertsons, Inc., 157 Idaho 71, 74, 334 P.3d 262, 265 (2014); Bell v. Idaho Dept. of Labor, 157 Idaho 744, 747, 339 P.3d 1148, 1150 (2014).

This Court “will not re-weigh the evidence or consider whether it would have reached a different conclusion from the evidence presented.” Bringman, supra; Bell, supra. In addition, all facts and inferences are viewed in the light most favorable to the facts found by the Commission, and its determinations as to credibility of witnesses and weight of evidence will be upheld unless clearly erroneous. Bringman, supra; Bell, 157 Idaho at 746-747, 339 P.3d at 1150-1151.

Finally, pure questions of law presented on appeal are freely reviewed. McNulty v. Sinclair Oil Corporation, 152 Idaho 582, 585, 272 P.3d 554, 557 (2012).

B. “Willfully” Under the Employment Security Law

Under the Employment Security Law, I.C. §§ 72-1301 *et seq.*, a claimant has the burden of establishing statutory eligibility for unemployment benefits, even in those cases involving claims of willful misrepresentation. McNulty, 152 Idaho at 585, 272 P.3d at 557.

The statutory eligibility conditions provide that a claimant is ineligible for unemployment benefits if “he has willfully made a false statement or willfully failed to report a material fact in order to obtain benefits.” I.C. § 72-1366(12). IDOL’s regulations provide that

[f]or purposes of Section 72-1366(12), Idaho Code, to willfully make

a false statement or to willfully fail to report a material fact to obtain benefits requires a purpose or willingness to commit the act or make the omission referred to. A specific intent to violate law is not required.

IDAPA 09.01.04.014.

The definition of “willfully” in this agency rule is consistent with Idaho case law:

This Court has defined willfulness as “imply[ing] simply a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate the law.” Current, 152 Idaho at 13, 266 P.3d at 488 (quoting [Meyer v. Skyline Mobile Homes, 99 Idaho 754, 761, 589 P.2d 89, 96 (1979)]).

Bringman, 157 Idaho at 76, 334 P.3d at 267.

[Willfully] 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.

Bell, 157 Idaho at 747, 339 P.3d at 1151, *quoting* McNulty, 152 Idaho at 586, 272 P.3d at 558.

Case law also makes clear that a finding of willfulness will be sustained where the claimant “was properly informed of his reporting obligation and his alleged misunderstanding lacked credibility.” Bringman, 157 Idaho at 76-77, 334 P.3d at 267-268, *citing* McNulty, 152 Idaho at 587, 272 P.3d at 559. *See also* Current, 152 Idaho at 13–14, 266 P.3d at 488–89 (“factfinder may consider the claimant's explanation unworthy of belief”).

C. Substantial Competent Evidence Supports the Commission's Finding of "Willfulness"

Substantial competent evidence supports the Commission's finding that Current willfully failed to report material facts in his weekly earnings reports to IDOL.

The case at bar is on all fours with Bell, *supra*, which involved a willful misrepresentation. The Court's opinion notes that Bell would have received a pamphlet informing him that if he was unable to determine the exact amount earned during a reporting week, he could "estimate weekly earnings as close as possible" but, if he did so, he was required to contact IDOL when he received corrected weekly earnings. Bell, 157 Idaho at 748, 339 P.3d at 1152. The pamphlet also informed Bell that "[m]aking false statements or failing to report material facts, including weekly earnings" constitutes fraud. *Id.*

The Court found that Bell willfully underreported his earnings by failing to investigate his actual earnings after estimating them in his weekly reporting:

Bell does not explain his failure to investigate his actual weekly gross wages prior to the DOL's request for additional information. Bell accessed additional payroll information through Sears' "My Personal Information" website and recovered his bi-weekly gross wages in response to the DOL's request, but apparently made no attempt to seek out this information prior to the DOL's request. As Bell notes, even this information did not include his weekly gross wages. But, had Bell accessed the information earlier, he could have compared the bi-weekly gross wages reported by Sears with the gross wages he reported to the DOL over the corresponding two-week periods and noted the discrepancies with the DOL. Bell likewise does not explain why he did not contact Sears directly to request weekly gross wage information or contact the DOL for advice concerning how to proceed in the absence of that information.

Bell, 157 Idaho at 748, 339 P.3d at 1152.

The Court in Bell held that the Commission's findings were supported by substantial competent evidence:

There is substantial and competent evidence in the record to support the Commission's findings that Bell willfully made false statements regarding the hours-worked issue and that he failed to report material facts regarding his actual weekly gross wages for the purpose of securing unemployment benefits. Bell argues that he did not intend to defraud the DOL. Though that may be so, willful conduct "does not require any intent to violate law" [Meyer v. Skyline Mobile Homes, *supra*, 99 Idaho at 761, 589 P.2d at 96.] The evidence in the record supports the conclusion that Bell knew of his obligation to correctly report his actual hours worked, on the one hand. And, on the other, he knew he was required to update the DOL if he initially reported inaccurate information, he knew the information he initially reported was inaccurate, and he made no attempt to provide the DOL with accurate information or notify the DOL that the information he provided was inaccurate.

157 Idaho at 749, 339 P.3d at 1153.

Here, Current received a similar pamphlet. Tr., p.18, l.14 – p.19, l.1. This pamphlet explained in part:

Keep track of each week's hours and earnings. Report all earnings from all employers before any deductions. If you cannot determine the exact amount you earned, you must estimate weekly earnings as closely as possible. If you do estimate earnings, you must call (208) 332-8942 when you receive the correct earnings information.

Exhibit, p.3 of 47.

It is evident from Current's testimony before the Appeals Examiner that, like Bell, he knew of his obligation to correct his estimated earnings, yet failed to do so. Here is a pertinent part of Current's testimony:

Q. Okay. So, when they told you [that] you could estimate your time, did they tell you that you should go back

and correct your earnings once you find out – once you found out what you actually were paid?

A. Well, I think they mentioned something about that, but, I – like I said, I haven't been able to even access a pay stub until May 18th. You know, I have requested some stuff from work and Laurel Van Orden has been kind enough in the past to print me copies of my check stubs, you know, because usually they charge for that, but she was kind enough to print me some copies earlier this year – I'm thinking it was around February [N.B. before the reporting weeks at issue here]

Tr., p.12, l.16 – p.13, l.3.

A Claimant cannot bury his or her head in the sand and claim ignorance or an honest mistake. This was made clear in Meyer:

[A] finding that a benefit claimant knew or thought it highly probable that he or she did not know what information a question solicited but nevertheless deliberately chose to respond without pursuing clarification would ordinarily support a conclusion of willful falsehood or concealment. Cf. United States v. Thomas, 484 F.2d 909 (6th Cir. 1973) (false statements in connection with acquisition of firearm were made knowingly if made with reckless disregard of whether statements were true or with conscious purpose to avoid learning the truth), *cert. denied*, 414 U.S. 912, 94 S.Ct. 253, 38 L.Ed.2d 151 (1973). See also United States v. Jewell, 532 F.2d 697 (9th Cir. 1976) (en banc) (possession of marijuana was knowing where defendant was aware of facts indicating vehicle contained marijuana and deliberately avoided positive knowledge of contraband's presence to escape responsibility if apprehended), *cert. denied*, 426 U.S. 951, 96 S.Ct. 3173, 49 L.Ed.2d 1188 (1976).

Meyer, 99 Idaho at 762, 589 P.2d at 97. Yet that is precisely what Current did here.

The Commission's finding that Current willfully underreported his earnings is supported by substantial competent evidence and should be upheld.

III.

This Court Should Award the Idaho Department of
Labor its Attorney Fees and Costs on Appeal
Pursuant to I.C. § 12-117(1)

Idaho Code § 12-117(1) provides as follows:

Unless otherwise provided by statute, in any proceeding involving as adverse parties a state agency or a political subdivision and a person, the state agency, political subdivision or the court hearing the proceeding, including on appeal, shall award the prevailing party reasonable attorney's fees, witness fees and other reasonable expenses, if it finds that the nonprevailing party acted without a reasonable basis in fact or law.

Because Current, without authority or coherent argument, does nothing more than ask this Court to reweigh the evidence and supplant the Commission's factual determinations – something settled case law dictates this Court may not do – his appeal is without reasonable basis in fact or law. Attorney fees and costs on appeal should be awarded against Current pursuant to I.C. § 12-117(1).

CONCLUSION

Current has failed to support his issues on appeal with argument or authority and should be deemed to have waived those issues.

Substantial competent evidence supports the Commission's finding that Current willfully misrepresented his earnings. Its decision finding Current ineligible for unemployment benefits for the work weeks that he willfully underreported earnings should be affirmed.

Further, because Current's appeal is without reasonable foundation in fact or law, IDOL should be awarded its attorney fees and costs on appeal.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Werth", with a long horizontal flourish extending to the right.

DOUG WERTH
Deputy Attorney General
Idaho Department of Labor

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 23rd day of May, 2017, 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:

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