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IN THE SUPREME COURT OF THE STATE OF IDAHO

CARLA SPARKS,

Claimant/Appellant,

vs.

LAURA DRAKE INSURANCE AND
FINANCIAL SERVICES, INC.,

Employer/Respondent,

and

IDAHO DEPARTMENT OF LABOR,

Respondent.

SUPREME COURT NO. 45420

BRIEF OF RESPONDENT
IDAHO DEPARTMENT OF LABOR

ON APPEAL FROM THE INDUSTRIAL COMMISSION
STATE OF IDAHO
THOMAS E. LIMBAUGH, CHAIRMAN

IDAHO DEPARTMENT OF LABOR

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STATEMENT OF CASE

A. Nature of Case

This action comes before this Court for judicial review of a decision of the Idaho Industrial Commission (“Commission”), which upheld a previous decision by Respondent Idaho Department of Labor (hereinafter “IDOL”). The decision which Claimant/Appellant Carla Sparks (hereinafter “Sparks”) is challenging was initially issued by an IDOL appeals examiner and involved a challenge to benefits being sought by Sparks following her dismissal by her former employer, Laura Drake Insurance and Financial Services, Inc. (hereinafter “Drake”).

B. Course of Proceedings

IDOL issued a *Personal Eligibility Determination* finding Sparks eligible to receive unemployment insurance benefits and a Chargeability Determination identifying Drake as the chargeable employer on March 31, 2017. (Tr. p. 9, l. 19 through p.10, l. 2; Exhibit to Record pp. 11-16). On April 3, 2017, Drake appealed the *Personal Eligibility Determination* asserting that Sparks was terminated for cause. (Exhibit to Record pp. 18-28).

The administrative appeal was assigned by IDOL to appeals examiner Paul Kime, who set the matter for hearing by telephone conference on April 26, 2017. (Tr. p. 4, ll. 7-21; Exhibit to Record pp. 1-3). At the time, set for the hearing Drake appeared and participated but Sparks did not. (Tr. p. 4, ll. 7-17; R. p. 1). The *Decision of Appeals Examiner* was issued by Mr. Kime on April 27, 2017, reversed the initial

Personal Eligibility Determination and found that Sparks was discharged for cause. (R. pp. 1-7).

On April 28, 2017, Sparks filed a request to reopen the hearing claiming that she had not received the notice of hearing until after the hearing date because she did not make an effort to obtain the package from the post office until after the hearing had taken place. (R. p. 15). Mr. Kime considered Sparks' request with the reason presented and concluded the explanation provided by Sparks for not appearing at the hearing was insufficient to justify reopening the hearing. (R. pp. 8-9).

On May 5, 2017 Sparks filed an appeal with the Idaho Industrial Commission (hereinafter "the Commission") which once again sought to reopen the evidentiary proceedings. (R. pp. 13-14). The Commission issued its Decision and Order on June 5, 2017. In that *Decision and Order*, the Commission considered Sparks' request to reopen the evidentiary proceedings and found that she had not provided a compelling reason to allow an additional hearing and specifically found Sparks' own negligence in failing to retrieve the *Notice of Hearing*, which had been properly served upon her, was insufficient to justify her failure to appear or warrant a new hearing. (R. p. 37). The Commission also conducted a *de novo* review of the substantive decision made by the appeals examiner and determined that based upon the evidence in the record, that Drake discharged Sparks for employment-related misconduct, and as such Sparks was ineligible for unemployment benefits. (R. pp. 38-41).

On June 16, 2017, Sparks wrote to the Commission again requesting to reopen the evidentiary proceedings. (R. pp. 44-46.) The Commission considered that correspondence as a request for reconsideration of the June 5, 2017 *Decision and Order*. (R. p. 47). The Commission extensively outlined the reasoning for its decision not to reopen the evidentiary record and affirmed the decision of the appeals examiner in an *Order Denying Reconsideration* issued August 29, 2017. (R. pp. 47-51).

On September 26, 2017, Sparks filed her appeal to the Idaho Supreme Court. (R. p. 53).

C. Statement of Facts

The operative facts are set out in the Findings of Fact in the *Decision of Appeals Examiner* and are adopted in full as follows:

1. Claimant [Sparks] began working for employer [Drake] on April 1, 2015. Her last day of work was February 22, 2017. Claimant worked full time for employer as a Property Casualty Customer Service Representative.
2. In about the last three months before claimant's discharge, employer had been experiencing increasing difficulties with claimant's performance. Claimant was not getting policy renewals done timely, she was not submitting reports timely, and there were interpersonal problems between claimant and a coworker.
3. Employer had weekly meetings with claimant, and reviewed claimant's work with her each week. Employer pointed out the problems in claimant's work, but never explicitly told her that she could be discharged if she did not improve.
4. Claimant's performance continued to lag. About two weeks before claimant's discharge, employer instructed claimant to prepare a policy renewal proposal for employer's largest client. Employer instructed claimant to complete the proposal while employer was on vacation. While on vacation, employer tried to phone in to speak to claimant in the middle of the vacation, and claimant refused to speak to her.

5. Upon her return, employer found that the proposal had not been finished. Employer was required to finish it herself.
6. The final straw for employer came when claimant mistakenly issued and exchanged a short-term policy for a long term policy for a client. Claimant had known of the mistake for several weeks and had taken no action to remedy the error.
7. Employer reviewed claimant's conduct, and finally decided that she was too large a liability, and discharged her.
8. In the first four of the five calendar quarters preceding the one in which the claimant applied for benefits, this employer paid the claimant more wages than any other employer.

(R. p. 2).

No contradictory facts have been established anywhere in the record.

RESTATED ISSUES ON APPEAL

- 1) Can Sparks rely upon her unsworn, uncorroborated statements as a means to impeach the hearing record on appeal?
- 2) Has Sparks shown that the Commission abused its discretion in its decision not to conduct an additional hearing?
- 3) Has Sparks shown that the Commission's decision is not supported by substantial and competent evidence?

STANDARD OF REVIEW

A determination by the Commission on whether or not to take additional evidence is reviewed for abuse of discretion. *Simpson v. Trinity Mission Health & Rehab of Midland L.P.*, 150 Idaho 154, 156, 244 P.3d 1240, 1242 (2010).

In appeals from the Commission, the Idaho Supreme Court's jurisdiction on substantive issues 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), (Citing *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 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 “does not re-weigh the evidence or consider whether it would have reached a different conclusion from the evidence presented.” *Hughen v. Highland Estates*, 137 Idaho 349, 351, 48 P.3d 1238, 1240 (2002) In addition, all facts and inferences are viewed in the light most favorable to the party who prevailed before the Commission, and its determinations as to credibility of witnesses and weight of evidence will be upheld unless clearly erroneous. *Neihart v Universal Joint Auto Parts, Inc.*, 141 Idaho 801, 802-03, 118 P.3d 133, 134-35 (2005).

This Court exercises free review over any questions of law decided by the Commission. *McNulty v. Sinclair Oil Corporation*, 152 Idaho 582, 585, 272 P.3d 554. 557 (2012).

ARGUMENT

- I. *Ms. Sparks is prohibited from relying upon the non-evidentiary statements submitted to this Court in the Statement of Facts of her brief.*

Ms. Sparks’ *Appellant’s Brief* consists almost entirely of a Statement of Facts which she wishes this Court to accept at face value. In actuality, that Statement of

Facts is nothing more than an attempt to impeach the testimony and evidence presented at the hearing held in this case. While it does include citations to the record those citations do not represent facts on which Sparks is attempting to rely, but rather testimony which Sparks is disputing followed by her own undocumented and unsworn statements contradicting the evidence offered at the hearing. This Court is prohibited from considering these non-evidentiary statements and must disregard any argument based upon those assertions.

Idaho case law has long held that in appellate proceedings, it is the responsibility of the appellant to establish and ensure that the record on appeal contains all items necessary to establish the appellant's right to the relief sought through the appeal. *Van Velson Corp. v. Westwood Mall Ass'n*, 126 Idaho 401, 406, 884 P.2d 414 (1994). This position correlates with one of the most important maxims of judicial review, that an appellate court will not consider issues presented for the first time on appeal. *See, Viveros v. State Dep't of Health and Welfare*, 126 Idaho 714, 716, 889 P.2d 1104 (1995).

In the instant case, Sparks failed to appear at the hearing and has been trying ever since to impeach the evidence presented at the hearing. It was Sparks' obligation to insure that the record contained the *facts and evidence* to support a showing of error on appeal. Unfortunately, she failed to appear and offer testimony at the proper time and place. As a result the record on appeal is devoid of all the evidence on which she wants to rely. At this point, Sparks is arguing that the appeals examiner erred by not considering evidence, which the appeals examiner was never given the

opportunity to review. Any error on this issue is an invited error which Sparks is estopped from asserting.

Idaho law is well established that “one may not successfully complain of errors one has consented to or acquiesced in. In other words, invited errors are not reversible.” *State v. Caudill*, 109 Idaho 222, 226, 706 P.2d 456, 460 (1985). “The doctrine of invited error applies to estop a party from asserting an error when his own conduct induces the commission of the error.” *State v. Atkinson*, 124 Idaho 816, 819, 864 P.2d 654, 657 (Ct.App.1993) (citation omitted)

Thomson v. Olsen, 147 Idaho 99, 106–07, 205 P.3d 1235, 1242–43 (2009).

The brief filed by Ms. Sparks is little more than a recitation of the testimony she would presumably have offered had either the appeals examiner or the Commission determined that the interest of justice required that additional evidence be taken in this matter. However, given that evidence was never reopened and none of the alleged “facts” are contained in the record, it is inappropriate for Sparks to cite to them throughout her brief. This Court should not consider any alleged assertion that “fraud occurred at the Hearing” or consider any of the unsworn statements that Sparks is attempting to insert into this appeal. This is the only appropriate manner of handling these statements since they are not supported by the record, and in fact directly contradict the record on many points.

Based upon controlling law from this Court, arguments that are not supported by citations to either facts *in the record* or legal authority are deemed waived.

However, we find that the constitutional arguments contained in Wheeler's briefs are both incoherent and unsupported by authority. Idaho Appellate Rule 35, which governs the content of briefs on appeal, requires that “[t]he argument. . . 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)(6) (emphasis added). Furthermore, this Court has held that issues on appeal that are not supported by propositions of law or authority are deemed waived and will not be considered.

Wheeler v. Idaho Dept. of Health & Welfare, 147 Idaho 257, 266, 207 P.3d 988, 997 (2009) (internal citation omitted).

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). This is naturally the case where this Court has consistently held that individuals representing themselves are held to the same standards as those represented by attorneys. “*Pro se* civil litigants are not accorded special latitude merely because they chose to proceed through litigation without the assistance of an attorney.” *Michalk v. Michalk*, 148 Idaho 224, 229, 220 P.3d 580, 585 (2009).

We note initially that while Loomis appeared at the summary judgment hearing *pro se*, he may not request special consideration on that basis. “*Pro se* litigants are held to the same standards and rules as those represented by an attorney.” *Golden Condor, Inc. v. Bell*, 112 Idaho 1086, 1089, n. 5, 739 P.2d 385, 388, n. 5 (1987); *State v. Sima*, 98 Idaho 643, 570 P.2d 1333 (1977).

Golay v. Loomis, 118 Idaho 387, 392, 797 P.2d 95, 100 (1990).

Sparks’ argument that fraud occurred at the hearing, is not supported by any citations to facts in the record, nor any legal authority. As such, that argument has been waived and must not be considered by this Court. This Court should ignore the unsworn allegations present by Sparks and decide this case on the appropriate appellate record.

II. *The Commission appropriately exercised its sound discretion in refusing to reopen the evidence when the only reason Sparks has given for failing to attend the hearing is her own negligence.*

Ms. Sparks' brief is completely devoid of any points of law on which she is attempting to rely in challenging the Commission's decision. As previously stated, any potential issue arguably raised in the brief should be considered waived due to the fact that her brief fails to meet the requirements of I.A.R. 35(a)(6). Sparks' failure to identify discrete allegations of error by the Commission creates a significant hardship for IDOL in its attempts to respond to her brief. IDOL must largely guess what issues and points to defend as opposed to being able to respond to discreetly identified points of fact and law.

Based upon the assertion of fraud justifying a new hearing, IDOL assumes that Sparks is arguing the Commission erred in denying her repeated requests to reopen the hearing for her to present additional evidence. However as stated above,

Whether the interests of justice require the admission of additional evidence is a matter left to the discretion of the Industrial Commission. *Slaven v. Road to Recovery*, 143 Idaho 483, 484, 148 P.3d 1229, 1230 (2006). This Court will affirm the Commission's determinations unless there is an abuse of that discretion. *Uhl v. Ballard Med. Prods., Inc.*, 138 Idaho 653, 657, 67 P.3d 1265, 1269 (2003). The test is "(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." *Super Grade, Inc. v. Idaho Dept. of Commerce and Labor*, 144 Idaho 386, 390, 162 P.3d 765, 769 (2007).

Simpson v. Trinity Mission Health & Rehab of Midland L.P., 150 Idaho 154, 156, 244

P.3d 1240, 1242 (2010).

Sparks has not even attempted to demonstrate any abuse of discretion by the Commission in its decision not to take additional evidence in this matter. On the contrary the Commission's *Order Denying Reconsideration* is a textbook example of a quasi-judicial body demonstrating the proper exercise of discretion in ruling that the interest of justice did not require the taking of additional evidence. (R. pp. 47-50).

The Commission clearly identified that it understood it had discretion in deciding whether the interests of justice required the presentation of additional evidence. (R. p.49, paragraph 1). Furthermore, the *Order Denying Reconsideration* does an excellent job of discussing the analysis used by the Commission in deciding not to reopen the evidentiary record in this case. That analysis demonstrated the Commission was acting within the boundaries of its discretion, consistent with appropriate legal standards, and reached its decision through the exercise of reason.

Sparks has not provided any argument or legal analysis explaining why she believes the Commission abused its discretion when it decided this case on the record set at the hearing, as opposed to reopening the record for her to present additional evidence. On the other hand the comprehensive set of orders issued by the Commission demonstrate a clear understanding and appropriate exercise of the discretion it held to decide this issue. There was no abuse of discretion by the Commission and this Court should affirm the Commission's ruling not to reopen the evidentiary record from the hearing.

III. *Substantial and competent evidence supports the Commission's finding that Sparks demonstrated a disregard for the standard of behavior that Drake reasonably expected from Sparks.*

The Commission found that Sparks was discharged for misconduct in connection with her employment. The personal eligibility conditions for unemployment benefits under the Idaho Employment Security Law provide, *inter alia*, that a claimant who "was discharged for misconduct in connection with his employment" is not eligible for benefits. *Idaho Code* § 72-1366(5); IDAPA 09.01.30.275.

Misconduct cases focus not on whether the employer had reasonable grounds for discharge, but rather on whether the facts resulting in the discharge constitute misconduct under *Idaho Code* § 72-1366(5) and IDAPA 09.01.30.275.02. *See, Adams v. Aspen Water, Inc.*, 150 Idaho 408, 413, 247 P.3d 635, 640 (2011).

The employer has the burden of proving an employee's discharge was for misconduct in connection with employment. *Adams*, 150 Idaho at 413, 247 P.3d at 640; IDAPA 09.01.30.275.01. IDOL's administrative rules describe three separate, though sometimes overlapping, grounds that may establish misconduct:

02. Disqualifying Misconduct. Misconduct that disqualifies a claimant for benefits must be connected with the claimant's employment and involve one of the following:

- a. Disregard of Employer's Interest. A willful, intentional disregard of the employer's interest.
- b. Violation of Reasonable Rules. A deliberate violation of the employer's reasonable rules.
- c. Disregard of Standards of Behavior. If the alleged

misconduct involves a disregard of a standard of behavior which the employer has a right to expect of his employees, there is no requirement that the claimant's conduct be willful, intentional, or deliberate. The claimant's subjective state of mind is irrelevant. The test for misconduct in "standard of behavior cases" is as follows:

- i. Whether the claimant's conduct fell below the standard of behavior expected by the employer; and
- ii. Whether the employer's expectation was objectively reasonable in the particular case.

IDAPA 09.01.30.275.02. This three-pronged approach follows well-established Idaho case law. *E.g.*, *Johns v. S. H. Kress & Co.*, 78 Idaho 544, 548, 307 P.2d 217, 219 (1957); *Jenkins v. Agri-Lines Corp.*, 11 Idaho 549, 602 P.2d 47 (1979). The Commission must consider all three potential factual bases for misconduct -- disregard of employer's interest, violation of reasonable rules, and disregard of standards of behavior. *Adams*, 150 Idaho at 413, 247 P.3d at 640.

The Commission found that Sparks was dismissed for misconduct in that she had disregarded "standards of behavior" relating to her employment, which is the third prong of misconduct. As a general rule, it need not be shown that an employee's disregard of a standard of behavior was willful, intentional, or deliberate. *Adams*, 150 Idaho at 413, 247 P.3d at 640.

The "standards of behavior" prong involves two inquiries: (1) whether the employee's conduct fell below a standard of behavior the employer had a right to expect; and (2) whether the employer's expectations were objectively reasonable under the circumstances. *Folks v. Moscow Sch. Dist. No. 281*, 129 Idaho 833, 837, 933 P.2d 642, 646 (1997).

The first inquiry focuses on the employer's subjective expectations, while the latter inquires as to whether those expectations are objectively reasonable. An expectation is objectively reasonable if it was communicated to the employee, or if it "flows naturally" from the employment relationship. "Whether the employer's expectations were objectively reasonable is a question of fact." *Folks v. Moscow Sch. Dist. No. 281*, 129 Idaho 833, 838, 933 P.2d 642, 647 (1997).

Substantial competent evidence supports the finding that Drake communicated its expectations to Sparks. The Commission highlighted that the testimony of Laura Drake established the employer's reasonable expectations that Sparks, "would make every effort to perform her job duties in a timely and conscientious manner." Drake also testified that this expectation was expressed to Sparks in a verbal warning and in weekly performance meetings. Finally, the Commission concluded that despite the fact Sparks, "should have realized that she needed to make every effort to complete her work in a timely and conscientious manner and that failure to do so could lead to her discharge," Sparks failed to do so. (R. p.41).

In *Locker v. How Soel, Inc.*, 151 Idaho 696, 263 P.3d 750 (2011), this Court reviewed a finding by the Commission that an employee's failure to obtain a medical release as requested by her employer was insubordination. The facts showed that the employee made a single half-hearted attempt to get a release and then, without explanation, did nothing more. The Court, after emphasizing it was "constitutionally constrained" from finding its own facts as employee urged on appeal, held:

We are unable to conclude, as a matter of law, that an employee has not willfully and deliberately disregarded the employer's order when the employee has both failed to comply with her employer's order and also failed to communicate any justification for her lack of compliance.

Locker, 151 Idaho at 700, 263 P.3d at 754.

The same analysis applies to the case at bar. This is particularly the case where Sparks, through her own negligence, failed to participate in the hearing. The undisputed testimony from Drake controls on appeal, since facts and the inferences from those facts are viewed in a light most favorable to the party who prevailed before the Commission. *Sadid v. Idaho State Univ.*, 154 Idaho 88, 94, 294 P.3d 1100, 1106 (2013).

In making her argument Sparks appears to be urging this Court to re-weigh the evidence, as well as her additional statements, and make independent findings of fact unconstrained by the record and based upon its own judgment. Such a request is directly contradictory to the Idaho Constitution, applicable case law and the established standard of review. Furthermore Sparks does not even discuss any legal support for her position rather just stating a number of conclusory statements.

When analyzed in accordance with appropriate legal standards and through the lens of the standard of review it is clear that the Commission's decision is based upon substantial and competent evidence in the record. This Court should affirm the Commission's decision in all respects.

CONCLUSION

Sparks has failed to list any germane legal issues or present any legal argument on appeal. Her brief further disregards and serves only to attack the record

on appeal and her fourth request to reopen the evidence in this case should be denied. The commission properly exercised its sound discretion when it chose to take this matter solely on the record established at the hearing. Substantial and competent evidence supports the factual findings of the Commission. The Commission's findings should be affirmed, and IDOL should be awarded its costs on appeal.

Respectfully submitted,



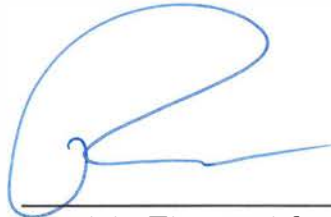
SCOTT KEIM
Deputy Attorney General
Idaho Department of Labor

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 23rd day of March, 2018, 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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