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### Ehrlich v. DelRay Maughan, M.D., P.L.L.C. Respondent's Brief Dckt. 45845

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IN THE SUPREME COURT OF THE STATE OF IDAHO

DENISE M. EHRLICH,  
Claimant/Appellant,

vs.

DELRAY MAUGHAN, M.D., P.L.L.C.,  
Employer/Respondent,

and

ST. LUKE'S REGIONAL MEDICAL  
CENTER,  
Cost Reimbursement  
Employer/Respondent,

and

IDAHO DEPARTMENT OF LABOR,  
Respondent.

SUPREME COURT NO. 45845

BRIEF OF RESPONDENT  
IDAHO DEPARTMENT OF LABOR

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

IDAHO DEPARTMENT OF LABOR

LAWRENCE G. WASDEN  
ATTORNEY GENERAL  
Doug Werth, ISBN 3660  
Deputy Attorney General  
Idaho Department of Labor  
317 W. Main Street  
Boise, Idaho 83735

EMPLOYER/RESPONDENT

Delray Maughan, M.D., P.L.L.C.  
13900 W. Wainwright 101  
Boise, Idaho 83713-5028

CLAIMANT/APPELLANT

JAMES MITCHELL  
James Mitchell Law  
453 W. Archerfield St.  
Meridian, Idaho 83646

COST REIMBURSEMENT  
EMPLOYER/RESPONDENT

St. Luke's Regional Medical Center  
400 S. Broadway  
Boise, Idaho 83702

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## STATEMENT OF THE CASE

### A. Nature of the Case

This is an unemployment benefits case. Claimant-Appellant Denise M. Ehrlich (“Ehrlich”) appeals from the decision of the Idaho Industrial Commission (“Commission”) finding her ineligible for unemployment benefits based upon her willful underreporting of earnings to Respondent Idaho Department of Labor (“Department”).

### B. Course of the Proceedings

Ehrlich applied for unemployment benefits with the Department on October 21, 2016. Exhibit, pp.17-22. She began submitting to the Department weekly certifications of her eligibility for benefits on April 15, 2017, which included certifications as to her weekly earnings from all employers. *Id.*

On September 28, 2017, after becoming aware of discrepancies between the earnings reported by Ehrlich and her employer, Delray Maughan, M.D., P.L.L.C. (“Maughan”), the Department mailed Ehrlich a letter requesting that she explain the earnings discrepancies. Exhibit, p.45.

Nothing in writing was submitted by Ehrlich, although, as discussed below in the Statement of Facts, she did speak with an unemployment claims investigator with the Department on October 10, 2017. Exhibit, p.43.

October 17, 2017, the Department mailed Ehrlich its eligibility and overpayment determinations. Exhibit, pp.46-50. The eligibility determination found Ehrlich ineligible for unemployment benefits because she willfully

misrepresented her earnings. Exhibit, pp.46-48. These determinations also informed Ehrlich that the last day she could file a protest was October 31, 2017. Exhibit, pp.47 and 50.

About two weeks later, Ehrlich sent a letter to the Appeals Bureau at the Department with various documents enclosed. Exhibit, p.51.

On November 13, 2017, an Appeals Examiner held a telephonic hearing on Ehrlich's appeal. Tr., p.1, l.11.

On November 14, 2017, the Appeals Examiner issued a written decision finding that Ehrlich had willfully misrepresented her earnings for the weeks at issue. R., pp.1-8. The decision also established an overpayment amount, imposed a statutory penalty, and notified Ehrlich that she would not be eligible for unemployment benefits for a one-year period. *Id.*

On November 28, 2017, Ehrlich timely appealed the Appeals Examiner's decision to the Commission. R., pp.9-17.

On December 8, 2017, Ehrlich filed a Request for Hearing and Request for Written Briefing, R., pp.21-24, a Notice of Amended Appeal, R., pp.25-27, and a Notice of Submission of Additional Documents. R., pp.32-43.

The Department filed a Notice of Appearance on December 8, 2017. R., pp.44-45.

On December 13, 2017, the Commission issued its Order Denying New Hearing and Establishing Briefing Schedule, which provided that Claimant's brief was due on or before December 28, 2018. R., pp.46-49.

On January 8, 2018, Ehrlich filed an untimely motion for an extension of time to file her brief, R., pp.51-53, which was denied. R., pp.54-56.

On January 16, 2018, Ehrlich filed a motion requesting that the Commission reconsider its order denying her request for an extension of time to file a brief, R., pp.58-61, which, likewise, was denied. R., pp.62-64.

On January 30, 2018, after a *de novo* review, the Commission issued a Decision and Order finding Ehrlich ineligible for unemployment benefits because of her willful misrepresentations of her earnings. R., pp.65-72.

On March 13, 2018, Ehrlich timely appealed to the Idaho Supreme Court. R., pp.73-76.

C. Statement of the Facts

As stated above, Ehrlich applied for unemployment benefits on October 21, 2016. Exhibit, pp.17-22. Ehrlich testified that when she opened her claim for unemployment benefits, she received a pamphlet from the Department detailing benefit rights, responsibilities and filing instructions, and that she had agreed to read and abide by the information in the pamphlet. Tr., p.26, ll.13-19. The pamphlet included the following explanatory statement:

**How do I report my earnings?**

You must report all your earnings for the week you worked, not the week you were paid. 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 your earnings as closely as possible. If you do estimate earnings, you must call (208) 332-8942 when you receive the correct earnings information. You must report any payments you

receive in exchange for services you provide or products you sell. This includes cash and non-cash payments such as room and board. **Mis-reported or under-reported earnings will be found in an audit weeks or months later and may result in severe criminal, civil and administrative penalties.**

Exhibit, p.4 (emphasis in original). The pamphlet also explained that “holiday, severance, bonus and vacation pay” must be reported. *Id.*

Ehrlich’s application for benefits included this certification: “I have read all instructions in connection with this application and also the UI Pamphlet explaining unemployment benefits reporting requirements.” Exhibit, p.17. She also checked a box during her on-line application for benefits to acknowledge the following:

**Reporting Income**

I understand that if I do any work during a week for which I claim benefits, my total wages before taxes, including military reserve pay or self-employment income, must be reported for the week in which the work was performed regardless of when I will be paid.

Exhibit, p.22 (emphasis in original).

The pertinent question that Ehrlich was asked during her weekly certifications concerning earnings stated:

**Employer Earnings Amount (\$)\***

Enter the total dollar amount you received from all employers, including tips, before any deductions were made.

Exhibit, p.24 (emphasis in original). It was in response to this question that during the period June 24, 2017 through September 9, 2017, Ehrlich entered \$20 for six of her eleven reporting weeks, but correctly entered her total earnings for



the weeks ending June 24, 2017, July 1, 2017, July 8, 2017, August 12, 2017, and September 9, 2017. Exhibit, pp.31-41. When asked during the hearing why she was able to report her earnings properly for almost half of the weeks during this period and then entered only \$20 for the other weeks, Ehrlich had no answer:

I was always trying to catch myself not putting the 20 dollars and, then, erasing it and putting in what the gross for the week was, because that question confused me, so I had it right most of the time and there were times that I didn't get it right, but consistently it can be seen that it was me putting in my – my wage per hour instead of the gross per week.

Tr., p.28, ll.2-8.

It is true that when Ehrlich misstated her earnings she was consistent. However, she never adequately answered the question why she was able to get her earnings correct on nearly half those weeks and not the others. Ehrlich's inability to do so is all the more troubling when one considers the fact that her benefit amount was \$410 for the months she stated earnings of \$20, and in the other months when she reported her true earnings her benefit check was between \$235 and \$295. Exhibit, p.30.

Ehrlich incorrectly reported her weekly earnings as \$20 for the weeks ending July 15, 2017, July 22, 2017, August 5, 2017, August 19, 2017, August 26, 2017, and September 2, 2017. Exhibit, pp.31-33, 37, and 41. The Department, as part of an audit program, became aware of discrepancies when it compared the weekly earnings reported by Ehrlich with the earnings reported by Maughan for those same weeks. Tr., p.21, l.16 – p.22, l.7; Exhibit, p.45.

The Department then sent Ehrlich a letter on September 28, 2017, which brought these discrepancies to her attention and asked her to

explain all wage differences and supply any records or evidence available that will support the earnings you reported. If the earnings were reported in error, explain why you misreported.

*Id.* The letter warned 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.*

On October 10, 2017, Ehrlich spoke on the telephone with an unemployment claims investigator and said that for the weeks in which there were discrepancies between her reported earnings and those reported by Maughan, she “definitely made a mistake,” and had entered her hourly wage rate. Exhibit, p.43. Ehrlich also said, “I was extremely tired a few times when I filled it out.” *Id.* The conversation ended with Ehrlich saying, “I think I know what my mistake was but I would like to look at it.” *Id.*

Although Ehrlich was given 48 hours to explain further the discrepancies, she did not avail herself of that opportunity. *Id.*

October 17, 2017, the Department mailed Ehrlich its eligibility and overpayment determinations. Exhibit, pp.46-50. Ehrlich was found ineligible for unemployment benefits because of her willful misrepresentations. *Id.* These determinations also informed Ehrlich that the last day she could file a protest was October 31, 2017. Exhibit, pp.47 and 50.

Almost two weeks later, Ehrlich sent a letter to the Appeals Bureau at the Department. Exhibit, p.51. In the letter, Ehrlich stated she was confused about the earnings she should report, and for the weeks at issue mistakenly entered her hourly wage rate. Exhibit, p.54.

Ehrlich's letter was treated as a protest, a hearing was held at which Ehrlich testified, and on November 14, 2017, the Appeals Examiner issued a written decision finding that Ehrlich had willfully misrepresented her earnings for the weeks at issue. R., pp.1-8. The decision established an overpayment amount, imposed a statutory penalty, and notified Ehrlich that she would not be eligible for unemployment benefits for a one-year period. *Id.*

Ehrlich timely appealed the Appeals Examiner's decision to the Commission. R., pp.9-17.

On January 30, 2018, after a *de novo* review, the Commission issued a Decision and Order which found Ehrlich ineligible for unemployment benefits because of her willful misrepresentations of earnings. R., pp.65-72.

This appeal followed.

## ISSUES ON APPEAL

- I. Does substantial and competent evidence support the Commission's finding that Ehrlich willfully misrepresented material facts when she underreported her earnings in weekly reports to the Idaho Department of Labor?
- II. 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.

#### Substantial and Competent Evidence Supports the Commission's Finding that Ehrlich Willfully Misrepresented Material Facts When She Underreported Her Earnings in Her Weekly Reports to the Idaho Department of Labor

In the proceedings before the Appeals Examiner and the Commission, Ehrlich did not dispute the facts showing the amounts she reported as earnings to the Department, or Maughan's recounting of her actual weekly earnings. Further, no argument has been made on appeal that the earnings amounts at issue were not material. The sole issue raised on appeal by Ehrlich is the question whether substantial and competent evidence supports the Commission's finding that she willfully misrepresented material facts when she underreported her earnings in weekly reports to the Department.

#### 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 it 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).

Although this Court may and should freely review questions of law, Commission findings must be upheld if based on "substantial and competent

evidence.” Substantial and competent evidence is relevant evidence that a reasonable mind might accept to support a conclusion. Bell v. Idaho Dept. of Labor, 157 Idaho 744, 746, 339 P.3d 1148, 1150 (2014).

This Court frequently explains that under the deferential substantial and competent evidence standard of review, it will not “re-weigh the evidence or consider whether it would have reached a different conclusion from the evidence presented” and “[t]he Industrial Commission's conclusions regarding the credibility and weight of evidence will not be disturbed unless the conclusions are clearly erroneous.” Bell, 157 Idaho at 746-747, 339 P.3d at 1150-1151, *quoting* Hughen v. Highland Estates, 137 Idaho 349, 351, 48 P.3d 1238, 1240 (2002) (emphasis added). Further, where a party on appeal challenges the Commission's findings of fact – as is the case here – all of the facts and inferences therefrom are viewed by the appellate court in the light most favorable to the facts found by the Commission. Bell, 157 Idaho at 747, 339 P.3d at 1151.

These standards of review in unemployment benefits appeals are well-settled and frequently recited by this Court, most recently in Current v. Wada Farms Partnership, 162 Idaho 894, 898, 407 P.3d 208, 212 (2017).

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. McNulty v. Sinclair Oil Corporation, 152 Idaho 582, 585, 272 P.3d 554, 557 (2012). A claimant must demonstrate that he or she has met the statutory eligibility

requirements set forth in Idaho Code § 72-1366. These eligibility requirements state, in pertinent part, that a claimant is ineligible for unemployment benefits if the claimant “has willfully made a false statement or willfully failed to report a material fact in order to obtain benefits.” I.C. § 72-1366(12).

The Department’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:

[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 synonymous with “intentionally,” “designedly,” “without lawful excuse,” and therefore not accidental.

Current, 162 Idaho at 899, 407 P.3d at 213, *quoting*, Bell, 157 Idaho at 747, 339 P.3d at 1151.

C. Substantial and Competent Evidence Supports the Commission’s Finding of “Willfulness”

Substantial and competent evidence supports the Commission’s finding that Ehrlich willfully made a false statement or failed to report material facts in her weekly earnings reports to the Department. Ehrlich admits that she

misrepresented her weekly earnings on the reporting weeks at issue. Her refrain to these uncontroverted facts is a familiar one – that she made an "honest mistake" in the weeks when she reported only \$20, her hourly rate of pay, instead of her total weekly earnings. *E.g.*, Tr., p.27. l.16 ("it was an honest mistake").

It was proper for the Commission to give little or no weight to Ehrlich's "honest mistake" suggestion because the facts showed that she was properly informed of her reporting requirements and her explanations for misreporting income lacked credibility. This Court noted recently in Current:

However, willfulness is found where a claimant "was properly informed of his reporting obligation and his alleged misunderstanding lacked credibility." Bringman v. New Albertsons, Inc., 157 Idaho 71, 77, 334 P.3d 262, 268 (2014) (*citing McNulty*, 152 Idaho at 587, 272 P.3d at 559).

Current, 162 Idaho at 899, 407 P.3d at 213.

Bell v. Idaho Dept. of Labor, *supra*, is instructive. This case also involved a willful misrepresentation. The Court's opinion explained that the claimant 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 the Department 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 and 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.

A Claimant claim confusion, and alternate between reporting weekly her gross earnings and her hourly rate of pay instead, and then credibly assert that an honest mistake was made. Meyer v. Skyline Mobile Homes, 99 Idaho 754, 589 P.2d 89 (1979), instructs:

[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).

99 Idaho at 762, 589 P.2d at 97.

Ehrlich was able to correctly report her earnings for some weeks and not others, and candidly testified that she would “catch” herself making these mistakes and then erase them. Yet, she made these mistakes, then correctly reported for one week, and then made the so-called mistakes again. Ehrlich never attempted to correct her mistakes until they were brought to light in a Department audit, and never contacted the Department for clarification even though she evidently was aware of the mistakes because she was “catching” herself. Further, the fluctuation in her benefit checks based upon the earnings she reported should have alerted Ehrlich to the fact that she was misreporting

earnings. These facts, when paired with the additional facts showing that Ehrlich was properly instructed as to her income reporting obligations, are facts upon which a reasonable person could conclude that Ehrlich's excuses and explanations lacked credibility. This is what the Commission found, and this finding is supported by substantial and competent evidence.

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

## II.

### 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.

This appeal does not involve any new law, but rather well-settled law and standards of review. The gist of Ehrlich's appeal is that she asks this Court to second-guess the Commission's findings concerning credibility, and to direct the Commission as to the weight that should be accorded her letter submitted with her initial protest. This Court is constitutionally compelled to restrain from fact-finding, or making its own determinations as to credibility and the weight of

evidence. Because her appeal is without reasonable basis in fact or law, attorney fees and costs on appeal should be awarded against Ehrlich pursuant to I.C. § 12-117(1).

#### CONCLUSION

Substantial and competent evidence supports the Commission's finding that Ehrlich willfully misrepresented her earnings. Its decision finding Ehrlich ineligible for unemployment benefits for the work weeks that she willfully underreported earnings should be affirmed.

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

Respectfully submitted,



DOUG WERTH  
Deputy Attorney General  
Idaho Department of Labor

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 31st day of October, 2018, I served two true and correct copies of the foregoing Brief of Respondent Idaho Department of Labor upon each of the following by depositing said copies in the United States mail, first class, postage prepaid:

ATTORNEY FOR APPELLANT  
James Mitchell  
James Mitchell Law  
453 W. Archerfield St.  
Meridian, Idaho 83646

Delray Maughan, M.D., P.L.L.C.  
13900 W. Wainwright 101  
Boise, Idaho 83713-5028

St. Luke's Regional Medical Center  
400 S. Broadway  
Boise, Idaho 83702



---

Patricia Paulin  
Legal Assistant