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NO. 69279-8

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JAY C. NYKOL,

Appellant,

v.

STATE OF WASHINGTON,
EMPLOYMENT SECURITIES DEPT.,

Respondents.

BRIEF OF APPELLANT

King County Superior Court Case No. 11-2-32402-8KNT

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ORIGINAL

TABLE OF CONTENTS

			Page
I.		OVERVIEW	1
II.		ASSIGNMENTS OF ERROR AND ISSUES	3
	A.	FIRST ERROR	3
	B.	SECOND ERROR	4
	C.	THIRD ERROR	5
	D.	FOURTH ERROR	6
	E.	FIFTH ERROR	8
	F.	SIXTH ERROR	8
	G.	SEVENTH ERROR	9
	H.	EIGHTH ERROR	10
III.		STANDARD OF REVIEW	11
IV.		STATEMENT OF THE CASE	12
V.		ARGUMENT	18
	A.	FIRST ERROR	18
		1. SINCE MR. NYKOL HAD A DISABILITY BOEING WAS REQUIRED TO REASONABLY ACCOMMODATE IT	21
		2. SAFEGUARDS WERE IN PLACE TO ENSURE MR. NYKOL DID NOT WORK WHILE UNDER THE INFLUENCE.	22
	B.	SECOND ERROR	24
		1. SINCE MR. NYKOL'S DISABILITY WAS NOT ACCOMMODATED AS REQUIRED BY LAW, THE EMPLOYER AND NOT MR. NYKOL, WAS THE	

PROXIMATE CAUSE OF HIS INABILITY TO OPERATE THE EMPLOYER'S VEHICLES. 24

C. THIRD ERROR 27

D. FOURTH ERROR 28

E. FIFTH ERROR 29

F. SIXTH ERROR 31

G. SEVENTH ERROR 33

H. EIGHTH ERROR 36

VI. CONCLUSION 37

TABLE OF CASES AND AUTHORITIES

Page

CASES

Boeing Co. v. State, 89 Wn.2d 443, 572 P.2d 8 (1978) 27

Doe v. Boeing Co., 121 Wn.2d 8, 846 P.2d 531 (1993) 19

Fosbre v. State, 70 Wn.2d 578, 424 P.2d 901 (1967) 27

Frisino v Seattle Sch. Dist., 160 Wn. App. 765; 249 P.3d 1044, (Div 1, 2011) 18

Griffith v. Boise Cascade, Inc., 111 Wn. App. 436, 45 P.3d 589 (2002) 21

Hale v Wellpinit School Dist., 165 Wn.2d 494; 198 P.3d 1021 (2009) 20

Henson v Employment Sec. Dep't, 113 Wn.2d 374, 377, 779 P.2d 715 (1989) 11

Johnson v. Dep't of Employment Sec., 112 Wn.2d 172, 769 P.2d 305 (1989) 11

Maltman v. Sauer, 84 Wn.2d 975, 530 P.2d 254 (1975) 26,27

McCoy v. American Suzuki Motor Corp., 136 Wn.2d 350, 961 P.2d 952 (1998) 26

Michaels v CH2M Hill, Inc., 171 Wn.2d 587 (2011) 24

Pulcino v Fed. Ex., 141 Wn.2d 629, 9 P.3d 787, (2000) .. 19

Qualls v. Golden Arrow Farms, Inc., 47 Wn.2d 599, 288 P.2d 1090 (1955) 26

Rasmussen v Employment Sec. Dept., 98 Wn. 2d 846, 658 P.2d 1240 (1983) 12, 34

Schooley v. Pinch's Deli Mkt., Inc., 134 Wn.2d 468, 951 P.2d 749 (1998) 25

Snyder v. Medical Serv. Corp, 98 Wn. App. 315, 988 P.2d 1023 (1999).......... 19

Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 858 P.2d 494 (1993) 11, 12

Waste Management of Seattle, Inc., v The Util. and Transp. Comm., 123, Wn.2d 621, 869 P. 2d 1034 (1994) 1

OTHER AUTHORITIES

57A AM. JUR. 2D *Negligence* § 692 26

AMA H-30.995 13

CODES

RCW 9A.72.085.......... 17

RCW 34.05.570 12

RCW 34.05.570(d).......... 11

RCW 34.05.570(e).......... 11

RCW 46.04.217 15

RCW 46.20 32

RCW 46.20.385 4,12,16,17,18,33

RCW 46.20.385(1).......... 32

RCW 46.20.385(1)(c)(i) 16

RCW 46.20.385(c)(1).... 17,32

RCW 46.20.720 36

RCW 49.60.040(7)(a) 13,20

RCW 49.60.180 3,4,5,6,7,16,18,20,29,31,33

RCW 49.60.180(2).... 18,21,26,28

RCW 49.60.180(3) 18

RCW 50.01.010 8,29,30

RCW 50.20.066 .... 6.8.28.29.30

RCW 50.20.066(1).... 28

I. OVERVIEW

Mr. Nykol seeks review of the decision of the Commissioner of the Employment Security Department denying him unemployment benefits and the Office of Administrative Hearing's (ALJ's) Findings of Facts and Conclusions of Law which were expressly adopted by the Commissioner. **CP 5-14.**

While Mr. Nykol approves of many of the ALJ's Findings and Conclusions[1], he takes issue with Conclusion 10 along with the lack of findings and conclusions with regard to the existence of his disability, his requests for a reasonable accommodation and a determination that the employer should have reasonably accommodated him.

Additionally, Mr. Nykol takes issue with several of the Commissioner's findings and conclusions addressed below. **CP 54-55, CP 65-66, CP 70-72, CP 73-76, and CP 9-14.**[2]

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[1] Specifically, but not limited to Finding 7 ("If the employer executed a waiver permitting the claimant to drive without installation of an interlock device on the work vehicle the claimant would...be permitted, by law, to drive company vehicles..."); and, ALJ Finding 5, which correctly noted **Mr. Nykol possessed a valid Washington Driver's License (an ignition interlock license**.) **CP 10.**

[2] This body does not review the findings and conclusions of the trial court; rather, it only reviews the administrative record. *Waste Management of Seattle, Inc., v The Util. and Transp. Comm.,* 123, Wn.2d 621, 633, 869 P. 2d 1034 (1994), Many arguments were raised by the State for the first time during the appeal to

While there are multiple errors being appealed, there are two overarching issues controlling ALJ Conclusion of Law 10. **CP 12**. This Court's resolution of those issues will be pivotal in determining the outcome of this appeal. They are (1) whether the employer failed to reasonably accommodate Mr. Nykol's disability of alcoholism by failing to sign a waiver of an interlock ignition device which would have allowed Mr. Nykol to operate his employer's vehicles and remain employed; and (2) whether the employer's failure to accommodate Mr. Nykol's disability was the proximate cause of his being unable to operate the employer's vehicle?

It was error not to answer these two questions in the affirmative.

As a result, Conclusion of Law 10 was also erroneous. Mr. Nykol could not have "willfully disregarded the probable [and foreseeable] consequences" (loss of ability to drive for his employer), as stated in the ALJ's Conclusion of Law 10, **CP 12,**

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the trial court and were apparently relied upon by the trial court erroneously. Since, appellate review is limited to the administrative record, Mr. Nykol will not address those issues in this brief but reserves the right to address those issues in reply if necessary and appropriate.

because Mr. Nykol should not have lost the ability to operate his employer's vehicles.

The employer's only stated reason for terminating Mr. Nykol was the loss of his ability to operate the employer's motor vehicles. **CP Sub 7 Office of Administrative Hearings Record hereinafter "Sub 7 OAH" pages 14-15 lines 17- 4**[3]. By refusing to sign a waiver of the interlock ignition device, the employer not only failed to reasonably accommodate Mr. Nykol, it in fact caused Mr. Nykol's termination. It is not lawful, logical or reasonable to conclude that Mr. Nykol engaged in misconduct when there was no reason to terminate him. **CP Sub 7 OAH pages 18-20 lines 22-19; page 29-31 lines 3-7; page 32, lines 2-10**.

II. ASSIGNMENTS OF ERROR AND ISSUES

A. FIRST ERROR:

The Commissioner erred by not finding and concluding that the employer failed to reasonably accommodate Mr. Nykol's disability of alcoholism as required under RCW 49.60.180 when it

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[3] Despite acknowledging that Mr. Nykol possessed an interlock ignition license (IIL), **CP Sub 7 OAH pages 16-18 lines 19-1; page 48 section 3,** the employer erroneously asserted that Mr. Nykol did not have a valid Washington State driver's license. See **CP 10** Finding of Facts 5 and 7.

refused to sign a waiver of the interlock ignition device (IID) which would have allowed him to drive with his interlock ignition license, a valid, alternative license issued per RCW 46.20.385.

ISSUES:

(I) Was Mr. Nykol's alcoholism a disability which required accommodation under Washington law?

(II) Was the employer notified of the disability?

(III) When Mr. Nykol asked his employer to sign the IID waiver under RCW 46.20.385 and it refused, did his employer fail to reasonably accommodate Mr. Nykol's disability under RCW 49.60.180?

B. SECOND ERROR:

The Commissioner erred in not finding and concluding that the employer's failure to sign the IID waiver was the proximate cause of Mr. Nykol being unable to operate his employer's vehicle.

ISSUES:

(I) In light of the employer's duty to reasonably accommodate Mr. Nykol's disability was it foreseeable that Mr. Nykol's conduct (DUI and suspension of his regular license) would likely result in his inability to drive for his employer when persons with suspended licenses, like Mr. Nykol, are granted a valid license allowing them to drive?

(II) In light of the employer's duty reasonably accommodate Mr. Nykol's disability, what was the

proximate cause of Mr. Nykol being unable to operate his employer's vehicle?

(III) In light of the employer's duty reasonably accommodate Mr. Nykol's disability, was the employer's refusal to sign the IID waiver an intervening cause or event such that Mr. Nykol's regular license suspension did not proximately cause his inability to drive?

C. THIRD ERROR:

Based upon errors one and two above, the ALJ's Conclusion of Law 10 must also be error.

ISSUES:

(I) In light of the employer's duty to reasonably accommodate Mr. Nykol's disability was it foreseeable that Mr. Nykol's conduct (DUI and suspension of his regular license) would likely result in his inability to drive for his employer when persons with suspended licenses are granted a valid license allowing them to drive?

Brief Answer:

As a matter of law, it was neither foreseeable nor likely ("probable" as defined in ALJ Conclusion 9) **CP 12,** that the employer would violate RCW 49.60.180 and refuse to reasonably accommodate Mr. Nykol's disability.

By refusing to sign a waiver of an ignition interlock device, (IID) which would have allowed Mr. Nykol to use his Interlock Ignition License to drive the employer's vehicles, the employer broke the causal chain of foreseeability, such that Mr. Nykol's conduct did not, as a matter of law, proximately cause his termination.[4] The employer's refusal to sign a waiver of the interlock ignition device constituted a failure to reasonably accommodate Mr. Nykol's disability in violation of RCW 49.60.180 and the failure to accommodate Mr. Nykol's disability proximately caused his termination. **CP 9-12**.

As a result, Mr. Nykol did not engage in misconduct and should not have been disqualified from receiving unemployment benefits.

D. FOURTH ERROR:

The Commissioner erred in denying unemployment benefits based upon RCW 50.20.066 which states ("alcoholism shall not

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[4] The ALJ correctly stated in Finding 7 ("If the employer executed a waiver permitting the claimant to drive without installation of an interlock device on the work vehicle the claimant would drive, he would be permitted, by law, to drive the company vehicles"). **CP 10.**

constitute a defense to disqualification from benefits due to misconduct.").

ISSUES:

(I) Was Mr. Nykol terminated for his alcoholism?

(II) Did Mr. Nykol have a valid driver's license such that he would have been qualified to work had the employer signed the IID waiver?

Brief Answer:

Mr. Nykol does not assert that alcoholism was the basis for his termination. Rather, the basis for his termination was the employer's refusal to allow Mr. Nykol to drive its vehicles. The employer alone determined whether Mr. Nykol could drive its vehicles. Unfortunately, its determination that Mr. Nykol could not drive its vehicles was wrong. If his employer had followed RCW 49.60.180 and accommodated Mr. Nykol's disability by signing a waiver of the Interlock Ignition Device, Mr. Nykol would have been allowed to drive for his employer and would not have been terminated.

E. FIFTH ERROR:

The Commissioner erred in denying Mr. Nykol unemployment benefits based upon RCW 50.01.010 (the preamble to the employment security act), which states "unemployment reserves used for the benefit of persons unemployed through no fault of their own..." by suggesting that "fault" unrelated to misconduct as defined by RCW 50.20.066 can form the basis to deny Mr. Nykol unemployment benefits.

ISSUES:

(I) Does fault that does not arise to misconduct disqualify Mr. Nykol from receiving unemployment?

(II) If so, was the employer at fault for rendering Mr. Nykol unable to drive when it refused to sign the IID waiver?

(III) Did the employer's refusal to sign the waiver the proximate cause of Mr. Nykol being unable to drive for his employer?

F. SIXTH ERROR:

The Commissioner erred in denying Mr. Nykol unemployment benefits by errantly stating Mr. Nykol lost his license and as a result, the employer was no longer able to employ claimant in his position of Firefighter Driver/Operator.

ISSUES:

(I) Did the Commissioner err in denying Mr. Nykol unemployment benefits when the decision stated Mr. Nykol lost his license, and as a result, the employer was no longer able to employ claimant in his position of Firefighter Driver/Operator even though Mr. Nykol had a valid license and was fully capable of legally driving his employer's vehicle as reflected in Administrative Finding 7. **CP 10.**

G. SEVENTH ERROR:

The Commissioner erred in failing to find undisputed facts which, if viewed as a whole, would have changed the outcome of the decision. In particular, the Commissioner erred by not finding (a) Mr. Nykol suffered from alcoholism; (b) Mr. Nykol sought a reasonable accommodation in the form of asking his employer to sign a waiver of the IID; (c) Mr. Nykol never lost the legal right to drive or operate a motor vehicle; (d) the employer did not fire Mr. Nykol for any performance-related problem; and (e) the employer had numerous safeguards at its disposal to more than adequately ensure that Mr. Nykol would not consume alcohol and/or be under the influence, while at work.

ISSUES:

(I) Did the Commissioner err when he failed to find or errantly analyzed undisputed facts: (a) Mr. Nykol suffered from alcoholism; (b) Mr. Nykol sought a reasonable accommodation in the form of asking his employer to sign a waiver of the IID; (c) Nykol never lost the legal right to drive or operate a motor vehicle; (d) the employer did not fire Mr. Nykol for any performance-related problem; and (e) the employer had numerous safeguards at its disposal to more than adequately ensure that Mr. Nykol would not consume alcohol and/or be under the influence, while at work?

H. EIGHTH ERROR:

The Commissioner erred in adopting the ALJ's Finding of Fact 9, which stated, "the claimant was released from employment because he failed to meet the requirements of performing his job duties since he did not possess a Washington State Driver's License."

ISSUES:

(I) Did the Commissioner err in adopting the ALJ's Finding of Fact 9, which stated, "the claimant was released from employment because he failed to meet the requirements of performing his job duties since he did not possess a Washington State Driver's License"?

Brief Answer:

Mr. Nykol possessed a valid Washington State Driver's License, called an ignition interlock license.

III. STANDARD OF REVIEW:

In this case, Mr. Nykol seeks review of the administrative decision based upon RCW 34.05.570(d) and (e). Subsection (d) allows for review if the agency **erroneously interpreted or applied the law** while subsection (e) allows for review if the **order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter.**

An agency's application of the law to a particular set of facts is subject to **de novo** review. *Tapper v. Employment Sec. Dep't,* 122 Wn.2d 397, 403, 858 P.2d 494 (1993) (citing *Henson v Employment Sec. Dep't,*113 Wn.2d 374, 377, 779 P.2d 715 (1989) ("With mixed questions of law and fact, the court determines the correct law independent of the agency's decision and then applies it to the facts as found by the agency.") *Johnson v. Dep't of Employment Sec.,* 112 Wn.2d 172, 175, 769 P.2d 305 (1989) "The

factual findings of the agency are entitled to the same level of deference which would be accorded under any other circumstance." *Tapper v. Employment Sec. Dep't,* 122 Wn.2d at 403, 858 P.2d 494 (1993).[5]

At this stage, the burden of demonstrating the invalidity of agency action is on Mr. Nykol. RCW 34.05.570.

IV. STATEMENT OF THE CASE

Mr. Nykol was employed as a firefighter for Boeing from December 1, 1988 through April 20, 2011. **CP 9,** (Finding of Fact 1); **CP Sub 7 OAH page 13 lines 20-24.** While on a leave of absence for a wrist injury Mr. Nykol was cited for Driving Under the Influence of alcohol (DUI) in September 2010. **CP 10** (Finding of Fact 5); **CP Sub 7 OAH page 21 lines 10-11; page 22 lines 8-9; page 28 lines 16-19.** In December 2010, Mr. Nykol was given an

[5] However, uncontroverted facts not formally found do not require a reweighing of evidence and can be reviewed de novo based upon the error of law standard. *Rasmussen v Employment Sec. Dept.*, 98 Wn. 2d 846, 850 ft. note 2, 658 P.2d 1240 (1983). Here, it was uncontroverted that: (1) Mr. Nykol had an Interlock Ignition License (IIL) that allowed him to legally drive his employer's vehicle had his employer signed a waiver of the IID; (2) Mr. Nykol was diagnosed with alcoholism; (3) he requested an accommodation to have his employer sign a waiver of the IID; (4) Mr. Nykol provided the employer with numerous safeguards to ensure that he was not under the influence of alcohol while working; and (5) the employer refused to consider Mr. Nykol's particular circumstances and instead relied on a blanket policy of refusing to sign a waiver despite it being authorized to do so under RCW 46.20.385.

alcohol assessment, was diagnosed with the disease of alcoholism and began a 30-day intensive outpatient program followed by a year-long prevention program. **CP SUB 7 OAH page 26 lines 9-17; page 29 lines 3-5; page 30 lines 22-35; CP 10**. Finding of Fact 8 (enrolled in treatment and AA).

Alcoholism is a disability as defined by RCW 49.60.040(7)(a) and defined by the American Medical Association (AMA) as "a primary, chronic disease with genetic, psychosocial, and environmental factors influencing its development and manifestations."

The AMA also sets forth the following policies:

H-30.995 Alcoholism as a Disability

1. The AMA believes it is important for professionals and laymen alike to recognize that **alcoholism is in and of itself a disabling and handicapping condition**. **CP Sub 7 OAH page 29 lines 3-5; page 30 lines 22-25; CP 24.**

In approximately January 2011, Mr. Nykol informed his third level manager, Tom Shinner, and later his second level manager, about his DUI; diagnosis of alcoholism; assessment; treatment and

likely suspension of his regular driver's license.[6] **CP Sub 7 OAH pages 28-29 lines 6-12.** At that time, Mr. Nykol also informed management that he **would be given an interlock driver's license** and would likely be placed on an ignition interlock device (IID) which would prevent his personal vehicle from starting without Mr. Nykol first passing a breathalyzer. **CP Sub 7 OAH page 16-17 lines 19-1; page 17 lines 12-15; page 22 lines 11-17, 23-24; page 23 lines 12-16; page 29 lines 17-25; page 30 lines 4-14.** Mr. Nykol also requested that his employer accommodate his disability by having it waive the requirement of placing the IID on its business vehicles. **CP Sub 7 OAH page 29 lines 6-7; pages 23-24 lines 9-17; page 31 lines 1-2.**

Mr. Nykol also told his employer that it should have no concerns over his operation of any work vehicle because:

> A. Prior to entering the employer's facility, Mr. Nykol had to drive to work. Mr. Nykol's personal vehicle was equipped with an IID. In order to start his vehicle each morning prior to coming to work, Mr. Nykol had to pass a state calibrated breathalyzer: **CP Sub 7 OAH page 20 lines 5-19; page 29 lines 17-25; page 31 lines 3-5.**

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[6] Since that time Mr. Nykol has undergone outpatient treatment for his alcoholism. Additionally, he was and is regularly attending AA meetings. **CP Sub 7 OAH pages 28-29 lines 20-16; CP 10** (Finding of Fact 8.)

B. After entering the employer's facility Mr. Nykol's state calibrated breathalyzer IID would have been on the employer's premises and it could have been used to test Mr. Nykol at any time during the day to ensure that he was not using alcohol and not under the influence while employed; **CP Sub 7 OAH page 30 lines 15-21; page 20 lines 15-19.**

C. The employer also had its own breathalyzer service to further ensure that Mr. Nykol was not using alcohol and not under the influence while employed; **CP Sub 7 OAH page 19 lines 10-12.**

D. Every day, Mr. Nykol had to pass through his employer's security gates and by its own security guards who could visually inspect/search Mr. Nykol's person and his vehicle, to determine and ensure that Mr. Nykol was not using alcohol and not under the influence while employed. Also, those same security guards had the ability to search Mr. Nykol's person or his belongings at any time throughout the work day. Finally, Mr. Nykol did not work alone such that his co-workers could also monitor his behavior to ensure he was not consuming alcohol or under its influence while at work. **CP Sub 7 OAH page 30, lines 15-21; page 19, lines 18-22.**

Although, Mr. Nykol's regular driver's license was suspended **CP 10** (Finding of Fact 5); he was never without a valid driver's license. **CP 10**, (Finding of Facts 5 & 7); **CP Sub 7 OAH page 22, lines 8-17, 23-24.** Rather, following the suspension of his regular driver's license he was issued an Ignition Interlock Driver's License (IIL) pursuant to RCW 46.04.217 and his personal vehicle was equipped with an Interlock Ignition Device (IID) pursuant to RCW

46.20.385. **CP 10**, (Finding of Fact 5); **CP Sub 7 OAH page 22, lines 8-17, 23-24; page 24, lines 15-17; page 17, lines 12-15; page 30, lines 4-14; pages 53-56.**

Pursuant to RCW 46.20.385(1)(c)(i), Mr. Nykol was eligible to drive his employer's vehicle(s) and would have remained an employee if his employer had signed a declaration waiving the requirements of an IID for company vehicles. **CP 10**, (Finding of Fact 7); **CP Sub 7 OAH page 17, lines 12-15; page 29, lines 6-7; page 31, lines 1-2.**

Mr. Nykol's DUI was not work related and nothing in the record suggests that he otherwise worked while under the influence of alcohol. **CP Sub 7 OAH page 28, lines 16-19.**

Sadly, his employer refused to reasonably accommodate Mr. Nykol's disability request (to have it sign the IID waiver). The employer has a blanket policy whereby it refuses to sign an IID waiver for any of its employees based upon its fear of liability to persons and property and it refuses to acknowledge its duty to analyze an employees' request for a waiver as a reasonable accommodation request under RCW 49.60.180 et.seq. **CP Sub 7 OAH page 16-17, lines 3-1; page 17, lines 16-18; page 18, lines**

2-9. Days later Mr. Nykol was terminated. **CP Sub 7 OAH page 32, lines 11-14.**

It must be understood that Mr. Nykol was not terminated for violating any employer rule **CP Sub 7 OAH page 14-15, lines 17-2**; rather, his employer terminated him simply because it refused to sign an IID waiver, which would have allowed him to utilize his valid interlock ignition license and drive for his employer. **CP Sub 7 OAH page 17, lines 12-15; CP 10** (Finding of Fact 7). **See also RCW 46.20.385**

> **The installation of an ignition interlock device is not necessary on vehicles owned, leased, or rented by a person's employer** and on those vehicles whose care and/or maintenance is the temporary responsibility of the employer, and driven at the direction of a person's employer as a requirement of employment during working hours. **The person must provide the department with a declaration pursuant to RCW 9A.72.085 from his or her employer stating that the person's employment requires the person to operate a vehicle owned by the employer or other persons during working hours.**
> RCW 46.20.385(c)(1).

Thereafter, Mr. Nykol sought and was denied unemployment benefits by ALJ Pierce. **CP 9-14.** That decision was later affirmed

by the Commissioner of the Employment Security Department and that decision was affirmed by the superior court. **CP 5-8; CP 54-56; CP 65-66. See also footnote 2 (*Supra*).**

V. ARGUMENT

A. FIRST ERROR:

The Commissioner erred by not finding and concluding that the employer failed to reasonably accommodate Mr. Nykol's disability of alcoholism as required under RCW 49.60.180 when it refused to sign a waiver of the interlock ignition device (IID) as allowed per RCW 46.20.385.

It is unlawful for an employer to discriminate against any person in the terms or conditions of employment or discharge any employee because of the presence of any sensory, mental, or physical disability. RCW 49.60.180(2), and (3).

An employer's failure to reasonably accommodate the sensory, mental, or physical limitations of a disabled employee constitutes discrimination unless the employer can demonstrate that such accommodation would result in an undue hardship to the employer's business. *Frisino v Seattle Sch. Dist.*, 160 Wn. App. 765; 249 P.3d 1044, (Div 1, 2011);

Pulcino v Fed. Ex., 141 Wn.2d 629; 9 P.3d 787, (2000)(overruled on other grounds)*; Snyder v. Medical Serv. Corp,* 98 Wn. App. 315, 988 P.2d 1023 (1999) (citing *Doe v. Boeing Co.,* 121 Wn.2d 8, 16, 18, 846 P.2d 531 (1993)).

"Disability" means:

> **The presence of a sensory, mental, or physical impairment that**:
>
> (i) Is medically cognizable or diagnosable; **or**
> (ii) Exists as a record or history; or
> (iii) Is perceived to exist whether or not it exists in fact.
>
> (b) **A disability exists whether it is temporary or permanent**, common or uncommon, mitigated or unmitigated, or whether or not it limits the ability to work generally or work at a particular job or whether or not it limits any other activity within the scope of this chapter.
>
> (c) For purposes of this definition, **"impairment" includes**, but is not limited to:
>
> (i) **Any physiological disorder**, or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological, musculoskeletal, special sense organs, respiratory, including speech organs, cardiovascular, reproductive, digestive, genitor-urinary, hemic and lymphatic, skin, and endocrine; or
>
> (ii) **Any mental, developmental, traumatic, or psychological disorder**, including but not limited to cognitive limitation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

> (d) Only for the purposes of qualifying for reasonable accommodation in employment, an impairment must be known or shown through an interactive process to exist in fact and:
>
> > (i) The impairment must have a substantially limiting effect upon the individual's ability to perform his or her job, the individual's ability to apply or be considered for a job, or the individual's access to equal benefits, privileges, or terms or conditions of employment; or ... RCW 49.60.040(7)(a).

Based upon the definition of a disability as set forth above, alcoholism is a disability and must be viewed as any other disease or condition subject to analysis as a disability under RCW 49.60.180.

Our State Supreme Court recognized that the Washington Law Against Discrimination (WLAD) was profoundly expanded through 2007 legislative amendments. Those amendments codified the definition of disability and expanded on prior interpretations of that term. *Hale v Wellpinit School Dist.,* 165 Wn.2d 494; 198 P.3d 1021 (2009).

Here, it cannot be contested that Mr. Nykol's alcoholism was a disability as defined above. It was diagnosed and is a physiological or psychological condition.

1. **<u>SINCE MR. NYKOL HAD A DISABILITY BOEING WAS REQUIRED TO REASONABLY ACCOMMODATE IT</u>**

A reasonable accommodation must allow the employee to work in the environment and perform the essential functions of his job. *Griffith v. Boise Cascade, Inc.*, 111 Wn. App. 436, 442, 45 P.3d 589 (2002). To accommodate, **the employer must affirmatively take steps to help the disabled employee continue working at the existing position** ... *Id.*

Here, despite its legal obligations under RCW 49.60.180(2) Boeing refused to accommodate Mr. Nykol's disability and took no affirmative steps to accommodate him. Moreover, it has never asserted that accommodating him would pose an undue hardship. This is because a simple accommodate was available.

a. Reasonable Accommodation

The employer could have and should have signed a waiver such that an interlock ignition device (IID) would not be required on its vehicles allowing Mr. Nykol to operate its vehicles for work using his Washington State Interlock Driver's License. (This would be wholly consistent with Finding of Fact 7 which stated "If the employer executed a waiver permitting the

claimant to drive without installation of an interlock device on the work vehicle the claimant would drive, he would be permitted, by law, to drive the company vehicles.") **CP 10.**

2. SAFEGUARDS WERE IN PLACE TO ENSURE MR. NYKOL DID NOT WORK WHILE UNDER THE INFLUENCE

The Employer was provided with numerous safeguards and could be more than reasonably assured that, by signing the IID waiver, it would not place persons or property at an unreasonable risk of injury due to Mr. Nykol's prior DUI and prior alcohol use when:

(1) the employer could reasonably rely upon the electronic interlock ignition device (breathalyzer) installed on Mr. Nykol's personal vehicle to ensure that he did not come to work under the influence because Mr. Nykol had to pass the breathalyzer in order to start and then drive his vehicle to his employer's work site each work day **CP Sub 7 OAH page 20, lines 5-19;**

(2) Mr. Nykol's state calibrated breathalyzer/IID located in his car would have been on his employer's premises for testing at any time during the day to ensure that Mr. Nykol was not using alcohol

and not under its influence while employed **CP Sub 7 OAH page 20, lines 15-19**;

(3) The employer could also reasonably rely upon its own, on site, breathalyzer services to ensure that Mr. Nykol was not using alcohol and not under the influence while employed **CP Sub 7 OAH page 19, lines 11-12**;

(4) The employer could have reasonably relied upon its own security personnel to visually inspect/search Mr. Nykol and his vehicle, (operated by the electronic interlock ignition device) to ensure that Mr. Nykol was not using alcohol and not under its influence while employed **CP Sub 7 OAH page 30, lines 15-21**;[7]

(5) The employer could and should follow its own policy of Mandatory Rehabilitation. **CP Sub 7 OAH page 61** (Exhibit 9 p. 2).

Here, the employer simply refused to reasonably accommodate Mr. Nykol and for the reasons stated above its refusal was an unlawful failure to accommodate him. The employer was given numerous safeguards such that signing the IID waiver

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[7] Any one of the breathalyzer options was available to the employer. It had every opportunity to ensure Mr. Nykol was not posing an unreasonable rise to persons or property.

was not an undue hardship.[8] Moreover, the employer's failure to argue the same at the administrative level bars it from raising that issue now for the rationale set forth in footnote 2 *Supra*.

B. SECOND ERROR:

The Commissioner erred in not finding and concluding that the employer's failure to sign the IID waiver was the proximate cause of Mr. Nykol being unable to operate the employer's vehicle. Had it found or concluded otherwise, Mr. Nykol could not have "willfully disregarded the probable consequences" i.e., loss of ability to drive because he would not have and should not have lost the ability to operate his employer's vehicle as held in Conclusion of Law 10. **CP 12.**

1. SINCE MR. NYKOLS' DISABILITY WAS NOT ACCOMMODATED AS REQUIRED BY LAW, THE EMPLOYER AND NOT MR. NYKOL, WAS THE PROXIMATE CAUSE OF HIS INABILITY TO OPERATE THE EMPLOYER'S VEHICLES.

Proximate cause can be divided into two elements: cause in **fact** and **legal** cause. *Michaels v CH2M Hill, Inc.*, 171 Wn.2d

[8] The ultimate finding that the employer acted illegally is immaterial to the determination of whether Mr. Nykol's conduce was misconduct. Rather, it is sufficient to find that the employer had a duty to sign the IID waiver and failed to do so.

587 (2011); *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 478, 951 P.2d 749 (1998). "'Cause in fact' refers to the actual 'but for' cause of the injury, i.e., 'but for' the defendant's actions the plaintiff would not be injured." *Id.*

Proximate legal causation analysis is determined as a matter of policy and whether the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability. **A determination of legal liability will depend upon 'mixed considerations of logic, common sense, justice, policy, and precedent.'"** *Schooley*, 134 Wn.2d at 478-79.

In the Initial Order, Administrative Law Judge Debra Pierce determined that "the claimant drank alcohol and drove a vehicle, resulting in a charge of driving under the influence of alcohol and the suspension of his driver's license." And, since he "also knew that he was required to maintain a valid driver's license to maintain his employment"... he "knew or should have known" (foreseeability) that "by drinking he jeopardized his employment" such that he "acted willfully disregarding the probable consequences" (The probable consequence in this case is Mr. Nykol's inability to drive for his employer.) **CP 12** (Conclusion of Law 10). **However, Mr.**

Nykol could, in fact, drive for his employer! CP 10 (ALJ Finding 7). And, because the employer's refusal to sign the IID was not proper or lawful per RCW 49.60.180(2), the loss of the ability to drive for his employer was neither foreseeable nor probable.

If we apply tort law and the issue of foreseeability within the framework of misconduct as defined by statute, we would necessarily reach a different conclusion than that of the Commissioner and the ALJ. If an intervening cause is unforeseeable then "'it will break the causal connection between the defendant's negligence and the plaintiff's injury'" and negate a finding of cause in fact. *Maltman*, 84 Wn.2d at 982 (quoting *Qualls v. Golden Arrow Farms, Inc.*, 47 Wn.2d 599, 602, 288 P.2d 1090 (1955)). *See also* 57A AM. JUR. 2D *Negligence* § 692, at 635.

Ordinarily, whether an independent cause is reasonably foreseeable is a question of fact for the jury. The issue may be resolved as a matter of law, however, if there is no question that the intervening cause was unforeseeable. *McCoy v. American Suzuki Motor Corp.*, **136** Wn.2d 350, 358**,** 961 P.2d 952 (1998). The theoretical underpinning of an **intervening cause** which is sufficient to break the original chain of causation is the **absence of**

its foreseeability. *Boeing Co. v. State*, 89 Wn.2d 443, 446, 572 P.2d 8 (1978); *Maltman v. Sauer*, 84 Wn.2d 975, 982, 530 P.2d 254 (1975); *Fosbre v. State*, 70 Wn.2d 578, 584, 424 P.2d 901 (1967).

Here, Mr. Nykol's employer's unlawful refusal to sign the IID waiver was, as a matter of law, the intervening cause and there is no basis to presume that Mr. Nykol could foresee his employer acting illegally.

C. THIRD ERROR:

Based upon Error One and Error Two above, the ALJ's Conclusion of Law 10 must also be error.

As stated in ALJ Finding of Fact 5, Mr. Nykol's DUI was "not on the job". **CP 10; CP Sub 7 OAH page 28, lines 16-19.** And, "the burden of establishing work-related misconduct was on the employer, as stated in ALJ Conclusion of Law 6. **CP 11.** Then, in ALJ Conclusion of Law 8, the ALJ analogized off-duty incarceration as a basis for misconduct to Mr. Nykol's situation. **CP 11.**

Based on this analysis the ALJ correctly drew the conclusion that foreseeability and proximate causation must be established in order to satisfy the three elements of misconduct "willfulness, a disregard of the employer's interest, and harm." **CP 11** (ALJ

Conclusion of Law 9). **See also** RCW 50.20.066(1) ("(1) An individual **shall be disqualified from benefits** beginning with the first day of the calendar week in which he or she has been discharged or suspended for **misconduct** **<u>connected with his or her work…')</u>**

Mr. Nykol does not take issue with Finding of Fact 5 and Conclusions of Law 6, 8 or 9 as stated above.

Rather, it is the ALJ's determination that Mr. Nykol's conduct, drinking and driving, would proximately cause a "probable" inability to drive for his employer that Nykol takes issue with. **CP 11** (ALJ Conclusion of Law 10).

For the reasons set forth above, Mr. Nykol was entitled to rely upon the protections afforded him by RCW 49.60.180(2) such that his termination for not being able to drive was wholly unforeseeable. As such, Conclusion of Law 10 is erroneous. Mr. Nykol did not engage in misconduct.

D. FOURTH ERROR

The Commissioner erred in denying unemployment benefits based upon RCW 50.20.066 which states ("alcoholism shall not

constitute a defense to disqualification from benefits due to misconduct.").

Mr. Nykol was not terminated for alcoholism nor was he disqualified from benefits as a result of any misconduct, nor is he asserting that his alcoholism is a defense to disqualification. Instead, Mr. Nykol was terminated because he could no longer operate his employer's vehicle after it refused to sign his IID waiver in violation of RCW 49.60.180. **CP Sub 7 OAH page 14-15, lines 25-4** (the employer's only stated reason for Mr. Nykol's termination was that "he was released because he did not meet the qualifications for the requirements to perform his job duties....he was not able to maintain a valid driver's license.").

Since alcoholism is not being used to justify conduct that otherwise might constitute misconduct, it was error for the Commissioner to cite RCW 50.20.066 as a basis for denying Mr. Nykol benefits.

E. FIFTH ERROR:

The Commissioner erred in denying Mr. Nykol unemployment benefits based upon RCW 50.01.010, the preamble to the employment security act, which states "unemployment

reserves used for the benefit of persons unemployed through no fault of their own..." by suggesting that "fault" unrelated to misconduct as defined by RCW 50.20.066 can form the basis to deny Mr. Nykol unemployment benefits.

Ironically, in citing to RCW 50.20.066, the Commissioner's decision failed to add the clause immediately following the "no fault" clause relied on by the Commissioner which states: **"and that this title shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum".**

There are no cases relying solely upon RCW 50.01.010 to deny one unemployment benefits. Rather, the fault must be viewed through the misconduct statute RCW 50.20.066 and through a proximate cause lens. Otherwise, the preamble would swallow the rule since arguably any type of negligent act, whether at work or not, which causes one to become disabled could constitute "fault" which could deprive a person of unemployment benefits to which they are otherwise entitled.

If fault is the issue, then the issue to be decided under a proximate cause analysis will be whose fault? Admittedly, Mr.

Nykol was at fault for driving while under the influence and he acknowledges the same. Regardless, the employer was at fault for not signing a waiver that it had a legal duty to sign as a reasonable accommodation under RCW 49.60.180. Under a proximate cause analysis, the employer had two choices (sign waiver or refuse to sign waiver). By choosing to refuse to sign the waiver, the employer acted illegally by not accommodating Mr. Nykol's disability. That choice, and not Mr. Nykol's suspended license was the legal proximate cause of Mr. Nykol's termination.

In the present, there was no misconduct. So, the "no fault" clause referenced above does not apply.

F. SIXTH ERROR:

The Commissioner erred in denying Mr. Nykol unemployment benefits by errantly stating that Mr. Nykol lost his license and as a result, the employer was no longer able to employ claimant in his position of Firefighter Driver/Operator.

Here, there is an enormous misunderstanding that must be addressed and clarified. The misunderstanding is the belief that Mr. Nykol no longer had a valid driver's license when he was terminated. In fact, the ALJ found that Mr. Nykol had a valid

driver's license at that time. **CP 10, Finding of Fact 5** ("he is permitted to drive with an ignition interlock device and an ignition interlock license") and **Finding of Fact 7** ("If the employer executed a waiver permitting the claimant to drive without installation of an interlock device on the work vehicle the claimant would ... be permitted, by law, to drive the company vehicles.")

RCW 46.20.et.seq., governs the issuance of driver's licenses in the State of Washington. In particular, RCW 46.20.385(1) allows the Department of Motor Vehicles to issue a valid substitute license called an ignition interlock driver's license to persons with suspended licenses. This is what Mr. Nykol was issued. **CP Sub 7 OAH page 24, lines 15-17; page 22, lines 23-24; page 16, lines 19-23; page 17, lines 3-15. CP Sub 7 OAH pages 53-56.**

Moreover, RCW 46.20.385(c)(1) expressly authorizes employers to allow individuals with ignition interlock licenses the ability to operate its own vehicles by signing a waiver so that employees can remain employed after having their regular license suspended.

Mr. Nykol's testimony before the ALJ confirmed the same:

Q. And what kind of waiver?

A. The waiver that the State has for the ignition interlock device. The ignition interlock device covers my personal vehicle, but **for my employer they have to be made aware that I'm on an interlock license and then they have to sign a waiver stating that they don't have to install the equipment on their vehicles.**

Q And then would you be permitted with your interlock driver's license to drive those work vehicles?

A. Yes, absolutely." CP Sub 7 OAH pages 23-24; lines 17-17 and in particular lines 8-17. See also CP Sub 7 OAH pages 53-56 (The Department of Licensing's web page regarding Ignition Interlock Licenses (IIL) and Interlock Ignition Devices (IID).

Here, Mr. Nykol had a valid license and if the employer had complied with RCW 49.60.180 and signed the IID waiver as authorized under RCW 46.20.385, then Mr. Nykol would have been able to operate his employer's vehicle.

G. SEVENTH ERROR:

The Commissioner erred in failing to find undisputed facts when if viewed as a whole would have changed the decision. In

particular, the Commissioner erred by not finding (a) Mr. Nykol suffered from alcoholism; (b) Mr. Nykol sought a reasonable accommodation in the form of asking his employer to sign a waiver of the IID; (c) Mr. Nykol never lost the legal right to drive or operate a motor vehicle; (d) the employer did not fire Mr. Nykol for any performance-related problem; and (e) the employer had numerous safeguards at its disposal to more than adequately ensure that Mr. Nykol would not consume alcohol and/or be under the influence, while at work.

Judicial review of the facts is not limited to those facts found by the ALJ or Commissioner. Rather, this court is to review the entire agency record. **RCW 34.05.558**. Because uncontroverted facts do not require a reweighing of evidence they can be reviewed de novo based upon the error of law standard. *Rasmussen v Employment Sec. Dept.*, 98 Wn. 2d 846, 850 ft. note 2, 658 P.2d 1240 (1983).

In the instant, there are numerous uncontested facts that should have been considered and adopted by the Commissioner.

- Mr. Nykol was diagnosed with alcoholism. **CP Sub 7 OAH page 26 lines 9-17; page 29 lines 3-5; page 30 lines 22-35;**
- Mr. Nykol asked his employer to sign a waiver for the interlock ignition device as an accommodation for his disability. **CP Sub 7 OAH page 29 lines 6-7; pages 23-24 lines 9-17; page 31 lines 1-2.**;
- Mr. Nykol did not lose the ability to drive or operate his employer's vehicle until the employer refused to sign the IID waiver. **CP 10** (Finding of Facts 5 & 7);
- The employer did not fire Mr. Nykol for performance related problems. **CP Sub 7 OAH page 28, lines 16-19**;
- The employer had numerous safeguards at its disposal to ensure that Mr. Nykol would not operate any of its vehicles while under the influence of alcohol. See Pages 15-16 *Supra* (Listing Safeguards of Sobriety).

Safeguards Available to the Employer:

In particular:

- Mr. Nykol drove to work in a vehicle equipped with a state calibrated breathalyzer which is part of his ignition interlock device.

- Mr. Nykol's employer could have randomly tested him for alcohol use throughout the day by having him blow into his interlock ignition device which is calibrated at 0.025 and not the more lax standard of 0.08. RCW 46.20.720.

- Mr. Nykol's employer had access to other breathalyzers to test Mr. Nykol throughout the day.

- Mr. Nykol's employer has security guards who could have visually inspected Mr. Nykol for signs of alcohol impairment prior to entering onto its premises. These same guards could have inspected his person or property for concerns of the same.

- Boeing should have adhered to its own policy of assisting employees with disabilities.

H. EIGHTH ERROR:

The Commissioner erred in adopting the ALJ's Finding of Fact 9, which stated, "the claimant was released from employment because he failed to meet the requirements of performing his job duties since he did not possess a Washington State Driver's License."

As stated earlier, Mr. Nykol had a valid driver's license. It was not that Mr. Nykol failed to meet any requirement. Rather, it

was that his employer prevented him from meeting those same requirements.

VI. CONCLUSION

For the foregoing reasons, the Commissioner's decision denying Mr. Nykol unemployment benefits for misconduct should be reversed and he should be awarded unemployment benefits retroactive to his application for the same.[9]

RESPECTFULLY SUBMITTED this 10 day of December, 2012.

By: ____________________
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[9] Should this Court overrule the Commissioner's decision and award Mr. Nykol unemployment benefits, Mr. Nykol will seek reimbursement of his attorney's fees which are authorized by RCW 50.32.160.