NO. 89544-9

SUPREME COURT OF THE STATE OF WASHINGTON

JAY NYKOL,

Appellant,

v.

EMPLOYMENT SECURITY DEPARTMENT FOR THE STATE OF WASHINGTON,

Respondents.

REPLY TO ANSWER TO PETITION FOR REVIEW

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

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I. Contrary to Respondent's brief, neither the Commissioner nor the Court of Appeals concluded that Nykol engaged in misconduct by driving under the influence as suggested by Respondent's counterstatement of the issues.

II. The Court of Appeals wrongly held that Nykol's ignition interlock license was not a "valid driver's license" and Respondent's assertion that the Court used the "plain and ordinary meaning" of that phrase to conclude the same was also incorrect.

A. The Court of Appeals definition of "valid driver's license" was created out of thin air and contradicted legislative intent.

While the phrase "valid Washington driver's license" is not expressly defined by statute, RCW § 46.20.001 states that **"[n]o person may drive a motor vehicle upon a highway in this state without first obtaining a valid driver's license issued to Washington residents under this chapter."** RCW § 46.20.001(1)[1]. Therefore, if one is legally able drive a motor vehicle, one must have a valid driver's license.

RCW § 46.20.001(2) states that a "person licensed as a driver under this chapter: (a) May exercise the privilege upon all highways in this state; (b) May not be required by a political subdivision to obtain any other license to exercise the privilege; and

[1] Exceptions to this rule exist in RCW § 46.20.025, but none of the listed exceptions are applicable to the case at hand.

May not have more than one valid driver's license at any time." WAC 308-104-006 clarifies that "[n]o person... may drive any motor vehicle upon a highway in this state **unless the person has in his or her possession a valid driver's license** issued under the provisions of chapter 46.20 RCW."

Because RCW § 46.20.001(1) states that "[n]o person may drive a motor vehicle upon a highway in this state without first obtaining a valid driver's license issued to Washington residents under this chapter, it is clear that Nykol had a "valid driver's license" because he was able to drive a motor vehicle on highways in Washington and in fact did so. CR 22; *See Cherry v. Municipality of Metro Seattle*, 808 P. 2d 746 (1991) ("A court interprets a statute so as to give effect to the Legislature's intent in creating the statute.") (*citing Longview Fibre Co. v. Cowlitz Cy.*, 114 Wn.2d 691, 790 P. 2d 149 (1990)). The Court of Appeals' alternative definition of the phrase "valid driver's license" contradicts legislative intent and should not be upheld.

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B. The Court of Appeals incorrectly defined the phrase "valid driver's license" to mean a "license that allows a person to drive in Washington unrestricted and unfettered, with no special conditions" and "does not mean a specialty license, available only if an individual's regular license is suspended..."

The Court of Appeals definition violates state law not only as to Nykol, but also as to all persons who suffer from a physical or mental disability, have an instruction permit or a temporary permit, or have an ignition interlock, temporary restricted, or occupational license.

"Valid" is defined as "fair or reasonable" or "acceptable according to the law[2]." The opposite, then, is "invalid," which means "being without foundation or force in fact, truth, or law[3]." When the definition of a "valid Washington driver's license" put forth by the Court of Appeals is viewed within the context of these definitions, the Court of Appeals' definition becomes absurd. This definition assumes that anyone whose license is subject to any restriction is invalid. This would mean that any individual who drives despite a mental or physical disability, has an instruction

[2] http://www.merriam-webster.com/dictionary/valid (last visited January 14, 2014).
[3] http://www.merriam-webster.com/dictionary/invalid (last visited January 14, 2014).

permit (RCW § 46.20.055) or a temporary permit (RCW § 46.20.055), **or has an ignition interlock,** temporary restricted, or occupational license (RCW §§ 46.20.385,.391) **has an "invalid" license.**[4] In fact, RCW § 46.20.400 states that at the expiration of the interlock ignition license the licensee may "obtain a new driver's license ... [but must] surrender his or her ... ignition interlock driver's license and his or her copy of the order." By using the term "new," the legislature further validated the fact that the interlock ignition license is simply another type of valid driver's license.

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[4] In support of this position, RCW § 46.20.041 states that persons with physical or mental disabilities or diseases may be evaluated to determine if they are safely able to drive a motor vehicle. On the basis of these evaluations, the department may "(a) Issue or renew a driver's license to the person without restrictions; (b) Cancel or withhold the driving privilege from the person; or (c) Issue a restricted driver's license to the person..." The restrictions, if implemented, must be suitable to the licensee's driving ability, and may include special mechanical control devices on the motor vehicle, limitations on the type of motor vehicle the licensee may operate, or other restrictions determined to be appropriate to assure safe operation of the motor vehicle. RCW § 46.20.041(2)(c)(i)-(iii). Because the department can attach restrictions or conditions to these individual's ability to operate a motor vehicle, it cannot be said that they are driving "unrestricted and unfettered, with no special conditions." Further, there is nothing to indicate that individuals with physical or mental disabilities have a "specialty license, available only if [their] regular license is suspended." *See* RCW § 46.20.041; *Nykol*, slip op. at 5. The Court of Appeals definition when viewed in context becomes dubious at best and is clearly contrary to legislative intent.

III. Nykol is not asking for the authority to adjudicate a disability accommodation claim within the forum of his claim for unemployment benefits. Nykol does not seek wage loss, future lost wages, emotional damages, or declaratory relief. Rather, he simply wants unemployment benefits. To determine whether his off-duty conduct would reasonably result in his termination, the Commissioner must have determined the proximate cause of the loss of his "regular" driver's license. To do so, an ALJ or the Commissioner must determine whether the employer should have signed the waiver of the ignition interlock device, hereinafter ("IID"), as a reasonable accommodation under RCW § 49.60.180.

First, the employer failed to raise this issue at the agency level and issues not raised cannot be raised on appeal. RCW § 34.05.554.

Should this court wish to address this issue, the Initial Order stated 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 Nykol's inability to drive for his employer.) CP 12 (Conclusion of Law 10) (emphasis added).

As discussed in Appellant's Petition for Review, 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.

Foreseeability is more than just mere speculation that something will occur. Foreseeability is tempered by proximate cause; if there is an intervening cause which is sufficient to break the original chain of causation, there is an absence of foreseeability. *Boeing Co. v. State*, 89 Wn.2d 443, 446, 572 P.2d 8 (1978). The unlawful refusal by Nykol's employer to sign the IID waiver was an intervening cause. There was no reason for Nykol to believe that his employer would not sign the waiver.

Respondent asserts that "Nykol asks this Court to ignore the fact that he drove drunk and to instead placed the blame for the loss of his driver's license and the driver's license [sic] and the ultimate consequence of his termination from employment on Boeing." *Resp. Brief*, 11-12. This argument misses the point;

Nykol is not blaming the loss of his "regular" driver's license on his employer, but rather arguing that his employer's failure to accommodate his disability (sign the IID waiver) as required by law under RCW § 49.60.180 resulted in his termination, and the failure to accommodate him was neither foreseeable nor reasonable. In other words, is it foreseeable that Nykol's employer would break the law by disregarding its obligation under § RCW 49.60.180? No.

A. Do ESD and the ALJ's have Authority/Jurisdiction regarding disability claims?

ESD's assertion that Nykol's claim should be denied on this basis runs afoul of the purpose of unemployment benefits. RCW § 50.01.010 explains that "economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of the state..." The policy behind these benefits is to assist those who have become unemployed through no fault of their own. *Id.* Nykol has shown that he became unemployed through no fault of his own; thus he was entitled to unemployment benefits. In determining an agency's power and authority our courts should look to the purpose of the act to determine whether an agency is acting

inconsistent with its powers. *Marquis v. City of Spokane*, 130 Wn.2d 97, 111, 922 P.2d 43 (1996). Here it is not.

The purpose of the Employment Security Act is set forth in its entirety.

> Whereas, **economic insecurity due to unemployment is a serious menace to the health, morals, and welfare of the people of this state; involuntary unemployment is, therefore, a subject of general interest and concern which requires appropriate action by the legislature to prevent its spread and to lighten its burden which now so often falls with crushing force upon the unemployed worker and his or her family. Social security requires protection against this greatest hazard of our economic life.** This can be provided only by application of the insurance principle of sharing the risks, and by the systematic accumulation of funds during periods of employment to provide benefits for periods of unemployment, thus maintaining purchasing powers and limiting the serious social consequences of relief assistance. **The state of Washington, therefore, exercising herein its police and sovereign power endeavors by this title to remedy any widespread unemployment situation which may occur and to set up safeguards to prevent its recurrence in the years to come. The legislature, therefore, declares that in its considered judgment the public good, and the general welfare of the citizens of this state require the enactment of this measure, under the police powers of the state, for the compulsory setting aside of**

> **unemployment reserves to be used for the benefit of persons unemployed through no fault of their own, and that this title shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum.** RCW § 50.01.010

There is nothing inconsistent with the preamble to allow the Commissioner or ALJ to interpret RCW § 49.60.180 when determining whether unemployment benefits should be allowed. [5]

IV. Alcoholism is not being used to excuse work related conduct or poor performance.

Respondent relies on RCW § 50.20.066(1) which states which states that '[a]lcoholism shall not constitute a defense to disqualification from benefits due to misconduct.'" As pointed out in Respondent's brief, this statute is aimed at holding alcoholic employees to the same performance standards as non-alcoholic employees. *Leibbrand v. Emp't Sec. Dep't*, 107 Wn App. 411, 420, 27 P.3 1186 (2001). Nykol agrees. However, he was not terminated for being an alcoholic nor was his performance affected

[5] Moreover, RCW 50.32.097 limits the admissibility of any finding or conclusion made by an ALJ, the department or its agents. Thus, the employer and employee are precluded from using the Commissioner's decision as offensive or defensive collateral estoppel. Had the legislature intended that ESD was prohibited from analyzing issues necessary to determine misconduct, it would have done so. That is not the case here.

by his alcoholism. He had a license and could have driven his employer's vehicles. This statute does not eliminate an employer's duty to reasonably accommodate an employee under RCW § 49.60.180. Since alcoholism is not being used to justify conduct that otherwise might constitute misconduct, RCW § 50.20.066(1) does not apply.

V. The scope of review includes the entire record, including testimony, not just the final decision of the Commissioner.

A limited review of the Commissioner's decision without considering the record as a whole is not appropriate here.

> **Judicial review is not selective, but must be conducted on the entire record, not by isolating evidence**. *Norway Hill Preserv. & Protec. Ass'n v. King Cty. Coun.*, 87 Wn.2d 267, 552 P.2d 674 (1976). The duty of the reviewing court to search the entire record for evidence both supportive of and contrary to the agency's findings is found in *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 95 L. Ed. 456, 71 S. Ct. 456 (1951). RCW 34.04.130(6)(e) addresses the clearly erroneous standard of review for factual determinations "in view of the entire record (quoting) *Franklin County Sheriff's Office v Sellers*, 97 Wn.2d 317, 324, 646 P.2d 113 (1982).
>
> Appellate review of administrative decisions is on the record of the administrative tribunal. **Although there is evidence to support a finding, the reviewing court can declare a finding to be clearly erroneous when based on the entire evidence in the record if it is left**

> **with a definite and firm conviction that a mistake has been committed**. *Franklin Cty.,* 97 Wn.2d at 324; *see also Ancheta v. Daly,* 77 Wn.2d 255, 259-60, 461 P.2d 531 (1969); *Universal Camera Corp. v. NLRB*; 340 U.S. 474, 95 L. Ed. 456, 71 S. Ct. 456 (1951).
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> **Mixed questions of law and fact, or law application issues, involve the process of comparing, or bringing together, the correct law and the correct facts, with a view to determining the legal consequences. Such questions exist where there is dispute both as to the propriety of the inferences drawn by the agency from the raw facts and as to the meaning of the statutory term**. *Daily Herald Co. v. Department of Empl. Sec.*, 91 Wn.2d 559, 561, 588 P.2d 1157 (1979). Because the resolution of mixed law and fact issues does not require "reweighing evidence of credibility and demeanor", this court reviews them under a de novo standard. *Franklin Cty.,* 97 Wn.2d at 330; *Department of Rev. v. Boeing Co.*, 85 Wn.2d 663, 538 P.2d 505 (1975); quoting *Johnson v ESD*, 112 Wn.2d 172, 175, 769 P.2d 305 (1989).

[The court has] "inherent and statutory authority to make a de novo review of the record independent of the agency's actions," we do not review witness credibility and we deem the decision prima facie correct. RCW § 50.32.150; *Rasmussen*, 98 Wn.2d at 850 (quoting *Devine v. ESD*, 26 Wn. App. 778, 781, 614 P.2d 231 (1980)).

A. Hearsay evidence of disability is admissible.

RCW § 34.05.461(4) states that "[f]indings of fact shall be based exclusively on the evidence of record in the adjudicative

proceeding and on matters officially noticed in that proceeding." Further, **"[f]indings may be based on such evidence <u>even if it would be inadmissible in a civil trial</u>."** *Id.*

Nykol testified that he had been diagnosed with alcoholism, underwent intensive treatment and dutifully informed his employer of this condition. CR 2; ("I've been enrolled in an alcohol treatment program...") CR 26; (..."when I returned to work in January of 2011 I immediately notified my third level supervisor...") CR 28; (suffering from alcoholism) CR 29. This testimony was not rebutted and is sufficient to establish that he had a disability that needed to be accommodated by having his employer sign an IID waiver. Thus, the fact that the Nykol "presented no other evidence" of his diagnosis is not relevant. *Resp. Brief* at 13. The ALJ both could have and should have made this finding of fact. RCW § 34.05.461(4).

VI. Public policy requires that review be accepted by this Court.

RAP 13.4(b) states that the Court may grant review "[i]f the petition involves an issue of substantial public interest that should be determined by the Supreme Court."

This Court should review this case because it involves several issues of public policy: Whether persons unemployed as a result of an employer's failure to adhere to RCW § 49.60.180 (failing to accommodate a disability) should form the bases for a denial of unemployment benefits? Whether any such denial of unemployment benefits should only be based upon the Commissioner and/or ESD's belief that it lacks the ability to analyze RCW § 49.60.180.?[6]

Nykol's denial of benefits based upon purported lack of jurisdiction/authority is not an isolated occurrence. In *Winkler v. Dep't of Emp't Sec.*, 2008 Wash. App. LEXIS 1930 (unpublished), Ms. Winkler was denied unemployment compensation benefits after leaving her job because she claimed that her employer failed to reasonably accommodate her disability. The Employment Security Department (ESD) concluded that it lacked the authority to evaluate a claim for reasonable accommodation under the Washington Law Against Discrimination (WLAD) and the Americans with Disabilities

[6] Recall, during the appeal to the trial courts the court held "the issue of reasonable accommodation under chapter RCW 49.60 is properly reserved for another forum. CP 66. See also Reply Brief to Court of Appeals pages 8-16 for rebuttal of ESD's brief contending analysis of other issues cannot occur within the context of an unemployment decision.

Act (ADA). The court determined that to grant Ms. Winkler's claim for unemployment benefits, the commissioner would have had to make an original determination about whether the employer failed to accommodate Ms. Winkler's disability, which it did not have authority to do. *Id.* at *10-11. Thus, Ms. Winkler was denied unemployment benefits. *Id.*

This case, along with the case at hand, shows that disabled individuals are being discharged from employment and denied unemployment benefits based on a purported lack of jurisdiction to determine if they do, in fact, have a disability.

Clearly, ESD's failure and/or refusal to analyze an employer's failure to accommodate one's disability violates ESD's own rules (WAC 192-150-055), the policy of broad coverage for the unemployed (RCW 50.01.010) and the need to eradicate all forms of discrimination (RCW 49.60.010).

VII. CONCLUSION

For the foregoing reasons, the Commissioner's decision denying Nykol unemployment benefits for misconduct should be

reversed and he should be awarded unemployment benefits retroactive to his application for the same.[7]

RESPECTFULLY SUBMITTED this 29 day of January, 2014.

By: _____

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[7] 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.

PROOF OF SERVICE

I, Karen Peirolo, am over the age of eighteen, reside in Skagit County and am competent to make the following declaration based upon my personal knowledge and belief:

On January 28, 2014, via U.S. mail postage prepaid, I sent a true and accurate copy of **Appellant's Reply to Answer to Petition for Review** to Dionne Padilla-Huddleston, Office of the Attorney General, 800 Fifth Avenue, Suite 2000, Seattle, WA 98104, attorney for Respondent.

I swear under penalty of perjury under the laws of the state of Washington that the above is true and correct to the best of my belief and knowledge

Dated this 28 day of January, 2014.

Karen Peirolo