697366

NO. 69736-6

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MOHAMED ABDELKADIR,

Petitioner,

v.

STATE OF WASHINGTON DEPARTMENT
OF EMPLOYMENT SECURITY,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

The Commissioner of the Employment Security Department determined that Mohamed Abdelkadir was ineligible to receive Training Benefits, a specific category of unemployment benefits, for two reasons. First, Abdelkadir did not submit a timely application for Training Benefits. Second, Abdelkadir did not meet the statutory definition of "dislocated worker," which is necessary to receive Training Benefits. The Commissioner appropriately evaluated Abdelkadir's eligibility for Training Benefits under the statutory requirements and correctly determined that Abdelkadir did not meet those requirements. The Court should affirm the Commissioner's decision.

II. COUNTERSTATEMENT OF THE ISSUES

a. Under RCW 50.22.150(2), an individual must submit a training program to the Department's Commissioner for approval within 60 days after being notified about the Training Benefits program. Did the Commissioner properly deny Abdelkadir's application for Training Benefits because he failed to submit it within 60 days after being notified of the program?

b. To be eligible for Training Benefits, a claimant must be a "dislocated worker," which means that the individual is unlikely to return to employment in his or her principal occupation or previous industry because of a diminishing demand for their skills in that occupation or industry. Did the Commissioner appropriately conclude that Abdelkadir was not a dislocated worker because the evidence in the record shows a demand for his occupation as a delivery driver?

c. Abdelkadir had the burden to demonstrate his eligibility for Training Benefits. Should his former employer's failure to participate in his administrative hearing entitle him to receive Training Benefits even though he did not meet the statutory requirements?

III. STATEMENT OF THE CASE

Abdelkadir opened his claim for unemployment benefits on February 19, 2009, and established a benefit year ending date[1] of February 13, 2010. Certified Administrative Record (AR) at 59, 85, 144 (Finding of Fact (FF) 1), 163.[2] The Department sent Abdelkadir an Unemployment Claims Kit on February 20, 2009, shortly after he opened his claim. AR at 87, 136, 145 (FF 5).

In August 2009, the Department's Commissioner issued a decision denying benefits to Abdelkadir because of the nature of his separation from employment. AR at 144 (FF 2), 157. Abdelkadir appealed the Commissioner's decision to superior court and then the court of appeals. AR at 145 (FF 3), 157. The parties settled the matter in Abdelkadir's favor on December 12, 2010. AR at 145 (FF 3), 157–58. This settlement was limited to his benefit eligibility related to the nature of his job separation. AR at 157–58. It did not address his eligibility for Training

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[1] A "benefit year" is the 52-consecutive-week period beginning with the first week in which an individual files an application for an initial determination of unemployment benefit eligibility. RCW 50.04.030.

[2] King County Superior Court transmitted the certified administrative record to this Court under a separate cover from the remaining clerk's papers.

Benefits. *Id.* The stipulated order presented to the court of appeals stated, "The Department agrees that the matter should be remanded to the Department for calculation of the benefits for which [Abdelkadir] is eligible." AR at 158.

Ten months later, in October 2011, Abdelkadir submitted an application for Training Benefits to the Department for the Auto General Service Tech program at Shoreline Community College beginning in January 2012. AR at 85–87, 103–08, 146 (FF 12).[3] The Department determined that Abdelkadir was not eligible for Training Benefits because his "last occupation is considered to be 'in demand' per the Workforce development council," rendering him employable with the skills and training he already possessed. AR at 85–91, 146 (FF 16). Additionally, the Department determined that Abdelkadir was ineligible for Training Benefits because he did not submit a timely training plan to the Department for approval. AR at 85–91, 146 (FF 16).

[3] At the same time, the Department considered Abdelkadir's eligibility for Commissioner Approved Training (CAT), which is a separate program under RCW 50.20.043. AR at 67–70. The Department initially denied Abdelkadir's application for CAT, but the administrative law judge set aside this decision. AR at 67-70, 140-143 (OAH Docket No. 01-2011-25297). The Department did not appeal this decision. WAC 192-04-060(2). As Abdelkadir was not prejudiced by the decision finding him eligible for CAT, it is not before this Court for review. *See* RCW 34.05.570(1)(d) ("The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.").

Abdelkadir appealed the Department's decision to the Office of Administrative Hearings. AR at 92–102. An administrative law judge (ALJ) affirmed the Department's decision. AR at 144–51.

Abdelkadir petitioned the Commissioner of the Department for review. AR at 153–60. The Commissioner's Review Office adopted the findings and conclusions of the ALJ and affirmed the Department's determination that Abdelkadir was not eligible for Training Benefits. AR at 162–65. Abdelkadir appealed to King County Superior Court, which affirmed the Commissioner's decision. CP at 122–24.

Abdelkadir now appeals to this Court.

IV. STANDARD OF REVIEW

The Washington Administrative Procedure Act governs judicial review of Commissioners' decisions. RCW 34.05.510; RCW 50.32.120; *Safeco Ins. Cos. v. Meyering*, 102 Wn.2d 385, 389, 687 P.2d 195 (1984). The reviewing court applies the standard of review directly to the administrative record. *Barker v. Emp't Sec. Dep't*, 127 Wn. App. 588, 592, 112 P.3d 536 (2005). "The appellate court reviews the findings and decisions of the Commissioner, not the . . . underlying ALJ order." *Emps. of Intalco Aluminum Corp. v. Emp't Sec. Dep't*, 128 Wn. App. 121, 126, 114 P.3d 675 (2005). The court may reverse a Commissioner's finding if

it is a clear error of law, if substantial evidence does not support it, or if it is arbitrary and capricious. RCW 34.05.570(3).

Questions of law are subject to de novo review. RCW 34.05.570(3)(d); *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993). However, the court must accord substantial weight to the agency's view of the law it administers and to an agency's interpretation of rules it promulgated. *Verizon Nw., Inc. v. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008).

Factual findings are sufficient if substantial evidence in the record supports them and could convince a fair-minded person of their truth. *Pappas v. Emp't Sec. Dep't*, 135 Wn. App. 852, 856, 146 P.3d 1208 (2006). Unchallenged factual findings are verities on appeal. *Tapper*, 122 Wn.2d at 407. Evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987). The reviewing court should "view the evidence and the reasonable inferences therefrom in the light most favorable to the party that prevailed" at the administrative proceeding below—here, the Department. *Tapper*, 122 Wn.2d at 407. The court may not substitute its judgment for that of the agency on the

credibility of the witnesses or the weight given to conflicting evidence. *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 35, 226 P.3d 263 (2010).

"In all court proceedings under or pursuant to this title the decision of the commissioner shall be *prima facie* correct, and the burden of proof shall be upon the party attacking the same." RCW 50.32.150; *see also Eggert v. Emp't Sec. Dep't.*, 16 Wn. App. 811, 813, 558 P.2d 1368 (1976) (recognizing that the Court's jurisdiction is "further limited by RCW 50.32.150"). Accordingly, Abdelkadir carries the burden of proving that substantial evidence does not support the Commissioner's factual findings or that the Commissioner committed an error of law.

V. ARGUMENT

The Commissioner's decision to deny Training Benefits to Abdelkadir was supported by substantial evidence and was made without error of law. The Commissioner properly concluded that Abdelkadir was ineligible for Training Benefits because his benefit application was untimely and because he did not establish that he is a dislocated worker.

The issue in this case is not whether Abdelkadir is entitled to unemployment compensation. Abdelkadir applied for and received regular unemployment compensation following his first appeal process. At issue in this case is whether Abdelkadir is entitled to Training Benefits, a specific category of benefits, which are in addition to regular benefits.

Training Benefits are additional benefits that are available for individuals who have exhausted their unemployment benefits and who meet certain additional eligibility criteria set forth in RCW 50.22.150 or .155. RCW 50.22.010(7), .150, .155. These are extraordinary benefits.[4] They are paid from an exhaustible fund, and, as such, a person's eligibility for Training Benefits is "[s]ubject to availability of funds." RCW 50.22.150(2). Therefore, an eligible person may not receive Training Benefits if the fund has been exhausted. WAC 192-270-055. Moreover, training benefits are "totally financed by the state." RCW 50.22.010(7) (additional benefits); *see* RCW 50.22.150(5)(c) (training benefits are additional benefits). For these reasons, it is important that the Department ensure at the outset that only eligible workers who have been displaced from their primary occupations receive Training Benefits.

Abdelkadir had the burden of demonstrating eligibility for these benefits. *See Townsend v. Emp't Sec. Dep't*, 54 Wn.2d 532, 534, 341 P.2d 877 (1959) (claimant has the burden to establish his rights to benefits under the Employment Security Act). The Commissioner correctly determined that Abdelkadir failed to carry his burden.

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[4] "Training Benefits" are defined as "Additional Benefits", which excludes "Regular" and "Extended" Benefits. RCW 50.22.010(5) (Regular Benefits); RCW 50.22.010(6) (Extended Benefits); RCW 50.22.010(7) (Additional Benefits); RCW 50.22.150(5)(c) (Training Benefits).

Abdelkadir has not formally challenged any of the Commissioner's factual findings under RAP 10.3(a)(4) and 10.3(g). This Court should therefore consider the findings to be verities on appeal. *Tapper*, 122 Wn.2d at 407. Nevertheless, the Department acknowledges that Abdelkadir, in his brief, appears to challenge the basis of findings four through seven and findings 13 and 14. As explained below, substantial evidence in the record supports these findings.

A. The Commissioner Properly Concluded That Abdelkadir's Application For Training Benefits Was Untimely, Rendering Him Ineligible For Such Benefits

RCW 50.22.150 establishes eligibility criteria for Training Benefits for unemployment benefit claims with an effective date before April 5, 2009. RCW 50.22.150(1); *cf.* RCW 50.22.155 (applies to claims with an effective date on or after April 5, 2009). Under the Department's regulations, the effective date of an unemployment claim is the Sunday of the calendar week in which the application for benefits is filed. WAC 192-100-035. Here, Abdelkadir filed his application for unemployment benefits on February 19, 2009. AR at 59, 85, 144 (FF 1). Thus, the effective date of his claim was February 15, 2009, the Sunday of the calendar week in which Abdelkadir filed his application for benefits. WAC 192-100-035. This Court should therefore evaluate Abdelkadir's claim for Training Benefits under RCW 50.22.150. RCW 50.22.150(1).

The statute sets forth two timing requirements for eligibility. The first is that the individual must develop "an individual training program that is submitted to the commissioner for approval within sixty days after the individual is notified by the employment security department of the requirements of this section." RCW 50.22.150(2)(d). The second requirement is that the individual enter the approved training program "by ninety days after the date of notification, unless the employment security department determines that the training is not available during the ninety-day period, in which case the individual enters training as soon as it is available." RCW 50.22.150(2)(e). Therefore, the time to submit a training program for approval begins to run when the individual is notified of the Training Benefits requirements.

Here, the Commissioner found that the Department gave Abdelkadir notice of the Training Benefits requirements on February 20, 2009. AR at 145 (FF 5–7). Substantial evidence in the record supports this finding. AR at 58–59, 87, 136. The exhibits at Abdelkadir's administrative hearing included the documents that the Department's claims telecenter used to determine its initial decision regarding Training Benefits. AR at 135. Among these documents is a document entitled "Date Calculator," which indicates that a "claims booklet went out on 2/20/09." AR at 136. Additionally, the record before the ALJ included

the Department's determination notice dated October 14, 2011. AR at 85–91. This notice states:

> The monetary determination mailed to you at the address you provided when you established your claim for unemployment insurance benefits advised you to submit a Training Benefits Application to the department within 60 days from the date you file a new claim or reopen an existing claim after new work. It further advised you that if you do not apply within the 60 day time frame, YOU WILL BE DENIED TRAINING BENEFITS.
>
> When you opened your claim for benefits you were mailed an Unemployment Claims Kit to the address you provided. . . . The Unemployment Claims Kit advised you in the inside cover that, to be eligible to receive Training Benefits you must apply within 60 days from the date you applied for or reopened your UI Claim, and to see page 6 of the booklet for more information. Page 6 states You will be denied Training Benefits if you fail to apply within 60 days from the date you receive this booklet.

AR at 87. Abdelkadir's testimony at the hearing also indicates that he received a claims booklet:

> [ALJ]: So when you opened your claim for unemployment benefits, did they send you anything in the mail about how to file your claim?
>
> [Abdelkadir]: They send me how to – no. They send me how to file, but – how to file for benefits, yeah, they send to me.
>
> [ALJ]: Did they send you something in the mail telling you what your weekly benefit amount would be?
>
> [Abdelkadir]: Yes, but the (inaudible) but they deny me benefits (inaudible).

AR at 58–59. Abdelkadir testified that he has had the same mailing address since 2004. AR at 59. Though Abdelkadir's testimony as to whether he had received the claims booklet was inconsistent, *see* AR at 59, the ALJ properly resolved the issue in favor of the Department. AR at 145 (FF 5–7).

The Department's regulations further support the ALJ's finding that the Department gave Abdelkadir notice of the Training Benefits requirements on February 20, 2009. WAC 192-120-010(2) requires the Department to mail a copy of the most recent version of its information booklet for claimants to each person who files an application for benefits. WAC 192-270-035(1) provides, "Information about training benefits will be included in the claimant information booklet mailed to you at the time you file your application for unemployment benefits (see WAC 192-120-010)." Further, for purposes of calculating the Training Benefits timing requirements, "the claimant information booklet is considered your notification of the eligibility requirements for the training benefits program." WAC 192-270-035(1). Each person who receives the claimant information booklet is presumed to understand its content—unless he asks for help understanding it—and is responsible for reporting and filing claims in accordance with its instructions. WAC 192-120-010(3), (5), (7).

Given the above-cited evidence and regulations, this Court should uphold the Commissioner's factual findings that the Department sent Abdelkadir an Unemployment Claims Kit on February 20, 2009, and that the kit contained information about the Training Benefits application process. AR at 145 (FF 5–7). The evidence is sufficient to convince a fair-minded person of the truth of the findings. *See Pappas*, 135 Wn. App. at 856. The ALJ and Commissioner were presented with conflicting evidence. This Court should defer to the trier of fact and may not substitute its judgment for that of the fact-finder regarding the weight given to conflicting evidence. *Smith*, 155 Wn. App. at 35.

Abdelkadir's application for Training Benefits was therefore due on April 25, 2009. AR at 136, 145 (FF 7); RCW 50.22.150(2)(d); WAC 192-270-035(2) (time for submitting training plan includes five days for the booklet to reach claimant by mail). The Commissioner found that Abdelkadir did not apply for Training Benefits until October 11, 2011. AR at 146 (FF 12). Substantial evidence in the record supports this finding. AR at 87, 108. The final page of the application in the record includes a signature from a WorkSource office specialist, showing a "Date received" of "10/11/11." AR at 108. The determination notice also indicates that Abdelkadir submitted his Training Benefits application on

October 11, 2011. AR at 87. Accordingly, substantial evidence supports this finding of fact.

Additionally, these factual findings support the legal conclusion that Abdelkadir was not eligible for Training Benefits because his application was untimely. AR at 149. The Department notified him of the requirements of the Training Benefits program in its Unemployment Claims Kit, mailed to him on February 20, 2009. AR at 145 (FF 5–7). Abdelkadir did not submit an individual training program to the Commissioner for approval until October 11, 2011. AR at 146 (FF 12). His application was not within 60 days of the notice given on February 20, 2009, and was therefore untimely. *See* RCW 50.22.150(2)(d). As a result, Training Benefits are not available for Abdelkadir. RCW 50.22.150(2).

The statute does not give the Department discretion with respect to the 60-day time frame applicable to Abdelkadir. *See* RCW 50.22.150(2). By contrast, the Training Benefits statute applicable to claims with an effective date on or after April 5, 2009, and before July 1, 2012, states that the Department "may waive the deadlines established under this subsection for reasons deemed by the commissioner to be good cause." RCW 50.22.155(1)(b)(iii); *see also* former WAC 192-270-035(3) (2009) ("For claims with an effective date on or after April 5, 2009, these timeframes may be waived for good cause."). But the Legislature did not

provide for any such good cause exception prior to April 5, 2009. For claims with an effective date before April 5, 2009, Training Benefits are only available for individuals who submit individual training programs for approval within 60 days. RCW 50.22.150(2)(d). Abdelkadir did not do so. The Commissioner correctly concluded that Abdelkadir was ineligible for Training Benefits for this reason.

B. The Commissioner Properly Concluded That Abdelkadir Is Ineligible For Training Benefits Because He Is Not A Dislocated Worker

The Commissioner concluded that Abdelkadir does not meet the definition of "dislocated worker" within the meaning of the Employment Security Act, and was therefore ineligible for Training Benefits even if his application had been timely. AR at 149. The Commissioner was correct.

Training Benefits are available for an individual who is a "dislocated worker as defined in RCW 50.04.075." RCW 50.22.150(2)(a). With respect to claims with an effective date prior to July 1, 2012, a dislocated worker is any individual who:

> (a) Has been terminated or received a notice of termination from employment;
>
> (b) Is eligible for or has exhausted entitlement to unemployment compensation benefits; *and*
>
> (c) Is unlikely to return to employment in the individual's principal occupation or previous industry because of a

> *diminishing demand* for their skills in that occupation or industry.

RCW 50.04.075(1) (emphasis added). The Legislature has expressed its intent that compensated "[r]etraining should be available for those unemployed individuals whose skills are no longer in demand." RCW 50.22.130(1).

Here, the Commissioner concluded that Abdelkadir was not a dislocated worker because his occupation was in demand. AR at 149. This conclusion is based upon the Commissioner's findings that Abdelkadir's occupation was in demand for his labor market as a delivery driver. AR at 145–46 (FF 4, 13–14).

The record supports the Commissioner's findings. Abdelkadir identified his primary occupation to be as a delivery driver. AR at 54–56, 103, 145. The exhibits before the ALJ showed that truck drivers for light or delivery services are classified as an occupation in "Demand" in the Seattle King County and Snohomish County Workforce Development Areas. AR at 109–110. Again, while Abdelkadir points to potentially conflicting evidence in the record about the availability of driving jobs—specifically, his own job search logs—the ALJ resolved this conflict in favor of the Department. This Court may not substitute its judgment for

that of the ALJ regarding the weight given to conflicting evidence. *Smith*, 155 Wn. App. at 35.

Based on this information, the Commissioner correctly concluded that Abdelkadir does not qualify as a dislocated worker because he did not establish that he was "unlikely to return to employment in the [his] principal occupation or previous industry because of a *diminishing demand* for [his] skills in that occupation or industry." RCW 50.04.075(1)(c) (emphasis added). The Commissioner properly concluded Abdelkadir is not eligible to receive Training Benefits for this reason. RCW 50.22.150(2)(a).

C. The Proceedings Before The Administrative Law Judge Were Not "Default" Proceedings

Abdelkadir argues that he should "win by default" because his employer's representative did not appear for the administrative hearing. This argument is incorrect under Washington's employment security law.

RCW 50.22.150 defines the Training Benefits eligibility requirements that Abdelkadir had the burden to establish in this case. *See Townsend*, 54 Wn.2d at 534 (burden is upon claimant to establish his right to benefits). His employer's lack of participation in the hearing had no bearing on whether Abdelkadir met that burden here.

Furthermore, if a party fails to attend or participate in an administrative hearing, the Administrative Procedure Act authorizes the ALJ to serve upon all parties a default "or other dispositive order." RCW 34.05.440(2). The Employment Security Act requires the ALJ, "after affording the parties reasonable opportunity for fair hearing," to render a decision "affirming, modifying, or setting aside the determination." RCW 50.32.040. A provision in the Department's regulations makes clear that the Department itself is an interested party in any benefit appeal proceeding. WAC 192-04-040.

For these reasons, the ALJ in Abdelkadir's case appropriately issued a decision affirming the Department's determination even though the employer did not participate in the hearing. Because the ALJ is required to render a decision affirming, modifying, or setting aside the Department's determination, and the Department itself is an interested party in Abdelkadir's benefit appeal, Abdelkadir was not entitled to "win by default" simply because his employer did not appear for the administrative hearing. *See* RCW 50.32.040; WAC 192-04-040.

VI. CONCLUSION

Abdelkadir was not eligible for Training Benefits because he failed to timely submit a training program for the Commissioner's approval. Additionally, the record supports the Commissioner's finding that

Abdelkadir's occupation was in demand. Finally, Abdelkadir was not entitled to win by "default" even though his employer did not participate in the administrative hearing. For these reasons, the Department respectfully requests that the Court affirm the Commissioner's decision.

RESPECTFULLY SUBMITTED this 10th day of June, 2013.

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PROOF OF SERVICE

I, Roxanne Immel, certify that I caused a copy of **Respondent's Brief** to be served on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 10th day of June 2013, at Seattle, Washington.

Roxanne Immel, Legal Assistant