

75405-0

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No. 75405-0

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

JOSE CUESTA, Respondent

v.

STATE OF WASHINGTON, DEPARTMENT OF EMPLOYMENT
SECURITY, Appellant

RESPONDENT'S BRIEF

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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I. INTRODUCTION

The Commissioner's Review Office erred in affirming Administrative Law Judge (ALJ) Debra Pierce's Initial Order, concluding that Mr. Jose Cuesta should be disqualified from unemployment benefits due to misconduct pursuant to RCW 50.20.066(1). The Commissioner misinterpreted and misapplied the law when he concluded that Mr. Cuesta's actions constituted misconduct when Mr. Cuesta made two mistakes over the course of one day while working in an unfamiliar area with an unfamiliar numbering system. Alternatively, the Commissioner failed to remand Mr. Cuesta's case for a new hearing when there were substantial technical difficulties, rendering portions of the record inaudible, and Mr. Cuesta's best language is Spanish. For all of the foregoing reasons, the Court should reverse the Commissioner's Decision or remand this case for a new hearing before the Office of Administrative Hearings.

II. ASSIGNMENTS OF ERROR

A. ASSIGNMENTS OF ERROR

1. The Commissioner's Review Office erred in concluding that Mr. Cuesta was discharged for misconduct.
2. The Commissioner's Review Office erred in failing to remand Mr. Cuesta's case for a new hearing.

B. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Whether this Court should reverse the Commissioner's Decision when the Commissioner erred in concluding that Mr. Cuesta was discharged for misconduct when Mr. Cuesta made two mistakes over the course of one day while working in an unfamiliar area with an unfamiliar numbering system. (Assignment of Error 1).
2. Whether this Court should reverse and remand the Commissioner's Decision for a new hearing when there were substantial technical difficulties, rendering portions of the record inaudible, and Mr. Cuesta's best language is Spanish. (Assignment of Error 2).

III. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On June 30, 2015, Mr. Cuesta was terminated because he twice failed to inspect parts he approved and verified as inspected. AR 79 (Finding of Fact (FF) 14).¹ He applied for unemployment benefits, and the Employment Security Department (ESD) determined that he was eligible. AR 61. Boeing appealed the ESD's determination, AR 65, and a telephonic hearing was held before ALJ Debra Pierce on September 11, 2015. AR 77. While there is some evidence on the record suggesting that Mr. Scott Hallstrom, Mr. Cuesta's shop steward, intended to represent

¹ The Certified Appeal Board Record will be referenced here as "AR" and will use its designated pagination.

him, Mr. Cuesta represented himself before ALJ Debra Pierce with Mr. Hallstrom as a witness. AR 47. There were substantial technical difficulties, which were commented upon by Judge Pierce and a witness, AR 22, 24-25, frequently rendering portions of the record inaudible. *See e.g.* AR 36, 39-41, 44-46, 50-53, and 57. Additionally, the hearing was conducted in English without a translator, despite Mr. Cuesta's best language being Spanish. *See* AR 4-58. That same day, ALJ Debra Pierce reversed the ESD's initial determination and concluded that Mr. Cuesta was terminated for misconduct. AR 80. Specifically, ALJ Debra Pierce found that Mr. Cuesta's conduct was:

Not inadvertence or ordinary negligence, but carelessness or negligence of such degree as to show an intentional or substantial disregard of the employer's interest, and the interests and safety of the flying public.

AR 80 (Conclusions of Law (CL) 9).

Mr. Cuesta appealed ALJ Debra Pierce's Initial Order to the Commissioner's Review Office. AR 87-94. Review Judge John M. Sells affirmed the ALJ's Initial Order. CP 5. Subsequently, as a result of the Commissioner's Decision, Mr. Cuesta appealed to the Superior Court, CP 1-3, where the Honorable Bruce Heller reversed the Commissioner's Decision, CP 40, concluding that Mr. Cuesta's conduct was not misconduct. CP 39 (CL 3.4).

B. STATEMENT OF FACTS

Mr. Cuesta was employed by Boeing from May 25, 2007, until June 30, 2015, as an assembly and installation inspector. AR 77-78 (FF 3). He was a union member. AR 78 (FF 3). Mr. Cuesta's job duties consisted of inspecting and verifying fabricated parts before installation on an aircraft to ensure compliance with Boeing's engineering requirements and installation plans. AR 78 (FF 4). His job ensured the integrity and performance of airplane parts. *Id.* He was typically assigned to the Automated Systems Assembly Tool (ASAT) area. AR 73.

On March 25, 2015, Mr. Cuesta was working in a different assembly area to cover work for another inspector. AR 78 (FF 6). He was generally familiar with the work required, but he had considerably less experience in this area. AR 73. On this date, Mr. Cuesta twice failed to inspect an airplane part that he had signed off on as inspected and approved. AR 78 (FF 7 & 9). Mr. Cuesta's errors were a mistake, possibly due to his lack of familiarity with the manifest numbering in the assembly he worked at on that day. AR 40-41. Alternatively, Mr. Cuesta reasons that these errors may have been the result of inadvertently selecting the wrong parts as inspected within the computer system. AR 73.

Vance Church, Mr. Cuesta's manager, observed Mr. Cuesta's first error. AR 78 (FF 7). Mr. Church saw that the computer system for Mr.

Cuesta's work area showed that a part was ready for inspection. *Id.* Soon after, the screen showed that the part had been inspected and approved. *Id.* During this time, Mr. Church and the mechanics on site observed that the part had not been inspected, as Mr. Cuesta was not at the work site. *Id.* In addition, Mr. Cuesta had not performed a concurrent inspection on the part.² AR 78 (FF 8).

As a result of this first error, an investigation was conducted by Mr. Church. AR 78 (FF 9). His investigation revealed that Mr. Cuesta had also inspected and approved a part that had yet to be fabricated. *Id.* A mechanic who worked in the area was supposed to drill holes into the part, but had not yet completed the work. *Id.* Mr. Cuesta had accidentally marked the work completed and ready for inspection. *Id.* During the investigation, Mr. Cuesta explained that his errors were accidental, the result of his high workload due to being shorthanded and his lack of familiarity with that particular work area. AR 73.

Boeing's workplace rules "prohibit falsifying of acceptance or approval o[f] work, such as stamping work complete with the knowledge work wasn't completed or done, or stamping work without checking." AR

² A concurrent inspection is an inspection that takes place while the part is in the process of fabrication. AR 78.

78-79 (FF 11). As a result of these two errors, Mr. Cuesta was terminated on June 30, 2015. AR 79 (FF 14).

IV. ARGUMENT

- A. THE COURT SHOULD REVERSE THE COMMISSIONER'S DECISION BECAUSE THE COMMISSIONER ERRED IN CONCLUDING THAT MR. CUESTA WAS DISCHARGED FOR MISCONDUCT WHEN MR. CUESTA MADE TWO MISTAKES OVER THE COURSE OF ONE DAY WHILE WORKING IN AN UNFAMILIAR AREA WITH AN UNFAMILIAR NUMBERING SYSTEM.

The Court of Appeals reviews an ESD decision in accordance with the Administrative Procedure Act (APA). RCW 34.05.570; RCW 50.32.120. Although the Court of Appeals reviews the ESD Commissioner's Decision and not the decision of the administrative appeal tribunal, the court reviews the administrative agency record in determining whether the decision should be reversed, modified, or sustained. Kenna v. Emp't Sec. Dep't, 14 Wn. App. 898, 905, 545 P.2d 1248 (1976).

The APA and Washington law provide nine standards for judicial review of an agency order in an adjudicative proceeding. RCW 34.05.570(3); RCW 50.32.120. An agency's findings of fact are reviewed under the substantial evidence standard. RCW 34.05.570(3)(e). To overturn an agency's finding of fact, the claimant must establish that the

finding is not supported by substantial evidence received by the court under the APA. *Id.* Substantial evidence is “evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premises.” Heinmiller v. State Dep’t of Health, 127 Wn.2d 595, 609-610, 903 P.2d 433 (1995), *cert. denied*, 518 U.S. 1006 (1996) (citations omitted). The court views the evidence in the light most favorable to the party who “prevailed in the highest forum that exercised fact-finding authority.” Miotke v. Spokane Cnty, 181 Wn. App. 369, 376, 325 P.3d 434 (2014). Furthermore, an agency’s conclusions of law can be reversed or modified if “[t]he agency has erroneously interpreted or applied the law.” RCW 34.05.570(3)(d). An agency’s conclusions of law are reviewed de novo. Premera v. Kreidler, 133 Wn. App. 23, 31, 131 P.3d 930 (2006). Whether an employee has engaged in misconduct is a mixed question of law and fact. Tapper v. Emp’t Sec. Dep’t, 122 Wn.2d 397, 402-403, 858 P.2d 494 (1993); Dermond v. Emp’t Sec. Dep’t, 89 Wn. App. 128, 132, 947 P.2d 1271 (1997). To resolve a mixed question of law and fact, the court first establishes the relevant facts, determines the applicable law, and then applies the law to the facts. Tapper, 122 Wn.2d at 403.

Title 50, otherwise known as the Employment Security Act (ESA), RCW 50.01.005, was enacted to use the state’s unemployment reserves “for the benefits of persons unemployed through no fault of their own.”

RCW 50.01.010; Safeco Ins. Co. v. Meyering, 102 Wn.2d 385, 392, 687 P.2d 195 (1984); Matson v. Hutt, 85 Wn.2d 836, 539 P.2d 852 (1975). Blameworthiness or its absence, therefore, is central to a determination of an employee's entitlement to benefits: "The disqualification provisions of the act are based upon the fault principle and are predicated on the individual worker's action, *in a sense his or her blameworthiness*." Safeco Ins. Co., 102 Wn.2d at 392 (emphasis added). With the ESA's purpose in mind, this title must be "liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to a minimum." RCW 50.01.010; Delagrave v. Emp't Sec. Dep't of State of Wash., 127 Wn. App. 596, 608-609, 111 P.3d 879 (2005). Meaning that, courts should not "narrowly interpret provisions to the worker's disadvantage when the statutory language does not suggest that such a narrow interpretation was intended." Delagrave, 127 Wn. App. at 609. "[T]he paramount concern...is to ensure that the statute is interpreted consistently with the underlying policy of this statute." Safeco, 102 Wn.2d at 392.

Nonetheless, claimants will be ineligible or disqualified from receiving unemployment benefits in certain situations. Chapter 50.20 RCW. One such situation occurs when a claimant is disqualified from receiving benefits because he has been discharged from his employer for

misconduct. RCW 50.20.066. The ESA's definition of misconduct includes, but is not limited to, the following types of conduct:

(a) [w]illful or wanton disregard of the rights, title, and interests of the employer or a fellow employee; (b) [d]eliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee; (c) [c]arelessness or negligence that causes or would likely cause serious bodily harm to the employer or a fellow employee; or (d) [c]arelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest."

RCW 50.04.294(1)(a-d).

On the other hand, misconduct does not include:

(a) [i]nefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity; (b) [i]nadvertence or ordinary negligence in isolated instances; or (c) [g]ood faith errors in judgment or discretion.

RCW 50.04.294(3)(a-c).

Moreover, an employer's "[g]ood cause for discharge is not to be equated with misconduct disentitling the worker to benefits." Ciskie v. State, Emp't Sec. Dep't, 35 Wn. App. 72, 76, 664 P.2d 1318 (1983). The burden of proving misconduct rests on the party alleging misconduct, and the appropriate standard is preponderance of the evidence. In Re Okazaki, Emp't Sec. Comm'r Dec.2d 113 (1975).

1. Mr. Cuesta does not assign error to the Commissioner's findings of fact, but asserts that the Commissioner misinterpreted and misapplied the law.

Mr. Cuesta does not challenge any of the Commissioner's factual findings, adopted from the Office of Administrative Hearings' findings of fact and conclusions of law. CP 4-6. Nevertheless, Mr. Cuesta challenges the Commissioner's conclusion that his actions were

not inadvertence or ordinary negligence but carelessness or negligence of such degree as to show an intentional or substantial disregard of the employer's interest, and the interests and safety of the flying public.

AR 80 (CL 9).

Mr. Cuesta should not have been disqualified from benefits under RCW 50.20.066(1) or under any other provision of Title 50. *See id.*

2. The Commissioner erred in concluding that Mr. Cuesta's conduct constitutes misconduct under RCW 50.04.294(1)(d) when Mr. Cuesta made two mistakes over the course of one day while working in an unfamiliar area with an unfamiliar numbering system.

The Commissioner improperly concluded that Mr. Cuesta's conduct constituted misconduct under RCW 50.04.294(1)(d), "carelessness or negligence of such degree as to show an intentional or substantial disregard of the employer's interest." AR 80 (CL 9). An employer's "[g]ood cause for discharge is not to be equated with

misconduct disentitling the worker to benefits.” Ciskie, 35 Wn. App. at 76. This Court should characterize Mr. Cuesta’s actions as “[i]nadvertence or ordinary negligence in isolated instances” in accordance with RCW 50.04.294(3)(b). Alternatively, this Court should characterize Mr. Cuesta’s actions as “[i]nefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity” in accordance with RCW 50.04.294(3)(a).

Courts have previously found a claimant’s conduct inadvertent or ordinary negligence in an isolated instance in a variety of circumstances. *See e.g.*, Michaelson v. Emp’t Sec. Dep’t, 187 Wn. App. 293, 349 P.3d 896 (2015); Wilson v. Emp’t Sec. Dep’t of State, 87 Wn. App. 197, 940 P.2d 269 (1997). In Michaelson, the Court found that the claimant’s actions were ordinary negligence when the claimant failed to “exercise reasonable care.” 187 Wn. App. at 901. In this case, the claimant was discharged from his position as a delivery driver after his employer determined that he was accountable for three car accidents in the past year. *Id.* at 899. Furthermore, in Wilson, the Court found that the claimant’s actions were ordinary negligence or the result of poor judgment when the claimant deviated from his employer’s notification procedure for receiving diamonds. Wilson, 87 Wn. App. at 204. In this case, the claimant was discharged from his position as a jewelry manager when he lost two

diamonds (in total) in two separate instances over the course of seven months. *Id.* at 199.

Mr. Cuesta's actions constitute "[i]advertence or ordinary negligence in isolated instances" similar to both Michaelson and Wilson. In this case, Mr. Cuesta "failed to exercise reasonable care" like the Michaelson claimant when he accidentally approved two parts prior to inspecting them. Michaelson, 187 Wn. App. at 901; AR 78 (FF 7 & 9). Mr. Cuesta was working in an unfamiliar area because he was assigned to cover the work of another inspector outside of his usual work assignment. AR 78 (FF 6). Moreover, on March 25, 2015, when Mr. Cuesta made the errors, he was very busy, the plant was short-staffed, and he was distracted by the threatening notes in his computer area from other co-workers. AR 79 (FF 13). As a result, Mr. Cuesta made an error, which he recognizes, but did not intend to commit. *Id.* Unlike the Michaelson claimant, Mr. Cuesta made only two mistakes, not three mistakes. Michaelson, 187 Wn. App. at 899. Additionally, unlike the Michaelson claimant, Mr. Cuesta's mistakes only occurred over the course of one day, not a single year. *Id.*; AR 78 (FF 7 & 9). Similarly, Mr. Cuesta's actions were the result of "poor judgment" when he deviated from his employer's procedures like the Wilson claimant when he accidentally approved parts prior to inspecting them. Wilson, 87 Wn. App. at 207; AR 78 (FF 7 & 9). Mr. Cuesta was

unfamiliar with the manifest numbering in the assembly he worked at on March 25, 2015. AR 40-41. He speculates that his errors may have been the result of inadvertently selecting the work parts as inspected within the computer system. AR 73. What's more, unlike the Wilson claimant, Mr. Cuesta's mistakes occurred on the same day, not over the course of seven months. AR 78 (7 & 9); Wilson, 87 Wn. App. at 204.

Moreover, courts have previously found that a claimant's conduct should be characterized as "[i]nefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity" for certain types of conduct. *See e.g. Markam Group, Inc. P.S. v. State Dep't of Emp't Sec.*, 148 Wn. App. 555, 200 P.3d 748 (2009). In Markam, the Court found that the claimant's actions should be characterized as "[i]nefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity" when the claimant was unable to perform her job to her employer's standards because she lacked the skills. Markam, 148 Wn. App. at 564. Specifically, the claimant was discharged from her position as a legal secretary because she made repeated errors, such as failing to serve the opposing parties in a medical malpractice case, failing to retrieve and record the necessary information for interrogatories, and providing information to an adjuster without the proper authority. *Id.* at 563.

Mr. Cuesta's actions should be characterized as "[i]nefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity" similar to the Markam claimant. Here, like the Markam claimant, Mr. Cuesta lacked the skills to perform his job to his employer's standards when he accidentally approved two parts prior to inspecting them. Markam, 148 Wn. App. at 564; AR 78 (FF 7 & 9). On March 25, 2015, Mr. Cuesta was assigned to cover work for another inspector in an unfamiliar area. AR 78 (FF 6). Mr. Cuesta's errors were a mistake. AR 40-41. While Mr. Cuesta is unsure how the mistakes were made, he believes that these errors occurred either as a result of his unfamiliarity with the manifest numbering in the area of the plant he worked at on that day, AR 40-41, or because he inadvertently selected the wrong parts as inspected within the computer system. AR 73. Mr. Cuesta did not intend to make two errors on March 25, 2015; he lacked the necessary skills to perform the job to his employer's standards when he worked in an unfamiliar area with an unfamiliar numbering system.

Furthermore, Mr. Cuesta's actions are distinguishable from the claimants in both Johnson and Smith whose actions constituted "[c]arelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest." RCW 50.04.294(1)(d).

In Johnson, the Court found that the claimant's actions constituted misconduct after concluding that her actions were "grossly negligent" and presented "a clearly dangerous situation." Johnson v. Emp't Sec. Dep't, 64 Wn. App. 311, 317, 824 P.2d 505 (1992). The claimant was a Metro bus driver who unknowingly carried her gun in her handbag to work and then unknowingly lost it on her scheduled bus route. Johnson, 64 Wn. App. at 313. Her husband had put her gun in her handbag without her knowledge. *Id.* In this case, unlike the Johnson claimant, Mr. Cuesta's actions were not "grossly negligent" when he accidentally approved two parts prior to inspecting them. *Id.* at 317; AR 78 (FF 7 & 9). No evidence in the record suggests that Mr. Cuesta had the opportunity to prevent or correct his mistake unlike the Johnson claimant who examined her handbag at least once when she drove her scheduled bus route. Johnson, 64 Wn. App. at 313. On March 25, 2015, Mr. Cuesta was very busy, and the plant was short-staffed. AR 79 (FF 13). He was covering the work of another inspector in an unfamiliar area of the plant, AR 78 (FF 6), and working with the unfamiliar manifest numbering of the assembly of that area. AR 40-41. This was in addition to receiving threatening notes from his co-workers because he did not support the Seahawks, a football team. AR 79 (FF 13). Moreover, Mr. Cuesta's actions did not present "a clearly dangerous situation" when he failed to inspect the parts prior to approving

them. Johnson, 64 Wn. App. at 317. While inspections occur to assure that fabricated airplane parts meet compliance standards, the employer had other measures, in addition to Mr. Cuesta's role as an inspector, to assure the safety of the flying public. *See* AR 78 (7 & 10). The employer had managers on the workfloor, as evidenced by Mr. Vance Church, Mr. Cuesta's manager, who observed the worksite when Mr. Cuesta made an error in approving a part prior to inspecting it. AR 78 (FF 7). Additionally, the employer has the ability to disassemble partially assembled aircraft to validate compliance, as evidenced by the employer's use of this procedure following Mr. Cuesta's two mistakes. AR 78 (FF 10). Mr. Cuesta recognizes the gravity of his job and did not intentionally sign off on fabricated parts prior to inspecting them. AR 79 (12).

In Smith, the Court found that the claimant's actions constituted misconduct after concluding that "[it] was not required to find that Smith intended to harm his employer's reputation; it [was]...sufficient that Smith intentionally performed an act in willful disregard for its probable consequences" that may then damage his employer's reputation. Smith v. Emp't Sec. Dep't, 155 Wn. App. 24, 37, 226 P.3d 263 (2010). The claimant was an employee of Kitsap County who secretly recorded his conversations with co-workers and the public from 2001 to 2004. Smith, 155 Wn. App. at 29 (the court reasoned that the claimant's recording of

his co-workers and the public was a violation of RCW 50.04.294(1)(d), but did not analyze his other instance of potential misconduct under this prong). He also removed an unauthorized program from his work computer against his employer's instructions. *Id.* at 30-31. In this case, Mr. Cuesta's two mistakes occurred on the same day unlike the Smith claimant's mistake of recording his co-workers and the public, which occurred continuously from 2001 until 2004. *Id.* at 29; AR 78 (FF 7 & 9). Moreover, unlike the Smith claimant, Mr. Cuesta did not intentionally commit the acts that led to charges of misconduct. AR 78-79 (FF 9 & 13). Mr. Cuesta's two mistakes were accidents, as evidenced by ALJ's characterization that Mr. Cuesta "accidentally marked [a part] as completed," AR 78 (FF 9), and her finding that Mr. Cuesta "was unable to identify any specific reason for his failure to inspect, but attributes his failure to error." AR 79 (FF 13). Comparatively, the Smith claimant intentionally put a recording device in his pocket, left it running until he had something "interesting," and then downloaded his recordings onto his computer. Smith, 155 Wn. App. at 30.

Accordingly, Mr. Cuesta's conduct is distinguishable from the claimants in both Johnson and Smith whose actions were "[c]arelessness or negligence of such degree or recurrence to show an intentional or

substantial disregard of the employer's interest" and, consequently, misconduct. RCW 50.04.294(1)(d).

3. Mr. Cuesta's conduct does not constitute misconduct under RCW 50.04.294(2)(f) when Mr. Cuesta made two mistakes over the course of one day while working in an unfamiliar area with an unfamiliar numbering system.

The Appellant asserts that "the record supports the conclusion that Cuesta violated a reasonable company rule that he knew or should have known," constituting misconduct under RCW 50.04.294(2)(f). Appellant's Opening Brief at 20. However, such an interpretation of the ESA violates the legislature's purpose in enacting Title 50 and accompanying case law. As argued above, this Court should characterize Mr. Cuesta's actions as "[i]nadvertence or ordinary negligence in isolated instances" in accordance with RCW 50.04.294(3)(b). Alternatively, this Court should characterize Mr. Cuesta's actions as "[i]nefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity" in accordance with RCW 50.04.294(3)(a) as previously argued.

RCW 50.04.294(2) considers a non-exclusive list of acts as misconduct because "the[se] acts signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee." (Emphasis added). One of these acts is the "[v]iolation of a company rule if the rule is reasonable and if the claimant knew or should have known of

the existence of the rule.” RCW 50.04.294(2)(f). While Mr. Cuesta does not dispute that his employer’s rule was reasonable or that he should have known of the rule, Mr. Cuesta’s conduct should not constitute misconduct under this provision because he is not blameworthy. Title 50 was enacted “for the benefit of persons unemployed through no fault of their own.” RCW 50.01.010; Safeco, 102 Wn.2d at 392. Blameworthiness or its absence, therefore, is central to a determination of an employee’s entitlement to benefits. *Id.* With the ESA’s purpose in mind, Title 50 mandates a liberal construction of its provisions. RCW 50.01.010; Delagrave, 127 Wn. App. at 608-609. Indicating that courts should not “narrowly interpret provisions to the worker’s disadvantage when the statutory language does not suggest that such a narrow interpretation was intended.” *Id.* at 609. In this case, Mr. Cuesta’s actions were not blameworthy. Prior to the two mistakes that he made on March 25, 2015, Mr. Cuesta had never received a verbal or written warning. AR 41 & 67. He believed that he had taken precautionary measures to prevent mistakes. AR 45. Most importantly, he took accountability after discovering his mistakes. AR 73 (“Because of this investigation, I plan to only inspect one job and one step at a time to avoid future mistakes”). Consequently, because Mr. Cuesta’s actions lack blameworthiness, his two mistakes made in an unfamiliar area while working with an unfamiliar numbering

system should not be narrowly construed as misconduct under RCW 50.04.294(2)(f). As argued above, this Court should characterize Mr. Cuesta's actions as "[i]nadvertence or ordinary negligence in isolated instances" in accordance with RCW 50.04.294(3)(b). Alternatively, this Court should characterize Mr. Cuesta's actions as "[i]nefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity" in accordance with RCW 50.04.294(3)(a).

B. THE COURT SHOULD REVERSE AND REMAND THE COMMISSIONER'S DECISION FOR A NEW HEARING BECAUSE THERE WERE SUBSTANTIAL TECHNICAL DIFFICULTIES, RENDERING PORTIONS OF THE RECORD INAUDIBLE, AND MR. CUESTA'S PRIMARY LANGUAGE IS SPANISH.

Prior to adopting the Office of Administrative Hearings' findings of fact and conclusions of law, the Commissioner reviewed the entire record, including the audio recording of the hearing. CP 4. During Mr. Cuesta's hearing on September 11, 2015, there were substantial technical difficulties, which were commented on by ALJ Debra Pierce and a witness. AR 22, 24-25. Ms. Shelton, an employer witness, commented, "You know, I'm sorry, Your Honor, I'm getting a lot of feedback," at the beginning of the hearing. AR 22. In response, Judge Pierce noted that, "First it was a dog barking and then there was the feedback a little bit." *Id.*

These technical difficulties frequently rendered portions of the record inaudible. *See e.g.* AR 36, 39-41, 44-46, 50-53, and 57. The Audio Transcription indicates “Inaudible” in 15 instances throughout the hearing. *Id.* Of the 15 instances, 12 instances occurred when Mr. Cuesta was testifying. AR 39-41, 44-46, 49-51, and 57. Based on these technical difficulties, the Court should reverse and remand the Commissioner’s Decision for a new hearing to develop a clearer record.

Moreover, as demonstrated by Mr. Cuesta’s testimony, Mr. Cuesta’s primary language is Spanish. AR 4-58. Additionally, during the September 11, 2015, hearing, an interpreter was not provided to Mr. Cuesta. *Id.* It is arguable that part of the confusion regarding who was the acting representative during the hearing (either Mr. Cuesta or Mr. Hallstrom) was due to Mr. Cuesta’s communication difficulties. *See* AR 46-47. At one point in the hearing, Mr. Hallstrom attempted to object to the opposing representative’s question with the understanding that he was representing Mr. Cuesta. AR 47. However, at the beginning of the hearing, Mr. Cuesta had indicated that he was representing himself. AR 9. Based on Mr. Cuesta’s communication difficulties, this Court should reverse and remand this case for a new hearing where an interpreter can be provided for Mr. Cuesta.

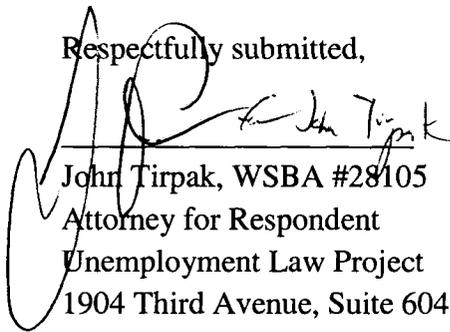
V. CONCLUSION

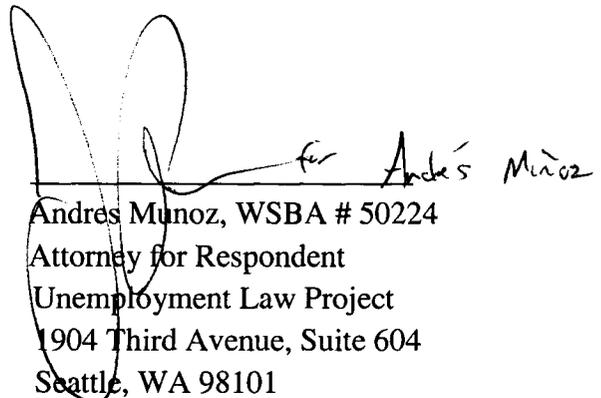
For the reasons stated above, Mr. Cuesta respectfully requests that this Court reverse the Commissioner's Decision and conclude that Mr. Cuesta was not discharged for misconduct as defined in RCW 50.04.294(1)(d) or RCW 50.04.294(2), allowing Mr. Cuesta to collect unemployment benefits. In the alternative, Mr. Cuesta requests that this Court reverse and remand this case for a new hearing to develop a clearer record, where an interpreter can be provided for Mr. Cuesta.

Mr. Cuesta further requests that reasonable attorney fees be awarded in an amount to be determined upon filing of a cost bill subsequent to this order. RCW 50.32.160 (mandating that attorney fees and costs shall be awarded upon reversal or modification of a Commissioner's order.)

Dated this 3 day of October 2016.

Respectfully submitted,


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