

No. 36939-7-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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DWAYNE LENCA,

Appellant,

v.

EMPLOYMENT SECURITY DEPARTMENT,  
STATE OF WASHINGTON,

Respondent.

**ORIGINAL**

FILED  
COURT OF APPEALS  
DIVISION II  
08 MAR 28 PM 1:36  
STATE OF WASHINGTON  
DEPT. OF LABOR & INDUSTRY  
BY [Signature]

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**REPLY BRIEF OF APPELLANT**

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## A. INTRODUCTION

Mr. Lenca was unemployed and had a job interview. But then the Office of Administrative Hearings (OAH) set a hearing at the same time as the job interview, requiring that he attend the hearing to defend against his former employer's opposition to his receiving unemployment benefits. CP Comm. Rec. 7.<sup>1</sup>

Mr. Lenca called the OAH to tell them of the conflict, as he stated at the beginning of the hearing while he was in the process of asking the ALJ how to proceed given the conflicting interview and hearing times. CP Comm. Rec. 7.<sup>2</sup> The ALJ told Mr. Lenca, who represented himself throughout these proceedings until this appeal, that the hearing would proceed. *Id.* An ALJ can grant continuances on the ALJ's own motion. WAC 192-04-120.

After Mr. Lenca left the hearing for his job interview, the ALJ took testimony from the employer on the central issue: the 25% wage reduction. CP Comm. Rec. 20. When the ALJ denied Mr.

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<sup>1</sup> Thurston County Superior Court has transmitted the Administrative Record, aka Certified Appeals Board Record, aka Commissioner's Record in this matter as a single, stand-alone document; that Record is separately paginated so references in this brief to that record will appear as "CP Comm. Rec.," meaning "Clerk's Papers Commissioner's Record." All other references to the Clerk's Papers will be in standard citation format, "CP," with reference to the page number as it appears on the Superior Court Clerk's Papers Index.

<sup>2</sup> The State's brief is therefore factually inaccurate when it states that Mr. Lenca "waited for the scheduled hearing and then explained he had a scheduling conflict" and that Mr. Lenca "did not communicate with OAH or Schwan about his unavailability until immediately before the hearing was convened . . ." State's Brief, pg. 18.

Lenca benefits, finding there had not been a 25% reduction in wages, Mr. Lenca appealed to the Commissioner and attached pay stubs demonstrating the 25% wage loss. CP Comm. Rec. 62-66.

The Commissioner<sup>3</sup> - despite statutory authority<sup>4</sup> that allows the Commissioner to order that additional evidence be taken - refused to consider the pay stubs, stating that “[a]bsent evidence that the record below was incomplete *for reasons within the control of the Office of Administrative Hearings, no additional evidence will be taken.*” CP Comm. Rec. 68.

#### **B. ISSUE ON REPLY**

Should the Commissioner’s Order be reversed for failing to follow the ESD’s own prior decisions that dictated that in fulfilling the ALJ’s “affirmative duty” to provide a fair hearing the ALJ should have postponed the hearing - on the ALJ’s own motion, which was “within the control” of the ALJ - when Mr. Lenca had alerted the OAH and ALJ of a time conflict and his subsequent absence at the hearing denied him the right to cross-examine or submit rebuttal evidence?

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<sup>3</sup> Though technically a “Review Judge” of the Commissioner’s Review Office reviews appeals from OAH decisions, for simplicity the review judge is referred to in this brief as “the Commissioner.”

<sup>4</sup> RCW 50.32.080.

## **C. STATEMENT OF THE CASE IN REPLY**

### **1. Substantive Facts: Job Separation.**

The State's Brief agrees that Mr. Lenca quit because he could not support himself after the pay structure changed at his job. State's Brief (hereafter, "St's Brf"), pg. 4. The State's brief also agrees that the employer told Mr. Lenca that the "minimum guaranteed payment" under which he had been hired could be extended. St's Brf, pg. 4.

In fact, Mr. Lenca testified that he had accepted the "step-down" structure, of less guaranteed money and increasing reliance on only a commission, with the understanding that "if it wasn't working out that we would go back and look at it and evaluate it at that time." CP Comm. Rec. 17. When in fact "it wasn't working out" financially for Mr. Lenca, he asked to exercise the option of extending the guaranteed income, but the employer told him "No." CP Comm. Rec. 18.

Mr. Lenca stated why he then quit:

**Mr. Lenca:** Because the income was drastically reduced when it went from guaranteed to a commission.

CP Comm. Rec. 15-16.

But the State's Brief disagrees: the State writes that at the OAH hearing the employer testified that when Mr. Lenca "quit he was still earning at least \$600 a week" and that the "ALJ determined that [the employer's] testimony was more credible." St's Brf, pg. 5.

The State, however, fails to note the two central facts here: one, the employer's supposedly "more credible" testimony was taken in Mr. Lenca's absence, and two, Mr. Lenca submitted rebuttal evidence to the contrary showing that he was earning less than \$600. These two omitted facts pertain to the two main reasons the Commissioner's Decision must be reversed here: first, the ALJ's "credibility" finding was made despite Mr. Lenca's absence – a situation "within the control" of the ALJ and one the ALJ could have remedied; and two, the Commissioner, who could have ordered that the evidence Mr. Lenca submitted be taken into the record, failed to do so.

The State's Statement of the Case thereafter is based entirely on the employer's testimony taken in Mr. Lenca's absence and the ALJ's findings based on that testimony *in absentia*. St's Brf, pgs. 5 – 6.

## 2. Procedural Facts

- a. **The ESD granted unemployment benefits to Mr. Lenca, finding he had quit with "good cause" when his wages were reduced by 25%.**

The ESD initially granted Mr. Lenca unemployment benefits because he had "good cause" to quit under the Employment Security Act when his "usual compensation" was reduced by 25%. CP Comm. Rec. 16-18, 36, 65.

- b. **Mr. Lenca, a *pro se* claimant, told both the OAH and the ALJ prior to his unemployment benefits hearing that he would have to leave the hearing for a job interview.**

The State's Brief argues that a "rational, fair-minded decision maker" would uphold the ALJ's findings of fact in this case. But a rational, fair-minded decision maker would see, contrary to the State's factual assertions and argument, that the OAH and the OAH's ALJ were well aware that Mr. Lenca, an unemployed worker who represented himself at the hearing, had a time conflict with the hearing – a job interview scheduled for the same time:

**Mr. Lenca:** ... I did want to make a statement, and *I don't know if the information was passed on when I spoke with someone earlier*, I explained that I was on my way to a job interview and so I called (unintelligible) a cell number –

**ALJ:** Okay.

**Mr. Lenca:** -- or my (unintelligible), so --

**ALJ:** I'm sorry, you just cut out. You said that you called in with a cell number, and then I think you were about to say my interview, but I didn't hear what you said after that.

**Mr. Lenca:** Uh, yes; my interview starts in about 20 minutes, so I didn't know if that was going to be an issue or --

CP Comm. Rec. 7 (emphasis added).

When Mr. Lenca finally had to leave for the job interview, he may well have thought he could submit additional evidence on appeal given the following exchange:

**Mr. Lenca:** Your Honor, I have to go, I have my interview coming up here. ***So what should I do from here?***

**ALJ:** Well, Mr. Lenca, the hearing will continue. You will miss out on an opportunity to ask Mr. Parlee [the employer's only witness] questions. Are you comfortable with that?

**Mr. Lenca:** ***Can I respond in writing or via e-mail?***

**ALJ:** Uh, no, because you won't have the opportunity to hear what Mr. Parlee is stating.

**Mr. Lenca:** Okay. **So I'd have to appeal if I disagree.**

**ALJ:** **Correct.**

**Mr. Lenca:** All right, that's fine, then. Thank you for your time.

CP Comm. Rec. 20 (emphasis added).

Without informing Mr. Lenca that the record would be closed on appeal, the ALJ then took testimony, in Mr. Lenca's absence, from the employer's witness, Mr. Parlee. Comm. Rec. 21.

The State's Brief argues that Mr. Lenca's assignment of error to the ALJ's Finding of Fact 9 - that Mr. Lenca was earning as much when he quit as when he started, \$600 per week – should be denied. The State argues this is true because “substantial evidence,” that is, evidence that is “sufficient to persuade a rational, fair-minded person of the truth of the finding” supports it. St's Brf, pg. 8 – 9.

This would be true only if the “rational, fair-minded person” were to ignore that Mr. Lenca was not at the hearing when this evidence was presented and that he submitted documentary evidence – his pay stubs – that showed he was earning less than \$600 per week, directly contrary to the employer's testimony. CP Comm. Rec. 66.

- c. The Commissioner denied Mr. Lenca's *pro se* appeal of the ALJ's denial of benefits and the Commissioner refused to consider or order the taking of rebuttal evidence showing Mr. Lenca's 25% loss of wages.**

When Mr. Lenca appealed the ALJ's denial of benefits and assessment of an overpayment, he submitted pay stubs to the Commissioner demonstrating a 25% loss of wages and that he had not been earning \$600 per week toward the end of his job, but instead \$384 one week and \$235 in his final week. CP Comm. Rec. 62-63, 65.

The Commissioner refused to consider the pay stubs or to order this additional evidence be taken, stating that “[a]bsent evidence that the record below was incomplete *for reasons within the control of the Office of Administrative Hearings, no additional evidence will be taken.*” CP Comm. Rec. 68.

The State's Brief argues that “[a]bsent specific authorization, the reviewing officer is not permitted to take additional evidence or to go outside the record established by the presiding officer.” St's Brf, 10.

This proposition is followed by no citation to authority – statutory, regulatory, or case authority – but it is *preceded* by a statement that the Commissioner must conduct a review in

accordance with RCW 34.05.464. *Id.* A reading of that statute will demonstrate that the statute does not state the proposition the State seems to claim it does, and in fact uses the word “record” only once and appears, despite confusing language, to give the “reviewing officer” all the same powers as the original “presiding officer”:

(4) The officer reviewing the initial order (including the agency head reviewing an initial order) is, for the purposes of this chapter, termed the reviewing officer. ***The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing,*** except to the extent that the issues subject to review are limited by a provision of law or by the reviewing officer upon notice to all the parties. In reviewing findings of fact by presiding officers, the reviewing officers shall give due regard to the presiding officer's opportunity to observe the witnesses.

(5) The reviewing officer shall personally ***consider the whole record or such portions of it*** as may be cited by the parties.

(6) The reviewing officer shall afford each party an opportunity to present written argument and may afford each party an opportunity to present oral argument.

RCW 34.05.464 (emphasis added).

But even if the rule urged by the State were true, Mr. Lenca's opening brief has provided citation to authority that allows the Commissioner, when presented with evidence that is clearly

pertinent to the central issues in an appeal, to order that additional evidence be taken:

Prior to rendering his decision, the commissioner **may order the taking of additional evidence by an appeal tribunal** to be made a part of the record in the case. **Upon the basis of evidence submitted to the appeal tribunal and such additional evidence as the commissioner may order to be taken**, the commissioner shall render his decision . . . Alternatively, the commissioner **may order further proceedings to be held before the appeal tribunal**, upon completion of which the appeal tribunal shall issue a decision . . .

RCW 50.32.080. The State's Brief cites this statute but fails to discuss it. St's Brf, pg. 11.

The State also cites WAC 192-04-170, which says nothing about the record being closed, and in fact contains the following provision:

(6) Any argument in support of the petition for review or in reply thereto not submitted in accordance with the provisions of this regulation shall not be considered in the disposition of the case **absent a showing that failure to comply with these provisions was beyond the reasonable control of the individual seeking relief.**

WAC 192-04-170. Here, Mr. Lenca was not allowed to fully participate at his hearing - "beyond his reasonable control" - and the pay stubs should have been considered or the Commissioner should have ordered that the evidence be taken.

Mr. Lenca, as an unemployment benefits recipient, was under an obligation to be “actively seeking work.” But the ALJ made him choose between fulfilling this “actively seeking work” obligation, under RCW 50.20.010, or staying at the hearing to protect his rights to a fair hearing, under RCW 50.32.040. The ALJ’s creation of this dilemma, and the Commissioner’s acquiescence in it, denied Mr. Lenca a fair hearing and the Commissioner’s Order should therefore be reversed.

#### **D. ARGUMENT**

**BY PENALIZING MR. LENCA FOR CHOOSING TO FULFILL HIS OBLIGATION TO BE “ACTIVELY SEEKING WORK” RATHER THAN STAYING AT THE HEARING TO CROSS-EXAMINE THE EMPLOYER AND SUBMIT REBUTTAL EVIDENCE, THE COMMISSIONER FAILED TO FOLLOW THE AGENCY’S OWN RULES ON FAIR HEARINGS.**

To demand that the unemployed Mr. Lenca miss or cancel his *pending job interview* for the sake of attending his *unemployment benefits hearing* is a demand that only Franz Kafka could fully appreciate.

It is axiomatic that unemployment compensation exists to help people through periods of unemployment, and that becoming fully employed remains the ultimate goal. In fact, this requirement –

that one be able to work, available for work, and actively seeking work – is a central statutory requirement of benefit eligibility:

(ii) With respect to claims that have an effective date on or after January 4, 2004, **to be available for work an individual must be ready, able, and willing, immediately to accept any suitable work which may be offered to him or her and must be actively seeking work** pursuant to customary trade practices and through other methods when so directed by the commissioner or the commissioner's agents. If a labor agreement or dispatch rules apply, customary trade practices must be in accordance with the applicable agreement or rules;

RCW 50.20.010 (emphasis added). Conceivably, had Mr. Lenca chosen to miss the job interview and stay at the hearing, the ESD could have denied him benefits for failing to fulfill his obligation to actively seek work. Instead, he left for the interview.

The central problem with the State's argument, and the Commissioner's Order that it defends, is that the argument is premised on the assumption that Mr. Lenca alone had an obligation to ask for a continuance or postponement. This is simply wrong and ignores the statutory, regulatory, and decisional law that places the burden of a fair hearing on the hearing officer:

\* \* \*

In any proceeding involving an appeal relating to benefit determinations or benefit claims, **the appeal tribunal, after affording the parties reasonable opportunity for fair hearing**, shall render its decision . . .

RCW 50.32.040.

And contrary to the State's argument and the Commissioner's Order that it defends, the hearing officer had the power when faced with a situation that obviously rendered a "fair hearing" impossible, to grant a continuance ***on the ALJ's own motion***:

Any party to a hearing may request a postponement of a hearing at any time prior to the actual convening of the hearing. The granting or denial of the request will be at the discretion of the presiding administrative law judge.

The ***presiding administrative law judge may in the exercise of sound discretion grant a continuance of a hearing at any time at the request of any interested party or on his or her own motion.***

WAC 192-04-120 (emphasis added).

The ESD's own past decisions have recognized this duty to provide claimants – and in Mr. Lenca's case, a *pro se* claimant – a continuance in furtherance of the fair hearing requirements: *In re Noble*, Comm. Dec. 2d No. 412 (1977).

The State's Brief – understandably – spends only two dismissive paragraphs on *Noble* and virtually ignores its facts that make *Noble* the most instructive decision for resolving the issue presented in this appeal.

In discussing *Noble*, the State's Brief in this case returns to the central error that the State and the Commissioner's Order it defends makes time and again: it contends that the claimant's attorney in *Noble* made a *request* while Mr. Lenca did not "request a continuance, but merely announced at the beginning of the hearing he had a job interview . . . ." St's Brf, pg. 18-19.

Trouble is, the State's claim both mischaracterizes *Noble* and mischaracterizes the facts in Mr. Lenca's case. The claimant's attorney in *Noble* did not request a continuance or a postponement either, and yet the Commissioner decided in that case that to have afforded the claimant a full and fair hearing, which the appeal tribunal had "an affirmative duty" to do, ***meant that the ALJ should have granted a continuance:***

[T]he conclusion is inescapable that the failure of the appeal examiner to furnish the text of the statute *or postpone the hearing was an effective denial of a reasonable opportunity for a fair hearing within the intendment of RCW 50.32.040.*

*Id.* (emphasis added).

Thus, Mr. Lenca, especially as a *pro se* claimant, was under no obligation to specifically request through the magic words of "postponement" or "continuance" what was obviously called for under the circumstances and what was part and parcel of the ALJ's

affirmative duty to provide: a continuance so that he could cross-examine witnesses against him and submit rebuttal evidence, that is, in short, a fair hearing.

This obligation was particularly acute in Mr. Lenca's case because he was a *pro se* claimant: In *Noble*, on the other hand, the claimant was represented by an attorney. Furthermore, even though the attorney in *Noble* did not ask for a postponement or a continuance, the Commissioner held this was the obvious solution to "affording the parties a reasonable opportunity for a fair hearing" under RCW 50.32.040:

The phrase "affording the parties a reasonable opportunity for a fair hearing" describes an arrangement or procedure whereby a party is informed of the law under which an alteration of his enjoyment of rights is to be considered; and in which the party is at liberty ***to present evidence in his behalf, and to cross-examine those who present evidence against him.*** Beyond that, however, *the phrase implies an affirmative duty on the part of the Appeal Tribunal to so conduct the hearing or proceeding that each party may make a knowledgeable and thorough presentation of its case, consistent with its ability to do so.*

*In re Noble*, Comm. Dec. 2d No. 412 (1977) (emphasis added), page 4 of opinion attached to Mr. Lenca's opening brief.

The analogy to Mr. Lenca's case is obvious: Mr. Lenca was denied the right to cross-examine the employer, who claimed Mr. Lenca was still earning as much as ever, and the right to submit

rebuttal evidence to this claim. And thus the ALJ's headlong pursuit of the hearing - and the Commissioner's acquiescence in that effort by affirming the ALJ's Order despite *Noble's* dictates - leads to the same conclusion that was found "inescapable" in *Noble*: "the failure of the appeal examiner to ... postpone the hearing was an effective denial of a reasonable opportunity for a fair hearing . . ." *Noble*, slip op. at 4.

Merely because Mr. Lenca, who represented himself in this proceeding, did not know to utter the words "continuance" or "postponement" does not mean that the statute, the regulations, and past commissioner's decisions mandating such a postponement could be ignored by either the ALJ or the Commissioner.

So, when the State argues that Mr. Lenca is incorrect in arguing he was denied a fair hearing because "the ALJ did not sua sponte grant him a continuance," the State ignores the statute that specifically provides the ALJ with the power to grant "on his or her own motion" - that is, sua sponte - a continuance.

Moreover, the State is both wrong and guilty of mischaracterizing Mr. Lenca's argument when the State writes that "Lenca presents no authority for the proposition that it is the ALJ's

obligation to grant a continuance, at the risk of denying a fair hearing, any time a pro se party appears for a hearing and announces he has a preexisting scheduling conflict.” St’s Brf, p. 19.

First, Mr. Lenca did indeed provide citation to and discussion of ample authority for the proposition that it is the ALJ’s obligation to grant a continuance: RCW 50.32.040, WAC 192-04-120, and *In re Noble*, as discussed here and in Mr. Lenca’s opening brief.

Second, Mr. Lenca at no time argued that a continuance must be granted “any time a pro se party appears for a hearing and announces he has a preexisting scheduling conflict.” But when a *pro se* party appears and states that he had contacted the hearing office prior to the hearing about the conflict and then restates that conflict to the hearing officer – an officer presiding over an unemployment benefits hearing for an unemployed worker who states without contradiction that he has a *job interview* to go to in 20 minutes – that is when a continuance should be granted. Doing so fulfills the fair hearing provisions of the ESA, the regulations pertaining to those provisions, and the Commissioner’s prior decisions that demand it. Not doing so violated Mr. Lenca’s right to a fair hearing.

Further, the State mischaracterizes the facts: “Lenca knew of the conflict and could have previously informed OAH ...” St’s Brf, pg. 19. Mr. Lenca began the hearing by stating that he HAD informed OAH. CP Comm. Rec. 7.

The State restates its central misconception, the same one made by the Commissioner whose order it defends, by stating that “Lenca’s judgment and his decision not to timely seek a continuance of the hearing because he had a prearranged job interview are factors that are outside of OAH’s control . . .” St’s Brf, pg. 20.

First, Mr. Lenca had called the OAH about the time conflict, second, he was under no obligation, as a *pro se* claimant, to use the magic word “continuance” when the facts were made apparent to the hearing officer that such a motion – on his or her own – was mandated under the circumstances.

Third, the regulations discussed throughout this brief show that the OAH, for whom the ALJ worked, did indeed have the power to grant a continuance and thus a fair hearing was not “outside of OAH’s control.”

Finally, the State misstates the Commissioner’s Order: “The Commissioner determined that the ALJ’s exercise of discretion here

was reasonable because Lenca chose to leave the hearing before the employer had offered his evidence.” St’s Brf, pg. 21. One will search the Commissioner’s Order in vain for the word “discretion.” The Commissioner said nothing of the sort. Nor does the Order even cite, much less discuss, the WAC that provides that the ALJ may, “*at the request of any interested party or on his or her own motion*” grant a continuance.

Therefore, the Commissioner’s Order in Mr. Lenca’s case should be reversed because one, it misinterpreted and misapplied the fair hearing provisions of the Act, RCW 50.32.040 & WAC 192-04-120, two, it misinterpreted and misapplied the taking of additional evidence provisions of the Act, RCW 50.32.080, and three, the Commissioner’s Order failed to follow the agency’s own past decision in *In re Noble*.

#### **E. CONCLUSION**

For the reasons stated above, Dwayne D. Lenca respectfully requests that this court reverse the Commissioner’s Order in this case because he was denied a full and fair hearing and was denied the opportunity to cross examine adverse witnesses and present evidence on his behalf in violation of the ESA and past agency decisions.

Petitioner also requests that reasonable attorney fees be awarded in an amount to be determined upon filing of a cost bill subsequent to this order and under authority of RCW 50.32.160 that mandates attorney fees and costs be awarded upon reversal or modification of a Commissioner's Order.

Dated this 27<sup>th</sup> Day of March 2008.

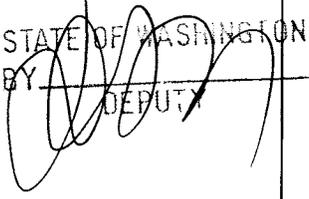
Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Marc Lampson', is written over a horizontal line.

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STATE OF WASHINGTON  
BY  DEPUTY

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON, DIVISION II

DWAYNE LENCA,

Petitioner,

and

STATE OF WASHINGTON, EMPLOYMENT  
SECURITY DEPARTMENT,  
Respondent.

Case No. 36939-7-II

**CERTIFICATE OF SERVICE BY MAIL**

I certify that on March 27, 2008, I filed by mail, postage prepaid, the original and one copy of Appellant's Reply Brief in this matter with this Court and mailed a copy of the same, postage prepaid, to the Respondent ESD's attorney, Matthew Tilghman-Havens, Asst. Attorney General Attorney General's Office, Licensing & Admin. Law Div., 800 Fifth Ave., Suite 2000, Seattle, WA 98104.

Dated this 27<sup>th</sup> Day of March 2008.



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