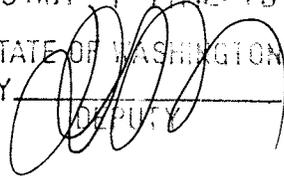


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STATE OF WASHINGTON
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No. 38009-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

LARRY HUGHES,

Appellant,

ORIGINAL

v.

EMPLOYMENT SECURITY DEPARTMENT,
STATE OF WASHINGTON,

Respondent.

BRIEF OF APPELLANT

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A. INTRODUCTION

Mr. Larry Hughes suffered massive brain damage in a car accident while on the job in 1995. Comm. Rec. 13-14 (Finding of Fact "FF" 1); 27¹. He was in critical care for a month, hospitalized for a year thereafter, then lived with his father, then his grandparents, and only returned to the workforce sporadically in 1998 to 2001. *Id.* His severe brain injuries resulted in long-term problems, including significant memory loss and as of 2007 he continued to be under the care of several doctors. Comm. Rec. 270 (FF 1).

When he lost his job in 2001 and was determined to be partially disabled, he began receiving unemployment benefits (UI benefits) and workers' compensation (L&I benefits). Comm. Rec. 249 (FF 5, 6). He received these benefits from September 2001 until November 2002. *Id.* In 2006, the ESD's new computer technology enabled it to discover that Mr. Hughes had impermissibly received L & I and UI benefits at the same time in 2001 and 2002 and that he had also been unable to work during

¹ The Commissioner's Record is the sole record for review in this matter but it is paginated separately from the rest of the Clerk's Papers; for simplicity, therefore, the Commissioner's Record will be referenced in this brief simply as "Comm. Rec." followed by the page as it is referenced in the original Commissioner's Record. The few references to the Clerk's Papers other than the Commissioner's Record will be designated with the usual designation, "CP."

that period. See, e.g., Comm. Rec. 70-77, 190-198. In June 2006, it therefore assessed an overpayment against Mr. Hughes for \$22,630.00. Comm. Rec. 74.

When Mr. Hughes appealed this assessment, an ALJ, and by adopted findings, the ESD's Commissioner, found that due to his brain injuries Mr. Hughes had "not ... knowingly withheld information" from the ESD and that there was "insufficient evidence to conclude there was knowing misrepresentation." Comm. Rec. 242, 251, (ALJ's Conclusion of Law 10), adopted by Commissioner at Comm. Rec. 264, 268.

The Commissioner, nevertheless, while adopting this finding of fact, went on to conclude that Mr. Hughes was not eligible for consideration of a partial or total waiver of the \$22,630 overpayment because there had been allegedly "wilful [sic] nondisclosure" due to Mr. Hughes' "failure to either question the Department about his conflicting reports or to inform it of the fact of the simultaneous claims and payments was wilful [sic]." Comm. Rec. 265, 269.

B. ASSIGNMENTS OF ERROR

Assignments of Error

1. The ESD's Commissioner erred in concluding that Mr. Hughes was "at fault" for the overpayment. CP Comm. Rec. 265, 269.²
2. The ESD's Commissioner erred in concluding that a redetermination three and a half years after the end of Mr. Hughes' claim for benefits was a proper redetermination under the statute. CP Comm. Rec. 265, 269.
3. The ESD's Commissioner erred in its finding of fact (that modified the ALJ's finding of fact number 7) that Mr. Hughes "personally deposited his benefit warrants in to his bank account." Commissioner's Substituted Finding of Fact 7, CP Comm. Rec. 264, 268.

Issues Pertaining to Assignments of Error

1. Was it error to find Mr. Hughes "at fault" and ineligible for consideration of a waiver of an overpayment when he had

² As noted above, the Commissioner's Record is the sole record for review in this matter and it is paginated separately from the rest of the Clerk's Papers; for simplicity, therefore, the Commissioner's Record will be referenced in this brief simply as "Comm. Rec." followed by the page as it is referenced in the original Commissioner's Record. The few references to the Clerk's Papers other than the Commissioner's Record will be designated with the usual designation, "CP."

severe brain injuries that made him “not able to comprehend to a substantial degree the writing” in the exhibits entered in his case and was “not able to understand, without assistance, correspondence pertaining to this case,” when “fault” under the ESA is to be determined by considering a claimant’s “mental abilities, emotional state, experience claiming unemployment benefits, and other elements of claimant’s personal situation which affect his knowledge and ability to comply with reporting all relevant information”? (Issue Pertaining to Assignments of Error 1 – 3).

2. Was it error for the Commissioner to conclude that the ESD made a valid “redetermination,” which necessitates a finding of “willful nondisclosure,” when the Commissioner also adopted a finding of fact that there was “not . . . clear, cogent and convincing evidence” that Mr. Hughes “knowingly withheld information” and that there was “insufficient evidence to conclude there was knowing misrepresentation” by Mr. Hughes? (Issue Pertaining to Assignments of Error 1 – 3).

3. Should attorney fees and costs be awarded to counsel for Mr. Hughes for work on this case at both the administrative and judicial review levels when the fees and costs are reasonable and when the Commissioner's Order should be reversed because it misapplied and misinterpreted the law?

C. STATEMENT OF THE CASE

1. **Substantive Facts: Job Separation & Award of Benefits**
 - a. **Mr. Hughes suffered massive brain injuries in an on-the-job car accident in 1995.**

Mr. Hughes, while on the job on March 10, 1995, had a disastrous car accident that caused him massive, traumatic, and permanent brain injuries. Comm. Rec. 13 - 14, 249 (FF 1)(the finding mistakenly states the accident occurred in 2005, but it is clear this is mistaken; see, e.g., Comm. Rec. 13, 27). He was in intensive care for a month, hospitalized for a year thereafter, then lived with his father, then with his grandparents. Comm. Rec. 14, 16, 22, 248 (FF 1). Because of the accident, he had to learn again to talk, walk, and "everything all over again." Comm. Rec. 13.

Though he returned sporadically to the workforce between 1998 and 2001, in September 2001 he was unemployed and was

determined to be "partially disabled" under the workers' compensation system. From September 2001 until November 2002 he received UI benefits and for that same period, and then up until the present, also received worker's compensation (L&I), having been injured while on the job. Comm. Rec. 16.

He did not remember when he applied for L&I benefits, but said he "vaguely" remembered filing for UI, though not when. Comm. Rec. 16.

During this period of time he was under the care of several doctors and in February 2002 one of his doctors noted that Mr. Hughes' problems arose from "frontal lobe injuries suffered from MVA 10 Mar 95." Comm. Rec. 94. In particular the doctor noted the course of treatment for Mr. Hughes:

Treatment has consisted of teaching the patient cognitive-behavioral strategies focusing on explaining to the patient about how his organic condition disrupts his life When it was discovered that he ***had some difficulty consolidating and incorporating what he was being taught due to short term memory deficits***, his significant other (S.O.) was invited to join him in session and both were taught how to apply the cognitive-behavioral strategies.

Comm. Rec. 95.

His prognosis was noted, in part, as follows: "While demonstrating a willingness to learn and an eagerness to again

earn a living, **the patient's ability** to learn therapeutic concepts and practice them in situation [sic] meaningful to him **is deficient.**"

Comm. Rec. 95.

- b. Because of his brain injuries, Mr. Hughes had little memory of the benefits process and no memory of receiving assistance from anyone with that process.**

At the appeals hearing regarding his \$22,630 overpayment, Mr. Hughes was asked many questions about his mental disabilities:

Q: Is there a problem with your recall?

Mr. Hughes: Very much so.

Q: What's the problem?

Mr. Hughes: I can't remember things.

* * *

Q: Okay. During anytime you were filing for benefits do you remember who helped you to fill out the information?

Mr. Hughes: No, I don't have a clue.

Q: Do you remember how you filled out the information?

Mr. Hughes: No.

Q: Do you remember how long you received benefits.

Mr. Hughes: I do not, ma'am.

Q: Can you remember how long you received L&I before you applied for benefits?

Mr. Hughes: I do not know.

Comm. Rec. 17. And later, the question of assistance arose again:

Q: Do you require assistance in reviewing documents or doing paperwork?

Mr. Hughes: Yes, ma'am.

* * *

Q: Who reviewed the documents with you?

Mr. Hughes: Margerie Bamford.

Q: Were you able to read and understand the documents on your own?

Mr. Hughes: No.

Comm. Rec. 20-21. About whether he knew the statute prohibiting receipt of both UI and L&I benefits, he replied as follows:

Q: Can you remember if anyone told you that you couldn't receive unemployment and your Labor & Industries payments, they were supposed to be separate, you couldn't receive them both at the same time?

Mr. Hughes: No.

Comm. Rec. 21-22.

Nor was he sure how he received his benefits money:

Q: Do you remember when you received your unemployment how you received your payments?

Mr. Hughes: By check, I think.

Q: Did you deposit your check into a bank?

Mr. Hughes: Yeah, I'm sure I did.

Comm. Rec. 22.

When he was specifically asked if anyone had helped him fill out L&I or ESD paperwork, he did not remember:

Q: No, I meant more with the different types of paperwork or documents you had to fill out. Did you have anyone to assist you when you lived at these different places?

Mr. Hughes: Not that I recall.

Comm. Rec. 23.

Under cross examination by the ESD regarding the period at issue, September 2001 to November 2002, Mr. Hughes stated he did not remember receiving assistance from anyone in filling out L&I or ESD paperwork:

ESD Q: Mr. Hughes, was somebody helping you file unemployment each week, do you remember?

Mr. Hughes: I ...

ESD Q: Was it a friend, or did you do it?

Mr. Hughes: I – see, I don't recall.

ESD Q: Was it by phone, do you recall whether you did it by phone or by Internet?

Mr. Hughes: I think it was by phone.

Comm. Rec. 42.

Under further cross examination regarding the weekly reporting, Mr. Hughes did not recall that process either:

ESD Q: Somebody was helping you call in each week, or were you calling in? I guess I didn't get that clear when you call unemployment.

Mr. Hughes: I believe somebody was helping me. I don't want to lie (unintelligible) tell you (unintelligible)
—

ESD Q: Were they verbally saying the questions out loud when they were calling, did they tell you what the questions were and ask you yes or no, do you remember that at all?

Mr. Hughes: I'm not sure. I don't know if they answered it for me, I don't remember, sir.

Comm. Rec. 47-48.

- c. Mr. Hughes did not remember Ms. Coster nor if she provided any assistance to him until her name was pointed out to him on some L&I paperwork.**

Marlyn Coster was not mentioned by Mr. Hughes until very near the end of the hearing when his representative asked him about a document that bore Marlyn Coster's name. Comm. Rec.

91 (Exhibit 5, page 5).The document is a handwritten note addressed to "L&I" and states the following:

"This is to confirm and give permission to have Marlyn Coster discuss and communicate via fax, phone, computer, etc. any issues regarding my claim. Claim # is P05471." The document was signed by Mr. Hughes. Comm. Rec. 91.

When asked thereafter who Marlyn Coster was, Mr. Hughes said she "was a friend of mine helping me." Comm. Rec. 50. In fact, he said she wrote the note though he signed it. Comm. Rec. 51.

On cross examination, the ESD inquired further about Ms. Coster:

ESD Q: Mr. Hughes, did Marlyn Coster and you reside in the same residence?

Mr. Hughes: Yes.

ESD Q: Because this letter that (unintelligible) referred to dated 9-26-01 where you said that you give permission for her to discuss things. Would Marlyn Coster possibly have been helping you claim each week unemployment? If she was in the same residence during that time?

Mr. Hughes: Very well may have been. I think so.

ESD Q: If you're living in the same residence you're sharing expenses; right?

Mr. Hughes: Right.

Comm. Rec. 54.

Mr. Hughes' understanding of the UI and L&I benefits process was shown on a "work verification" document sent to him by L & I, where Mr. Hughes noted that he had not worked since 8/7/01 to the present (4/10/02) and that he was "still unemployed on workers comp." Comm. Rec. 88.

2. Procedural Facts: Administrative Decisions

- a. Three and a half years after it awarded Mr. Hughes benefits, the ESD assessed a \$22,630.00 "overpayment" against him.**

The ESD originally granted Mr. Hughes unemployment benefits from September 5, 2001, to November 9, 2002.

Three and a half years later, in June 2006, when it discovered he had also been receiving worker's compensation during that time, it then assessed an overpayment of \$22,630.00.

Comm. Rec. 71, 74 (docket no. 6920)³. Additionally, when it

³ Apparently because Mr. Hughes was assessed an overpayment both because he was receiving L&I benefits and because he was not "able and available" to work, there were two different decisions and two different docket numbers for his overpayment assessment, docket no. 6920 concerned the L&I benefits; docket no. 6921 concerned the "able and available" determination; thus, there are two

determined through inquiry that due to his permanent and substantial brain injuries he was not able to work during the period of September 2, 2001, to November 9, 2002, the ESD also determined that he was overpaid because he had not been “able and available for work.” Comm. Rec. 192 (docket no. 6921). In his written response to this overpayment assessment he stated that he “[d]idn’t know UI and worker’s compensation were overlapping, just kept claiming both not knowing they overlapped,” and that he “[d]idn’t comprehend about the fact UI and L&I were overlapping.” Comm. Rec. 82, 203.

After the appeals hearing on the overpayment, the ALJ entered two decisions on the two different docket numbers, 6920 and 6921. The findings of fact are exactly the same in each. Comm. Rec. 239 – 240; 248-249. While the numbering of the conclusions of law differ between the two decisions, they too are essentially the same, finding Mr. Hughes liable for an overpayment of \$22,630 and not eligible for a waiver because he was “at fault” for the overpayment. Comm. Rec. 241-242; 249-251.

different ALJ decisions and two different Commissioner’s Decisions pertaining to these two docket numbers. This accounts for some oddities in the citation to the record here as well as an oddity in a portion of the Commissioner’s Decisions, as will be noted on occasion in the course of this brief.

- b. On Mr. Hughes' administrative appeal, an ALJ found that Mr. Hughes "was not able to comprehend to a substantial degree the writing in the exhibits . . . in this case."**

The ALJ made the following finding of fact which was adopted in its entirety by the Commissioner on further appeal:

2. Claimant is not able to comprehend to a substantial degree the writing in the exhibits admitted to the record in this case. Claimant has not been able to understand, without assistance, correspondence pertaining to this case.

Comm. Rec. 240 (FF 2); 249 (FF 2); adopted by Commissioner, Comm. Rec. 264, 268.

The ALJ also made the following finding of fact which was also entirely adopted by the Commissioner except for its final sentence:

7. Claimant has little if any recollection about the filing of his weekly claims for unemployment benefits in the relevant weeks. Claimant vaguely recalls this was done by telephone rather than by Internet. Claimant believes he was assisted in his weekly claim filing by Marlyn Coster. Claimant and Marlyn Coster lived together beginning in September 2001. *We find, for purposes of adjudicating overpayment issues here, that Marlyn Coster acted as claimant's agent with his approval and assisted him in the filing of his claim for unemployment benefits.*

Comm. Rec. 240 (FF 7); 249 (FF 7), adopted (except for final italicized sentence) by Commissioner at Comm. Rec. 264, 268.

- c. **On Mr. Hughes' appeal of the ALJ's decision, the Commissioner found that Mr. Hughes had not "knowingly withheld information" and had not made any "knowing misrepresentation" to the ESD.**

The Commissioner modified the ALJ's Finding of Fact No. 7 as follows:

With reference to finding No. 7, claimant testified that he "[believed] somebody was helping [him] file those unemployment claims; [he did] not know if they answered the questions for [him]," that "[Ms. Coster] was a friend of [his], she was helping [him]," that "[he remembered] getting unemployment checks," and that "[he was] sure [he] deposited them in a bank." We find, then, that Ms. Coster assisted claimant in filing his claims for unemployment benefits **and that he personally deposited his benefit warrants into his bank account.** We have not adopted the last sentence at finding No. 7 because the evidence does not show that claimant appointed Ms. Coster his agent for the purpose of filing claims for unemployment compensation benefits.

Comm. Rec. 264, 268 (emphasis added).

The Commissioner also adopted the ALJ's conclusion of law that there had been no knowing withholding of information or any misrepresentation:

It is not established by clear, cogent and convincing evidence that claimant *knowingly withheld* information with the intent to obtain unemployment benefits improperly. Considering the totality of claimant's testimony, and claimant's mental status at the time in question, **there is insufficient evidence to conclude there was knowing misrepresentation** by the higher standard of proof of clear,

cogent and convincing evidence. Therefore, the terms of RCW 50.20.070 should not be applied.

Comm. Rec. 242 (Conclusion of Law 9); 251 (CL 10); adopted by Commissioner, Comm. Rec. 264, 268 (emphasis added).

Therefore, while finding no fraud under RCW 50.20.070 and finding that Mr. Hughes had not “knowingly withheld information,” the ALJ nevertheless found that Mr. Hughes was “at fault” for the overpayment and was thus not eligible for a consideration of a waiver of the overpayment in whole or in part. Comm. Rec. 242 (CL 13); 251 (CL 14). This is the ALJ’s Conclusion of Law on that issue:

13. In this case, there is the argument to be made for claimant that given his mental disabilities and his personal situation, he reasonably could not have known payments were paid improperly. For purposes of the analysis here, however, we find claimant was assisted in the weekly claim filing process by his friend Marlyn Coster, with whom he was living at the time. Ms. Coster presumably was acting, in essence, as the agent of the claimant. Claimant is responsible for his agent’s acts, authorized by him-the principal. The agent presumably had authority (claimant’s approval) to transact business binding on the principal. We further presume the agent reasonably should have known that claimant was receiving L&I benefits. Therefore, the claimant’s legal obligation, about which there is virtually no doubt, should be claimant’s responsibility and should not be forgiven as a matter of equity. We conclude claimant was at fault and therefore not eligible for consideration of waiver.

Comm. Rec. 242 (Conclusion of Law 13); 251 (Conclusion of Law 14).

- d. **The Commissioner, however, went on to find that a redetermination was proper because there had been “wilful [sic] nondisclosure” in that Mr. Hughes had not questioned the ESD about his conflicting reports or informed it of his simultaneous claims.**

The Commissioner did not adopt the ALJ's conclusion of law 13, omitting the conclusion that Ms. Coster was Mr. Hughes' agent, but finding, nevertheless willful nondisclosure. Because the overpayment assessment of \$22,630 came nearly four years after Mr. Hughes had received his last unemployment check, the commissioner made it a point to state that the overpayment assessment had been, under the statute, a “redetermination” that would be proper “only if the requirements of either RCW 50.20.160(3) or (4) are met,” and the commissioner concluded as follows:

Instead of conclusion No. 13 we note that RCW 50.20.160(4)(c) permits the Department to make a redetermination in the event of **wilful [sic] nondisclosure**. Here, claimant filed weekly claims and received weekly unemployment benefit checks for fourteen months while simultaneously receiving workers' compensation benefits every two weeks. Either he alone or he and Ms. Coster together informed the Department each week that he was able to work while, at the same time, he was receiving

biweekly benefits for being unable to work. He personally deposited the Department's payments into his bank account. On this evidence, we are satisfied that ***his failure to either question the Department about his conflicting reports or to inform it of the fact of the simultaneous claims and payments was wilful*** [sic]. In that circumstance, the Department's "determination" notice issued June 29, 2006 is a proper redetermination.

On the basis of the foregoing, we conclude that claimant is not entirely free from fault in the matter of his overpayment and that, accordingly, he is liable for refund of the overpayment.

Comm. Rec. 265, 269.

Therefore, because the Commissioner found Mr. Hughes "at fault," he was not eligible for consideration of a partial or total waiver of his overpayment liability.

At the time of the administrative hearing in this case, in 2007, he remained injured, under medical care from both a physician and psychologist, and on at least three medications.

Comm. Rec. 14, 19, 25. As of April 26, 2007, he had worked only sporadically since the accident. Comm. Rec. 15, 18. At the time of the hearing his sole income was from L&I, a check for \$948 per month. Comm. Rec. 56.

The Thurston County Superior Court, on further appeal, affirmed the Commissioner. CP 66-69. This appeal timely followed. CP 70-75.

D. ARGUMENT

1. **MR. HUGHES WAS NOT “AT FAULT” FOR THE OVERPAYMENT BECAUSE BOTH THE ALJ AND THE COMMISSIONER CONCLUDED THAT HE HAD NOT “KNOWINGLY WITHHELD INFORMATION” AND THAT THERE WAS “INSUFFICIENT EVIDENCE TO CONCLUDE THERE WAS KNOWING MISREPRESENTATION.”**

It was an error of law for the Commissioner to find Mr. Hughes “at fault” and ineligible for consideration of a waiver of an overpayment when Mr. Hughes had severe and continuing brain injuries that both the ALJ and the Commissioner found caused him to be “not able to comprehend to a substantial degree the writing” in the exhibits entered in his case and “not able to understand, without assistance, correspondence pertaining to this case.” Comm. Rec. 240 (Finding of Fact 2).

This was an error of law because “fault” under the ESA is to be determined by considering a claimant’s *“mental abilities, emotional state, experience claiming unemployment benefits, and other elements of claimant’s personal situation which affect his knowledge and ability to comply with reporting all relevant information.”* By the ALJ’s and Commissioner’s own findings, Mr. Hughes’ mental abilities and other elements of his situation made him unable to understand the documents in his case and thus, by

extension had to have “affect[ed] his knowledge and ability to comply with reporting all relevant information” to the ESD.

The ESD can recover “overpayments” and a claimant can seek a waiver of some or all of that overpayment:

- (1) **An individual who is paid any amount as benefits under this title to which he or she is not entitled shall, unless otherwise relieved pursuant to this section, be liable for repayment of the amount overpaid.** The department shall issue an overpayment assessment setting forth the reasons for and the amount of the overpayment. . . .
- (2) **The commissioner may waive an overpayment if the commissioner finds that the overpayment was not the result of fraud, misrepresentation, willful nondisclosure, or fault attributable to the individual** and that the recovery thereof would be against equity and good conscience: PROVIDED, HOWEVER, That the overpayment so waived shall be charged against the individual's applicable entitlement for the eligibility period containing the weeks to which the overpayment was attributed as though such benefits had been properly paid.

RCW 50.20.190.

The ESD determines fault or no fault under a lengthy regulation, the pertinent portion of which follows:

(1) When an overpayment occurs, the department will make a finding of fault or nonfault based on information provided by you and your employer and from information contained in the department's records. After reviewing all such information, **you will be considered to be at fault when the overpayment is:**

(a) **The result of fraud, misrepresentation, or willful nondisclosure;**

* * *

(d) Based on the presence of all of the following three elements:

(i) You were paid benefits in an amount greater than you were entitled to receive and you accepted and retained those benefits; and

(ii) **The payment of these benefits was based on incorrect information or a failure to furnish information which you should have provided** as outlined in the information for claimants booklet, claimant directives and other reasonable written communications issued by the department; or information which you caused another person to fail to disclose; and

(iii) **You had notice** that the information should have been reported.

* * *

(3) In deciding whether or not you are at fault, the department will also consider education, mental abilities, emotional state, your experience with claiming unemployment benefits, and other elements of your personal situation which affect your knowledge and ability to comply with reporting all relevant information. This includes information contained in the information for claimants booklet, claimant directives and other reasonable written communications issued by the department.

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In the instant case, the ALJ made specific findings of fact about Mr. Hughes' mental abilities:

1. Claimant Larry Hughes was seriously injured in an auto accident in 2005 [sic]. . . . Brain injury has caused long-term problems for claimant's memory and mood.

2. Claimant is not able to comprehend to a substantial degree the writing in the exhibits admitted to the record in this case. Claimant has not been able to understand, without assistance, correspondence pertaining to this case.

Comm. Rec. 239-40 (FF 1 & 2); 248-49 (FF 1 & 2); adopted by Commissioner, Comm. Rec. 264, 268.

The ALJ also reached a Conclusion of Law pertaining to the mental abilities of Mr. Hughes:

3. Considering claimant's significant memory deficit and his testimony of having no recollection with regard to the issuance in June 2006 of the determinations in question, and evidence at to [sic] **claimant's inability to read and fully understand the determination**, we find good cause to allow the late appeal . . .

Comm. Rec. 241 (Conclusion of Law 3); 250 (Conclusion of Law 3); adopted by Commissioner, Comm. Rec. 264, 268.

Moreover, the ALJ reached an additional Conclusion of Law regarding Mr. Hughes' mental abilities and his knowledge about benefits:

13. In this case, there is the argument to be made for claimant that given his mental disabilities and his personal situation, **he reasonably could not have known payments were paid improperly.** . . .

Comm. Rec. 242 (Conclusion of Law 13); 251 (Conclusion of Law 14).

The ALJ goes on in this Conclusion of Law, however, to find "fault" based on a purported agent-principal relationship between Ms. Coster and Mr. Hughes. *Id.* The Commissioner rejected this Conclusion of Law and, apparently also, the agency law upon which it was argued – but substituted a conclusion that is neither supported by the record or sound reasoning.

This was the Commissioner's substituted conclusion:

Instead of conclusion No. 13 we note that RCW 50.20.160(4)(c) permits the Department to make a redetermination in the event of **wilful [sic] nondisclosure**. Here, claimant filed weekly claims and received weekly unemployment benefit checks for fourteen months while simultaneously receiving workers' compensation benefits every two weeks. Either he alone or he and Ms. Coster together informed the Department each week that he was able to work while, at the same time, he was receiving biweekly benefits for being unable to work. He personally deposited the Department's payments into his bank account. On this evidence, we are satisfied that **his failure to either question the Department about his conflicting reports or to inform it of the fact of the simultaneous claims and payments was wilful [sic]**. In that circumstance, the Department's "determination" notice issued June 29, 2006 is a proper redetermination.

On the basis of the foregoing, we conclude that claimant is not entirely free from fault in the matter of his overpayment and that, accordingly, he is liable for refund of the overpayment.

Comm. Rec. 265, 269.

The legal error is finding “willful nondisclosure,” legally necessary for purposes of the redetermination and the “at fault” finding, but adopting the findings and conclusions above that concluded Mr. Hughes did not have the mental ability to “knowingly” withhold information or to make a “knowing misrepresentation,” especially given his inability to read and fully understand any of the documents in his case – as was found and concluded by both the ALJ and Commissioner.

Additionally, the Commissioner’s conclusion that Mr. Hughes’ “failure to either question the Department about his conflicting reports or to inform it of the fact of the simultaneous claims and payments was wilful [sic],” makes neither legal nor logical sense in relation to the findings about his inability to read or remember.

Furthermore, the factual findings hidden within the Commissioner’s substituted conclusion of law, that “[e]ither he [Mr. Hughes] alone or he and Ms. Coster together informed the Department each week that he was able to work” and that Mr. Hughes “personally deposited the Department’s payments into his bank account” are not supported by the testimony, which proved he was not even sure how he received his benefits money:

Q: Do you remember when you received your unemployment how you received your payments?

Mr. Hughes: *By check, I think.*

Q: Did you deposit your check into a bank?

Mr. Hughes: *Yeah, I'm sure I did.*

Comm. Rec. 22. These answers do not indicate that Mr. Hughes “personally deposited” the payments into his bank account as the Commissioner found.⁴ Nor did the testimony prove that Ms. Coster helped him with his ESD claim:

Under further cross examination regarding the weekly reporting, Mr. Hughes did not recall that process either:

ESD Q: Somebody was helping you call in each week, or were you calling in? I guess I didn't get that clear when you call unemployment.

Mr. Hughes: *I believe somebody was helping me.* I don't want to lie (unintelligible) tell you (unintelligible)
—

ESD Q: Were they verbally saying the questions out loud when they were calling, did they tell you what the questions were and ask you yes or no, do you remember that at all?

Mr. Hughes: *I'm not sure. I don't know if they answered it for me, I don't remember, sir.*

⁴ This factual error, that Mr. Hughes “personally deposited his benefit warrants in to his bank account,” is repeated in the Commissioner's Substituted Finding of Fact 7 (Comm. Rec. 264, 268) and error is specifically assigned to that finding as well.

Comm. Rec. 47-48. And he showed further uncertainty:

ESD Q: Because this letter that (unintelligible) referred to dated 9-26-01 where you said that you give permission for her to discuss things. ***Would Marlyn Coster possibly have been helping you claim each week unemployment?*** If she was in the same residence during that time?

Mr. Hughes: Very well ***may have been. I think so.***

Comm. Rec. 54.

Aside from the uncertain and equivocal answers here, the letter to which the ESD is referring that gave Ms. Coster permission to discuss his “case” was a note attached to L&I documents and it was addressed to L&I, not the ESD. Comm. Rec. 91, see exhibit 5 generally, Comm. Rec. 87 – 91.

Thus, whether an error of law or a conclusion not based on substantial evidence, the Commissioner’s determination that Mr. Hughes was “at fault” should be reversed because it misinterprets and misapplies the statutes and regulations regarding “fault,” and rests on extrapolations from equivocal testimony that is given in the context of a hearing that demonstrated Mr. Hughes’ inability to read or comprehend the documents in his case.

Issues of law are the responsibility of the judicial branch.

Tapper v. Employment Security, 66 Wn. App. 448, 451, 832 P.2d

449 (1992), *rev'd on other grounds*, 122 Wn.2d 397, 858 P.2d 494 (1993). Therefore, when reviewing legal questions the court is allowed to substitute its judgment for that of the administrative agency. *Franklin County Sheriff's Office v. Sellers*, 97 Wn.2d 317,324-325, 646 P.2d 113 (1982) *cert. denied*, 459 U.S. 1106 (1983). Pure questions of law are reviewed *de novo*. *Id.* In resolving a mixed question of law and fact, the court first establishes the relevant facts, determines the applicable law, and applies it to the facts. *Tapper v. ESD*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993). While deference is granted to the agency's factual findings, the agency's application of the law is reviewed *de novo*. *Dermond v. Employment Security Department*, 89 Wn. App. 128, 132, 947 P.2d 1271 (1997).

An agency's order can be reversed when it does not rest on substantial evidence and evidence is only "substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter. . . ." RCW 34.05.570(3)(e); *Olmstead v. Department of Health*, 61 Wn. App. 888, 812 P.2d 527 (1991).

"Substantial evidence" exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise. *Bering v. Shaw*, 106 Wn.2d 212, 721 P.2d 918 (1986), *cert. denied*, 479 U.S. 1050 (1987).

An appellate court will reverse factual findings of the trier of fact if those findings are not supported by substantial evidence. *Mood v. Banchemo*, 67 Wn.2d 835, 410 P.2d 776 (1966).

To find that Mr. Hughes was "at fault" at the same time finding that he did not have the mental capacity to read or remember much of anything that had occurred since his on-the-job car accident was a logical error, a factual error, and a legal error that should be reversed.

2. THE "REDETERMINATION" IN 2006 OF MR. HUGHES' APPLICATION FOR BENEFITS AFTER NEARLY FOUR YEARS HAD ELAPSED SINCE HE HAD RECEIVED HIS LAST UNEMPLOYMENT CHECK IN 2002 WAS NOT A VALID REDETERMINATION BECAUSE THERE WAS NO PROOF OF WILLFUL NONDISCLOSURE.

Under the Employment Security Act, the ESD would have been prohibited from assessing an overpayment against Mr. Hughes nearly four years after the fact without a finding of fraud, misrepresentation, or willful nondisclosure. Therefore, the ESD's Commissioner made such a "willful nondisclosure" finding – and

thereby also precluded any possibility of a waiver - despite having adopted another finding of fact that Mr. Hughes had not "knowingly withheld information" and had made no "knowing misrepresentation." Conclusions that are so completely contradictory betray an error of law that should be reversed.

The ESD is barred from recovering alleged overpayments absent a finding of fraud or ***willful nondisclosure*** or misrepresentation:

(1) A determination of amount of benefits potentially payable issued pursuant to the provisions of RCW 50.20.120 and 50.20.140 shall not serve as a basis for appeal but shall be subject to request by the claimant for reconsideration and/or for redetermination by the commissioner at any time within one year from the date of delivery or mailing of such determination, or any redetermination thereof: PROVIDED, That ***in the absence of fraud or misrepresentation on the part of the claimant, any benefits paid prior to the date of any redetermination which reduces the amount of benefits payable shall not be subject to recovery*** under the provisions of RCW 50.20.190. A denial of a request to reconsider or a redetermination shall be furnished the claimant in writing and provide the basis for appeal under the provisions of RCW 50.32.020.

* * *

(4) ***A redetermination may be made at any time:*** (a) To conform to a final court decision applicable to either an initial determination or a determination of denial or allowance of benefits; (b) in the event of a back pay award or settlement affecting the allowance of benefits; or (c) ***in the case of fraud, misrepresentation, or willful nondisclosure.*** Written notice of any such redetermination shall be promptly

given by mail or delivered to such interested parties as were notified of the initial determination or determination of denial or allowance of benefits and any new interested party or parties who, pursuant to such regulation as the commissioner may prescribe, would be an interested party.

RCW 50.32.060 (emphasis added).

Here the ALJ held, and the Commissioner adopted the finding, that Mr. Hughes had not “knowingly withheld information”:

It is not established by clear, cogent and convincing evidence that claimant *knowingly withheld information with the intent to obtain unemployment benefits improperly.* Considering the totality of claimant's testimony, and claimant's mental status at the time in question, there is insufficient evidence to conclude there was knowing misrepresentation by the higher standard of proof of clear, cogent and convincing evidence. Therefore, the terms of RCW 50.20.070 should not be applied.

Comm. Rec. 242 (Conclusion of Law 9); 251 (CL 10); adopted by Commissioner, Comm. Rec. 264, 268 (emphasis added).

But then the Commissioner made a completely contradictory finding and conclusion:

Instead of conclusion No. 13 we note that RCW 50.20.160(4)(c) permits the Department to make a redetermination in the event of ***wilful [sic] nondisclosure.*** Here, claimant filed weekly claims and received weekly unemployment benefit checks for fourteen months while simultaneously receiving workers' compensation benefits every two weeks. Either he alone or he and Ms. Coster together informed the Department each week that he was able to work while, at the same time, he was receiving biweekly benefits for being unable to work. He personally deposited the Department's payments into his bank account.

On this evidence, we are satisfied that ***his failure to either question the Department about his conflicting reports or to inform it of the fact of the simultaneous claims and payments was wilful*** [sic]. In that circumstance, the Department's "determination" notice issued June 29, 2006 is a proper redetermination.

On the basis of the foregoing, we conclude that claimant is not entirely free from fault in the matter of his overpayment and that, accordingly, he is liable for refund of the overpayment.

Comm. Rec. 265, 269.

Here the Commissioner adopted the finding of fact that held that there was "not . . . clear, cogent and convincing evidence that claimant *knowingly withheld* information" and that there was "insufficient evidence to conclude there was knowing misrepresentation." The Commissioner cannot, under pain of direct contradiction, find Mr. Hughes had **not "knowingly withheld information"** while at the same time concluding that there **was "willful nondisclosure"** sufficient to overcome the statutory prohibition against recovering an overpayment that is assessed nearly four years after the final check had been received.

The conclusion that there was "willful nondisclosure" in light of the other conclusion that there was none is therefore an error of law and not based on substantial evidence, two grounds that merit reversal under the Administrative Procedure Act as noted in the

prior section. Because the “redetermination” was premised on an error of law, the redetermination was invalid because absent a legitimate finding of willful nondisclosure the ESD could not properly “redetermine” benefits nearly four years after the final check had been issued.

3. ATTORNEY FEES AND COSTS IN THIS CASE ARE MANDATED BY STATUTE WHEN THE COURT REVERSES A COMMISSIONER’S ORDER.

A claimant who succeeds in convincing a court to reverse a Commissioner’s Order is allowed reasonable attorney fees and costs as mandated by statute:

It shall be unlawful for any attorney engaged in any appeal to the courts on behalf of an individual involving the individual's application for initial determination, or claim for waiting period credit, or claim for benefits to charge or receive any fee therein in excess of a reasonable fee to be fixed by the superior court in respect to the services performed in connection with the appeal taken thereto and to be fixed by the supreme court or the court of appeals in the event of appellate review, and if the decision of the commissioner shall be reversed or modified, such fee and the costs shall be payable out of the unemployment compensation administration fund. In the allowance of fees the court shall give consideration to the provisions of this title in respect to fees pertaining to proceedings involving an individual's application for initial determination, claim for waiting period credit, or claim for benefits. In other respects the practice in civil cases shall apply.

RCW 50.32.160 (emphasis added). The fees and costs contemplated in this statute are stated in mandatory terms: “such fee and the costs *shall* be payable out of the unemployment compensation administration fund.” *Id.* Pursuant to RAP 18.1, counsel therefore requests fees be awarded.

E. CONCLUSION

For the reasons stated above, Larry L. Hughes respectfully requests that this court reverse the Commissioner’s Order in this case.

Specifically, Mr. Hughes requests that the Order be reversed for two reasons: One, because the “redetermination” was not proper without a valid finding of “willful nondisclosure”; two, because he was not “at fault” under the regulation that mandates that when it is shown that a claimant’s “mental abilities” affected the claimant’s “knowledge and ability to comply with reporting all relevant information” to the ESD, there should be no finding of fault.

Given the ample findings of the ALJ and the Commissioner regarding Mr. Hughes’ inability to read or understand the documents in his case, the only possible conclusion is that he did

RCW 50.32.160 (emphasis added). The fees and costs contemplated in this statute are stated in mandatory terms: “such fee and the costs *shall* be payable out of the unemployment compensation administration fund.” *Id.*

E. CONCLUSION

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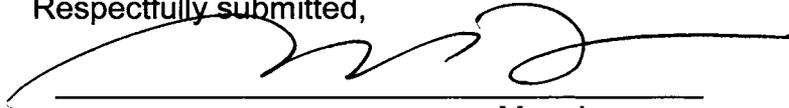
Given the ample findings of the ALJ and the Commissioner regarding Mr. Hughes’ inability to read or understand the documents in his case, the only possible conclusion is that he did not have the knowledge or ability to comply with the reporting requirements and was thus not at fault.

not have the knowledge or ability to comply with the reporting requirements and was thus not at fault.

Finally, petitioner also requests that reasonable attorney fees be awarded in an amount to be determined upon filing of a cost bill or an agreed fee order 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 30th day of September 2008.

Respectfully submitted,



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DIVISION II

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STATE OF WASHINGTON
BY [Signature]
DEPUTY

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

LARRY HUGHES,

Appellant,

and

STATE OF WASHINGTON, EMPLOYMENT
SECURITY DEPARTMENT,
Respondent.

Case No. 38009-9-II

CERTIFICATE OF SERVICE
Administrative Appeal

I certify that on September 30, 2008, I placed into the U.S. mail, postage prepaid, the original and one copy of the appellant's opening brief in this matter addressed to the Court of Appeals Division II and I emailed and placed into the U.S. mail a copy of the appellant's opening brief addressed to Pedro Bernal, Attorney for Respondent, at the Attorney General's Office, Licensing & Administrative Law Division, 800 5th Ave., Suite 2000, Seattle, WA 98104-3188.

Dated this 30th day of September 2008.

[Signature]

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