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COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

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DIVISION II
STATE OF WASHINGTON

Cossetta Stroud, *Appellant*

v.

State of Washington, Department of Social and Health Services

BRIEF OF APPELLANT

Paul A. Neal, WSBA No. 16822
Neal & Neal, LLC, Attorneys at Law
112 E. 4th Ave., Suite 200
Olympia, WA 98501
(360) 352-1907
Attorney for Appellant

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A. Introduction

The central question in this case is whether Cossetta Stroud neglected her father. Yet no reviewing judge has ever addressed the fundamental question on review: Were the Administrative Law Judge's (ALJ) findings that Ms. Stroud did not neglect her father supported by substantial evidence? Instead, DSHS's Review Judge assumed original jurisdiction to substitute his own view of the preponderance of the evidence. Similarly, instead of recognizing the ALJ's credibility finding were binding, the Review Judge treated them as a rebuttable presumption. The Review Judge proffered these errors of law as support for his erroneous reversal of the ALJ's decision.

Cossetta Stroud did not neglect her father. She cared for him from the day he moved into her house in 1998 until the day he died in 2004. She also worked and raised her young son. She worked hard and she was stretched thin, but her care for her father never turned to neglect.

DSHS believed leaving Mr. Stroud alone, however briefly, was neglect. The Doctors and other medical professionals testifying on behalf of Ms. Stroud reached the opposite conclusion. The ALJ held a full hearing and heard testimony presenting competing inferences on this question. After

carefully considering and weighing all the evidence, he found Mr. Stroud could be safely left alone and therefore Ms. Stroud did not neglect her father.

Ms. Stroud respectfully asks the Court to apply the correct standard on review, reverse the decision of the Board, reinstate the decision of the ALJ, and enter judgement in her favor.

B. Assignments of Error

1. The Review Judge erred in assuming original jurisdiction, rather than appellate jurisdiction, over this case. FOF nos. 13, 17, 20, 23, 24, 25, 30, 49, 51; COL nos.4 - 16, 32 - 57.
2. The Review Judge erred in evaluating the evidence under the preponderance of the evidence standard, substituting his own view of the evidence for that of the ALJ. COL nos 41, 56.
3. The Review Judge erred in reversing ALJ findings of fact that were supported by substantial evidence. COL 4-16, 32-57.
4. The Review Judge erred in treating the ALJ's credibility findings as presumption subject to rebuttal by a preponderance of the evidence. COL 41 -48.
5. The Review Judge erred in applying the 2003 amendments to RCW

74.34.020(9) retroactively. COL nos. 25, 26, 27, 28, 29, 30, 31.

6. The Superior Court Judge erred in admitting additional evidence into the record on review. CP 174, 175.
7. The Superior Court Judge erred in not awarding attorney's fees to Ms. Stroud for her successful reversal of DSHS final order denying her standing. CP 258, 259.
8. DSHS erred in finding Ms. Stroud neglected her father and terminating her IP contract. Ms. Stroud is entitled to back pay for the services she continued to provide after DSHS terminated her contract. COL 58.

C. Issues Pertaining to Assignments of Error.

1. Is the Review Judge bound by DSHS's WAC 388-02-0600 limiting him to appellate jurisdiction rather than original jurisdiction?
2. Is the Review Judge bound by the substantial evidence standard or may he substitute his judgement for that of the ALJ under the preponderance of the evidence standard?
3. May the Review Judge reverse ALJ findings of fact that are supported by substantial evidence?

4. Are ALJ credibility findings binding on the Review Judge, or may he treat them as a presumption that may be rebutted by a preponderance of the evidence?
5. Was it an error of law to apply the 2003 amendments to RCW 74.34.020(9), a quasi-criminal statute, retroactively?
6. Did the Superior Court Judge's admission of additional evidence on review violate RCW 34.05.562(1)?
7. Did DSHS meet its burden of establishing its final order in denying Ms. Stroud standing to appeal its finding of neglect such that she is not entitled to attorney's fees under 4.84.350?
8. If Ms. Stroud did not neglect her father and DSHS's termination of her IP contract was therefore invalid, is she entitled to back pay for services she provided to her father between the date that her contract was terminated and the date of his death?

D. Statement of the Case

1. Procedural History

In March of 2003 DSHS issued a "substantiated finding" that Ms. Stroud neglected her father John Stroud, a vulnerable adult. DSHS moved

to terminate Ms. Stroud's independent provider (IP) contract to care for her father. Ms. Stroud, acting on Mr. Stroud's behalf under a power of attorney, filed an appeal. Recognizing that Ms. Stroud should continue to be paid for the services she continued to provide, ALJ Adam Torem stayed DSHS's termination of the IP contract pending a full hearing. *See* March 23, 2003 order granting stay, RP 799-817.

The ALJ reversed DSHS's finding of neglect, CP 90 -120. DSHS's review judge vacated the ALJ's order, finding he lacked jurisdiction to evaluate the merits of the finding of neglect. *See* July 16, 2003, Board decision, RP 701-713.

The Thurston County Superior Court, Judge Hicks presiding, reversed and remanded for application of the correct legal standard to the ALJ's findings of fact. *See* August 27, 2004, order on review, RP 681-684. On remand the Board again reversed the initial order, CP 190 - 247. Ms. Stroud appealed. Mr. Stroud died before the appeal could be heard, causing the dismissal of the case for mootness in 2005 without consideration of the substantive review. *See* RP 546-547. Ms. Stroud then resumed her appeal of the underlying finding of neglect and resulting termination of her IP contract in her own name. DSHS issued a final order denying her standing to pursue

that appeal. CP 10 - 29. The Thurston County Superior Court, Judge Hirsch presiding, reversed that order, consolidated the two appeals in the current case, and ordered a judicial review hearing on the merits.

The Superior Court allowed DSHS to enter the declaration of Carol Sloan into the record on review, CP 174-175. The Superior Court found DSHS's final order was "supported by substantial evidence" and affirmed, CP 176 - 183. The Superior Court Judge does not appear to have considered whether the ALJ's findings of fact were supported by substantial evidence, instead accepting the Review Judge's application of the preponderance of the evidence standard, CP 164.

2. Finding of Neglect

John Stroud suffered from Huntington's disease, a progressive, debilitating disease, CP 205. The Strouds were dissatisfied with the care he received in a boarding home and a nursing home. Because of that concern Ms. Stroud undertook his care. Mr. Stroud designated her as his attorney-in-fact and moved into her home, which she also shared with her young son, who was in kindergarten at the time. Ms. Stroud cared for her father until his death in 2004. She was a designated care-giver under the DSHS COPES program and was paid for 184 hours per month of care to her father, CP 205,

206. Her responsibilities did not stop after 184 hours, however. She was required, and did, provide the same level of care for her father whenever “other COPES provider not scheduled to provide care,” i.e. approximately 345 hours per month. DSHS comprehensive assessment, RP 843, 867, *see* 845. While working to support herself and her son, Ms. Stroud did everything in her power to provide a high level of care for her father.

DSHS’s adult protective services investigated allegations Ms. Stroud was neglecting her father by leaving him alone in the home, CP 209. The investigators found Ms. Stroud’s practice of occasionally leaving her father alone was neglect and moved to terminate her status as a COPES caregiver.¹ Mr. Stroud appealed. CP 217, 218.

Trained medical professionals agreed Mr. Stroud could be safely left alone. Nurse Nancy Schuman, ARNP with the University of Washington Medical Center (UWMC), concluded that Mr. Stroud should have someone

¹ From February 12, 2003, through March 25, 2003, Ms. Stroud undertook the care of her cousin, Sherrie Wallace, who also suffered from Huntington’s disease. The situation was difficult, and APS allegations of neglect also arose from that relationship. *ALJ findings of fact 26-44*. The ALJ found that Ms. Wallace was not a vulnerable adult and that her alleged treatment would not support a termination of Ms. Stroud’s IP status. *ALJ conclusion of law no. 7*. He further found that Ms. Stroud’s treatment of Ms. Wallace did not constitute neglect under the statute nor did they demonstrate a lack of concern for her father’s well-being. *ALJ conclusion of law no. 19 -24*. The DSHS Board of Appeals agreed. Ms. Stroud’s treatment of Ms. Wallace is not at issue in this case.

with him when eating, but that he could be left alone. Dr. Edam, Mr. Stroud's primary physician, social worker Catherine Kendall, who specialized in caring for patients with Huntington's disease, and Dr. Thomas Bird, both of the UWMC, all advised Mr. Stroud could be left alone, CP 97-98. The Department, however, felt that Mr. Stroud should never be left alone, even for a moment, CP 92-96.

The ALJ noted the conflicting testimony. On the one hand he had Dr. Edam, Ms. Kendall, "the only witness presented by either side with any specialized knowledge of patients with Huntington's disease." and Dr. Bird. On the other he had the testimony from the Department's social workers, none of whom were medical professionals. He expressly weighed the competing inferences and found Ms. Kendall's testimony more credible than the Department's witnesses', clearly stating his finding were based on credibility as required by RCW 34.05.461(3), CP 111 - 115, COL 11-15.

Based upon his weighing of the competing evidence, the ALJ concluded: "That a person in Mr. Stroud's condition must certainly be provided extensive daily support and assistance, but I decline to conclude that he must be attended to every minute of the day. ... Additionally, there has been no evidence offered of any decline in the Appellant's condition that

can be linked to Ms. Stroud's methods of caring for her father." CP 115,
COL 15.

After considering all of the available evidence, I conclude that Ms. Stroud has not neglected the Appellant and that the Appellant's health has not been negatively affected by her caregiving. I further conclude that Ms. Stroud had the ability and is willing to continue caring for the Appellant. Ms Stroud has not demonstrated any behavior showing "a serious disregard of consequences of such a magnitude as to constitute a clear and present danger" to her father. Based on the advice and counsel she has received from the specialists at UWMC, I conclude that Ms. Stroud is justified in leaving her father alone in the home for reasonable periods of time. Therefore, I conclude there is no justification to terminate her employment as one of the Appellant's IPs under WAC 388-71-054(4), WAC 388-71-0546(3), or under WAC 388-71-0551(4).

CP 114, 115, COL 18.

...Ms. Stroud has made every possible personal sacrifice in order to keep her father in her own home and out of a nursing facility. She has competing responsibilities but these do not "prevent or interfere with" her scheduled hours as her father's IP.

29. No evidence was presented to show that Ms. Stroud failed to provide any of the formal care hours she is obligated by Department contract to provide for her father. While she may at time have difficulty in juggling all of her roles, she has admirably minimized any conflicts in schedule, resolving these in favor of her father's needs. Therefore, I conclude that there is no justification to terminate her employment as one of the Appellant's IPs under WAC 388-71-0546.

CP 119, COL 28, 29.

DSHS appealed to its Board of Appeals. After reviewing all of the evidence, the Review Judge determined “the (ALJ) Findings of Fact are supported by substantial evidence in the record and are adopted as findings in this decision,” HR 709, and “The Findings of Fact clearly and accurately reflected the evidence presented on the hearing record.” COL 7, RP 712. Nonetheless, it vacated the initial decision, ruling the ALJ had no authority to consider the validity of the finding of neglect. COL 7, RP 712. The Thurston County Superior Court reversed the Board’s decision, finding the ALJ properly evaluated the underlying finding of neglect, and remanded, RP 682, 683.

On December 30, 2004, the DSHS Board of Appeals issued a revised final order. First, it ignored its earlier conclusion that the initial orders findings of fact were supported by substantial evidence. Next, the Review Judge treated the ALJ like an investigator, reviewing the evidence gathered at the hearing and expressly using the preponderance of the evidence standard to substitute his own opinion, CP 241, COL 56. Applying the preponderance of the evidence standard yielded two major reversals of the ALJ’s findings that: (1) Mr. Stroud could safely be left alone for reasonable

periods of time, CP 234, COL 41; and (2) Ms. Stroud's witnesses and evidence were more credible than DSHS's. CP 235-238, COL 43-48. The Review Judge did not consider whether the ALJ's findings were supported by substantial evidence, opting instead to substitute his own view of the facts based on the preponderance of the evidence.

New findings of fact were also inserted to support retroactive application of the 2003 amendments to the definition of neglect. CP 221-223 COL 4-16.

The Superior Court Judge found that the Review Judge's findings were supported by substantial evidence and upheld DSHS's final order, CP 161-165. No reviewing judge has ever found that the ALJ's original findings of fact were not supported by substantial evidence.

E. Argument

The fundamental legal error in DSHS's final order is the Review Judge's assumption of original jurisdiction over Ms. Stroud's appeal. DSHS' rule on appeal prohibits the Review Judge from substituting his or her own view of the facts, instead limiting review judges to appellate jurisdiction. By assuming original jurisdiction, the Review Judge rendered

an unsupportable decision.

1. Standard of Review

"In reviewing an administrative decision, the appellate court stands in the same position as the superior court. ... Thus, the appellate court applies the appropriate standard of review directly to the administrative record." *Galvin v. Employment Sec. Dep't*, 87 Wn. App. 634, 640, 942 P.2d 1040 (1997) (citations omitted). DSHS defined the appropriate standard of review in WAC 388-02-0600(2)²:

(2) In all other cases, a review judge may only change the hearing decision if:

(a) There are irregularities, including misconduct of a party or misconduct of the ALJ or abuse of discretion by the ALJ, that affected the fairness of the hearing;

(b) The findings of fact are not supported by substantial evidence based on the entire record;

(c) The decision includes errors of law;

(d) The decision needs to be clarified before the parties can implement it; or

(e) Findings of fact must be added because the ALJ failed to make an essential factual finding. The additional findings must be supported by substantial evidence in view of the entire record and must be consistent with the ALJ's findings that are supported by substantial evidence based on the entire record.

² WAC 388-02-0600 was amended in 2008, including the addition of a new subsection (1). While this caused (2) to be renumbered as (3), there was no change in its language, WSR 08-21-144. This brief will refer to (2) to reflect the law in effect in 2004 and maintain consistency with cases construing the rule, which use the prior numbering.

Costanich v. Soc. & Health Servs., 138 Wn.App. 547, 156 P.3d 232

(2007) held that WAC 388-02-0600:

Requires significant deference to the ALJ, which is appropriate because an independent ALJ hears the case to “insure the contestant has a fair and impartial fact finder.” If the review judge could simply substitute his own view of the evidence for that of the ALJ in every case, review by an ALJ would be superfluous. As we explained in *Deffenbaugh v. Department of Social and Health Services*, when considering a similarly-worded earlier version of the hearing rules, this deferential standard is “analogous” to appellate court review of a trial court’s decision.

Costanich, 555. The required “significant deference” has been absent until now. There has never been a finding that the ALJ’s view of the case was not supported by substantial evidence.

“The substantial evidence standard is highly deferential to the agency fact finder. The evidence must be of a sufficient quantum to persuade a fair-minded person of the truth of the premise.” *Nationscapital v. Dep’t of Fin. Insts.* 133 Wn.App. 723, 137 P.3d 78 (2006). If that test is met, the findings must be upheld. This is so even if the reviewing court would form a different conclusion from its own reading of the record. *Callecod v. Washington State Patrol*, 84 Wn.App. 663, 676, 929 P.2d 510 (1997).

DSHS review of ALJ decisions must apply the substantial evidence standard in WAC 388-02-0600(2):

Administrative agencies are bound by their own rules. *Ritter v. Board of Commissioners*, 96 Wash.2d 503, 637 P.2d 940 (1981); *Christensen v. Terrell*, 51 Wash.App. 621, 754 P.2d 1009 (1988). This general rule is particularly appropriate in the hearing process, which is conducted by an administrative law judge from an independent agency of government to insure that the contestant has a fair and impartial fact finder. The "substantial evidence rule" contained in WAC 388-08-413(3)(b), delineating for the review judge the standard to be used for review of the ALJ's initial decision, is analogous to its familiar application between trial and appellate courts. It was properly invoked by the appellant.

Deffenbaugh v. Department of Social and Health Services, 53 Wn.App. 868, 871, 770 P.2d 1084 (1989). Both the Review Judge and the Superior Court Judge failed to apply the proper standard on review.

The Superior Court Judge erroneously accepted DSHS's argument, based on *Tapper v. Employment Security Dep't*, 122 Wn. 2d 397, 120 P.3d 130(2005), that an agency is free to substitute its findings for those of the hearings examiner without considering whether the ALJ findings were supported by substantial evidence. The *Costanich* Court rejected that exact argument: "But Tapper was not a DSHS case. Here, DSHS hearing rules delineate the authority of the review judge, and DSHS is bound by those rules." *Costanich* 554.

2. The Review Judge Assumed Original Jurisdiction.

The ALJ correctly weighed the evidence and credibility of the

witnesses to determine leaving Mr. Stroud alone for brief periods of time was not neglect. The Review Judge had no authority to use a preponderance of the evidence standard to substitute his own view.

WAC 388-02-0600 requires the Review Judge to review the ALJ's order in a limited appellate capacity. It has no grant of original or general jurisdiction. It is subject to the same limitations placed on a Superior Court reviewing an agency decision, *Herman v. State of Washington Shorelines Hearings Bd.*, 149 Wn.App. 444, 455, 204 P.3d 928 (2009). The Review Judge's assumption of original jurisdiction set the stage for a series of errors.

a. The Board Exceeded its Scope of Review on Remand.

The Review Judge first manifested his erroneous assumption of jurisdiction by reviewing facts and conclusions with no error assigned to them.

The Board's July 16, 2003 order expressly considered the ALJ's findings of fact, ruled they were supported by substantial evidence, and adopted them without modification, RP 709, 712.

On appeal, the Stroud's assigned error to the Review Judge's reversal of the ALJ's conclusions of law. They did not challenge the findings of fact. "We consider unchallenged findings of fact as verities on

appeal.” *Nationscapital v. Dep’t of Fin. Insts.*, 133 Wn.App. 723, 137 P.3d 78 (2006). “An assignment directed at a conclusion of law does not bring up for review the facts upon which it is founded.” *McIntyre v. Plywood Company*, 24 Wn.App. 120, 123, 600 P.2d 619 (1979).

Judge Hicks understood this in ordering a remand with specific instructions:

3. The DSHS Board of Appeals erred in concluding that the petitioner had the right to contest the termination of Cossetta Stroud’s medicaid contract but not to challenge the Adult Protective Services finding of neglect upon which the contract termination was partially based. The APS finding is a piece of evidence that an Administrative Law Judge may take into account when making a decision to sustain or reverse the termination of a care provider’s contract.

4. Because the Board of Appeals ruled that the petitioner did not have a right to contest the APS finding of neglect, the Board did not consider whether Ms. Stroud’s conduct met the definition of neglect under WAC 388-71-0540(4) and chapter 74.34 RCW. ...

5. Remanding this matter to the DSHS Board of Appeals is an appropriate remedy under RCW 34.05.570(3)(f) where the agency has not decided all issues requiring resolution by the agency.

HR 681-684. Judge Hicks ordered the Review Judge to consider whether the uncontested findings of fact supported a legal conclusion of neglect, not engage in a de novo review.

An order on remand limits the scope of review to those issues specified in the order, *Brighton v. Dep't of Transp.*, 109 Wn.App. 855, 861, 38 P.3d 344 (2001). The Board's reversal and amendment of unappealed findings of fact was outside the scope of the remand order and thus outside its authority.

b. The Review Judge Rejected Findings Supported by Substantial Evidence.

The Board based its reversal of the ALJ's finding of no neglect on its own view of the preponderance of the evidence. That is, it ignored WAC 388-02-0600(2)(b)'s prohibition against changing the initial order if the findings were supported by substantial evidence. DSHS cannot ignore its own rules, *Costanich*, at 554. The Superior Court Judge perpetuated this error by limiting her review to the question of whether the **Review Judge's** findings were supported by substantial evidence.

The Court of Appeals recently confirmed DSHS's Review Judge's duty to uphold ALJ findings supported by substantial evidence, *Krabbae v. DSHS*, 144 Wn.App. 432, 442 (2008). There the ALJ evaluated whether a caretaker who left vulnerable adults in a group home alone had committed neglect. Given the specific facts, including the fact that licensed group homes are contractually required to provide 24-hour care, the ALJ found he

had. On appeal the caretaker argued that WAC 388-02-0600(2)(e)'s limitation on the review judges ability to enter new findings was invalid. Though invalidating WAC 388-02-0600(2)(e) the Court specifically upheld the remainder of the rule including the substantial evidence review standard in WAC 388-02-0600(2)(b), *Krabbe*, 442. The Court then upheld the **ALJ** finding regarding neglect "because substantial evidence supports the finding." *Krabbae* at 435.

It is a verity that the ALJ's findings regarding the allegations of neglect were supported by substantial evidence. Although the ALJ here reached the opposite result from the ALJ in *Krabbae*, his findings on neglect require the same deference. The ALJ's finding should be reinstated and the Review Judge's findings reversed.

c. The ALJ's Credibility Finding Are Binding.

The ALJ specifically found the Stroud's witnesses more credible than those offered by DSHS on the question of whether Mr. Stroud could safely be left alone for short periods of time. Court's have consistently ruled that credibility determinations by the Judge hearing the witness are binding:

"Credibility determinations are for the trier of fact and cannot be reviewed on appeal." Accord *Benn*, 134 Wn.2d at 910 (credibility determinations cannot be characterized as

inaccurate.) Conflicting evidence may still be substantial, so long as some reasonable interpretation of it supports the challenged findings. *Ino Ino*, 132 Wn.2d at 112 (citations omitted). That there may be other reasonable interpretations of the evidence does not justify appellate court reversal of a trial court's credibility determinations.

Personal Restraint of Gentry, 137 Wn.2d 379, 411, 972 P.2d 1250 (1999)

quoting *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

This standard has been expressly applied to DSHS's Board of Appeals: "The reviewing agency or court must accept the fact finder's 'views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences.'" *Costanich*, at 556. This is consistent with RCW 34.05.464(4)'s requirement to give due regard to the ALJ's opportunity to observe witnesses, i.e. treat credibility findings as binding, *Krabbe*, 444.

Here the Review Judge did not accept the ALJ's credibility finding. Instead he treated it like a rebuttable presumption, overcoming it with his view of a preponderance of the evidence, *Cowell v. Good Samaritan Community Health Care*, 153 Wn.App. 911, 926, 225 P.3d 294 (2009). The Review Judge substituted his own view of the evidence to reverse the ALJ's finding that the Stroud's expert witness were more credible than DSHS's lay witnesses. COL 48, RP 646. Once again, the Review Judge assumed

original jurisdiction when he was limited by law to appellate jurisdiction.

Costanich prohibits Review Judge's from reversing ALJ credibility findings:

The review judge not only ignored the ALJ's credibility determinations, he also chose to base his decision on the very evidence the ALJ rejected as lacking credibility:....The review judge substituted his own view of the evidence for the ALJ's findings, which are supported by substantial evidence. This is clearly an error under the deferential standard that applies to appeals from the ALJ's decision about abuse allegations.

The review judge in this case committed the exact same error. The Superior Court's effort to distinguish *Costanich* perpetuates the error by treating credibility findings as rebuttable presumptions. That error, like the error in *Costanich*, should be reversed.

3. The Review Judge Applied the Wrong Law.

After erroneously substituting his own view of the evidence for the ALJ's, the Review Judge proceeded to apply the wrong version of the statute. The ALJ applied the version of RCW 74.34.020(9) in effect at the time of the alleged neglect. The Review Judge retroactively applied a subsequent amendment. Whichever version of the statute is applied, the underlying question of fact is the same: Did Ms. Stroud fail to properly care for her father by leaving him alone for short periods of time? The trier of fact found that she provided an appropriate level of care. That is, she did not

neglect her father. That finding was supported by substantial evidence.

Whichever version of the statute is used, Ms. Stroud's behavior did not meet the legal definition of neglect.

It is, however, important to note that the Review Judge's retroactive application of the amended definition of neglect was an error of law. "A statute is presumed to operate prospectively unless the Legislature indicates that it is to operate retroactively." *State v. T.K.*, 139 Wn. 2d 320, 329, 987 P.2d 63 (1999). Here, the Legislature specifically provided an effective date providing the amendments were prospective. §3, ch. 230, laws of 2003.

DSHS has never carried its burden to show Legislative intent of retroactivity. *Scarsella Bros. v. Dept. of Licensing*, 53 Wn. App. 882, 888, 771 P.2d 760 (1989). That is particularly fatal to retroactive application here where the statute forms the basis for potential prosecution and criminal penalties and is therefore quasi-criminal³. *In re Kindshi*, 52 Wn.2d 8, 10, 392 P.2d 824 (1958), cited as controlling *Nguyen v. Dep't of Health*, 144 Wn.2d 516, 528, 29 P.3d 689 (2000). Amendments to quasi-criminal

³ A finding of neglect by DSHS support charges of criminal mistreatment under RCW 9A.42.020 (first degree, class B felony), 9A.42.030 (second degree, class C felony), 9A.42.035 (third degree, gross misdemeanor), or 9A.42.037 (fourth degree, misdemeanor).

statutes, even if curative or remedial, cannot be applied retroactively. *State v. McCarthy*, 112 Wn.App. 231, 237, 48 P.3d 1014(2002).

4. The Superior Court Erred in Allowing DSHS to Supplement the Record on Review.

DSHS submitted the declaration of Carol Sloan to supplement the record before the Superior Court. The declaration contains new evidence not relevant to this case. The Court erred in allowing should Ms. Sloan's declaration into the record, CP 174, 175.

Judicial review of facts under the APA "must be confined to the agency record." RCW 34.05.558. "Under RCW 34.05.562(1) new evidence is admissible only under highly limited circumstances." *Motley-Motley, Inc. v. State*, 127 Wn.App. 62, 76 (2005). RCW 34.05.562(1) allows new evidence to be received by a court on judicial review of an agency action only if it relates to the validity of the agency action at the time it was taken and is required to decide specific disputed issues.

Ms. Sloan's declaration attempts to prejudice Ms. Stroud by bringing in facts from another, unrelated proceeding. To the extent it is not introducing new evidence, it reiterates information already in the record, RP 66-67.

Since the purpose of strictly limiting evidence on judicial review is to ensure that the court retains its appellate role rather than acting as a tribunal of original jurisdiction it would be antithetical to that purpose to allow new evidence to be admitted here. The Courts review "must be confined to the agency record." RCW 34.05.558. Ms. Stroud respectfully asks that the Court reverse the Superior Court record and strike Ms. Sloan's declaration from the record.

5. Ms. Stroud is Entitled to Back Pay and Attorneys Fees.

a. Ms. Stroud is Entitled to Back Pay.

DSHS ceased paying Ms. Stroud for her services when the Board of Appeals entered its first order on July 16, 2003. Ms. Stroud continued to live with his daughter and she continued to care for him, albeit without compensation. Although DSHS apparently provided COPES providers to replace the 6 hours per day for which it paid Ms. Stroud, it still required her to care for her father at least 11.5 hours per day, approximately 345 hours per month, RP 845.

Ms. Stroud did not neglect her father. Therefore the Department never had authority to terminate her contract. Like an employee who establishes wrongful termination, Ms. Stroud is entitled to back pay of 184

hours per month times her hourly amount from July 16, 2003, through the date of Mr. Stroud's death on October 18, 2004, plus interest, regardless of whether someone else was hired to take her place. The Legislature gave this Court authority to grant relief from the DSHS's unlawful decision-making process, failure to follow the agency rule on the scope of its review and erroneous retroactive application of law. RCW 34.05.570(3) (c), (d), (h). In order to grant relief, the Court must fashion a remedy.

RCW 34.05.574 gives a court discretion to fashion a remedy that requires an agency to comply with the law. In exercising that discretion, however, the court must endeavor to remedy past errors...

Boeing Co. v. Gelman, 102 Wn.App. 862, 10 P.3d 475, review denied 142 Wn.2d 10210, 16 P.3d 1267 (2000). This includes the authority to set aside agency action, RCW 34.05.574(1).

Compelling DSHS to follow the law and remedy past errors requires setting aside the finding of neglect and the resulting agency actions. Those included the threat of placing Ms. Stroud on the abuser registry, revoking her status as a qualified IP and terminating her IP contract. Remedying the contract termination requires making payments due under it. This is payment for work that Ms. Stroud performed, indeed, work DSHS required her to perform. Payment she would have received but for DSHS's erroneous

finding of neglect.

b. Ms. Stroud is Entitled to Attorney's Fees.

Ms. Stroud has already successfully obtained reversal of DSHS's May 26, 2006 final order denying her standing to appeal, CP 10 - 29. The Superior Court erroneously denied her an award of attorney's fees for that reversal, CP 258, 259. If successful in obtaining reversal of the DSHS's December 30, 2004, order Ms. Stroud will be entitled to additional attorney's fees.

Ms. Stroud has incurred significant attorney's fee obligations in her efforts to clear her name and reverse DSHS's erroneous decision. She is entitled to an award of reasonable fees and costs incurred obtaining relief from a DSHS decision rendered under Title 74 RCW, RCW 74.08.080.

The appropriateness of a fee award under RCW 74.08.080 is reinforced by the numerous procedural roadblocks thrown up by DSHS to prevent substantive review of its neglect finding:

We conclude that the fundamental underpinning of the fee award provision is a policy at once punitive and deterrent- a corrective policy which would discipline respondent for violations of Title 74 RCW or of its own regulations, by shifting to the respondent the costs of righting its mistakes.

...

...At present, it is contended, the private bar shuns welfare cases, leaving them to SCLS; the respondent thus has rarely been assessed fees where incautious, careless, or wrongful actions by its employees have improperly denied benefits and required correction by an appellate court. Clearly an incentive to more careful scrutiny is not out of place.

Respondent admits that "a decision for the appellant would give the Department added cause to evaluate each case with more scrutiny.

Berry v. Burdman, 93 Wn.2d 17, 24, 604 P.2d 1288 (1980) quoting *Tofte v. Department of Social & Health Servs.*, 85 Wn.2d 161, 165, 531 P.2d 808 (1975). In finding Ms. Stroud guilty of neglect and twice applying the incorrect standard of review to resurrect that finding, DSHS has violated both Title 74 RCW and its own regulations. Ms. Stroud is entitled to reasonable attorneys fees and costs under RCW 74.08.080 incurred to correct those violations.

Ms. Stroud is also entitled to attorneys fees and costs under RCW 4.84.350. The Superior Court Judge found she is a qualified party under RCW 4.84.340(5), CP 259. As a qualified party who prevails in a judicial review action, Ms. Stroud is entitled to an award of reasonable attorney's fees and costs, RCW 4.84.350.

The Superior Court Judge found DSHS's position with regard to the finding of neglect was substantially justified and thus denied an award of

fees. That decision considers the wrong issue. Ms. Stroud was requesting a fee award for the reversal of DSHS's May 23, 2006, final order denying her standing. That denial was not reasonably justified. Ms. Stroud is entitled to a fee award for that reversal, just as she will be entitled to a fee award if she obtains reversal of the finding of neglect.

Ms. Stroud asks the Court to set a subsequent hearing where she can present evidence establishing an amount for reasonable attorney's fees and costs.

Respectfully submitted this 21st day of June, 2010.

A handwritten signature in black ink, appearing to read 'Paul Neal', written over a horizontal line.

Paul Neal, WSBA #16822
Attorney for Cossetta Stroud

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COURT OF APPEALS

10 JUN 21 PM 3:40

STATE OF WASHINGTON

BY _____
Clerk

**IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON**

COSSETTA STROUD

v.

**STATE OF WASHINGTON,
DEPARTMENT OF SOCIAL AND HEALTH
SERVICES**

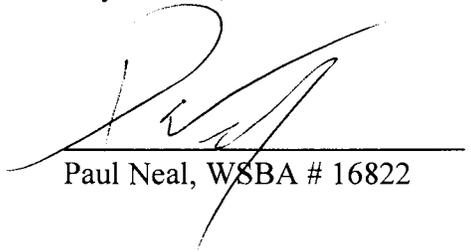
No. 40391-9-II

PROOF OF SERVICE

I, Paul Neal, declare that I am the attorney of record for Appellant Cossetta Stroud in this action. On June 21st, 2010, I delivered the original of Ms. Stroud's Appellate Brief to ABC Legal Messengers for filing with Division II of the Court of Appeals. On June 21st, 2010, I personally delivered a copy of said brief to DSHS's counsel of record at her offices at 7141 Cleanwater Drive SW; Olympia, WA 98504-0124.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at Olympia, Washington on this 21st day of June, 2010


Paul Neal, WSBA # 16822