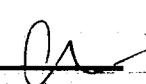


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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

JAMES E. WATKINS,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF EMPLOYMENT
SECURITY,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

An individual who refuses to report for work despite his employer having work available for him quits his job without good cause. The Respondent, Employment Security Department (Department), denied the application for unemployment benefits of Appellant, James E. Watkins, because he refused to return to work under these circumstances. This refusal caused his separation from employment such that he voluntarily terminated his employment.

The Department correctly determined Mr. Watkins did not establish good cause for quitting his work and therefore properly denied him unemployment benefits. Because substantial evidence supports the Commissioner's findings of fact, and the conclusion that Mr. Watkins voluntarily quit his employment without good cause is free of error, the Department respectfully requests that this Court affirm the Commissioner's decision denying Mr. Watkins unemployment benefits.

II. ISSUES PRESENTED

1. Did the Commissioner properly conclude Mr. Watkins voluntarily quit his employment when he refused to return to work despite his employer having work available for him?
2. Did the Commissioner properly conclude Mr. Watkins failed to establish he quit for good cause when his voluntary termination resulted from Mr. Watkins' refusal to accept a position offered by his employer?

3. If this Court determines Mr. Watkins did not quit but was discharged, is the appropriate remedy a remand to the Commissioner's Review Office for the determination of additional issues?

III. STATEMENT OF THE CASE¹

Mr. Watkins worked as a security guard for Northwest Protective Services, Inc. from August 10, 2007 until August 24, 2009. CP Comm'r Rec. 17-18, 126 (Finding of Fact (FF) 1).² He was injured on May 26, 2009 but continued to work for a few days until seeking emergency room treatment. CP Comm'r Rec. at 19, 27, 126 (FF 2). Due to this injury, Mr. Watkins was not released to work again until June 2, 2009 on which date he was released for modified or light-duty. CP Comm'r Rec. at 19, 63-67, 126 (FF 2). Mr. Watkins continued to be authorized for light-duty work throughout June, July, and August but the employer did not have any light-duty work for Mr. Watkins until August 6, 2009. CP Comm'r Rec. at 19, 63-69, 126 (FF 3).

On August 6, 2009, an employer representative phoned Mr. Watkins to inform him of the available light-duty work but Mr. Watkins

¹ The statement of facts by Mr. Watkins cites to the administrative record regardless of whether the point in the records is reflected in a finding of fact. *See* Br. Appellant at 5-9. The Department provides this statement of the case to present the facts as found by the Commissioner, which are the basis for this Court's review. These findings are not specifically challenged and thus are verities on appeal.

² For ease of reference, the certified administrative record is referred to as "CP Comm'r Rec." as the Appellant has designated it in his brief. The number in parentheses represents either specific findings of fact (FF) or conclusions of law (CL) made by the Administrative Law Judge or the Commissioner.

stated he would not return to work in spite of the work release from his physician. CP Comm'r Rec. at 20, 22, 127 (FF 3). The employer also sent Mr. Watkins a letter indicating it had a position available for him that met his work restrictions and that he was expected to return to work on August 11, 2009. CP Comm'r Rec. at 19, 70, 127 (FF 3).

On August 10, 2009, the physician monitoring Mr. Watkins' injury reviewed the employer's light security officer position and determined Mr. Watkins could perform this position. CP Comm'r Rec. at 69; *see also* CP Comm'r Rec. at 126 (FF 2). When Mr. Watkins saw his physician on August 17, 2009, the physician did not change any of Mr. Watkins' work restrictions and again authorized him to perform light duty work activities including frequent (3 to 6 hours) sitting, standing, and walking. CP Comm'r Rec. at 20, 21, 67, 127 (FF 4).

The employer unsuccessfully attempted to reach Mr. Watkins by phone between August 6, 2009 and approximately August 17, 2009. CP Comm'r Rec. at 20, 22-23, 72, 127 (FF 4). When the employer and Mr. Watkins finally spoke, Mr. Watkins advised he was unable to come to work despite his physician's release. CP Comm'r Rec. at 23, 127 (FF 4). Following this conversation, the employer determined Mr. Watkins did not intend to return to work and effective, August 24, 2009, considered Mr. Watkins as having quit since he abandoned his job. CP Comm'r Rec.

at 71, 127 (FF 4). The employer mailed Mr. Watkins a letter informing him of the separation. CP Comm'r Rec. at 71, 127 (FF 4).

Mr. Watkins applied for unemployment insurance benefits as a result of his separation from employment. The Department initially granted his request for benefits. CP Comm'r Rec. at 41-45. The employer appealed the Department's decision to the Office of Administrative Hearings (OAH). Following the hearing, the administrative law judge (ALJ) found Mr. Watkins was discharged but that his conduct did not rise to the level of misconduct, and he was therefore not disqualified from unemployment benefits. CP Comm'r Rec. at 126-131. The employer petitioned the Commissioner of the Department for Review.

The Commissioner accepted all of the ALJ's findings of fact but rejected the ALJ's conclusions 1-9.³ Instead, the Commissioner determined the matter should be adjudicated as a voluntary quit since Mr. Watkins was the moving party in the job separation. CP Comm'r Rec. at 140 (CL II). The Commissioner reasoned:

We conclude that claimant was the moving party: he was offered the job assignment which fell within the restrictions his doctor had ordered, but failed to respond or show up for

³ The final agency determination is rendered by a review judge from the Commissioner's Review Office. For the sake of simplicity, the review judge is referred to throughout this brief as the Commissioner because the Commissioner of Employment Security has delegated his authority to make a final agency decision in these matters to the Commissioner's Review Office. See WAC 192-04-020(5).

work. Rather, he abandoned his job. Consequently, we conclude that he voluntarily quit employment.

CP Comm'r Rec. at 140 (CL II). Because Mr. Watkins failed to establish good cause for the quit, the Commissioner denied benefits. CP Comm'r Rec. 140-141 (CL II, III).

Mr. Watkins petitioned the superior court for judicial review and the superior court affirmed the Commissioner's decision. CP 14. This appeal followed.

IV. STANDARD OF REVIEW

Mr. Watkins seeks judicial review of the administrative decision of the Commissioner of the Employment Security Department. Judicial review of such decisions is governed by the Washington Administrative Procedures Act (APA) pursuant to RCW 34.05.510 and RCW 50.32.120. The court of appeals sits in the same position as the superior court on review of the agency action under the APA and applies the APA standards directly to the administrative record. *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.2d 263 (2010). The court reviews the decision of the Commissioner, not the underlying decision of the ALJ except to the extent the Commissioner's decision adopted any findings and conclusions of the

ALJ's order.⁴ *Id.*; *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993).

The Commissioner's decision is considered prima facie correct and the burden of demonstrating its invalidity is on the appellant. RCW 50.32.150; RCW 34.05.570(1)(a); *Smith*, 155 Wn. App. at 32. The court should only grant relief if "it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d).

A. Review of factual matters

Judicial review of disputed issues of fact must be limited to the agency record. RCW 34.05.558. This standard of review is particularly relevant here because Mr. Watkins has challenged only one finding of fact. Br. Appellant at 3. All other unchallenged findings of fact are verities on appeal. RAP 10.3(g); *Tapper*, 122 Wn.2d at 407. The court must uphold an agency's findings of fact must if they are supported by substantial evidence. *Wm. Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750, 755 (1996). Substantial evidence is evidence that is "sufficient to persuade a rational, fair-minded person of the truth of the finding." *In re Estate of Jones*, 152

⁴ Since it is the Commissioner's decision under review, Mr. Watkins improperly requests this Court to determine whether the Department's initial determination and the ALJ's order were correct. Br. Appellant at 4.

Wn.2d 1, 8, 93 P.3d 147 (2004). Evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987). The reviewing court should “view the evidence and the reasonable inferences therefrom in the light most favorable to the party that prevailed” at the administrative proceeding below. *Tapper*, 122 Wn.2d at 407.

The court may not substitute its judgment for that of the agency on the credibility of witnesses or the weight to be given to conflicting evidence. *Smith*, 155 Wn. App. at 35; *Davis v. Dep’t of Labor & Indus.*, 94 Wn.2d 119, 124, 615 P.2d 1979 (1980). The Commissioner “is authorized to make his own independent determinations based on the record and has the ability and right to modify or replace an ALJ’s findings, including findings of witness credibility.” *Smith*, 155 Wn. App. at 36 n.2.

B. Review of questions of law

Questions of law are subject to de novo review. *Tapper*, 122 Wn.2d at 403. However, where an agency has expertise in a particular area, the court should accord substantial weight to the agency’s decision. *Markam Group, Inc. v. Dep’t of Emp’t Sec.*, 148 Wn. App. 555, 561, 200 P.2d 748 (2009); *Wm. Dickson Co.*, 81 Wn. App. at 407.

C. Review of mixed questions of law and fact

Mr. Watkins' argument that the Commissioner erred in concluding he did not quit voluntarily but was discharged raises a mixed question of law and fact because it involves the meaning of the terms "voluntary quit" and "discharge" as applied to the facts found in this case. When reviewing mixed questions of law and fact, the court must (1) determine which factual findings are supported by substantial evidence; (2) make a de novo determination of the correct law; and (3) apply the law to the applicable facts. *Tapper*, 122 Wn.2d at 403.

As with review of pure issues of fact, the court does not reweigh credibility or demeanor evidence when reviewing factual inferences made by the Commissioner before interpreting the law. *Wm. Dickson Co.*, 81 Wn. App. at 411. In addition, the court is not free to substitute its judgment of the facts for that of the agency. *Tapper*, 122 Wn.2d at 403. Accordingly, with respect to the question of whether Mr. Watkins voluntarily quit or was discharged, the Court reviews factual findings to assess whether they are supported by substantial evidence in the record and then applies the law de novo to the facts as found by the Commissioner.

V. ARGUMENT

Mr. Watkins did not show up for work when his employer made work available to him despite the fact that his doctor had cleared him for light duty. Under these circumstances, the Commissioner properly held that Mr. Watkins abandoned his job. Job abandonment is treated a voluntary quit under the Employment Security Act, and a claimant is only eligible for benefits if he or she has good cause to quit. Mr. Watkins did not. This Court should affirm the Commissioner's decision because substantial evidence supports the findings of fact and there are no errors of law.

Mr. Watkins challenges the nature of his separation from employment with Northwest Protective Services, claiming he was discharged and did not voluntarily quit. Therefore, the crux of this case is whether Mr. Watkins quit or was fired.

The Employment Security Act "shall be liberally construed for the purpose of reducing *involuntary unemployment* and the suffering caused thereby to a minimum." RCW 50.01.010 (emphasis added). As such, the burden is on the claimant to establish his right to benefits under the Act, and this burden of proof never shifts during the course of proceedings. *Townsend v. Emp't Sec. Dep't*, 54 Wn.2d 532, 534, 341 P.2d 877 (1959); *In re Anderson*, 39 Wn.2d 356, 365, 235 P.2d 303 (1951). The Act

requires that the Department analyze the facts of each case to determine what actually caused the employee's separation. *Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 390, 687 P.2d 195 (1984). Liberal construction of the Act does not require payment of benefits to a claimant who was responsible for his separation from employment because he intentionally refused his employer's offered work assignment that complied with his work restrictions.

Even if this Court determines Mr. Watkins did not quit but was discharged, he may still be ineligible for benefits because he was discharged for abandoning his position which was insubordination, an inexcusable absence, and a violation of company policy. If the Court concludes Mr. Watkins was in fact discharged, the appropriate remedy is a remand to the Commissioner's Review Office for the determination of additional issues.

A. Mr. Watkins voluntarily quit his employment.

The Commissioner properly concluded that under the facts of this case, Mr. Watkins voluntarily quit his employment by refusing his employer's work assignment. After an absence from work due to an injury, Mr. Watkins' physician cleared him to return to light duty work beginning June 2, 2009. CP Comm'r Rec. at 19, 63-67, 126 (FF 2). His employer offered him a light-duty position on August 6, 2009. CP

Comm'r Rec. at 20, 22, 127 (FF 2, 3). However, Mr. Watkins refused to accept the position. CP Comm'r Rec. at 20, 22, 127 (FF 2, 3). On these facts, the Commissioner properly concluded Mr. Watkins voluntarily quit.

The Act sets aside unemployment funds for the benefit of “persons unemployed through no fault of their own.” RCW 50.01.010. For a claimant to receive benefits, “the act requires that the reason for the unemployment be external and apart from the claimant.” *Safeco*, 102 Wn.2d at 392. A person is disqualified from receiving unemployment benefits if he or she “left work voluntarily without good cause.” RCW 50.20.050(2)(a).

How a job separation is initially characterized, either as a voluntary quit or a discharge, will trigger which statutory section, and which analytical inquiry, will appropriately apply to the facts at issue. *Safeco*, 102 Wn.2d at 389. Whether RCW 50.20.050 (voluntary quit) or RCW 50.20.066 (discharge for misconduct) applies to a claim depends upon the event that caused the unemployment. *Id.*

“The terms ‘left work voluntarily’ in RCW 50.20.050 and ‘discharged’ in RCW 50.20.060 are legal terms, and the facts of a case determine which section controls.” *Read v. Emp’t Sec. Dep’t*, 62 Wn. App. 227, 233, 813 P.2d 1262 (1991), citing *Safeco*, 102 Wn.2d at 390. To leave work “voluntarily” requires “showing that an employee

intentionally terminated his or her own employment.” *Id.* at 393. The question of whether a claimant has quit or been discharged must be resolved on the basis of the employee’s intent. *Korte v. Emp’t Sec. Dep’t*, 47 Wn. App. 296, 301, 734 P.2d 939 (1987). How the parties characterize a separation, while a factor to be considered, is not determinative of whether the separation was a quit or a discharge. *See Safeco*, 102 Wn.2d at 390-391. A voluntary termination, however, is broader than simply announcing one’s intent to quit or tendering resignation. *See Korte*, 47 Wn. App. at 301.

In determining whether a job separation amounts to a quit or a discharge, the Department looks to identify who was the moving party in the separation. *In re Millholland*, Empl. Sec. Comm’r Dec. 1272 (1975).⁵ The Department also looks to the immediate cause for the job separation in determining whether it was a voluntary quit or a discharge. *In re Hensley*, Empl. Sec. Comm’r Dec.2d 636 (1980).

Here, the Commissioner correctly held that Mr. Watkins was responsible for his separation from employment because he refused work available to him and he therefore voluntarily quit his employment. CP Comm’r Rec. at 140 (CL II). Mr. Watkins was offered a job assignment

⁵ Under RCW 50.32.095, the Commissioner may designate certain Commissioner’s decisions as precedent. Such precedents are persuasive authority for the courts. *Martini v. Emp’t Sec. Dep’t*, 98 Wn. App. 791, 795, 990 P.2d 981, 984 (2000).

that fell within the restrictions ordered by his doctor and was expected to begin the assignment on August 11, 2009. CP Comm'r Rec. at 20, 22, 127 (FF 3). However, Mr. Watkins refused to accept the assignment both verbally and by failing to respond to the employer's August 6, 2009 letter. CP Comm'r Rec. at 20, 22, 70, 127 (FF 3). When Mr. Watkins again spoke with the employer regarding returning to light-duty work, he similarly indicated that he was refusing to accept the assignment. CP Comm'r Rec. at 23, 127 (FF 4). The employer then sent him a letter indicating it considered him as having quit and ending the employment relationship. CP Comm'r Rec. at 71, 127 (FF 4). Because the employer had work for Mr. Watkins, his separation from employment arose from his own refusal to accept the light-duty work which he had been authorized to perform. It would be contrary to the purpose of the Employment Security Act to grant benefits to someone who was no longer working due to his decision not to accept available and suitable work.

All of these factual findings are supported by testimony from the employer's representative and the record. CP Comm'r Rec. at 16, 19-24. Despite Mr. Watkins' testimony that he did not know he had been released for light-duty work, CP Comm'r Rec. at 28-29, he knew that after his office visits, his doctor completed and faxed activity prescription forms to Mr. Watkins' employer. CP Comm'r Rec. at 29. These forms clearly

indicate his doctor released him to light duty beginning June 2, 2009 and continuing through the date of his separation from employment. CP Comm'r Rec. at 92-96, 98. Notably, just three days before the employer offered Mr. Watkins' the job assignment, his physician approved modified duties for Mr. Watkins including frequent (3-6 hours) sitting and standing. CP Comm'r Rec. at 66. The employer waited until it had a position meeting these restrictions before it requested Mr. Watkins return to work and it also confirmed with Mr. Watkins' physician that Mr. Watkins could perform the light-duty position. CP Comm'r Rec. at 20, 25-26, 69; *see also* CP Comm'r Rec. at 126 (FF 2). There is, therefore, substantial evidence in the record to support all of the Commissioner's findings and the Commissioner's characterization of how the job separation occurred.

While Mr. Watkins did not specifically utter the words "I quit", he repeatedly and intentionally refused to accept the light duty job assignment available to him and that his physician had authorized him to perform. It is hard to imagine what result Mr. Watkins would expect to occur other than a separation from his employment when he knew he had been released for light-duty work, knew his employer had a position for him, and knew he was expected report to work on August 11, 2009, but nevertheless expressly rejected the work. *See Nordlund v. State Dep't of Emp't Sec.*, 135 Wn. App. 515, 144 P.3d 1208 (2006) (where employee,

among other failures, failed to seek permission for extended absence from work, employment separation was decided as voluntary quit).

Because Mr. Watkins manifested intent to quit, he voluntarily terminated his employment. For example, in *Safeco*, an employee submitted her letter of resignation to her employer indicating she was giving them her two-week notice. *Safeco*, 102 Wn.2d at 386. However, the same day the employee turned in her letter of resignation, the employer informed her that she did not have to work during her notice period, but that she would still be paid for that time. *Id.* at 387. In finding the employee was not discharged but voluntarily quit, the court in *Safeco* noted “she unilaterally and voluntarily submitted her resignation to her supervisors, informing them that she was quitting.” *Id.* at 393. Furthermore, the court emphasized the “employer had no intention of letting [the employee] go and only did so because the employee quit.” *Id.*

Similarly here, the employer had no intention of letting Mr. Watkins go prior to his refusal to accept the assignment. To the contrary, the employer actively sought to find suitable work for Mr. Watkins given his work restriction. Mr. Watkins had medical clearance to work, but nevertheless refused to work the hours the employer needed him to work. It was only after Mr. Watkins intentionally

refused the assignment that the employer considered Mr. Watkins as having quit.

In *Vergeyle v. Employment Security Department*, 28 Wn. App. 399, 402, 623 P.2d 736 (1981), an employee who acknowledged in writing that her unauthorized absence would result in her discharge was held to have voluntarily terminated her employment. However, neither *Vergeyle* nor the Employment Security Act requires that an employee make such an acknowledgment in order for the separation to be considered a voluntary quit. Rather, it is a voluntary quit if the claimant, “by his or her own choice, intentionally of his or her own free will, terminated the employment.” *Id.* at 402 (quoting *Allen v. CORE Target City Youth Program*, 275 Md. 69, 79, 338 A.2d 237 (1975)).

Mr. Watkins implies that in order to voluntarily quit, an employee must submit a resignation letter, as in *Safeco*, or take similar action, as in *Vergeyle*. Therefore, he argues that since Mr. Watkins did not submit a letter or otherwise state that he quit, the Commissioner erred in concluding he voluntarily quit. This is incorrect. RCW 50.20.050 does not require the claimant to have taken any specific action or uttered any specific words in order for his claim to be properly adjudicated as a voluntary quit. Rather, to leave work voluntarily requires that the employee intentionally terminated his own employment. *Safeco*, 102 Wn.2d at 393. Mr.

Watkins' refusal of the offered assignment was a sufficient intentional act such that the obvious result was that he voluntarily quit his employment.

In *Korte*, a noncontract worker, who was directed to leave her keys on her desk if she did not sign employer's proposed contract, turned in her keys, and sought unemployment compensation. *Korte*, 47 Wn. App. at 297-99. In determining the nature of the separation, the court held the worker voluntarily quit her employment given that the employer was willing to retain the worker as an employee, subject to condition, but the worker intentionally rejected the condition. *Id.* at 301. Similarly, here the employer was willing to retain Mr. Watkins as an employee and found an assignment for him that met his work restrictions. Mr. Watkins could have continued in his employment. However, he intentionally rejected the job assignment and thereby voluntarily left his employment.

The Commissioner's findings that Mr. Watkins refused the offered job assignment support the conclusion that Mr. Watkins was the moving party in terminating his employment. CP Comm'r Rec. at 140 (CL II). The Court should therefore uphold the Commissioner's conclusion that Mr. Watkins was the moving party.

B. Mr. Watkins' unilateral decision to refuse the offered work is a voluntary quit.

It is noteworthy that Mr. Watkins did not make any attempt to work when work was offered to him in early August. He did not appear for his shift and try to perform the work, only to find that he was unable to do so because of the pain. Rather, contradicting his doctor's assessment that he was able to perform light-duty work, Mr. Watkins unilaterally determined he was unable to work. In effect, he attempted to continue to claim that he could not work due to disability from a workplace injury after his treating physician determined he was able to work under limited conditions.

However, refusing to appear for work was not the appropriate means to dispute his doctor's assessment of his condition. Rather, he should have visited his treating physician again for a new diagnosis or obtained a second opinion. *See* WAC 192-150-060.⁶ Providing benefits to Mr. Watkins in this situation vitiates the requirement that an injured worker support restrictions on his ability to work with a physician's

⁶ WAC 192-150-060(4) provides as follows:

If your employer offers you alternative work or otherwise offers to accommodate your disability, you must demonstrate good cause to refuse the offer. This may include, but is not limited to, information from your physician that the accommodation offered by your employer was inadequate to reasonably accommodate your medical condition, or information demonstrating that the alternative work offered you by your employer was not suitable.

statement. *See* WAC 192-150-060(6)⁷. Followed to its logical end, it would allow an injured individual to retain employment status with an employer indefinitely without submitting to the diagnosis of a physician, forcing the employer to “fire” a worker who is claiming injury.

The Commissioner’s role is to determine whether Mr. Watkins was eligible for unemployment benefits based on the evidence before him. Here, the evidence established Mr. Watkins was cleared for light-duty work but refused his employer’s available position. It is not for the Commissioner to decide whether in fact Mr. Watkins’ doctor was incorrect to release him to light-duty work. The reasonable and necessary course of action for Mr. Watkins if he thought he could not work was to go back to his to his doctor and explain why he was unable to work and inform the employer he was taking such action. *See* WAC 192-150-060(4); *see also* RCW 51.32.090 (describing when an injured worker must return to available work under the Industrial Insurance Act).

C. The Commissioner’s decision does not rely on a theory of “constructive quit”.

Mr. Watkins claims the Commissioner’s conclusion that he voluntarily quit relies on the finding that he was the moving party in the

⁷ WAC 192-150-060(6) provides as follows:
If you are on a leave of absence due to your disability, you must promptly request reemployment from your employer when you are again able to return to work.

job separation, thereby improperly applying the “constructive quit” theory of job separation. Br. Appellant at 17-21. However, the Commissioner did not apply a “constructive quit” theory as discussed in *Bauer v. Emp’t Sec. Dep’t*, 126 Wn. App. 468, 108 P.3d 1240 (2005), which is thus distinguishable. There, a commercial driver was terminated from his job after his commercial driver’s license was suspended for committing serious traffic infractions. *Id.* at 471–72. The Commissioner determined that because the driver failed to “maintain his license, a requisite of his job, he effectively quit his employment.” *Id.* at 472 (quotation omitted). The court disagreed and held that the driver’s termination-triggering conduct—i.e., traffic violations that resulted in the loss of his commercial driving privilege—did not amount to a “voluntary” quit, especially because one of the violations was expressly found not to be intentional. *Id.* The *Bauer* court held that the driver did not voluntarily quit because he did not undertake intentional acts with knowledge that he would lose his job. The court indicated that, where circumstances demonstrate that a claimant undertakes affirmative and/or intentional acts with knowledge of the consequences, the claimant may be deemed to have voluntarily quit. *Id.* at 478.

Here, Mr. Watkins’s choice to refuse the offered job assignment was not an accidental driving violation as in *Bauer*, but an intentional

decision freely made that eliminated his availability for work. Given that the employer sent Mr. Watkins a letter stating he needed to appear for work on August 11, when Mr. Watkins decided to not return the letter or appear for work, he acted with the knowledge that termination would follow as a consequence. *See Bauer*, 126 Wn. App. at 478.

Thus, the Commissioner's ruling is distinguishable from *Bauer* because of the finding that Mr. Watkins intentionally refused the offered job. CP Comm'r Rec. at 70, 127 (FF 3, 4). This intentional act, performed with the knowledge that termination would result, makes this a case of voluntary termination. *See Vergeyle*, 28 Wn. App. at 401.

Mr. Watkins relies on language from *Brousseau v. Maine Employment Security Commission*, 470 A.2d 327 (Me. 1984), a decision of the Supreme Court of Maine, to support the proposition that a voluntary quit can only be found when the employee takes the affirmative act of resigning. Br. Appellant at 19. However, neither *Bauer* nor *Brousseau* supports that proposition. On the facts, *Brousseau* is distinguishable in the same way as *Bauer*: the employee in *Brousseau* was a truck driver who was terminated from his position because he was convicted of DUI and thus lost his commercial driver's license. *Brousseau*, 470 A.2d at 328. Thus, the driver's act of losing his driver's license was not intentional and

could not support a finding that he voluntarily terminated his position. *Id.* at 330.

Bauer quotes the following language from *Brousseau*:

[A]n individual leaves work ‘voluntarily’ only when freely making an affirmative choice to do so. The clear import of the statute is that it is the intentional act of leaving employment rather than the deliberate commission of an *antecedent act* which disqualifies an individual from eligibility for benefits.

Bauer, 126 Wn. App. at 476–77, quoting *Brousseau*, 470 A.2d at 330 (emphasis added). Based on this reasoning, acts that are not intentional limitations by the employee on his availability for work but traffic infractions committed off the job did not meet the statutory standard for voluntarily leaving work. *Bauer*, 126 Wn. App. at 476.

In contrast to *Brousseau*, Mr. Watkins intentionally declined the offered job assignment from his employer. This is not an “antecedent act” committed off the job with consequences for employment, nor an unintentional act that resulted in his being unavailable for work. Rather, Mr. Watkins agreed to work for this employer and then did not appear for work that was available for him despite being cleared by his physician to perform such work.

D. Mr. Watkins has not established good cause to quit under RCW 50.20.050.

A person is generally ineligible to receive unemployment benefits when he leaves employment voluntarily, unless he had good cause to quit. RCW 50.20.050(2). A claimant may establish good cause under one of eleven enumerated per se reasons listed in RCW 50.20.050(2)(b) or, at the time of Mr. Watkins' job separation, under RCW 50.20.050(2)(a) for general good cause. The burden of establishing good cause to quit is on the claimant. *Townsend v. Emp't Sec. Dep't*, 54 Wn.2d 532, 534, 341 P.2d 877 (1959).

Mr. Watkins explained at the administrative hearing that he chose not to return to work because he did not feel physically capable. CP Comm'r Rec. at 29. Under RCW 50.20.050(2)(b)(ii), good cause may be shown if the separation was "necessary because of the claimant's illness or disability" if:

- (A) The claimant pursued ***all reasonable alternatives*** to preserve his or her employment status by requesting a leave of absence, by having promptly notified the employer of the reason for the absence, and by having promptly requested reemployment when again able to assume employment. These alternatives need not be pursued, however, when they would have been a futile act, including those instances when the futility of the act was a result of a recognized labor/management dispatch system; and
- (B) The claimant terminated his or her employment status, and is not entitled to be reinstated to the same position or a comparable or similar position;

RCW 50.20.050(2)(b) (ii) (emphasis added). *See also* WAC 192-150-055 (to establish good cause for leaving work voluntarily because of illness or disability, the claimant must have left work primarily because of such illness or disability, the illness or disability made it necessary for him to leave work; and he first exhausted all reasonable alternatives prior to leaving work including notifying the employer of the reason for the absence and asking to be reemployed when you able to return to work.); WAC 192-150-060 (notification requirements when employee leaves work because of disability and employer's offers of alternative work).

Here, Mr. Watkins' disability or illness did not make it necessary for him to separate from his employment. To the contrary, Mr. Watkins' physician, whom he visited on a regular basis, had determined he was able to do restricted work. CP Comm'r Rec. 92-96, 127 (FF 3, 4). Mr. Watkins determined on his own he was unable to perform the work, unilaterally informed his employer he was unable, and refused to take the job assignment. This was not a reasonable course of action in light of his employer's efforts to find an assignment for Mr. Watkins that met his work restrictions.

Mr. Watkins asserted at the administrative hearing he did not know his physician had released him to light duty. CP Comm'r Rec. at 28-30. However, even if Mr. Watkins was previously unaware of the release, the

employer informed Mr. Watkins on August 6, 2009 that he had been released for light-duty and that they had light duty position available for him. Mr. Watkins next saw his physician on August 17, 2009 after he had been informed about the work release. CP Comm'r Rec. at 96. If Mr. Watkins doubted his ability to be released for light duty, he could have addressed these concerns with his physician. Yet, the physician again indicated that Mr. Watkins was able to perform modified duties. CP Comm'r Rec. at 96.

Notably, Mr. Watkins does not argue in his brief that he had either per se or general good cause to quit. It is the claimant's burden to establish eligibility for benefits and here Mr. Watkins fails to do so. RCW 50.32.150; *Leibbrand v. Emp't Sec. Dep't*, 107 Wn. App. 411, 417, 27 P.3d 1186 (2001). Therefore, he cannot establish good cause to quit and the Commissioner properly concluded Mr. Watkins should be denied benefits.

E. If this Court determines Mr. Watkins did not quit but was discharged, the appropriate remedy is a remand to the Commissioner's Review Office for the determination of additional issues.

Should the Court conclude Mr. Watkins did not quit but was discharged by his employer, the Department respectfully requests a remand to the Department. *See* RCW 34.05.574. Mr. Watkins may still

be ineligible for unemployment compensation by having been discharged for misconduct under RCW 50.20.066. Remand is appropriate so as to afford the Commissioner the opportunity to determine whether Mr. Watkins' conduct rose to the level of disqualifying misconduct. See *Safeco*, 102 Wn.2d at 394-395. In *Safeco*, the employment separation was initially decided as a discharge. On appeal however, the Court determined the employee voluntarily quit and remanded the matter to the Commissioner to determine if the employee could establish good cause to quit. *Id.* Since the Commissioner had previously applied the incorrect law, remand was the appropriate remedy so as to allow application of the correct law. *Id.*

Because the Commissioner concluded Mr. Watkins quit without good cause, he did not apply the misconduct statute. Accordingly, those determinations are not before this court on review, and the appropriate remedy—should the Court conclude Mr. Watkins was discharged—is a remand to the Commissioner's Review Office for a determination of that issue.

F. An award of attorney fees is only allowable if the Court reverses or modifies the decision of the Commissioner.

The Act provides for an award of attorney fees and court costs to a claimant only if the decision of the Commissioner is reversed or modified.

RCW 50.32.160. Only a reasonable attorney fee may be charged under the statute. *Id.* Here, the Court should refuse Mr. Watkins's request for attorney fees if it affirms the decision of the Commissioner. *See id.* If the Court reverses or modifies the Commissioner's decision, the Department reserves the right to present argument regarding the reasonableness of attorney fees granted.

VI. CONCLUSION

For the foregoing reasons, the Department respectfully requests that the Commissioner's decision be affirmed. Alternatively, should the Court find that Mr. Watkins did not quit but was discharged, the proper remedy would be a remand to the Commissioner for a determination of whether he was discharged for misconduct

RESPECTFULLY SUBMITTED this 10th day of August 2011.

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NO. 42023-6

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

JAMES E. WATKINS,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF EMPLOYMENT
SECURITY,

Respondent.

CERTIFICATE OF
SERVICE

I, Rain Dineen, certify that I caused a copy of **Brief of Respondent** to be served via US Mail Postage Prepaid via Consolidated Mail Service and electronic mail on all parties or their counsel of record on the date below to:

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via hand delivery to:

Washington State Supreme Court

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

DATED this 10th day of August 2011 at Olympia, WA.


RAIN DINEEN, Legal Assistant