

NO. 43230-7

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

DAN ISBELL,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF EMPLOYMENT
SECURITY,

Respondent.

RESPONDENT'S BRIEF

ROBERT M. MCKENNA
Attorney General

Dionne Padilla-Huddleston
Assistant Attorney General
38356
P.O. Box 40110
Olympia, WA 98504-0110
(360) 586-2588

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUES PRESENTED1

 1. Unemployment compensation is available to individuals who are “unemployed.” RCW 50.20.010. Under RCW 50.04.310(1), an individual is “unemployed” if, in a given week, he works *less than* full time and earns less than one and one-third times his weekly benefit amount plus five dollars. Did the Commissioner properly conclude Mr. Isbell was not actually “unemployed” during the weeks he worked less than full time but earned *more than* one and one and one-third times his weekly benefit amount plus five dollars and, therefore, overpaid benefits because he was paid the full weekly benefit amount?1

 2. An individual who is “unemployed” under RCW 50.04.310(1) is eligible for unemployment benefits but his weekly benefit amount is subject to reduction if he earned any wages during the week claimed. RCW 50.20.130. The individual is only entitled to his weekly benefit amount less seventy-five percent of that part of the remuneration payable to him with respect to such week which is in excess of five dollars. *Id.* Did the Commissioner properly conclude Mr. Isbell did not accurately report his earnings during some weeks he claimed benefits, his weekly benefit amount was incorrectly calculated, and, he was therefore overpaid benefits?2

 3. Did the Commissioner properly conclude Mr. Isbell was at fault in causing the Department to overpay him benefits, not entitled to waiver of the overpayment, and therefore liable for repayment of \$13,516 in overpaid benefits when he was informed that he was to accurately report his gross weekly earnings and not just his hourly wage?.....2

| | | |
|------|--|----|
| III. | COUNTER STATEMENT OF THE CASE | 2 |
| IV. | STANDARD OF REVIEW..... | 5 |
| | A. Review of factual matters | 6 |
| | B. Review of questions of law..... | 7 |
| | C. Mixed questions of law and fact | 7 |
| V. | ARGUMENT | 7 |
| | A. Mr. Isbell was not unemployed during 31 weeks he claimed benefits and was therefore ineligible for benefits during those weeks..... | 8 |
| | B. Mr. Isbell had partial earnings in 32 weeks he claimed benefits; his weekly benefit amount was therefore subject to reduction. | 11 |
| | C. Mr. Isbell was at fault for his overpayment and is therefore liable for its refund. | 13 |
| VI. | CONCLUSION | 18 |

TABLE OF AUTHORITIES

Cases

| | |
|---|--------|
| <i>Edinger v. Emp't Sec. Dep't</i> , 58 Wn. App. 525, 793 P.2d 1004 (1990)..... | 13 |
| <i>Fred Hutchinson Cancer Research Ctr. v. Holman</i> , 107 Wn.2d 693, 732 P.2d 974 (1987)..... | 6 |
| <i>In re Estate of Jones</i> , 152 Wn.2d 1, 93 P.3d 147 (2004)..... | 6 |
| <i>Markam Group, Inc. v. Dep't of Emp't Sec.</i> , 148 Wn. App. 555, 200 P.2d 748 (2009)..... | 7 |
| <i>Smith v. Emp't Sec. Dep't</i> , 155 Wn. App. 24, 226 P.2d 263 (2010)..... | passim |
| <i>Tapper v. Emp't Sec. Dep't</i> , 122 Wn.2d 397, 858 P.2d 494 (1993)..... | passim |
| <i>Wm. Dickson Co. v. Puget Sound Air Pollution Control Agency</i> , 81 Wn. App. 403, 914 P.2d 750 (1996)..... | 6, 7 |

Statutes

| | |
|--------------------------|--------------|
| RCW 34.05.510..... | 5 |
| RCW 34.05.558..... | 2, 6, 15, 16 |
| RCW 34.05.562..... | 2, 15 |
| RCW 34.05.566..... | 2, 15 |
| RCW 34.05.570(1)(a)..... | 6 |
| RCW 34.05.570(1)(d)..... | 6 |
| RCW 50.04.310..... | 11 |

| | |
|---------------------------|--------|
| RCW 50.04.310(1)..... | passim |
| RCW 50.04.320(4)(a) | 9 |
| RCW 50.20.010 | 1, 8 |
| RCW 50.20.130 | passim |
| RCW 50.20.190 | 16 |
| RCW 50.20.190(1)..... | 13 |
| RCW 50.20.190(2)..... | 13, 15 |
| RCW 50.32.120 | 5 |
| RCW 50.32.150 | 6 |

Rules

| | |
|------------------|----|
| RAP 10.3(g)..... | 6 |
| RAP 10.3(h)..... | 13 |

Regulations

| | |
|-----------------------------|-------|
| WAC 192-120-001..... | 8 |
| WAC 192-120-010..... | 8, 11 |
| WAC 192-120-010(2)..... | 14 |
| WAC 192-120-010(3)..... | 15 |
| WAC 192-120-010(5)..... | 15 |
| WAC 192-120-010(7)..... | 15 |
| WAC 192-140-005(5)(g) | 11 |
| WAC 192-220-010..... | 16 |

| | |
|-----------------------------|----|
| WAC 192-220-017(1)..... | 13 |
| WAC 192-220-017(3)(a) | 14 |
| WAC 192-220-020(1)..... | 14 |
| WAC 192-220-020(1)(b)..... | 15 |

Appendix 1

I. INTRODUCTION

Mr. Isbell was paid \$13,516 in unemployment benefits to which he was not entitled. This overpayment was the result of Mr. Isbell incorrectly reporting his gross weekly wages, leading the Department to miscalculate the amount of his weekly unemployment benefit. For some of the weeks Mr. Isbell claimed and was paid unemployment benefits, he earned sufficient wages such that he was not actually unemployed and, therefore, not eligible for benefits. For other weeks Mr. Isbell claimed and was paid benefits, he did not accurately report his earnings, his weekly benefit amount was incorrectly calculated, and he was overpaid benefits.

Because Mr. Isbell failed to correctly report his employment status and income, the Commissioner of the Employment Security Department concluded Mr. Isbell was at fault in causing the Department to overpay him benefits, not entitled to a waiver of the overpayment, and liable for repayment of \$13,516 in overpaid benefits. The Department respectfully requests the Court affirm the Commissioner's decision as it is supported by substantial evidence and free from any error of law.

II. ISSUES PRESENTED

1. Unemployment compensation is available to individuals who are "unemployed." RCW 50.20.010. Under RCW 50.04.310(1), an individual is "unemployed" if, in a given week, he works *less than* full time and earns less than one and one-third times his weekly benefit amount plus five dollars. Did the Commissioner properly conclude Mr. Isbell was not actually "unemployed" during the weeks he worked less than full time but earned *more than* one and one and one-third times his weekly benefit amount plus five dollars

and, therefore, overpaid benefits because he was paid the full weekly benefit amount?

2. An individual who is “unemployed” under RCW 50.04.310(1) is eligible for unemployment benefits but his weekly benefit amount is subject to reduction if he earned any wages during the week claimed. RCW 50.20.130. The individual is only entitled to his weekly benefit amount less seventy-five percent of that part of the remuneration payable to him with respect to such week which is in excess of five dollars. *Id.* Did the Commissioner properly conclude Mr. Isbell did not accurately report his earnings during some weeks he claimed benefits, his weekly benefit amount was incorrectly calculated, and, he was therefore overpaid benefits?
3. Did the Commissioner properly conclude Mr. Isbell was at fault in causing the Department to overpay him benefits, not entitled to waiver of the overpayment, and therefore liable for repayment of \$13,516 in overpaid benefits when he was informed that he was to accurately report his gross weekly earnings and not just his hourly wage?

III. COUNTER STATEMENT OF THE CASE¹

Dan Isbell began working for Aldberbrook Resort and Spa on August 24, 2005, and, with the exception of one week, has been continuously employed there as a banquet cook. Clerk’s Papers (CP)^{2,3}

¹ Mr. Isbell’s statement of the case cites the administrative record regardless of whether the point in the record is reflected in a finding of fact. *See* Appellant’s Br. at 2-5. The Department provides this counterstatement of the case to present the facts as found by the Commissioner, which are the basis for this Court’s review. *See Tapper v. Emp’t Sec. Dep’t*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993); *Smith v. Emp’t Sec. Dep’t*, 155 Wn. App. 24, 32, 226 P.2d 263 (2010). Mr. Isbell’s statement of the case also refers to a January 2010 overpayment notice and a March 2010 Initial Order. *See* Appellant’s Br. at 2-5. These documents are not part of the certified administrative record, CP 3, and Mr. Isbell has not sought the Court’s permission to supplement the record. The documents should therefore not be considered by the Court. *See* RCW 34.05.558 (Judicial review of disputed facts must be confined to the agency record unless supplemented in accordance with RCW 34.05.562 and RCW 34.05.566).

² The certified administrative record was transmitted by the Mason County Superior Court Clerk as Sub. No. 3 and given Clerk’s Papers (CP) numbers 67-812. The certified administrative record is cited herein as CP using the page numbers assigned by

100; 103; 104; 109-110; 753 (FF 1). He earns \$15.25 per hour and works between 15 and 40 hours per week. CP 100; 103; 753 (FF 1).

Mr. Isbell began submitting claims for unemployment benefits in January 2010. CP 374; 753 (FF 2); 759 (FF 2); 767 (FF 2); 772 (FF 2); 778 (FF 2). When he opened his claim, he received a copy of the Unemployment Benefits Claims Kit from the Department. CP 375-90; 753 (FF 2); 759 (FF 2); 767 (FF 2); 772 (FF 2); 778 (FF 2). This kit explains how to properly submit a weekly claim for benefits and explains that a claimant must report all work and gross income earned in a week. CP 384. The kit also explains that earning too much money during a week may make a claimant ineligible for benefits, CP 378, and that benefits may be denied if the claimant is employed full time. CP 382.

Despite these instructions, when Mr. Isbell reported his earnings to the Employment Security Department, he reported his hourly rate of \$15.25 rather than his total weekly gross pay. CP 105; 107; 317-18; 323-25; 344; 356-67; 754 (FF 15); 762 (FF 31); 768 (FF 13); 773 (FF 13); 778 (FF 6). As a result, the Department improperly paid Mr. Isbell his full

the Clerk. 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.

³ The certified administrative record contains the exhibits for five docket numbers heard by the Office of Administrative Hearings. Each docket number addressed different weeks for which Mr. Isbell had submitted a claim for unemployment benefits. The issues in all five matters were whether Mr. Isbell was unemployed and subject to benefit denial and whether his weekly benefit amount was subject to reduction due to partial earnings. The record includes five copies of the transcript (one copy for each OAH docket number), but only one hearing was held on July 12, 2011, to address all five docket numbers. The agency record also contains five copies of many of the same documents since the same set of exhibits was submitted for each docket number. The Department's brief cites to the relevant testimony or exhibit the first time it is found in the record.

weekly unemployment benefit amount for 31 weeks during which he was not actually “unemployed” and for 32 weeks during which his benefit amount should have been reduced based on the amount he earned.

The table attached to the Department’s Brief as Appendix 1 summarizes the weeks Mr. Isbell claimed benefits, the amount he reported in earnings, his actual earnings verified by his employer, the amount of unemployment benefits he was paid, and the amount of benefits he was overpaid.

The Department conducted an investigation of Mr. Isbell’s claim history and provided him with an Advice of Rights informing him that it was questioning his weekly claims. CP 319-21; 344; 368. Based on this investigation, the Department determined Mr. Isbell had earnings he underreported and he either did not meet the definition of “unemployed” or was “unemployed” but his benefit amount was subject to reduction because of his earnings. CP 313-18. Mr. Isbell appealed this decision, and an administrative hearing was held before the Office of Administrative Hearings (OAH). CP 309-12. The Administrative Law Judge (ALJ) issued five initial orders each addressing different weeks for which Mr. Isbell had submitted benefits claims. The initial orders concluded Mr. Isbell did not meet the definition of “unemployed,” was therefore ineligible for benefits, and was at fault for any overpaid benefits. CP 752-81. Mr. Isbell petitioned for review of those initial orders to the Commissioner of the Department. CP 785-88.

The Commissioner adopted all of the ALJ's findings but did not adopt his conclusions. Instead, the Commissioner concluded that for the 31 weeks listed in bold in Appendix 1, Mr. Isbell was not "unemployed" because he earned more than one and one-third his weekly benefit amount plus five dollars, was therefore ineligible for any benefits, and was overpaid benefits during those weeks. CP 792 (CL II-IV). The Commissioner further concluded that for the 32 weeks italicized in Appendix 1, Mr. Isbell was "unemployed" but had earnings he did not accurately report, his weekly benefit amount was therefore subject to reduction, and he was overpaid benefits during those weeks because his benefit amount was not properly reduced. CP 793 (CL V). Mr. Isbell petitioned the superior court for judicial review, and the superior court affirmed the Commissioner's Decision. CP 21-23. This appeal followed.

IV. STANDARD OF REVIEW

Mr. Isbell 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 Procedure 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 Commissioner's decision is considered prima facie correct, and the burden of demonstrating the invalidity of an agency action is on the party

challenging the decision. RCW 50.32.150; RCW 34.05.570(1)(a); *Smith*, 155 Wn. App. at 32. The court should grant relief only 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. Unchallenged findings of fact are verities on appeal. RAP 10.3(g); *Tapper v. Emp’t Sec. Dep’t*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993). 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 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.

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. Mixed questions of law and fact

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. *Smith*, 155 Wn. App. at 35-36. 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, 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. Isbell failed to correctly report his weekly gross wages when submitting his weekly benefit claims and instead reported his hourly wage as though it were his weekly earnings. He was consequently paid \$13,516 in benefits to which he was not entitled for two reasons: (1) for 31 weeks,

the Department paid him unemployment benefits when he in fact did not meet the definition of “unemployed” because his gross earnings exceeded one and one-third times his weekly benefit amount, RCW 50.04.310(1), and (2) for 32 weeks, he met the definition of “unemployed,” but he did not report of all his earnings, resulting in the Department overpaying him unemployment benefits.

As a weekly claimant, Mr. Isbell received a copy of the Department’s information booklet, which explained how to properly report his weekly earnings. CP 376-90. Unless he asked questions, Mr. Isbell was presumed to have understood the contents of the booklet, and he was responsible for filing claims in accordance with its instructions. WAC 192-120-001, 192-120-010. Accordingly, Mr. Isbell was at fault in causing the overpayment of benefits, and he is consequently liable for repayment of the overpaid benefits. Any assertion by Mr. Isbell that the Department failed to inform him that he was improperly reporting his wages is not supported by the record and does not eliminate his responsibility for the overpayment.

A. Mr. Isbell was not unemployed during 31 weeks he claimed benefits and was therefore ineligible for benefits during those weeks.

A claimant is eligible for unemployment benefits only if he is “unemployed.” RCW 50.20.010. An individual is “unemployed” in two situations: (1) during any week in which he performs no services and with respect to which no remuneration is payable to the individual, or (2) during any week of less than full time work “if remuneration payable . . .

is less than one and one-third times the individual's weekly benefit amount plus five dollars." RCW 50.04.310(1). Remuneration is all compensation paid for personal services, including commissions and bonuses and the cash value of all compensation paid in any medium other than cash. RCW 50.04.320(4)(a).

Here, it is undisputed that Mr. Isbell was working for Alderbrook while at the same time filing weekly unemployment claims. Thus, under RCW 50.04.310(1), Mr. Isbell could only meet the definition of "unemployed" if he was working less than full time *and* earning less than one and one-third times his weekly benefit amount plus five dollars. *See* RCW 50.04.310(1). The Commissioner correctly concluded Mr. Isbell earned too much during 31 of the weeks he submitted benefit claims to be considered unemployed, thereby rendering him ineligible for benefits.

The ALJ's findings of fact, which were adopted by the Commissioner, reveal that for the following 31 weeks, Mr. Isbell reported \$15.25 in earnings but that his actual earnings were much greater: the weeks ending February 13, 2010 — February 20, 2010; March 27, 2010; April 10, 2010 — May 15, 2010; June 12, 2010 — October 9, 2010; January 22, 2011 — January 29, 2011; February 26, 2011; and March 26, 2011. CP 753-54 (FF 8, 9, 14); 759-61 (FF 4-9, 13-30); 772-73 (FF 7-8, 12), 778 (FF 5). Mr. Isbell has not challenged the factual findings regarding the weeks he claimed benefits, the amount of earnings he reported to the Department, or the amount he actually earned. They are, therefore, verities on appeal. *Tapper*, 122 Wn.2d at 407. In any event,

substantial evidence supports the Commissioner's findings regarding Mr. Isbell's reported versus actual earnings at Alderbrook, as set forth in Appendix 1.

Based on these findings, the Commissioner properly concluded Mr. Isbell was not unemployed and ineligible for benefits. CP 792 (CL III). For example, in the week ending February 13, 2010, Mr. Isbell reported to the Department he earned \$15.25 and was consequently paid \$325 in unemployment benefits. CP 320. In actuality, his earnings for that week were \$559.52, as verified by his employer. CP 324; 753 (FF 8). Mr. Isbell's \$559.52 in earnings is greater than one and one-third times his weekly benefit amount of \$333⁴ plus five dollars ($\$333 \times 1 \frac{1}{3} = \$444 + \$5 = \449); he therefore did not meet the definition of unemployed during that week, and was overpaid \$325 for the week ending February 13, 2010. The same is true for all the weeks set forth in bold in Appendix 1 to the Department's Brief—Mr. Isbell received his maximum weekly unemployment benefit despite also being paid wages by his employer. For those 31 weeks, the Commissioner properly determined Mr. Isbell was not unemployed and ineligible for unemployment benefits. He was not entitled to *any* of the benefits paid during those weeks and, as addressed further below, he must repay them.

⁴ Mr. Isbell's maximum weekly benefit was \$333 in 2010 and \$267 in 2011. CP 378; see <http://www.esd.wa.gov/uibenefits/benefitcheck/how-much.php>.

B. Mr. Isbell had partial earnings in 32 weeks he claimed benefits; his weekly benefit amount was therefore subject to reduction.

If a claimant meets the definition of “unemployed” set forth in RCW 50.04.310(1), he is eligible for unemployment benefits. But, his weekly benefit amount is subject to reduction if he earned any wages during the week claimed. RCW 50.20.130. The claimant is only entitled to “an amount equal to his or her weekly benefit amount less seventy-five percent of that part of the remuneration (if any) payable to him or her with respect to such week which is in excess of five dollars.” *Id.*

Here, it is undisputed Mr. Isbell was employed with Alderbrook while he was claiming benefits. He was required to accurately report his Alderbrook wages to the Department so that the Department would know whether he was unemployed during any week or whether his benefit amount was subject to reduction because of earnings during that week. *See* RCW 50.04.310; RCW 50.20.130; WAC 192-140-005(5)(g) (each week a claimant files for benefits, she must truthfully report “[a]ny earnings and the number of hours [she] worked during the week claimed.”); WAC 192-120-010.

For 32 weeks, Mr. Isbell met the definition of “unemployed” in RCW 50.04.310(1), but he also had wages during those weeks that he did not truthfully report. The Commissioner properly concluded Mr. Isbell’s benefit amount was subject to reduction based on those wages. *See* RCW 50.20.130.

The ALJ's findings of fact, which were adopted by the Commissioner reveal that for the following weeks, Petitioner reported \$15.25 in earnings but that his actual earnings were greater: January 9, 2010 – February 6, 2010; February 27, 2010 – March 20, 2010; April 3, 2010; May 22, 2010 – June 5, 2010; October 16, 2010 – January 15, 2010; February 5, 2011— February 19, 2011; March 5, 2011— March 12, 2011. CP 753-54 (FF 3-7, 10-13); 759-761 (FF 3, 10-12,); 767-68 (FF 3-12); 772-73 (FF 3-6, 9-11); 778 (FF 3-4). Mr. Isbell has not challenged these factual findings regarding the weeks he claimed benefits, the amount of earnings he reported to the Department, or the amount he actually earned. Accordingly, they are verities on appeal. *Tapper*, 122 Wn.2d at 407. Regardless of Mr. Isbell's failure to challenge any of the findings, substantial evidence supports the Commissioner's findings, as set forth in Appendix 1 to the Department's Brief.

Based on these findings, the Commissioner properly concluded Mr. Isbell had earnings during the weeks in question such that his benefit amount should have been subject to reduction pursuant to RCW 50.20.130. CP 793 (CL V). It was, however, not reduced by the correct amount because Mr. Isbell did not accurately report his weekly earnings. Rather, for 32 weeks he claimed benefits, Mr. Isbell reported his hourly wage of \$15.25 as his gross weekly earnings rather than his total gross weekly earnings. CP 105; 107; 317; 323-25; 344; 356-67; 754 (FF 15); 762 (FF 31); 768 (FF 13); 773 (FF 13); 778 (FF 6). Because of his

erroneous reporting, the Department did not correctly calculate his weekly benefit amount.

For these weeks, the Commissioner properly determined Mr. Isbell's benefit amount was subject to reduction because of his Alderbrook wages. Mr. Isbell has not assigned error to the amount of the overpayment as required by RAP 10.3(h) or challenged the Commissioner's findings regarding the amount of the overpayment. As explained further below, he is liable for the repayment of the benefits to which he was not entitled.

C. Mr. Isbell was at fault for his overpayment and is therefore liable for its refund.

“An individual who is paid any amount as benefits under [the statute] to which he or she is not entitled shall, unless otherwise relieved pursuant to this section, be liable for repayment of the amount overpaid.” RCW 50.20.190(1); *see also Edinger v. Emp't Sec. Dep't*, 58 Wn. App. 525, 529, 793 P.2d 1004 (1990) (under 50.20.190, a person who has received an overpayment is liable to repay that amount, subject to certain waiver provisions). The Commissioner may waive an overpayment if the overpayment was not the result of fault attributable to the individual and if requiring the individual to repay the overpayment would be against “equity and good conscience.” RCW 50.20.190(2) (emphasis added). Claimants must repay the full amount of an overpayment unless they are granted a waiver. WAC 192-220-017(1).

The Commissioner may not waive overpayments that are the result of fault attributable to the benefits claimant. RCW 50.20.190(2); WAC

192-220-017(3)(a). A claimant is at fault for an overpayment when the overpayment is the result of fraud, misrepresentation, or willful nondisclosure, or when (1) the claimant was paid benefits in an amount greater than he was entitled; (2) the claimant provided incorrect information, did not disclose information that should have been disclosed, or caused another person to fail to disclose information; and (3) the claimant had notice that the information should have been reported, included written communications from the Department, such as the unemployment claims kit. WAC 192-220-020(1)

The Commissioner properly concluded Mr. Isbell was at fault for the overpayment and, therefore, not eligible for a waiver. Mr. Isbell was paid benefits greater than to which he was entitled, he provided incorrect earnings information, and he had notice on how to properly report his earnings. The Unemployment Benefit Claims Kit specifically informs all claimants that they are required to report their gross weekly wages. CP 384. The Department provides this booklet to each person who files an application for unemployment benefits. WAC 192-120-010(2). And the record makes clear that Mr. Isbell was provided a copy of this booklet. CP 375-90; 795 (CL VII). The kit specifically informs claimants of the following:

You must report all work and income earned each week, including income that is: Earned from part-time work, including your current employer. . . . You must report your earnings (gross pay) before deductions, not your net pay. You must report income for the week you earn it, regardless of when you receive the pay. If you do not, you may lose your right to future benefits and have to pay back

the benefit you received. . . . If you are uncertain whether something is considered earnings, call the Telecenter.

CP 384.

Each person who receives the booklet, including Mr. Isbell, is presumed to understand its contents—unless he asks for help understanding it—and is responsible for reporting and filing claims in accordance with its instructions. WAC 192-120-010(3), (5), (7).

Despite notice of how to properly report his weekly hours and earnings, Mr. Isbell incorrectly answered the Department's questions during the course of filing his claims regarding his weekly gross earnings, which the Department used to determine whether he was unemployed and whether his weekly benefit amount was subject to reduction. CP 793 (CL VII). He failed to read or comply with the instructions provided to him. Accordingly, he is not free from fault in causing the overpayment and, therefore, must repay it. RCW 50.20.190(2); WAC 192-220-020(1)(b).

Mr. Isbell asserts that his incorrect reporting of his weekly earnings was the Department's fault rather than his own because the Department did not inform him of what he was doing incorrectly. *See* Appellant's Br. at 2-5. This assertion rests on Mr. Isbell's interpretation of what occurred regarding a February 2010 overpayment notice that is not at issue in the current matter.⁵ Mr. Isbell alleges he was not informed

⁵ Mr. Isbell submitted to this Court on April 26, 2012, as a Verbatim Report of Proceedings, the transcript of a March 2010 hearing addressing the February 2010 overpayment notice. This transcript is not part of the certified administrative record, and Mr. Isbell did not seek the Court's permission to supplement the record; therefore, this transcript should not be considered by the Court. *See* RCW 34.05.558 (Judicial review of disputed facts must be confined to the agency record unless supplemented in accordance with RCW 34.05.562 and RCW 34.05.566).

during the hearing addressing the February 2010 overpayment notice of how or why he had an overpayment and that the failure to inform him deprived him of due process. However, the final order relating to the February 2010 overpayment is not a part of the record currently before the Court and, therefore, may not be reviewed by this Court. RCW 34.05.558.

Mr. Isbell also argues the Department did not notify him of the reason for his overpayment as required by RCW 50.20.190. Appellant's Br. at 3; *see also* WAC 192-220-010. This is not true. The Department complied with this requirement by mailing Mr. Isbell on March 14, 2011, a determination notice that included the reasoning for the overpayment. CP 313-18. While Mr. Isbell may not have understood the reasoning behind the February 2010 overpayment notice (which is not before the Court) or the April 2011 overpayment notice, this does not mean the Department failed in its statutory duty to provide notice of the reasons for the overpayment.

Further, Mr. Isbell fails to acknowledge that the Unemployment Claims Kit specifically instructs all claimants on their responsibility for reporting weekly gross wages, not hourly wages. CP 384; 753 (FF 2). The March 2010 Initial Order, while not part of the record before this Court but attached to Mr. Isbell's declaration re: Notice of Appeal as Exhibit 2, cites to RCW 50.20.130 and concludes he was liable for the overpayment because his benefit amount was not properly reduced. The order clearly put Mr. Isbell on notice that he was submitting claims in a manner that resulted in an overpayment. But even after being put on

notice, Mr. Isbell continued to report his wages in the same manner consequently resulting in further overpayments. *See* Appellant's Br. at 4. Mr. Isbell's ability to correctly report his gross total wages was entirely within his control and his failure to do so makes him at fault for the overpayment and responsible for its repayment.

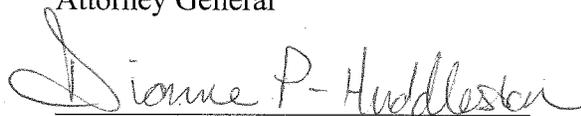
Importantly, the Commissioner explicitly found Mr. Isbell's testimony that he was unaware he was being overpaid to be not credible. CP 792 (CL I). Despite often earning weekly wages in excess of his weekly benefit amount, he continued to receive his full weekly benefit amount *in addition to* his wages. *Id.* (emphasis added); Appendix 1. The Commissioner is fully "authorized to make his own independent determinations based on the record . . . including findings of witness credibility." *Smith*, 155 Wn. App. at 36 n.6. And, as discussed, on appeal, the court may not substitute its judgment for that of the agency's on the credibility of witnesses. *Id.* at 35. Because the Commissioner properly determined that Mr. Isbell was not free from fault in causing the overpayment of benefits, the Court should affirm the Commissioner's decision.

VI. CONCLUSION

For the foregoing reasons, the Department respectfully requests that this Court affirm the decision of the Commissioner.

DATED this 18th day of September 2012.

ROBERT M. MCKENNA
Attorney General



DIONNE PADILLA-HUDDLESTON
WSBA# 38356
Assistant Attorney General
(360) 586-2588

PROOF OF SERVICE

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

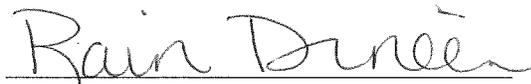
Dan Isbell
P.O. Box 1911
Belfair, WA 98528

Original filed electronically with:

Court of Appeals, Division II

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

DATED this 18th day of September 2012, at Olympia, WA.


RAIN DINEEN, Paralegal

Respondent's Appendix 1

Respondent's Appendix 1

| <u>OAH Docket No.</u> | <u>Week ending:¹</u> | <u>Earnings reported:</u> | <u>Actual earnings:</u> | <u>Benefits paid:²</u> | <u>Overpayment amount:</u> | <u>Citation to Record:</u> |
|------------------------------|--|----------------------------------|--------------------------------|--|-----------------------------------|---|
| 04-2011-16868 | <i>1/9/10</i> | <i>\$15.25</i> | <i>\$384.01</i> | <i>\$325</i> | <i>\$277</i> | 105, 111-12, 314, 317, 324, 753 (FF 3) |
| | <i>1/16/10</i> | <i>\$15.25</i> | <i>\$320.87</i> | <i>\$325</i> | <i>\$229</i> | 105, 111-12, 314, 317, 324, 753 (FF 4) |
| | <i>1/23/10</i> | <i>\$15.25</i> | <i>\$276.18</i> | <i>\$325</i> | <i>\$196</i> | 105, 111-12, 314, 317, 324, 753 (FF 5) |
| | <i>1/30/10</i> | <i>\$15.25</i> | <i>\$407.34</i> | <i>\$325</i> | <i>\$204</i> | 105, 111-12, 314, 317, 324, 753 (FF 6) |
| | <i>2/6/10</i> | <i>\$15.25</i> | <i>\$193.22</i> | <i>\$325</i> | <i>\$134</i> | 105, 111-12, 314, 317, 324, 753 (FF 7) |
| | 2/13/10 | \$15.25 | \$559.52 | \$325 | \$325 | 105, 111-12, 313, 317, 324, 753 (FF 8) |
| | 2/20/10 | \$15.25 | \$463.46 | \$325 | \$325 | 105, 111-12, 313, 317, 324, 753 (FF 9) |
| | <i>2/27/10</i> | <i>\$15.25</i> | <i>\$356.51</i> | <i>\$325</i> | <i>\$256</i> | 105, 111-12, 314, 317, 324, 754 (FF 10) |
| | <i>3/6/10</i> | <i>\$15.25</i> | <i>\$180.10</i> | <i>\$325</i> | <i>\$124</i> | 105, 111-12, 314, 317, 324, 754 (FF 11) |
| | <i>3/13/10</i> | <i>\$15.25</i> | <i>\$413.64</i> | <i>\$325</i> | <i>\$299</i> | 105, 111-12, 314, 317, 324, 754 (FF 12) |
| | <i>3/20/10</i> | <i>\$15.25</i> | <i>\$306.23</i> | <i>\$325</i> | <i>\$218</i> | 105, 111-12, 314, 317, 324, 754 (FF 13) |
| | 3/27/10 | \$15.25 | \$580.11 | \$325 | \$325 | 105, 111-12, 313, 317, 324, 754 (FF 14) |
| 04-2011-16869 | <i>4/3/10</i> | <i>\$15.25</i> | <i>\$341.90</i> | <i>\$325</i> | <i>\$245</i> | 105, 111-12, 314, 317, 324, 759 (FF 3) |
| | 4/10/10 | \$15.25 | \$518.79 | \$325 | \$325 | 105, 111-12, 313, 317, 324, 759 (FF 4) |
| | 4/17/10 | \$15.25 | \$593.38 | \$325 | \$325 | 105, 111-12, 313, 317, 323, 759 (FF 5) |
| | 4/24/10 | \$15.25 | \$593.15 | \$325 | \$325 | 105, 111-12, 313, 317, 323, 759 (FF 6) |
| | 5/1/10 | \$15.25 | \$491.81 | \$325 | \$325 | 105, 111-12, 313, 317, 324, 686 (FF 7) |

¹ The weeks listed in bold are weeks the Commissioner concluded Mr. Isbell was not unemployed. CP 792 (CL II-IV). The weeks listed in italics are the weeks the Commissioner concluded Mr. Isbell had work and earnings that he did not accurately report. CP 793 (CL V).

² The Administrative Law Judge's findings of fact state that the benefits paid were \$314 for all weeks in 2010 (except for December 18, 2010 for which benefits were \$292) and \$267 for all weeks in 2011. CP 752-81. The ALJ's findings are correct in that Petitioner's check amount was \$314 in 2010 but this amount included \$25 in a federal weekly benefit increase. This \$25 has not been included in the overpayment currently before this Court. CP 315. Rather, the weekly benefits paid for 2010 is based on the following: \$314 (check total) - \$25 (federal weekly benefit increase) = \$289 + \$36 (amount sent to IRS on Petitioner's behalf) = \$325. See CP 317-18, 369-74. There was no federal weekly benefit in 2011 and the benefits paid for 2011 is based on the following: \$233 (check total) + \$26 (amount sent to IRS on Petitioner's behalf) = \$259. See CP 317-18, 369-74.

Respondent's Appendix 1

| | | | | | | |
|---------------|----------|---------|-----------|-------|-------|---|
| | 5/8/10 | \$15.25 | \$613.66 | \$325 | \$0 | 105, 111-12, 313, 317, 324, 759 (FF 8) |
| | 5/15/10 | \$15.25 | \$601.92 | \$325 | \$325 | 105, 111-12, 313, 317, 324, 759 (FF 9) |
| | 5/22/10 | \$15.25 | \$328.62 | \$325 | \$235 | 105, 111-12, 314, 317, 324, 760 (FF 10) |
| | 5/29/10 | \$15.25 | \$211.07 | \$325 | \$147 | 105, 111-12, 314, 317, 324, 760 (FF 11) |
| | 6/5/10 | \$15.25 | \$397.42 | \$325 | \$287 | 105, 111-12, 314, 317, 324, 760 (FF 12) |
| | 6/12/10 | \$15.25 | \$546.10 | \$325 | \$325 | 105, 111-12, 313, 317, 324, 760 (FF 13) |
| | 6/19/10 | \$15.25 | \$1055.15 | \$325 | \$0 | 105, 111-12, 313, 317, 324, 760 (FF 14) |
| | 6/26/10 | \$15.25 | \$531.28 | \$325 | \$325 | 105, 111-12, 313, 317, 324, 760 (FF 15) |
| | 7/3/10 | \$15.25 | \$538.33 | \$325 | \$325 | 105, 111-12, 313, 317, 323, 760 (FF 16) |
| | 7/10/10 | \$15.25 | \$576.91 | \$325 | \$325 | 105, 111-12, 313, 317, 323, 760 (FF 17) |
| | 7/17/10 | \$15.25 | \$693.95 | \$325 | \$0 | 105, 111-12, 313, 317, 252, 760 (FF 18) |
| | 7/24/10 | \$15.25 | \$639.84 | \$325 | \$325 | 105, 111-12, 313, 317, 323, 761 (FF 19) |
| | 7/31/10 | \$15.25 | \$490.60 | \$325 | \$60 | 105, 111-12, 313, 317, 252, 761 (FF 20) |
| | 8/7/10 | \$15.25 | \$498.37 | \$325 | \$325 | 105, 111-12, 313, 317, 323, 761 (FF 21) |
| | 8/14/10 | \$15.25 | \$681.83 | \$325 | \$0 | 105, 111-12, 313, 317, 323, 761 (FF 22) |
| | 8/21/10 | \$15.25 | \$524.91 | \$325 | \$325 | 105, 111-12, 313, 317, 252, 761 (FF 23) |
| | 8/28/10 | \$15.25 | \$605.43 | \$325 | \$0 | 105, 111-12, 313, 317, 323, 761 (FF 24) |
| | 9/4/10 | \$15.25 | \$709.96 | \$325 | \$325 | 105, 111-12, 313, 317, 323, 761 (FF 25) |
| | 9/11/10 | \$15.25 | \$532.68 | \$325 | \$325 | 105, 111-12, 313, 317, 323, 761 (FF 26) |
| | 9/18/10 | \$15.25 | \$824.87 | \$325 | \$0 | 105, 111-12, 313, 317, 323, 762 (FF 27) |
| | 9/25/10 | \$15.25 | \$588.65 | \$325 | \$325 | 105, 111-12, 313, 317, 323, 762 (FF 28) |
| | 10/2/10 | \$15.25 | \$553.12 | \$325 | \$325 | 105, 111-12, 313, 317, 323, 762 (FF 29) |
| | 10/9/10 | \$15.25 | \$483.73 | \$325 | \$325 | 105, 111-12, 313, 317, 323, 762 (FF 30) |
| | | | | | | |
| 04-2011-16870 | 10/16/10 | \$15.25 | \$393.45 | \$325 | \$284 | 105, 111-12, 314, 317, 323, 767 (FF 3) |
| | 10/23/10 | \$15.25 | \$274.04 | \$325 | \$194 | 105, 111-12, 314, 317, 323, 767 (FF 4) |
| | 10/30/10 | \$15.25 | \$410.73 | \$325 | \$319 | 105, 111-12, 314, 317, 323, 767 (FF 5) |
| | 11/6/10 | \$15.25 | \$411.14 | \$325 | \$297 | 105, 111-12, 314, 317, 323, 767 (FF 6) |

Respondent's Appendix 1

| | | | | | | |
|---------------|----------|---------|----------|-------|-------|---|
| | 11/13/10 | \$15.25 | \$69.39 | \$325 | \$41 | 105, 111-12, 314, 317, 323, 767 (FF 7) |
| | 11/20/10 | \$15.25 | \$311.10 | \$325 | \$222 | 105, 111-12, 314, 317, 323, 767 (FF 8) |
| | 11/27/10 | \$15.25 | \$333.67 | \$325 | \$239 | 105, 111-12, 314, 317, 323, 767 (FF 9) |
| | 12/4/10 | \$15.25 | \$139.23 | \$325 | \$93 | 105, 111-12, 314, 317, 323, 767 (FF 10) |
| | 12/11/10 | \$15.25 | \$420.05 | \$325 | \$311 | 105, 111-12, 314, 317, 323, 768 (FF 11) |
| | 12/18/10 | \$15.25 | \$239.73 | \$325 | \$206 | 105, 111-12, 314, 317, 323, 768 (FF 12) |
| | | | | | | |
| 04-2011-16871 | 12/26/10 | \$15.25 | \$149.15 | \$259 | \$0 | 105, 111-12, 314, 317, 323, 772 (FF 3) |
| | 1/1/11 | \$15.25 | \$127.80 | \$259 | \$85 | 105, 111-12, 314, 317, 324, 772 (FF 4) |
| | 1/8/11 | \$15.25 | \$133.90 | \$259 | \$89 | 105, 111-12, 314, 317, 324, 772 (FF 5) |
| | 1/15/11 | \$15.25 | \$63.29 | \$259 | \$36 | 105, 111-12, 314, 317, 324, 772 (FF 6) |
| | 1/22/11 | \$15.25 | \$579.29 | \$259 | \$0 | 105, 111-12, 313, 317, 325, 772 (FF 7) |
| | 1/29/11 | \$15.25 | \$454.60 | \$259 | \$259 | 105, 111-12, 313, 318, 325, 772 (FF 8) |
| | 2/5/11 | \$15.25 | \$268.85 | \$259 | \$190 | 105, 111-12, 314, 318, 325, 772 (FF 9) |
| | 2/12/11 | \$15.25 | \$247.67 | \$259 | \$175 | 105, 111-12, 314, 318, 325, 773 (FF 10) |
| | 2/19/11 | \$15.25 | \$170.81 | \$259 | \$117 | 105, 111-12, 314, 318, 325, 773 (FF 11) |
| | 2/26/11 | \$15.25 | \$446.96 | \$259 | \$259 | 105, 111-12, 314, 318, 325, 773 (FF 12) |
| | | | | | | |
| 04-2011-16872 | 3/5/11 | \$15.25 | \$349.54 | \$259 | \$251 | 105, 111-12, 314, 318, 325, 778 (FF 3) |
| | 3/12/11 | \$15.25 | \$133.44 | \$259 | \$89 | 105, 111-12, 314, 318, 325, 778 (FF 4) |
| | 3/26/11 | \$15.25 | \$579.65 | \$259 | \$259 | 105, 111-12, 313, 318, 325, 778 (FF 5) |

WASHINGTON STATE ATTORNEY GENERAL

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