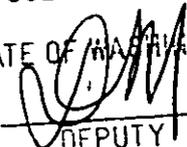


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STATE OF WASHINGTON

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No. 47349-6-II

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

DENISE FUGATE,

Respondent,

v.

WASHINGTON STATE DEPARTMENT OF EMPLOYMENT
SECURITY,

Appellant.

OPENING BRIEF OF RESPONDENT

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A. INTRODUCTION

The Petitioner, Denise Fugate (“Ms. Fugate”), appears before this Court pursuant to the provisions of RCW 34.05.510 through RCW 34.05.598 of the Washington Administrative Procedure Act (“WAPA”), appealing a final decision of the Commissioner of the Employment Security Department (“Commissioner”) issued on February 28, 2014, Docket Number 122013-00075. The Commissioner determined that Ms. Fugate was discharged for misconduct and disqualified from receiving unemployment compensation benefits pursuant to RCW 50.20.066(1) because of misconduct, as defined by RCW 50.04.294(2)(a) (“insubordination showing a deliberate, willful, or purposeful refusal to follow the reasonable directions or instructions of the employer”) and RCW 50.04.294(1)(b) (“deliberate violations or disregard of standards of behavior”) of the Employment Security Act (“Act”).

On appeal, the Superior Court found that Ms. Fugate’s actions reflected an error of judgment and not disqualifying misconduct pursuant to RCW 50.04.294. The Superior Court also adopted the Commissioner’s Findings of Fact, with the exception that substantial evidence did not support the Commissioner’s treatment of a key employer witness for the employer as a supervisor. On February 27,

2015, the Superior Court entered an Order reversing the Commissioner's denial of benefits.

Ms. Fugate respectfully appeals the Commissioner's denial of benefits, and requests that consistent with the Superior Court's interpretation of the record and applicable law, the Commissioner's denial be set aside, and that she be granted benefits.

The Superior Court also awarded fees in the amount of \$5,141.50 based on the parties' stipulation. This Court should affirm that order. It should additionally award fees and costs to Ms. Fugate on her appeal, pursuant to RCW 50.32.160 and RAP 18.1.

B. ASSIGNMENTS OF ERROR

Ms. Fugate assigns no error to the Thurston County Superior Court's reversal of the Commissioner's Order. However, this matter is a judicial review under the Washington Administrative Procedure Act, RCW 34.05, wherein the Court of Appeals sits in the same position as the superior court and reviews the Commissioner's decision. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). Therefore, Ms. Fugate assigns error to the findings and conclusions of the Commissioner below, and not the superior court, which ruled in Ms. Fugate's favor. *See* RAP 10.3(h); RCW 50.32.120 (judicial review of the

Commissioner's decision is governed by the Administrative Procedure Act).

1. Substantial evidence in the record does not support the Commissioner's determination that Ms. Fugate misled her employer regarding her injury.
2. Substantial evidence in the record does not support the Commissioner's determination that Ms. Fugate acted in defiance of her employer's instruction.
3. The Commissioner's conclusion that Ms. Fugate deliberately acted in violation of her employer's interests and committed disqualifying misconduct was an error of law.
4. The Commissioner's conclusion that Ms. Fugate was willfully insubordinate and committed disqualifying misconduct was an error of law.
5. The Commissioner's conclusion that Ms. Fugate's error in judgment disqualified her from benefits was an error of law.

C. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1. Whether substantial evidence supports the Commissioner's determination that Ms. Fugate misled her employer regarding her injury? (Assignment of Error 1)
2. Whether substantial evidence supports the Commissioner's determination that Ms. Fugate intentionally disregarded instructions from her employer when the instructions were not established in the record? (Assignment of Error 2)
3. Whether it was an error of law for the Commissioner to conclude that Ms. Fugate deliberately acted against her employer's interests? (Assignment of Error 3)
4. Whether it was an error of law for the Commissioner to conclude that Ms. Fugate did not commit a good faith error in judgment when she continued to perform her job duties and therefore

wrongfully disqualified Ms. Fugate from benefits? (Assignment of Error 4)

D. STATEMENT OF CASE

Ms. Fugate began her employment at Printcom (“Printcom” or “employer”) in April 2013. Administrative Record (“AR”) 13, 73. Printcom is a printing company and distributor of business and corporate promotional products. AR 12. She was employed full time as a press operator and bindery worker, earning approximately \$14.00 per hour. AR 13.

On October 10, 2013, Ms. Fugate strained her back muscles while working, causing her pain. AR 73. She was reluctant to see a doctor, but did so when Judy Covert, Printcom’s Secretary/Treasurer, instructed her to. AR 16, 35, 73. The doctor determined that the injury was a muscle spasm, and filled out an L&I form indicating that Ms. Fugate should “seldom” lift, push, or pull more than five pounds for a duration of three days. AR 22-23, 63, 74. The doctor did not quantify the weight limit verbally in his discussion with Ms. Fugate. AR 74. She did not look carefully at the form when she received it, and until Jim Covert, Printcom’s President, pointed out the lower weight restrictions on the form the next morning, she believed her weight restriction was twenty pounds. AR 33. The medical restriction was to elapse Sunday,

October 13, 2013, and therefore was only effective for one work day – Friday, October 11, 2013. AR 17, 63, 74.

Ms. Coover instructed Jeri Melton, Printcom's office manager, to attach instructions to Ms. Fugate's timecard listing various restrictions to Ms. Fugate's job duties. AR 17-18, 64, 74, 94. However, when she arrived at work on the morning of October 11, Ms. Fugate was not feeling any pain, and feared that if she could not physically perform her job duties, her job would be in jeopardy. AR 23, 35-36, 37, 74. She had experienced a previous back injury which had healed quickly with very little pain, and believed this injury was similar. AR 24-25. Believing she could and should perform her regular job duties as long as she was not feeling any pain, Ms. Fugate completed her work. AR 23-24, 35-36, 37. In doing so, she testified that she "did lift some boxes" but did not confirm whether they exceeded the weight limit her doctor described on her medical restriction form. AR 36. She testified that she made a "judgment call" that she should do her job if she could without pain. AR 36.

Shortly after Ms. Fugate began her shift, Mr. Coover showed Ms. Fugate the doctor's medical restriction form and instructed her to refrain from lifting items weighing more than five pounds. AR 74, 94-95. Later, after receiving reports from Ms. Fugate's coworkers that she

was lifting items in excess of her restrictions, Ms. Coover observed Ms. Fugate pushing a wheeled cart containing items weighing more than five pounds. AR 20, 74. Among the restrictions Ms. Melton described early that morning was the instruction that Ms. Fugate not push “carts with anything on them;” however, Ms. Fugate testified that she could push the cart with one finger and did not believe pushing the cart exceeded her medical restriction. AR 26-27, 64, 74. Additionally, the Coovers’ conversations with Ms. Fugate regarding her restrictions did not indicate that she should refrain from pushing any carts. AR 62, 65. When Ms. Coover witnessed Ms. Fugate pushing the cart, she sent Ms. Fugate home. AR 20. Mr. Coover called Ms. Fugate later in the evening of Friday, October 11 and terminated her. AR 14.

Ms. Fugate applied for unemployment benefits but was denied based on the Employment Security Department’s determination that she committed misconduct. AR 46. Ms. Fugate timely appealed. AR 50, 52-53. On January 7, 2014 Administrative Law Judge (“ALJ”) Todd Gay heard testimony from Ms. Fugate and Printcom witnesses Judy Coover and Jeri Melton. AR 73. ALJ Gay reversed ESD’s denial of benefits, finding that Ms. Fugate exhibited poor judgment, but that the employer failed to demonstrate Ms. Fugate’s misconduct based on the

mitigating circumstance that Ms. Fugate feared an injury would cost her job and felt she had to “suck it up.” AR 75.

Printcom appealed to the Commissioner of Employment Security. AR 83, 85-89. The Commissioner adopted the ALJ’s findings of fact with some augmentation, but reversed the ALJ’s conclusion of law that Printcom failed to prove misconduct. AR 94-96 (reversing Conclusion of Law 7). The Commissioner determined Printcom proved Ms. Fugate’s misconduct pursuant to RCW 50.04.294(2)(a) and RCW 50.04.294(1)(b). AR 96. In so finding, the Commissioner did not specify which portions of its opinion constituted findings of fact and which were conclusions of law. AR 94-96. It is from this decision that Ms. Fugate appeals to this court.

E. STANDARD OF REVIEW

Judicial review of the final administrative decision issued by the Commissioner of the Employment Security Department is governed by the Washington Administrative Procedure Act, RCW Title 34.05 (the “WAPA”). *Tapper*, 122 Wn.2d at 402. The Commissioner is the final authority for the Department’s determinations on unemployment compensation. *Id.* at 404. This court sits in the same position as the superior court and directly reviews the Commissioner’s decision and the administrative record according to the standards of the WAPA. *Id.* at

402. The court may also review the underlying decision of the ALJ to the extent that the Commissioner adopts the ALJ's findings. *Kirby v. State Emp't Sec. Dep't*, 179 Wn. App. 834, 842-43, 320 P.3d 123 (2014). The party challenging an agency's action, here Ms. Fugate, carries the burden of demonstrating the action was invalid. RCW 34.05.570(1)(a).

The WAPA allows the reviewing court to reverse the Commissioner's decision if the decision is not based on substantial evidence or the decision is based on an error of law. RCW 34.05.570(3). The court may determine that substantial evidence does not support the agency's decision if the record does not contain evidence of sufficient quantity to persuade a fair-minded, rational person of the truth or correctness of the agency order. *Affordable Cabs, Inc. v. Emp't Sec. Dep't*, 124 Wn. App. 361, 367, 101 P.3d 440, 443 (2004). In determining whether substantial evidence supports the Commissioner's findings of fact, the reviewing court considers the entire administrative record. *Kirby*, 179 Wn. App. at 843. Unchallenged findings are generally verities on appeal. *Tapper*, 122 Wn.2d at 407.

The determination of whether an employee's behavior constitutes work-related misconduct is a mixed question of law and fact. *Stephens v. Emp't Sec. Dep't*, 123 Wn. App. 894, 903, 98 P.3d 1284 (2004). Upon review, the appellate court will "accept the [c]ommissioner's

unchallenged factual findings, apply the substantial evidence standard to the challenged findings of fact, independently determine the applicable law, and apply the law to the facts.” *Michaelson v. Emp’t Sec. Dep’t*, WL 1874303 at *3 (amended May 26, 2015). While the reviewing court accords deference to the Department’s interpretation of employment law, it is “ultimately for the court to determine the purpose and meaning of the statutes, even when the court’s interpretation is contrary to that of the agency.” *Gaines v. Emp’t Sec. Dep’t*, 140 Wn. App. 791, 796, 166 P.3d 1257 (2007). The process of applying the law to the facts of the case is subject to *de novo* review. *Daniels v. Emp’t Sec. Dep’t*, 168 Wn. App. 721, 728, 281 P.3d 310 (2012).

F. SUMMARY OF ARGUMENT

In denying benefits to Ms. Fugate, the Commissioner made findings which were not supported by substantial evidence in the record, and made errors in applying both supported and unsupported facts to the law. The Commissioner imputed knowledge of the employer’s instructions to Ms. Fugate in order to establish her deliberate refusal to follow those instructions, but did not establish what the employer’s instructions to Ms. Fugate had actually been, a prerequisite to determining whether she failed to follow them. The Commissioner then erroneously concluded that Ms. Fugate intended to harm her employer.

The Commissioner's Order misused the Employment Security Act's exception to misconduct based on errors in judgment, holding that Ms. Fugate could not substitute her own judgment for that of her employer when such an error is the very basis of the exception. It is this final error which is most egregious, as it contravenes the legislature's stated purpose in enacting the Act: liberal construction of the statutory language in favor of the unemployed worker.

G. ARGUMENT

The Washington State Legislature specifically sets forth that the Employment Security Act ("the Act") is to be interpreted liberally. RCW 50.10.010. The legislature emphasized the importance of liberal construction by stating in the preamble of the Act that "this title shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum." *Id.* Washington courts have adopted the reasoning that:

Unemployment compensation statutes were enacted for the purpose of relieving the harsh economic, social and personal consequences resulting from unemployment. If these statutes are to accomplish their purpose, they must be given a liberal interpretation.

Gaines, 140 Wn. App. at 798 (quoting 3A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 74.7, at 921-23 (6th ed. 2003)). Accordingly, the Act must be liberally construed in

favor of the unemployed worker. *Delagrave v. Emp't Sec. Dep't.* 127 Wn. App. 596, 608-609, 111 P.3d 879 (2005).

Under the Act, a worker may be disqualified from receiving unemployment compensation if termination resulted from misconduct connected to his or her work. RCW 50.20.066. Nevertheless, conduct that justifies termination does not necessarily disqualify the employee from unemployment compensation. *Johnson v. Emp't Sec. Dep't.*, 64 Wn. App. 311, 314-15, 824 P.2d 505 (1992).

I. Factual Findings Must Be Supported By Substantial Evidence

The WAPA allows the reviewing court to reverse the Commissioner's decision if the decision is not based on substantial evidence or the decision is based on an error of law. RCW 34.05.570(3). The court may determine that substantial evidence does not support the agency's decision if the record does not contain evidence of sufficient quantity to persuade a fair-minded, rational person of the truth or correctness of the agency order. *Affordable Cabs, Inc.*, 124 Wn. App. at 367. In determining whether substantial evidence supports the Commissioner's findings of fact, the reviewing court considers the entire administrative record. *Kirby*, 179 Wn. App. at 843. Here, several of the Commissioner's factual findings were not supported by substantial

evidence, and Ms. Fugate asks that the Court set aside those findings and apply only substantially supported facts to the law.

a. The Court may consider the unchallenged factual findings of both the Commissioner and the ALJ.

Under the WAPA, the Commissioner exercises all of the decision-making power of the ALJ, including the power to make his or her own findings of fact, and in the process may set aside or modify the findings of the ALJ. *Tapper*, 122 Wn.2d at 404. On appeal, the court reviews the factual findings of the Commissioner, but may also evaluate findings made by the ALJ and adopted by the Commissioner. *Kirby*, 179 Wn. App. at 842-43.

Here, the Commissioner adopted the ALJ's findings of fact, with certain augmentations. AR 94-96. The Commissioner did not specifically delineate which findings it augmented in recording its decision; therefore "it is within the prerogative of [this Court] to exercise its own authority in determining what facts have actually been found below." *Tapper*, 122 Wn.2d at 406 (wherein the court described certain relevant facts adopted from the findings of both the ALJ and the Commissioner's decisions).

b. Facts adopted by the Commissioner and undisputed on appeal may be treated as verities.

The Commissioner left several key ALJ findings – Findings of Fact Nos. 3, 6, and 8 – undisturbed, and they are particularly relevant to Ms. Fugate’s entitlement to benefits. Ms. Fugate does not dispute those findings. Undisputed facts are verities on appeal. *Tapper*, 122 Wn.2d at 407.

First, the Commissioner did not augment or modify the finding that Ms. Fugate’s doctor did not quantify her weight restrictions verbally. AR 74 (FF3). Thus, according to the ALJ and Commissioner’s findings, Ms. Fugate first learned her exact weight restrictions when she was first counseled by Jim Coover on the morning of October 11, when she returned to work. AR 74 (FF3), 94. *See also* AR 33 (Ms. Fugate “just glanced” at the medical form and did not see the medical restriction “until they brought it to my attention the next morning.”).

Next, the Commissioner did not augment or modify the finding that when Ms. Fugate returned to work on October 11, she was not feeling any back pain, and was afraid if she did not demonstrate physical ability, her job would be in jeopardy. AR 74 (FF6). *See also* AR 23 (“I didn’t have any pain when I woke up. And ... so I assumed that doing my job was expected of me.”), AR 33 (“I wasn’t in any pain. I didn’t have any trouble (inaudible), or lifting, or turning. And the ... day

before the injury had subsided.”), AR 35-36 (Judge Gay: “...were you worried that if you were hurt, and you had to be on light duty that the employer might not like that?” Ms. Fugate: “Yes.”).

Ms. Fugate testified that Ms. Melton, Printcom’s office manager and assistant to the Cooverts, caused her to be fearful for her job because of her injury:

Ms. Fugate: ...I told [Ms. Melton] that I had to lay on the floor to try and really relax [...] the muscle spasm in my back. And at that point she told me not to tell anybody, because I would get fired if I did.

...

Judge Gay: Now, um, the - when Jeri told you, um, “Don’t tell anybody, uh, were you - were you worried that if you were hurt, and you had to be on light duty that the Employer might not like that?

Ms. Fugate: Yes.

AR 35-36. The fact of Ms. Fugate’s fear is a verity.

Finally, the Commissioner did not augment or modify the finding that the force required to move the cart was not established, and that Ms. Fugate testified without opposition that she could move the cart with one finger. AR 74 (FF 8). *See also* AR 26 (“I could push it with one finger.”). Neither the ALJ nor the Commissioner made specific findings

as to the exact nature of the restrictions imposed upon Ms. Fugate. *See infra* Sec. G.I.a.2.

These undisputed facts establish that while Ms. Fugate may have worked outside of her medical restrictions, she did so with the belief that she should do so because she was not feeling pain, and because her job would be in jeopardy if she did not.

c. The Commissioner's augmented findings are not supported by substantial evidence.

The Commissioner augmented the ALJ's findings, holding that Ms. Fugate initially told her employer she was fine, while she was in fact experiencing back spasms, AR 94; that she was admonished not to lift items more than five pounds, AR 94-95; and that Ms. Fugate was sent home and fired after she was observed "lifting beyond her restrictions again," AR 95-96. These augmented findings are not supported by substantial evidence, and are not sufficiently developed to support the Commissioner's application of the augmented facts to the law. Additionally, the Commissioner drew unsupported factual inferences as to whether Ms. Fugate's pushing a cart violated her restrictions, then relied upon those inferences in applying the law.

1. The Commissioner lacked substantial evidence to support its finding that Ms. Fugate misled her employer about her injury.

The Commissioner made an augmented finding that Ms. Fugate “gave conflicting accounts after she apparently hurt her back at work. She told her employer she was fine, but the employer received reports from other employees that they observed [Ms. Fugate] in pain.” AR 94. First, the Commissioner’s finding cannot be accurate on its face: if the employer learned from other employees that Ms. Fugate was in pain when she said it was fine, Ms. Fugate did not give “conflicting accounts;” rather, she gave an account which conflicted with other employees’ accounts.

Leaving the Commissioner’s internal inconsistency aside, its finding that Ms. Fugate told her employer “she was fine” when “[c]laimant admits she was having back spasms” is not supported by substantial evidence in the record. Ms. Fugate testified that she informed Mr. Covert of her injury and that she was in pain, but that she would attempt to work through it. AR 35 (“And I did mention it to Jim and let him know that I was trying to work through the pain.”). Ms. Fugate later told Mr. Covert she was “fine,” but she did so when she returned to work the following morning, when the injury had subsided. AR 33.

The only testimony in the record supporting the Commissioner’s finding is that of Judy Covert, and it is hearsay. Ms. Covert testified:

“...Jim told me that Denise had injured her back ... he said, ‘She told me she’s fine. That she had laid down, and she was fine.’” AR 15. *See also* AR 16. Mr. Covert himself did not testify, and his written statement admitted into evidence did not contain facts supporting the Commissioner’s finding. *See* AR 65.

While hearsay is admissible in administrative hearings, the Commissioner may not rely on it in reaching factual findings, unless the presiding officer has also ordered that the finding did not unduly abridge the parties’ opportunity to confront witnesses and rebut evidence. *In re Daren S. Andrus*, Emp. Sec. Comm’r Dec.2d 960 (2010). Neither the ALJ nor the Commissioner made any such order. *See* AR 73-76, 94-96. Therefore, Ms. Covert’s hearsay testimony as to what Mr. Covert told her is invalid and cannot be considered substantial support of the Commissioner’s finding. Without Ms. Covert’s testimony, or indeed even with it, there is insufficient evidence in the record to persuade a fair-minded, rational person that the Commissioner’s finding - that Ms. Fugate told her employer she was “fine” when she was not - is true and correct. *See Affordable Cabs, Inc.*, 124 Wn. App. at 367.

2. The Commissioner lacked substantial evidence to infer Ms. Fugate’s knowledge and deliberate disregard of her employer’s instructions and standards.

Even where the Commissioner merely weighed the testimony to reach inferences in favor of the employer, those inferences must still be supported by substantial evidence in the record. *Griffith v. Emp't Sec. Dep't*, 163 Wn. App. 1, 7, 259 P.3d 1111 (2011) (where the Commissioner inferred that employee misrepresented whether he sought permission to apologize for his actions, but the record did not support that employee had in fact made that argument). “Disqualifying evidence” which would prevent an employee from receiving unemployment compensation benefits, must be established by a preponderance of evidence. *Crain v. Emp't Sec. Dep't*, 65 Wn. App. 51, 55, 827 P.2d 34 (1992).

There is not sufficient evidence to persuade a “fair minded, rational person” that the Commissioner’s inferences and ultimate decision were correct. The Commissioner inferred from the record that Ms. Fugate “lift[ed] beyond her restrictions again” when Ms. Coover observed her pushing a cart, the deciding incident causing Ms. Fugate’s termination. AR 95-96. In fact, Ms. Fugate testified she could push it with one finger and its weight, i.e. the force required to push it, was not established in the record. AR 26-27, 64, 74. The Commissioner inferred and found that it was in excess of her restriction, but because

Ms. Fugate's restrictions were unclear and the weight of the cart was not established, that finding is not supported by substantial evidence.

The Commissioner's inference was also unsupported by substantial evidence in that it failed to determine the actual restrictions placed upon Ms. Fugate, and so failed to establish that Ms. Fugate's pushing a cart violated her restrictions at all. Instead, the Commissioner referred to a note which "specifically identified what duties claimant could perform," but did not describe its contents. AR 94. The Commissioner then found that the "employer's president repeated the instructions and showed her the doctor's note," again not describing either note's contents. *Id.* The only finding referring to the nature of the restrictions was that Ms. Fugate was witnessed "lifting boxes well over her restriction limit of 5 lbs." *Id.*¹

On the other hand, substantial evidence supports the ALJ's findings (undisturbed by the Commissioner) that while Ms. Fugate had been informed and reminded of her restrictions, whatever they were, she was not feeling pain, she believed she could and should perform her regular job duties if possible, she believed her job would be in jeopardy

¹ The ALJ made similarly incomplete findings. See AR 74, FF 5 ("The employer arranged for a note ... detailing her medical restrictions.") and FF 8 ("Claimant moved a cart with a total gross weight believed to be more than five pounds.").

if she did not, and she could push the cart Ms. Coover observed her pushing with one finger. AR 74, 94-96.

II. The Agency Misapplied the Law Regarding Misconduct

Generally, unemployed workers are eligible for benefits unless they are disqualified by statute. *See* RCW 50.20.060. Under the Act, a worker may be disqualified from receiving unemployment compensation if termination resulted from misconduct connected with his or her work. RCW 50.20.066. RCW 34.05.570(3)(d) allows the disqualified worker relief if “[t]he agency has erroneously interpreted or applied the law.”

The overarching goal of the Act is to “preserve eligibility for benefits where the employee merely makes an error of judgment . . . that is, the behavior cannot be characterized as mere incompetence, inefficiency, erroneous judgment, or ordinary negligence.” *Galvin v. Emp’t Sec. Dep’t*, 87 Wn. App. 634, 643 (1997) (quoting *Tapper v. Emp’t Sec. Dep’t*, 122 Wn.2d at 409). *See also Dermond v. Emp’t Sec. Dep’t*, 89 Wn. App. 128, 133, 947 P.2d 1271 (1997). Even misconduct that justifies termination does not necessarily disqualify the employee from unemployment compensation. *Johnson*, 64 Wn. App. at 314-15 (citing *Ciskie v. Emp’t Sec. Dep’t*, 35 Wn. App. 72, 76, 664 P.2d 1318 (1983) (“Good cause” for discharge is not to be equated with misconduct disentitling the worker to benefits.)).

The Commissioner misapplied the facts to the law in denying Ms. Fugate benefits, as the Commissioner did not establish that she willfully disregarded the rights of her employer or willfully refused to follow the reasonable directions of her employer. Rather, Ms. Fugate made a good faith error in judgment, with the intent of supporting her employer's interests, not disregarding them.

a. Ms. Fugate did not act deliberately in violation of the employer's interests.

The Commissioner erroneously determined that Ms. Fugate was discharged for disqualifying misconduct under RCW 50.04.294(1)(b). AR 96. Misconduct, within the meaning of the statute and as applied to Ms. Fugate, is defined as "deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee." RCW 50.04.294(1)(b). Ms. Fugate did not deliberately disregard standards of behavior. The ALJ's findings, undisturbed by the Commissioner, were that her doctor did not enumerate her weight restriction verbally. She testified that she did not look at her restriction sheet carefully until Mr. Coover showed it to her. AR 33. Thus, she was unaware of the exact weight restriction the doctor had noted until Mr. Coover showed her the medical note. *Id.* After that conversation, Ms. Fugate continued to believe that she could safely perform the duties

she performed. AR 23-24, 35-36, 37, 74. She also continued to believe that her job would be in jeopardy if she did not. *Id.*

Where an employee does not act out of a “conscious intent to harm the employer when she refused to follow the employer’s instructions,” it is not misconduct. *Kirby*, 179 Wn. App. at 837. The employer must establish misconduct “by evidence that the employee was aware that he or she was disregarding the employer’s rights.” *Kirby*, 179 Wn. App. at 847. Ms. Fugate testified plainly that she did not intend to harm her employer. AR 38 (“I didn’t have any disregard for them, I was trying to show them that I wasn’t hurt.”). She believed her job was in jeopardy. AR 74.

In *Kirby v. Emp’t Sec. Dep’t*, the court established that an employee must be aware they were disregarding the employer’s rights in order to have committed misconduct. 179 Wn. App. at 847. There, an employee refused her employer’s direct instruction to write up an incident report, based on her fear “that it would be used against her.” *Id.* at 840. The employee was mistaken; her employer only asked her to fill out the report because they believed she had not completed one yet. *Id.* The court upheld the ALJ’s finding that the employee’s actions were not disqualifying insubordination because “the parties did not have the

same understanding of what the claimant was being asked to do.” *Id.* at 847.

In *Kirby*, the employee was not aware she was disregarding her employer’s rights, and therefore did not intentionally jeopardize her employer’s interests when she was insubordinate. *Id.* Similarly, Ms. Fugate testified that she did not intend to disregard Printcom’s rights, AR 38, and there is no evidence that the Coverts indicated to Ms. Fugate that they were concerned about Printcom’s liability for further injury or indicated any other risk of harm they perceived. Like the employee in *Kirby*, Ms. Fugate received conflicting instructions regarding her restrictions, and misunderstood her employer’s interests in that she believed she should do as much of her usual work as she could without pain. AR 23, 35-36, 37, 74.

The Commissioner concluded that Ms. Fugate’s actions risked her employer’s interests in the form of 1) further injury to Ms. Fugate herself, and 2) liability and harm to other employees. AR 96. No party has contended that Ms. Fugate’s initial injury was anything other than accidental. If Ms. Fugate had in fact intended to harm Printcom’s interests, she could only have caused that harm by continuing to work, sustaining further painful injury to herself, and then holding Printcom liable. A powerful desire on the part of Ms. Fugate to harm her

employer such that she would intentionally injure herself in the process is not indicated in the record and strains credibility. Similarly mystifying is the Commissioner's conclusion that Ms. Fugate's continuing to work somehow risked liability to Printcom in the form of injury to *other* employees. In fact, employer witnesses indicated that they told Ms. Fugate to have other employees do her lifting for her. AR 20, 62, 67. Simply put, the Commissioner's conclusion that Ms. Fugate intentionally harmed her employer's interests is implausible and not supported by Ms. Fugate's testimony or reasonable logic.

b. Ms. Fugate's actions were not willfully insubordinate.

The Act identifies insubordination "showing a deliberate, willful or purposeful refusal to follow the reasonable directions or instructions of the employer" as one type of disqualifying misconduct. RCW 50.04.294(2)(a). "Willful" means "intentional behavior done deliberately or knowingly, where you are aware that you are violating or disregarding the rights of your employer or a coworker." WAC 192-150-205(1).

Mere failure to follow the employer's direction is not disqualifying misconduct: "When the record supports a finding that an employee was fired for failing to follow the employer's directions but the employer fails to show that the directions were reasonable and that

the failure to follow them was deliberate, willful, or purposeful, the employee's conduct does not rise to the level of misconduct disqualifying the employee from receiving unemployment benefits." *Kirby*, 179 Wn. App. at 837.

1. The instructions provided by the employer to Ms. Fugate were inconsistent and unclear.

In order to determine whether Ms. Fugate acted in defiance of her employer's instructions, the Commissioner must necessarily have established which instructions Ms. Fugate received. The Commissioner did not establish those facts, instead referring to a note which "specifically identified what duties claimant could perform," then found that the "employer's president repeated the instructions and showed her the doctor's note," then found that Ms. Fugate was witnessed "lifting boxes well over her restriction limit of 5 lbs." AR 94. Ms. Fugate received one set of restrictions from her doctor, which both Mr. and Ms. Coover apparently referred to in discussion with Ms. Fugate, AR 62, 63, 65, and another set of written instructions from her employer, which Mr. Coover also apparently referred to. AR 64, 65. The instructions differ in one key aspect: the doctor's restrictions instruct Ms. Fugate to "seldom" push, pull, or lift anything in excess of five pounds, while Ms. Melton's note instructs Ms. Fugate not to push anything at all. When the

Commissioner ultimately reached a finding, it was merely that Ms. Fugate was witnessed “lifting boxes well over her restriction limit of 5 lbs.” AR 94. The Commissioner appears to be reaching a finding that Ms. Fugate had a lifting restriction of five pounds, but provides no finding as to what Ms. Fugate’s other restrictions were, if any. Ms. Fugate was terminated as a result of pushing a cart, but it is not established whether she was instructed not to push any cart at all or merely no cart weighing more than five pounds. Therefore, it cannot be established whether she knowingly violated the instruction.

Because the Commissioner failed to establish the necessary facts to support its conclusion and failed to support certain key findings with substantial evidence, its application of the law to those facts was erroneous. It was error for the Commissioner to find that Ms. Fugate intentionally disregarded her employer’s interests and willfully defied her employer’s instructions, and its findings should be reversed.

c. Ms. Fugate’s actions are excluded from disqualifying misconduct because they were good faith errors or negligence.

Actions which demonstrate “inadvertence or ordinary negligence in isolated instances” or “good faith errors in judgment or discretion” are *excluded* from the statutory definition of misconduct. RCW

50.04.294(3)(b) and (c) (emphasis added). Ms. Fugate's decision to continue to work reflected poor judgment, but it was an isolated mistake.

WAC 192-150-200(3)(b) defines "inadvertence or ordinary negligence" to be an action that is "an accident or mistake and is not likely to result in serious bodily injury." WAC 192-150-205(3) defines "negligence" to be a "failure to exercise the care that a reasonably prudent person usually exercises." While the WACs do not specifically define "serious bodily injury," WAC 192-150-205(4) analogously defines "serious bodily harm" to mean "bodily injury which creates a probability of death, or which causes significant permanent disfigurement, or which causes a significant loss or impairment of the function of any bodily part or organ."

In continuing to perform her job duties, Ms. Fugate made a mistake, demonstrating isolated negligence and an error in judgment, but she risked no serious bodily injury in doing so. Even where an employee's actions might expose their employer to liability, or where an employee fails to exercise reasonable care multiple times, the employee's ordinary negligence is excluded from statutory misconduct. *Michaelson*, WL 1874303 at *4 (where an employee had three at-fault collisions in one year, "failed to exercise reasonable care," but did not

evidence the necessary intentional or substantial disregard of his employer's interests to disqualify him from benefits).

Ms. Fugate was diagnosed with a muscle spasm. AR 22-23, 63, 74. She rested it and iced it, and woke up feeling no pain. AR 33, 36, 74. A reasonably prudent person might restrict their actions anyway, but using WAC 192-150-205(4)'s analogous definition of serious bodily harm, Ms. Fugate's failure to do so was not likely to result in serious bodily injury. Her actions meet the statutory definition of "ordinary negligence" and are not disqualifying misconduct.

Similarly, Ms. Fugate made a good faith error in judgment. She felt no pain, and believed she could and should perform her regular job duties, or risk consequences. AR 74. She understood, from her conversations with Mr. and Ms. Coovert, that she should avoid lifting, but also believed that she could safely push the envelope cart. AR 26-27, 64, 74, 94-96. She made a judgment call, based on those beliefs, that she should perform those duties. *See. e.g.* AR 35 ("I made a judgment call."). *Contrast with Tapper*, 122 Wn.2d at 411 (the court upheld the Commissioner's determination that the claimant "affirmatively 'ignored'" directions of her employer). The Commissioner found that "[w]e do not believe ... claimant should be allowed to substitute her own judgment about what was more important to the employer." AR

96. But in fact, the statute's exclusion of good faith errors in judgment from the definition of misconduct allows just that. Ms. Fugate did not deliberately ignore her employer's directions; she believed her job was in jeopardy, and made good faith errors as to whether she should continue doing her regular duties, and after Ms. Coovert's warning, whether pushing the wheeled cart contravened her instructions.

1. The Commissioner erroneously limited the statute's exceptions to misconduct in concluding that Ms. Fugate did not make an error in judgment.

ESD will likely assert that Ms. Fugate did not have the discretion to exercise judgment over which tasks she could perform. Clerk's Papers ("CP") at 19. But under that argument, the misconduct exclusions of RCW 50.04.294(3) would not apply to any employee accused of insubordination, because no employee has the authority to simply say "no" to an employer's instruction. Such a reading significantly curtails the application of RCW 50.04.294(3), is in no way indicated by the plain language of the statute, and should not be upheld by this Court. "Construction of the benefits statute which 'would narrow the coverage of the unemployment compensation laws' is viewed 'with caution.'" *Michaelson*, WL 1874303 at *3 (citations omitted).

The Act does not exclude from the misconduct analysis only certain errors of judgment which are within the decisionmaking authority of the employee – it excludes *any* conduct which is a good faith error in judgment. See RCW 50.04.294(3). For example, in *Wilson v. Emp't Sec. Dep't*, the court held that even employee acts which violate an employer policy may still be good faith errors in judgment, because the court must evaluate the employee's conduct in light of her reason for violating the policy and her good faith intent to comply. 87 Wn. App. 197, 202, 940 P.2d 269 (1997) (“There is no evidence in the record to show that Wilson acted with a deliberate intent to violate his employer's policy or in willful disregard of his employer's interest... These acts were, by Wilson's own admission, in violation of the employer's policy. However, at most they amounted to ... an exercise of poor judgment.”).

While Ms. Fugate lacked discretion in the work she performed – she had to do whatever work her employer assigned to her, as nearly every person described by a business as it “employee” must – she could, and did, exercise judgment as to whether she was physically capable of performing her usual tasks. Moreover, the Act must be “liberally construed.” RCW 50.01.010. The Commissioner did not uphold that mandate here.

Under the plain meaning of the statute, Ms. Fugate made a good faith error in judgment. Her error was in her decision that she needed to show her employer that she was able to work based on her belief that her job was in jeopardy if she could not perform all her regular duties. When she testified that she made a “judgment call,” her testimony was in reference to trying to balance the employer’s light duties against her regular duties, given that she was not in any pain and believed her injury was resolved. AR 36 (“I was trying to do my light duties as requested ... I did lift some boxes. And I was trying to do my job. And I was not in any pain.”). She acknowledged it was a mistake, but that she was “regarding the needs of the customers and the importance of the job.” AR 91. Her judgment was incorrect – her job became at risk when she continued to perform her duties – but she made the decision in good faith.

III. Request for Attorney Fees and Costs Under RAP 18.1

Under RCW 50.32.160 and RCW 50.32.100, if Ms. Fugate prevails in this court, she is entitled to reasonable attorney fees and costs. “[I]f the decision of the commissioner shall be reversed or modified, such fee and costs shall be payable.” RCW 50.32.160. The fee shall be reasonable, and fixed “by the supreme court or the court of appeals in the event of appellate review.” *Id.* Ms. Davison asks this court to award

reasonable fees in accordance with RAP 18.1, and affirm the superior court's previous fees order. *See* CP 33-34.

H. CONCLUSION

Ms. Fugate requests that this court affirm the decision of the superior court reversing the Commissioner's decision denying benefits based on misconduct. The Commissioner's finding that Ms. Fugate intentionally disregarded instructions by her employer was not based on substantial evidence in the record and the conclusion that Ms. Fugate engaged in disqualifying misconduct was an error of law.

RESPECTFULLY SUBMITTED this 1st day of July, 2015.

TELLER & ASSOCIATES, PLLC



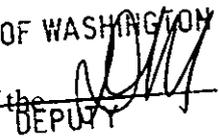
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CERTIFICATE OF SERVICE

STATE OF WASHINGTON

I hereby declare under penalty of perjury under the laws of the  DEPUTY

State of Washington that on July 1, 2015, I caused to be served by email delivery, per counsel agreement, a true and correct copy of the foregoing pleading upon counsel of record at the addresses stated below:

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And caused to be filed a true and correct copy of the foregoing pleading upon the court:

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402


Brenda Blankenship