

NO. 49362-4-II

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

HAROLD GARY WILLIAMS,

Respondent,

v.

WASHINGTON STATE DEPARTMENT
OF EMPLOYMENT SECURITY,

Appellant.

APPELLANT'S RESPONSE BRIEF

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I. INTRODUCTION

Harold Williams was discharged from his job as a hostler at Old Dominion after he moved a trailer without first checking to see whether the door was closed and, as a result, a forklift and its driver fell to the ground. This conduct violated a safety rule requiring all hostlers to visually inspect trailer doors to ensure the trailer was safe to move before moving it. Williams was discharged for violating this rule.

Witness testimony established that Williams knew or should have known about this rule. Specifically, the testimony established that each hostler was individually told about the rule and the rule was reinforced at safety meetings that Williams attended. The Commissioner found this testimony more credible than Williams'. Accordingly, the Department's Commissioner correctly concluded that Williams' actions amounted to misconduct that disqualifies him from unemployment benefits because he violated a reasonable employer rule of which he was aware. RCW 50.04.294(2)(f). Additionally, the Commissioner correctly found that Williams committed misconduct under RCW 50.04.294(1)(a) and (d) because his conduct – which placed a co-worker at risk for serious bodily harm and exposed his employer to liability – was a willful or wanton disregard of the interests of his employer or a fellow employee and was carelessness of such a degree as to show a substantial disregard of his

employer's interest. Finally, this Court should affirm the Commissioner's order under the additional basis that Williams' conduct was carelessness likely to cause serious bodily harm to a fellow employee. RCW 50.04.294(1)(c).

Substantial evidence in the administrative record supports the Commissioner's factual findings, and the decision was correct under the law. Thus, this Court should reverse the superior court and affirm the Commissioner's decision denying Williams unemployment benefits.

II. STATEMENT OF THE ISSUES

1. Does substantial evidence support the findings of fact that Old Dominion implemented, communicated, and enforced a policy requiring hostlers to visually check trailer doors before moving the trailer when the witnesses testified that the policy was adopted by the corporate office, communicated down the chain of managers, communicated to each hostler individually, reiterated at safety meetings, and that other employees had been discharged for violating it?
2. Does substantial evidence support the Commissioner's finding of fact that Williams knew or should have known of the policy requiring hostlers to visually check doors when the testimony showed Williams had been personally informed of the decision and was present at safety meetings that discussed this safety rule?
3. Did the Commissioner correctly conclude that Williams committed disqualifying misconduct under the Employment Security Act when:
 - a. Williams violated his employer's reasonable rule requiring hostlers to visually inspect trailer doors to ensure they were closed before moving the trailer when he moved a trailer

without first checking the doors, causing a forklift and its driver to fall to the ground, RCW 50.04.294(2)(f)?

- b. Williams acted in willful or wanton disregard of his employer's rights, title, and interests when he violated his employer's reasonable safety policy of which he was aware, RCW 50.04.294(1)(a)?
 - c. Williams' conduct evinced carelessness or negligence of such a degree as to show a substantial disregard of the employer's interest when his violation of his employer's safety policy created a risk of serious bodily harm to a fellow employee and exposed his employer to liability due to that risk, RCW 50.04.294(1)(d)?
4. Should the Court also affirm the Commissioner's order on the basis that Williams' conduct was carelessness or negligence that would likely cause serious bodily harm to a fellow employee when the conduct caused a forklift and its driver to fall from a trailer, RCW 50.04.294(1)(c)?
5. Should the Court reverse the superior court's award of attorney fees and costs to Williams because the Commissioner's decision should be affirmed?

III. STATEMENT OF THE FACTS

Harold Williams was employed by Old Dominion Freight as a dockworker and hostler from 2007 through 2015. Clerk's Papers (CP) 37, 125, 142 (Finding of Fact (FF 3)). In late 2013 or early 2014, the Old Dominion Freight corporate office instituted a policy to reduce accidents on loading docks. CP 41-42, 65, 69, 142 (FF 5, 11). The employer had previously allowed hostlers to rely on computer messages that would tell the hostler when the trailer doors were closed and ready to move. CP 41-

42, 65, 142 (FF 5, 11). The new policy required hostlers to visually inspect trailer doors to ensure the door was secure and that it was safe to move the trailer. *Id.* The employer verbally communicated the policy change to each hostler individually and at safety meetings, but the policy was not in writing. CP 52-53, 142 (FF 8-9).

On September 18, 2015, Williams failed to perform the required visual inspection. CP 39-40, 68-62, 65, 73, 142-143 (FF 12 and 14). Had Williams performed a visual inspection, as required by the policy, he would have seen that a forklift was on the trailer. CP 48, 143 (FF 16). But Williams did not perform the inspection and pulled the trailer. CP 39-40, 58-62, 142 (FF 12). As a result, the forklift and its driver fell to the ground. CP 39-40, 68-62, 65, 73, 142 (FF 12). The driver was not seriously injured but was shaken up. CP 41, 142 (FF 13). The forklift was damaged. *Id.* A dock worker had incorrectly noted in the computer that the trailer was ready to move from the docking station. CP 61-62, 143 (FF 14). The employer discharged Williams for violating the safety policy. CP 44, 142 (FF 4).

Williams applied for unemployment benefits, and the Department denied his claim. CP 119-123, 141 (FF 1). After an administrative hearing on Williams' appeal, an administrative law judge (ALJ) determined Williams had been discharged from work for disqualifying misconduct. CP

141-46. At the administrative hearing, the employer presented testimony from William Gehlson (the manager), Cory McCammon (the hostler supervisor), and Daniel Larson (the assistant terminal manager). CP 37-51 (Gehlson), 51-64 (McCammon), 65-70 (Larson). Williams testified on his own behalf and presented two witnesses. CP 71-88 (Williams), 89-100 (Cruz), 100-105 (Brown). The two witnesses, Matthew Cruz and Michael Brown, were dock workers—not hostlers. CP 89-100, 100-105.

Old Dominion’s witnesses testified consistently on the requirements of the policy, when the policy was instituted, how the policy was communicated to all hostlers – including Williams – and how the policy was reiterated at safety meetings that hostlers attended. CP 41-43, 52-54, 58, 65, 69, 106, 143 (FF 21). Specifically, Gehlson and Larson testified that the policy was instituted by the corporate office. CP 41-42 (Gehlson), 69 (Larson), 142 (FF 5). Gehlson, Larson, and McCammon all testified that the rule was communicated to each hostler individually and reiterated at the safety meetings. CP 41-43 (Gehlson), 52-54 (McCammon), 65-70 (Larson), 133, 142-143 (FF 5-10, 22-23).

Additionally, Williams’ witnesses testified consistently with Old Dominion’s witnesses—and inconsistently with Williams on key points. For example, Cruz testified that, as discussed at the safety meetings, the rule required hostlers to check the trailer doors as part of a “triple check”

system. CP 92, 98, 99. Brown confirmed that the safety meetings were for both hostlers and dock workers and that he had seen Williams at the meetings, albeit not on a routine basis. CP 104-105.

By contrast, Williams' testimony differed in several respects from the testimony of all the witnesses—including his own witnesses. CP 73-87, 143 (FF 21). Specifically, Williams testified he had been told not to check the trailers and to stay in his seat to increase productivity—but that he would defy this order and check the trailers anyway if he heard a loud sound or felt shaking in the trailer. CP 74.

The ALJ weighed and resolved the conflicting evidence in Old Dominion's favor. Specifically, the ALJ found Old Dominion's witness testimony and other evidence more credible than Williams' after considering "the demeanor and motivation of the witnesses . . . as well as the logical persuasiveness of the parties' evidence"; Old Dominion's evidence was "more logically persuasive" than Williams'. CP 143 (FF 21). In particular, the ALJ found it significant that the testimony of Williams' witnesses was consistent with the testimony of Old Dominion's witnesses. *Id.* Accordingly, the ALJ determined the evidence showed Williams was disqualified from unemployment benefits because he had been discharged for disqualifying misconduct under RCW 50.04.294(1)(d). CP 146.

Williams petitioned the Department's Commissioner for review of the ALJ's initial order. CP 155-58. The Commissioner adopted the findings of fact and conclusions of law of the ALJ and affirmed the initial order finding that Williams was discharged for disqualifying misconduct. CP 161-64. The Commissioner adopted the credibility finding of the ALJ. CP 161-62. The Commissioner additionally concluded that Williams was discharged for misconduct *per se* for violation of a reasonable company policy of which he was aware under RCW 50.04.294(2)(f), and because his conduct was in willful and wanton disregard of the right, title, and interests of the employer under RCW 50.04.294(1)(a). CP 162.

Williams appealed to the Pierce County Superior Court. Making new findings and reweighing the evidence, the superior court reversed the Commissioner's decision and awarded attorney fees and costs to Williams. CP 247-49, 266-270, 306-307. The Department appeals.

IV. STANDARD OF REVIEW

The appellate court's "limited review of an agency decision is governed by the Administrative Procedure Act (APA), chapter 34.05 RCW." *Campbell v. Emp't Sec. Dep't*, 180 Wn.2d 566, 571, 326 P.3d 713 (2014); RCW 50.32.120. This Court sits in the same position as the superior court and applies the APA standards directly to the administrative record. *Campbell*, 180 Wn.2d at 571. Thus, the decision on review is the

Commissioner's final order, which adopted the ALJ's factual findings and legal conclusions. *Id.*; *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993); *Delagrave v. Emp't Sec. Dep't*, 127 Wn. App. 596, 604, 111 P.3d 879 (2005) (superior court's findings of fact and conclusions of law are superfluous to appellate court's review). In this appeal, the Commissioner's decision is *prima facie* correct, and it is Williams' burden to demonstrate its invalidity. RCW 34.05.570(1)(a); RCW 50.32.150; *Campbell*, 180 Wn.2d at 571.

Under the APA, the court gives “[g]reat deference” to the Commissioner's factual findings and substantial weight to the agency's interpretation of the law. *Daniels v. Dep't of Emp't Sec.*, 168 Wn. App. 721, 727, 281 P.3d 310 (2012). The Commissioner's findings of fact must be upheld if supported by substantial evidence in the agency record. RCW 34.05.558; RCW 34.05.570(3)(e); *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). Unchallenged factual findings are verities on appeal. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d at 407.

Evidence is substantial if it 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); *Campbell*, 180 Wn.2d at 571. 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 is to “view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed” at the administrative proceeding below—here, the Department. *William Dickson Co.*, 81 Wn. App. at 411; *see also Tapper*, 122 Wn.2d at 403 (court gives deference to agency’s factual findings).

The Court may not reevaluate the fact finder’s determinations as to witness credibility because review for substantial evidence “necessarily entails acceptance of the fact-finder’s views regarding credibility of witnesses and the weight to be given reasonable but competing inferences.” *William Dickson Co.*, 81 Wn. App. at 411 (quoting *State ex rel. Lige & Wm. B. Dickson Co. v. Cty. of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992)); *Smith v. Emp’t Sec. Dep’t*, 155 Wn. App. 24, 35-36, 226 P.3d 263 (2010). A court may not substitute its judgment of the facts for that of the agency. *Tapper*, 122 Wn.2d at 403.

The Court reviews questions of law de novo, under the error of law standard. RCW 34.05.570(3)(d); *Tapper*, 122 Wn.2d at 407. Because the Department has expertise in interpreting and applying unemployment benefits law, 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); *William Dickson Co.*, 81 Wn. App. at 407.

Whether a claimant committed misconduct is a mixed question of law and fact. *Griffith v. Dep't of Emp't Sec.*, 163 Wn. App. 1, 8, 259 P.3d 1111 (2011). To resolve a mixed question of law and fact, the Court engages in a three-step analysis in which it: (1) determines whether the Commissioner's factual findings are supported by substantial evidence; (2) makes a de novo determination of the law; and (3) applies the law to the facts de novo. *Tapper*, 122 Wn.2d at 403.

V. ARGUMENT

The Legislature enacted the Employment Security Act, Title 50 RCW, to provide compensation to individuals who are "involuntarily" unemployed "through no fault of their own." RCW 50.01.010; *Tapper*, 122 Wn.2d at 408. As such, a claimant is disqualified from receiving unemployment benefits if he has been discharged from his job for work-connected "misconduct." RCW 50.20.066(1); RCW 50.04.294. This rule advances the policy that it is unfair to require an employer to compensate employees who engage in conduct harmful to its interests. *Tapper*, 122 Wn.2d at 409.

In general, the Act provides four broad categories of misconduct that will disqualify an applicant from receiving unemployment benefits:

- (a) Willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee;
- (b) Deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee;
- (c) Carelessness or negligence that causes or would likely cause serious bodily harm to the employer or a fellow employee; or
- (d) Carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest.

RCW 50.04.294(1). “Carelessness” and “negligence” are defined as the “failure to exercise the care that a reasonably prudent person usually exercises.” WAC 192-150-205(3).

The Act also identifies specific examples of *per se* misconduct “because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee.” RCW 50.04.294(2); *Daniels*, 168 Wn. App. at 728, (“Certain types of conduct are misconduct *per se*.”). One such act of *per se* misconduct is a “[v]iolation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule.” RCW 50.04.294(2)(f).

In this case, substantial evidence supports the Commissioner’s findings that Old Dominion adopted a safety rule requiring hostlers to visually inspect the trailer door to ensure it was closed before pulling the trailer away, CP 142 (FF 5, 11); that Williams knew or should have known of the rule, CP 142-43 (FF 8, 9, 22, 23); and that Williams failed to inspect

a trailer door before moving it away from the docking station and, as a result, a forklift and its driver fell to the ground causing damage to the forklift and shaking up the driver. CP 142 (FF 12-13). Substantial evidence also supports the Commissioner's determination that Williams was not credible, CP 143 (FF 21), and this Court does not revisit credibility determinations.

Applying the law to these findings, the Commissioner correctly concluded that Williams' conduct constituted misconduct on three separate grounds: (1) misconduct *per se* due to violation of a company policy of which Williams was aware under RCW 50.04.294(2)(f); (2) carelessness or negligence of such a degree as to show a willful and wanton disregard of the rights, title and interests of his employer under RCW 50.04.294(1)(a); and (3) carelessness or negligence of such a degree as to show a substantial disregard of the employer's interest under RCW 50.04.294(1)(d).

Furthermore, although the Commissioner did not conclude that Williams committed misconduct due to carelessness or negligence that would likely cause serious bodily harm to a fellow employee under RCW 50.04.294(1)(c), the Commissioner made the relevant findings of fact necessary to reach this conclusion, and those findings of fact are supported by substantial evidence. Because this Court applies the law to the facts de

novo and may affirm on any legal ground supported by the record, this Court should affirm on this additional basis. *See Tapper*, 122 Wn.2d at 403; RAP 2.5(a); *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2014).

A. Substantial Evidence Supports the Commissioner's Factual Findings

Williams disputes only the findings of facts related to Old Dominion's policy requiring hostlers to visually inspect trailer doors before removing a trailer from the docking station. Opening Br. of Resp't 3; CP 142 (FF 5-9, 11, 16, 22-24). Specifically, Williams challenges that Old Dominion instituted, communicated, and enforced the new safety policy; that Williams was discharged for this reason; and that Old Dominion's testimony was more credible than Williams'. Opening Br. of Resp't 3. Substantial evidence supports all of these findings and the other factual findings are verities on appeal. *Tapper*, 122 Wn.2d at 407.

1. Substantial evidence supports the Commissioner's finding that the employer instituted a new safety policy

Substantial evidence in the record supports the Commissioner's finding that the employer adopted a safety policy requiring hostlers to inspect trailer doors to ensure they were secure before moving the trailer, rather than relying solely on the computer system. CP 142 (FF 5).

Gehlon, Old Dominion's manager, testified that in late 2013 or early 2014, the corporate office instituted the policy requiring hostlers to visually inspect trailer doors before moving trailers. CP 41-42, 142 (FF 5). Gehlon communicated the policy to all the managers and supervisors and instructed them to discuss and enforce the policy with the hostlers. CP 42, 142 (FF 7). Gehlon explained that the policy was verbally communicated and not in writing, CP 43, 142 (FF 6), but that Old Dominion had several unwritten safety policies that could result in termination. CP 43. One example includes using a ladder to drop bars rather than using the blades of the forklift. *Id.* Larson corroborated Gehlon's testimony that the policy had been instituted by the corporate office, CP 70, and that there are several important, but unwritten, safety policies at Old Dominion. CP 65.

Williams' witness, Matt Cruz, testified that Old Dominion had adopted and reinforced the safety rule. CP 91-92. Cruz testified that the safety meetings stressed a "triple check" system that required hostlers to physically check the trailer doors, *id.*, and that failure to use the "triple check" system was a "safety issue." CP 98. This contradicts Williams' repeated assertion that "neither witness testified that they were aware of any policy that explicitly required hostlers to check the doors." Opening Br. of Resp't 11, 17, 21.

The testimony in the record supports the Commissioner's finding that the employer implemented a policy requiring hostlers to ensure trailer doors were secured before removing a trailer from the docking station.

2. Substantial evidence supports the Commissioner's finding that Williams was aware of the safety rule

Substantial evidence also supports the finding that Williams knew about the rule. CP 143 (FF 21). The employer's witnesses testified consistently about how the policy was communicated to all the hostlers—including Williams. McCammon, the hostler supervisor, and Larson, the assistant terminal manager, corroborated how the policy was communicated to employees. CP 52-53 (McCammon), 65 (Larson). Specifically, McCammon testified that he personally met with Williams to communicate the policy and reiterated the rule at safety meetings held on the dock with the entire crew. CP 52-54. The purpose of the individual meetings was to answer any questions the hostlers might have about the new policy and to make sure each hostler understood the importance of checking the doors before pulling the trailer out. CP 53-54. Additionally, if a hostler missed a safety meeting, McCammon would meet with the hostler individually to go over the information covered at the meeting. CP 107. McCammon also testified that, before the incident, Williams had

acted in compliance with the safety policy but, in this particular instance, Williams failed to check the doors. CP 52-53.

Larson verified that he also spoke with the hostlers about the policy. *Id.* Larson further testified that the policy was discussed at the safety meetings and that Williams had been present at some of those safety meetings. CP 66. Larson's testimony corroborated McCammon's testimony that Williams had previously checked the doors as required by the policy. *Id.* Substantial evidence supports that Williams knew about the safety rule.

3. The Commissioner did not find that the policy was unenforced

Williams argues that substantial evidence does not support the finding that he knew about the policy because the employer did not enforce the policy. Opening Br. of Resp't 26. But there is no finding that the policy was not enforced, and this Court's review is limited to whether substantial evidence supports the findings that were made by the Commissioner, not whether other findings could have been made. The absence of a finding can be interpreted as a negative finding. *State v. Armenta*, 134 Wn.2d 1, 14, 948 P.2d 1280 (1997) ("In the absence of a finding on a factual issue we must indulge in the presumption that the

party with the burden of proof failed to sustain their burden on this issue.”).

Even so, evidence in the record establishes that the employer actually enforced the policy. McCammon testified the employer constantly worked with the hostlers to change the old bad habit of not checking doors—until they were perfect—but in this instance, Williams failed to check the door. CP 53, 107. Cruz testified that a “triple check” system had been adopted. CP 92. Brown’s testimony also supports an inference that Old Dominion took increasing measures to change this old bad habit. Specifically, Brown contradicted Williams’ testimony that Old Dominion wanted hostlers to stay in their seats and focus on productivity. CP 75, 103. Brown testified that Old Dominion started using chocks under the wheels of the trailer to force hostlers to get out of the hostling unit, check the trailer door, and remove the wheel chocks before moving the trailer. CP 103. This belies Williams’ claims that the focus of Old Dominion was on productivity rather than worker safety. CP 75.

Furthermore, Williams’ assertion that the policy was unenforced because Cruz and Brown saw hostlers pull trailers without checking doors but were unaware of other discharges is inapt. Opening Br. of Resp’t 21, 27. Gehlson testified that numerous other workers company-wide had been discharged for pulling trailers without first checking. CP 50.

Furthermore, as dockworkers at one location, Cruz and Brown would not likely be aware of discharges at other locations, or the past history of discipline or severity of accidents that led to disciplinary or discharge decisions made by management. The Commissioner did not find that the policy was unenforced, nor would substantial evidence support such a finding.

4. This Court may not reweigh credibility determinations on appeal

Finally, this Court should decline to make new credibility findings. *William Dickson Co.*, 81 Wn. App. at 411 (quoting *State ex rel. Lige & Wm. B. Dickson Co. v. Cty. of Pierce*, 65 Wn. App. at 618); *Smith*, 155 Wn. App. at 35-36. Here, the ALJ resolved conflicting evidence by considering the witnesses' demeanor, motivations, and the logical persuasiveness of the parties' positions. CP 143 (FF 21). The ALJ determined that the testimony and evidence presented by Old Dominion's witnesses was more credible and that Old Dominion's version of events was more logically persuasive. *Id.* In particular, the ALJ found it persuasive that even Williams' witnesses' testimony was consistent with the employer's. *Id.* The Commissioner adopted the ALJ's findings of fact and conclusions of law, explicitly adopting the credibility determination. CP 161-63.

Although Williams argues that Old Dominion's witnesses' testimony was self-serving (while Cruz and Brown were neutral parties who testified against their own interests), Opening Br. of Resp't 21-22, this ignores that Williams' own testimony was self-serving and that the testimony of Williams' witnesses was consistent with Old Dominion's. *See* CP 143 (FF 21) ("It is significant to note that the testimony of the claimant's witnesses was consistent with the testimony of the employer"). To accept Williams' versions of events, the trier of fact would have to find that *all* the witnesses testified falsely in some respect—even Williams' own witnesses.

Williams further erroneously argues that neither the ALJ nor the Commissioner were able to make credibility determinations because the hearing was conducted telephonically. Opening Br. of Resp't 21. But, as the precedential Commissioner's decision relied on by Williams in his Opening Brief states:

The Office of Administrative Hearings now conducts hearings by telephone. The administrative law judge 'observes' the demeanor of witnesses only by their tone of voice, hesitancy in answering, evasiveness, and other factors bearing on credibility which are detectable by telephonic communication. The record upon which we review Initial Orders includes a digital audio recording of the telephonic hearing, not a written transcript of the hearing. Hence, in listening to the digital audio recording of purposes, we are essentially in the same position as the

administrative law judge to “observe” the witnesses and assess their credibility.

In re Andrus, Emp’t Sec. Comm’r Dec.2d 960 (2010), at *6;¹ *see* Opening Br. of Resp’t 19.

Viewing the exhibits and testimony in the light most favorable to the Department, substantial evidence supports the finding that Old Dominion instituted a policy requiring hostlers to check the doors, communicated it to the hostlers individually—including Williams—and reemphasized it at the safety meetings. This Court should decline Williams’ invitation to reweigh the evidence and make new credibility determinations. *See William Dickson Co.*, 81 Wn. App. at 411; *Tapper*, 122 Wn.2d at 403, 406.

B. Williams Committed Disqualifying Misconduct Under the Employment Security Act

The Commissioner correctly applied the law to the facts and concluded that Williams was discharged for misconduct as defined by the Act. Williams committed *per se* misconduct when he violated the reasonable company safety rule requiring him to check trailer doors before moving the trailer—a rule which Williams was aware of. RCW

¹ Under RCW 50.32.095 the Commissioner may designate certain Commissioner’s decisions as precedents. These precedents are to be treated as persuasive authority by a reviewing court. *Martini v. Emp’t Sec. Dep’t*, 98 Wn. App. 791, 795, 990 P.2d 981 (2000). *In re Andrus* is attached to this brief as Appendix A.

50.04.294(2)(f). And because a forklift and its driver fell off the trailer as a result of the violation of this rule, Williams' conduct was also (1) = (a) in willful or wanton disregard of his employer's rights, title, and interests, (2) (d) negligence or carelessness of such a degree as to show a substantial disregard of Old Dominion's interest, and (3) carelessness or negligence that would likely cause serious bodily harm to a fellow employee. *See* RCW 50.04.294(1)(a), (d), (c). Additionally, Williams' conduct did not constitute an isolated instance of inadvertence or ordinary negligence, or a good faith error in judgment or discretion. *See* RCW 50.04.294(3)(b), (c). The Court should affirm.

1. Williams violated a reasonable company rule that he knew or should have known

Williams committed misconduct *per se* when he violated a reasonable company rule of which he knew or should have known. RCW 50.04.294(2)(f); *Daniels*, 168 Wn. App. at 728. "A company rule is reasonable if it is related to your job duties, is a normal business requirement or practice for your occupation or industry, or is required by law or regulation." WAC 192-150-210(4).

As discussed, substantial evidence supports the findings that Old Dominion had a rule requiring hostlers to visually inspect trailer doors to ensure they were secured before moving the trailer from the docking

station and that Williams knew about the rule. CP 41-42, 44, 65, 69, 142-143 (FF 8, 9, 11, 22, 23). The rule was reasonable because it served to reduce the number of accidents occurring on the loading docks. CP 41-42, 142-143 (FF 5, 21).

Nevertheless, Williams violated the policy by pulling a trailer away from the loading dock without first inspecting the trailer door to see if it was secure. CP 142 (FF 12). The employer discharged Williams for violating the policy. CP 142 (FF 4). Thus, Williams committed misconduct *per se* because he violated a reasonable company policy of which he was aware or should have been aware. RCW 50.04.294(2)(f).

Contrary to Williams' arguments, the findings of fact do not support that Old Dominion implemented a policy but regularly failed to enforce it, nor does the case law cited by Williams establish that this is an exception to RCW 50.04.294(2)(f). Opening Br. of Resp't 26; *see* Section V.A.3 above. Williams argues this case is analogous to *In re Griswold*, 102 Wn. App. 29, 259 P.3d 153 (2000), because—in his words—that case holds that “[w]here an employer routinely fails to enforce a policy and a supervisor condones violation, an employee cannot later be found to have acted against the employer’s interest.” Opening Br. of Resp’t 26. This is incorrect. *Griswold* focuses on the fact that the employer policies were ambiguous and appeared to *permit* the employee’s conduct, and managers

routinely allowed it. *In re Griswold*, 102 Wn. App at 39, 40, and 42.² In contrast here, the employer’s policy unambiguously required hostlers to always check the doors. CP 41-42, 65, 69, 142 (FF 5). Nonetheless, Williams violated the policy. Williams incorrectly states that WAC 192-150-210(5) creates a “notice requirement” for employers. Opening Br. of Resp’t 23-24. But WAC 192-150-210(5) merely sets forth a certain circumstance in which the Department “will” find an employee knew or should have known of an employer policy.³ The regulation does not exhaustively describe the only circumstances an employee will be found to have known or should have known of an employer policy. Here, the findings of fact state that Williams *actually knew* of the policy. CP 142-43 (FF 8-10, 21-23). Williams was individually told of the policy by his supervisor, CP 142-43 (FF 8, 23), and the policy was reiterated at safety meetings which Williams attended. CP 142 (FF 9). Williams was aware of the policy. This Court should affirm the Commissioner’s Order concluding

² “We first observe that the policies appear to permit, not prohibit, purchases of past pull-date meat by employees where authorized by the department manager.” *In re Griswold*, 102 Wn. App at 39; “Nor had her supervisor authorized a practice that appeared to depart from company policy . . . her supervisor appeared to be acting within company policy, not outside it.” *Id.* at 40.

³ “The department will find that you knew or should have known about a company rule if you were provided an employee orientation on company rules, you were provided a copy or summary of the rule in writing, or the rule is posted in an area that is normally frequented by you and your co-workers, and the rule is conveyed or posted in a language that can be understood by you.” WAC 192-150-210(5).

that Williams violated a reasonable company policy of which he was aware.

2. Williams' conduct was willful or wanton and in disregard of the rights, title, and interests of his employer or his fellow employee, RCW 50.04.294(1)(a)

Williams' conduct also amounted to a “[w]illful or wanton disregard of the rights, title, and interests of the employer.”⁴ RCW 50.04.294(1)(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 co-worker.” WAC 192-150-205(1). In determining whether the employee’s actions were “willful,” as that term is used in the statute, the focus is not on whether the employee intended to harm the employer. *Hamel v. Emp’t Sec. Dep’t*, 93 Wn. App. 140, 146, 966 P.2d 1282 (1998). Rather, an employee acts willfully if he or she acts deliberately or knowingly. WAC 192-150-205(1).

Here, Williams moved a trailer away from a docking station without checking the rear door after a forklift had entered the trailer. CP 142 (FF 12). The forklift and its driver fell to the ground causing a serious accident that had the potential to cause serious bodily harm to the forklift

⁴ To affirm the Commissioner’s decision, the Court need only conclude that Williams’ conduct constituted misconduct as defined in any one of the provisions in RCW 50.04.294(1) or (2). Therefore, if the Court concludes that Williams’ conduct constituted misconduct under RCW 50.04.294(2)(f)—violation of a reasonable company rule that Williams knew or should have known about—it need not decide whether any other definition of misconduct applies.

driver and serious damage to the forklift. CP 142 (FF 12-13). Williams was aware of the potential risk of pulling out a trailer when the doors were not secure because he had previously been involved in a similar incident where he pulled a trailer when the forklift was still on the trailer. CP 143 (FF 19). As such, Williams should have had a heightened sense of awareness after a near miss. CP 145 (CL 14). An employer has the right to expect its employees to be aware of and follow its policies. An employer also has an interest in ensuring all employees act in a manner that creates a safe workplace for fellow employees. Nonetheless, Williams intentionally pulled a trailer without first checking to see that the door was secure in violation of Old Dominion's policy requiring hostlers to check the doors. This conduct constituted a willful disregard of Old Dominion's interests and was, therefore, disqualifying misconduct. RCW 50.04.294(1)(a).

3. Williams' conduct constituted carelessness or negligence of such a degree as to show a substantial disregard of his employer's interests

Misconduct also includes "carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest." RCW 50.04.294(1)(d). Thus, if a worker engages in a single significant and serious incident of carelessness or negligence ("such a degree"), or repeatedly fails to exercise the care that a reasonably person usually exercises (such "recurrence"), he has committed

“misconduct” under RCW 50.04.294(1)(d). *See Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn. App. 777, 790, 6 P.3d 583 (2000) (courts generally presume the use of “or” in a statute as disjunctive absent clear legislative intent to the contrary.) In contrast, misconduct does not include “inadvertence or ordinary negligence in isolated instances.” RCW 50.04.294(3); *Michaelson v. Emp’t Sec. Dep’t*, 187 Wn. App. 293, 301, 349 P.3d 896 (2015). The existence of a statutory exclusion for “isolated” instances of “ordinary” negligence demonstrates the clear intent to treat serious or repeated acts of negligence differently than insignificant or occasional mistakes.

When the carelessness or negligence is of a sufficient degree, misconduct can arise from a single instance. *See Johnson v. Emp’t Sec. Dep’t*, 64 Wn. App. 311, 316, 824 P.2d 505 (1992) (holding that a single serious incident amounts to disqualifying misconduct). Thus, the failure to exercise reasonable care may be a single instance if that instance evinces a substantial disregard for the employer’s interest. The level of carelessness or negligence rising above “ordinary negligence” has been found when (1) unintentional actions and violations of policies create a clearly dangerous situation or (2) when actions create a risk of impacting the employer’s interests in serving its customers and exposes the employer to liability.

Johnson, 64 Wn. App. at 316, *Smith v. Emp't Sec. Dep't*, 155 Wn. App. at 36.

In *Johnson v. Employment Security Department*, Virginia Johnson worked as a King County Metro bus driver. *Johnson*, 64 Wn. App. at 313. Unknown to Johnson, her husband placed her gun into her handbag before she left for work. *Id.* Johnson testified that she did not see the gun in her bag while at work. *Id.* Johnson's gun was later found on the bus she had been driving. *Id.* The Court reasoned that Johnson's failure to be aware that her gun was in her purse, had fallen out of her purse on the bus, and that she left it on the bus "presented a clearly dangerous situation." *Id.* at 317. Johnson's single instance of negligence was of such a degree as to disqualify her from unemployment benefits. *Id.* at 317.

In *Smith*, the Court held that recording conversations with co-workers or members of the public without their consent constituted carelessness or negligence of such degree to show intentional or substantial disregard of a county employer's interest. *Smith*, 155 Wn. App. at 36. Smith alleged that he was unaware that his employer had a policy prohibiting his recording of conversations with co-workers and members of the public without their consent. *Id.* at 34. Nonetheless, the Court held that even an unknowing violation of an employer policy constituted negligence of such degree as to show substantial disregard of the

employer's interest. *Id.* at 36. This was because public knowledge of Smith's recordings could have adversely impacted the employer's interests in serving its constituents by making citizens less willing to discuss issues with county employees and because Smith's actions could have exposed the county to litigation and liability. *Id.* at 36. The Court found it irrelevant that no one knew of the recordings because it is the mere potential for harm to the employer—including reputational harm—that matters. *Id.* at 36. No intended harm to the employer's reputation is required. *Id.* at 37. Nor is it required that any harm result because the focus is on the potential for harm. *Id.*

Here, Williams' act of moving a trailer without first checking that the trailer door was secure presented a clearly dangerous situation that Old Dominion was attempting to prevent with its safety rule. Williams' conduct created a serious risk of harm to his fellow employees who were operating forklifts that entered and exited the trailers. Furthermore, his actions exposed Old Dominion to liability because it is foreseeable that an injured employee could bring suit against Old Dominion. Finally, Old Dominion has an interest in having the reputation of being a safe workplace that carefully handles the goods it loads into trailers. Old Dominion sought to decrease the number of accidents caused by hostlers relying solely on the computer system. CP 142 (FF 5). As a result, Old

Dominion instituted its policy that required hostlers to visually inspect the doors, CP 142 (FF 5), creating a “triple check system.” CP 92. Nonetheless, Williams chose to rely solely on the computer system when making his decision to pull the trailer away. CP 142 (FF 12). The resulting accident had the potential to seriously injure his fellow employee. This conduct was in substantial disregard of Old Dominion’s interest in keeping its employees safe.

The Commissioner properly concluded that Williams’ failure to visually inspect the trailer door to ensure it was safe to move the trailer before moving it was misconduct under RCW 50.04.294(1)(d). The Court should affirm the Commissioner’s decision.

4. Williams’ conduct was also carelessness or negligence that would likely cause serious bodily harm to a fellow employee

Williams’ conduct also amounted to carelessness or negligence that was likely to cause serious bodily harm to a fellow employee. RCW 50.04.294(1)(c). Because the Court applies the law to the facts de novo and may affirm on any ground “if the record has been sufficiently developed to fairly consider the ground,” RAP 2.5(a), the Court should also conclude Williams’ conduct amounted to misconduct under RCW 50.04.294(1)(c) and affirm the Commissioner’s decision. RAP 2.5(a); *Costich*, 152 Wn.2d at 477.

Williams moved a trailer away from a docking station without first physically checking that the trailer was closed. CP 142 (FF 12). Because a forklift had entered the trailer, the forklift—and the driver inside the forklift—fell to the ground. *Id.* The forklift was damaged and the driver was shaken up—but not seriously injured. CP 142 (FF 13). However, the accident had the potential to cause serious bodily harm. CP 44, CP 145-46 (CL 13). Thus, Williams’ carelessness in not ensuring that the trailer was closed had the likelihood of causing serious bodily harm to a fellow employee—the very thing the policy sought to prevent. The fact that the forklift driver was not severely injured in this instance does not take away from the *likelihood* of serious bodily harm. This Court should affirm the Commissioner’s decision on the additional basis that Williams’ conduct also constitutes misconduct under RCW 50.04.294(1)(c).

5. Williams’ conduct was not an isolated instance of inadvertence or ordinary negligence, or a good faith error in judgment or discretion

Williams’ conduct was not an isolated instance of inadvertence or ordinary negligence or a good faith error in judgment or discretion. RCW 50.04.294(3)(b) or (c). The Act specifies that “misconduct” does not include:

- (a) Inefficiency, unsatisfactory conduct, or failure to perform well as the result of inability or incapacity;

(b) Inadvertence or ordinary negligence in isolated instances; or

(c) Good faith errors in judgment or discretion.

RCW 50.04.294(3).

First, Williams' conduct was not "[i]nadvertence or ordinary negligence in isolated instances," RCW 50.04.294(3)(b). Old Dominion instituted a policy intended to prevent accidents that posed the risk of significant bodily harm to its employees. CP 41-42, 65, 69, 142 (FF 5). Williams was made aware of this policy, and it was reiterated to him. CP 52-53, 66, 68, 92, 105, 107, 142-43 (FF 8, 9, 22). Nonetheless, Williams violated this policy causing an accident with the potential to cause serious bodily harm to a fellow employee. CP 39-40, 58-62, 66, 91-92, 98, 142-43 (FF 12, 21).

Because Williams' conduct was not ordinary negligence, it is analogous to neither *Michaelson v. Employment Security Department*, 187 Wn. App. 293, 349 P.3d 896 (2015), nor *Wilson v. Employment Security Department*, 87 Wn. App. 197, 940 P.2d 269 (1997). In *Michaelson*, the court considered whether a delivery driver who backed into a parked car, rolled back into a stopped car, and backed into a loading dock all within a 12-month period was discharged for misconduct under RCW 50.04.294(1)(d). *Michaelson*, 187 Wn. App. at 296-97. The Court held

that these three ordinary accidents, without more, demonstrated only that the employee “failed to exercise reasonable care.” *Id.* at 301.

In *Wilson*, the claimant failed to take proper steps to keep track of loose diamonds and, as a result, lost two diamonds. *Wilson*, 87 Wn. App. at 199. The value of the lost diamonds was less than \$1500. *Id.* Furthermore, the claimant intended to comply with the policy, but simply failed to do so in a timely manner to prevent the loss. *Id.* at 203. The court noted that the policy did not require the logging of the diamonds within a certain time period. *Id.* Thus, neither of these cases involved the willful violation of a workplace policy designed to improve work place safety and discourage accidents that have the potential to cause serious bodily harm to a fellow employee.

Here, Williams pulled a trailer away from the loading dock while a forklift and its driver were still in the trailer. CP 142 (FF 12). Although the driver was only “shaken up” and not seriously injured, CP 142 (FF 13), the possibility for serious bodily harm is self-evident. Furthermore, Williams had previously been involved in a similar accident where a forklift was on the trailer when he moved it, CP 143 (FF 19), and Williams should have worked with a heightened sense of awareness for the possibility of harm. CP 77, 143 (FF 19), 145 (CL 14).

Second, Williams' conduct was not the result of "[g]ood faith error[] in judgment or discretion." RCW 50.04.294(3)(c). Williams' supervisor informed Williams of the safety rule. CP 142-43 (FF 8, 23). Furthermore, the policy was reiterated at safety meetings attended by Williams. CP 142, 143 (FF 5-11, 21). The policy did not leave any room for exceptions or for Williams to exercise his judgment or discretion. *See* CP 142 (FF 5). Williams' actions are not an exception to misconduct under RCW 50.04.294(3)(c).

C. The Commissioner's Decision Was Not Arbitrary or Capricious

The Commissioner's decision was not arbitrary or capricious. The "one who seeks to demonstrate that action is arbitrary and capricious must carry a heavy burden." *Pierce Cty. Sheriff v. Civil Serv. Comm'n of Pierce Cty.*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983). Agencies act in an arbitrary or capricious manner when their action is "willful and unreasoning and taken without regard to the attending facts or circumstances." *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997). A decision is not arbitrary or capricious if there is room for more than one opinion and the decision is based on due consideration, even if the Court disagrees with it. *Id.*

The Commissioner's decision in this case was not "willful and unreasoning and taken without regard to the attending facts or

circumstances.” *Id.* The parties presented conflicting evidence, which the ALJ and Commissioner resolved in the employer’s favor after due consideration of the witnesses’ demeanor and motivation as well as the logical persuasiveness of the evidence. CP 143 (FF 21), 161-162. The record shows that the Commissioner carefully considered the testimony and evidence in the record in reaching his conclusion. *Id.* Thus, Williams cannot meet his “heavy burden” to establish that the Commissioner’s decision was arbitrary or capricious. *See Pierce Cty. Sheriff*, 98 Wn.2d at 695.

D. The Court Should Reverse the Superior Court’s Award of Attorney Fees and Costs If the Commissioner’s Decision Is Reversed or Modified

Williams is entitled to reasonable attorney fees and costs only if this Court ultimately modifies or reverses the Commissioner’s decision. RCW 50.32.160. As shown above, this Court should reverse the superior court’s decision and affirm the Commissioner’s decision. Thus, this Court should also reverse the superior court’s award of attorney fees and costs to Williams.

VI. CONCLUSION

The Commissioner correctly concluded Williams was discharged from employment for misconduct under the Act. The Commissioner’s decision is supported by substantial evidence and is free of errors of law. The Department respectfully asks the Court to reverse the superior court’s

decision and affirm the Commissioner's decision denying Williams unemployment benefits.

RESPECTFULLY SUBMITTED this 15th day of May, 2017.

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PROOF OF SERVICE

I, Jennifer Wagner, certify that I caused a copy of—**Appellant’s Response Brief**—to be served on all parties or their counsel of record on the date below as follows:

US Mail via Consolidated Mail Services to:

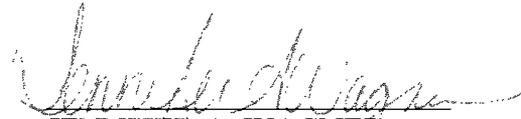
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 15th day of May, 2017 at Olympia, WA.


JENNIFER A. WAGNER
Legal Assistant

APPENDIX A

THOMSON REUTERS
WESTLAW

Washington State Employment Security Department Precedential Decisions of Commissioner

In re: DAREN S. ANDRUS

Commissioner of the Employment Security Department.
December 30, 2010

Empl. Sec. Comm'r Dec.2d 960 (WA), 2010 WL 6795726

Commissioner of the Employment Security Department.

State of Washington.

***1 In re : DAREN S. ANDRUS**

***1**

Case No. 960

***1**

Review No.

2010

-6086

***1**

Docket No. 01-

2010

-27051

***1 December 30, 2010**

DECISION OF COMMISSIONER

***1** On November 29, 2010, DAREN S. ANDRUS petitioned the Commissioner for review of an Initial Order issued by the Office of Administrative Hearings on October 28, 2010. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the entire record and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), we do not adopt the Office of Administrative Hearings' findings of fact or conclusions of law and instead enter the following.

***1** This case presents legal issues arising under provisions of the Administrative Procedure Act, Chapter 34.05 RCW, concerning admissibility of evidence in administrative adjudicative proceedings, and when findings of fact may be based on evidence that would be inadmissible in civil actions in our state courts under the Washington Rules of Evidence. For this reason, the findings of fact set forth below consist partly of facts concerning claimant's employment with and separation from the interested employer, but also consist partly of factual descriptions of certain types of evidence upon which the administrative law judge erroneously based findings of fact which led the judge erroneously to conclude that, as a matter of law, claimant was disqualified from benefits for alleged misconduct under RCW 50.20.066(1). Normally, descriptions of evidence, as opposed to statements of facts found from competent and credible evidence of record, are not included in findings of fact. However, in this case, findings concerning the types of evidence of record are essential to a decision on the merits.

FINDINGS OF FACT

I

***1** The employer is an upscale full service hotel with a fine dining steakhouse restaurant and adjacent bar on premises.

II

***1** Claimant was employed as a food server at employer's restaurant. He began employment on June 24, 2004. His last day of work was May 27, 2010. Claimant's position was full-time, permanent, and union. His rate of pay at time of discharge was \$8.55 per hour, plus tips. Claimant was discharged by the employer on May 28, 2010, for alleged violations of employer policies.

III

***1** On July 3, 2010, the Department issued a Determination Notice, allowing benefits to claimant on the grounds that misconduct by claimant had not been established. Exhibit 2.

IV

***1** The employer timely filed an appeal of the Determination Notice to the Office of Administrative Hearings. Exhibit 3.

V

*1 The administrative law judge held two hearings. At an October 11, 2010 telephonic hearing claimant did not appear. The employer appeared through three witnesses, its human resources director, the general manager of the employer's restaurant and adjacent bar, and the restaurant manager. The hearing proceeded in claimant's absence. Without objection, Exhibits 1 through 5 were admitted into evidence, and the employer's three witnesses testified. Claimant subsequently showed good cause for his nonappearance, as evident from a November 11, 2010 docket entry, stating "need to re-hear, claimant holding on wrong conference line." A second telephonic hearing was held on October 27, 2010. At the second hearing claimant appeared. Employer also appeared through two witnesses, the employer's human resources director and the general manager of the restaurant and adjacent bar. The restaurant manager did not appear. Before the second hearing, claimant received and listened to an audio recording of the first hearing. Without giving claimant an opportunity to object, the administrative law judge stated that she was "incorporating" the audio recording of the first hearing into the record of the second hearing, including the testimony of the restaurant manager who was absent from the second hearing. Without objection, the same Exhibits 1 through 5 which were admitted into evidence at the first hearing were again admitted into evidence at the second hearing. Testimony was then given by the employer's human resources director, as well as claimant and one witness for claimant, who worked in the bar adjacent to the restaurant.

VI

*2 On May 28, 2010, the employer discharged claimant for alleged violations of employer's written "harassment-free workplace policy" (Exhibit 4, pp. 7-10) and the employer's written "code of conduct," which was not offered in evidence.

VII

*2 There is no evidence of any problems with claimant's performance of his job or of any disciplinary action against him by the employer for the approximately four and one-half (4-1/2) year period from the commencement of his employment until October 31, 2008.

VIII

*2 On November 4, 2008, the employer gave claimant a written warning for alleged conduct on October 31, 2008, asserting that claimant violated employer's "harassment-free workplace policy" and "code of conduct." Exhibit 4, p. 2. The alleged conduct consisted of "yelling" at and intimidating a coworker. This warning was based on an investigation conducted by a human resources employee, consisting of interviews of one or more employees at the restaurant. The human resources employee who conducted the investigation did not testify. Only one of the employer's witnesses, the restaurant manager, had personal knowledge of claimant's conduct on October 31, 2008. The restaurant manager testified at the first hearing, at which claimant was not present for good cause, that she observed claimant yelling and engaging in angry behavior on that date. In the "Team Member Comments" section of the warning form, claimant wrote "see attached." However, the warning as offered by the employer and introduced into the evidence did not include the written comments on the warning submitted by claimant at the time. Exhibit 4, p. 2. At hearing, claimant denied engaging in the conduct described in the warning and provided an alternate explanation of what occurred. Because the restaurant manager did not appear as a witness at the second hearing, claimant did not have an opportunity to confront or cross-examine her. The conduct of which the restaurant manager had personal knowledge occurred approximately one and one-half (1-1/2) years prior to claimant's discharge, and was not the reason for claimant's discharge on May 28, 2010.

IX

*2 On November 3, 2009, the employer gave claimant a written warning for alleged conduct on October 28, 2009, asserting that claimant violated the employer's "code of conduct" and "harassment-free workplace policy." Exhibit 4, p. 3. The alleged conduct consisted of claimant using profanity ("stop bitching") and making threatening statements ("I'll take you down and tear you apart") to a cocktail server coworker. This warning was based on an investigation conducted by the employer's human resources director consisting of interviews of one or more employees at the employer's restaurant and bar. None of the employer witnesses who testified at the hearing personally observed the alleged conduct of claimant resulting in the warning. At hearing, claimant denied engaging in the conduct described in the warning and provided a different explanation of what occurred.

X

*3 On January 12, 2010, the employer gave claimant a written warning for conduct on December 3, 2009. Exhibit 4, p. 4. The warning alleged that claimant had engaged in unspecified "inappropriate behavior which created a hostile environment." This warning was based on an investigation conducted by yet another human resources employee of the employer, consisting of interviews of one or more employees at the restaurant and viewing a surveillance videotape. The human resources employee did not testify. The videotape was not offered in evidence. The employer's human resources director testified that the employer's surveillance videotapes do not include audio recordings. None of the employer witnesses who testified at the hearing personally observed the alleged conduct of claimant, resulting in the warning. At hearing, claimant denied engaging in the conduct alleged in the warning and provided an alternate explanation of what occurred. In the "Team Member Comments" section of the warning, claimant wrote "signed under protest" and "will greave [sic] process."

XI

*3 The incident giving rise to the employer's decision to discharge claimant for alleged violations of employer policies occurred on May 27, 2010. That decision was documented in a "Corrective Action Form," dated May 28, 2010, alleging that on May 27 claimant "yelled" at coworkers for help in serving a customer order and otherwise intimidated the coworkers, in violation of the employer's "code of conduct" and "harassment-free workplace" policy. Exhibit 4, pp. 5 and 6. Claimant was discharged for his alleged conduct on May 27, 2010, based on an investigation conducted by the employer's human resources director on May 28, 2010. The investigation consisted of interviews of coworkers at the restaurant and viewing of a surveillance videotape (without audio). The human resources director testified that in her interviews with claimant's coworkers on May 28, 2010, the coworkers stated that claimant had yelled at and intimidated them on May 27, 2010, and that one of the coworkers stated that she was upset and was in tears during the May 28, 2010 interview. The human resources director also testified at hearing that her review of the videotape showed that claimant made a kicking motion, but not directed at any

coworker. The videotape was not offered in evidence. None of the employer witnesses who testified at the hearing personally observed the alleged conduct of claimant resulting in his discharge. At hearing, claimant denied engaging in the conduct described in the documentation of his discharge and in the human resource director's testimony concerning the contents of the videotape, and provided an alternate explanation of what occurred.

XII

*3 With the exception of the restaurant manager, whose testimony at the first hearing concerning claimant's alleged conduct on October 31, 2008 is discussed in Finding of Fact No. VIII above, none of the coworkers having personal knowledge of claimant's conduct on any of the dates giving rise to prior written warnings appeared to testify. No employer witnesses with personal knowledge of claimant's conduct on May 27, 2010 appeared to testify. Claimant had no opportunity to confront and cross-examine any of the witnesses who had personal knowledge of the conduct. Because the videotape (without audio) of claimant's conduct on May 27, 2010 was not introduced into evidence, claimant had no opportunity to view it and provide rebuttal testimony concerning what occurred as depicted in the videotape.

XIII

*4 The administrative law judge entered the following unadopted finding No. 8:

*4 The parties' testimony conflicted on whether the claimant's behavior violated the harassment-free workplace policy and the employer's code of conduct in the final incident on May 27, 2010. In resolving this conflict I considered the demeanor and motivation of the witnesses. Because the employer presented direct testimony that the employer viewed the security tape and conducted an investigation and interviewed employees who worked that night, and the claimant received prior warnings for the offending behavior, I find the claimant's [sic — employer's] direct testimony more persuasive than claimant's testimony on this issue, and that the claimant's behavior violated the harassment-free workplace policy and the employer's code of conduct on May 27, 2010. In entering this finding, I need not be persuaded beyond a reasonable doubt as to the true state of affairs, nor must the persuasive evidence be clear, cogent and convincing. The trier of fact need only determine what most likely happened. (Emphasis supplied.)

*4 For reasons which will be discussed below, we do not adopt the administrative law judge's findings, including the dispositive finding No. 8, quoted above, regarding witness credibility and claimant's alleged violations of employer policies on May 27, 2010.

XIV

*4 Claimant credibly testified, and we find as fact, that the coworkers who made statements to the human resources director about claimant's conduct on May 27, 2010, and prior incidents giving rise to written warnings, stood to benefit from claimant's discharge. Claimant held a higher food server position than the coworkers, and if claimant was discharged, the coworker's chances of receiving promotions would increase. The coworkers had motives to exaggerate or fabricate concerning alleged misconduct by claimant.

XV

*4 Claimant credibly testified, and we find as fact, that claimant's conduct on May 27, 2010, consisted of the following. In a loud voice he called "hands" in a noisy kitchen area. A call of "hands" by a food server such as claimant is customary at employer's restaurant to convey that the food server requires assistance from coworkers in serving a customer order. When claimant called hands, the cook had prepared most of the order, ready for service, but was completing some items. One of claimant's coworkers, his server assistant, responded to claimant's call. Claimant told his assistant to wait with him, while the cook finished the last items, and to assist him in serving the order. For unclear reasons, rather than waiting and assisting with service as claimant had instructed, claimant's server assistant left and went on a cigarette break with other server assistants, leaving claimant to serve the order alone. None of claimant's coworkers cried or became upset at the time. Claimant's conduct on May 27, 2010, for which he was discharged, did not violate the employer's "harassment-free workplace" policy. Exhibit 4, p. 10. Because the employer's "code of conduct" is not in evidence, there is no basis for finding that claimant's conduct violated whatever that "code" may provide.

XVI

*5 During the weeks at issue claimant made at least three job search contacts and had no restrictions or limitations on his ability to work and availability for work.

QUESTIONS PRESENTED

I

*5 Did the employer meet its burden of proving misconduct by claimant within the meaning of RCW 50.20.066(1) as more particularly defined in RCW 50.04.294?

II

*5 Did the findings of fact, upon which the administrative law judge based conclusions of law that claimant was disqualified from benefits under RCW 50.20.066(1) and RCW 50.04.294, violate RCW 34.05.461(4) by unduly abridging claimant's rights to confront witnesses and rebut evidence?

III

*5 Was claimant available for, able to and actively seeking work during the weeks at issue under RCW 50.20.010(1)(c)?

CONCLUSIONS OF LAW

I

*5 The employer bears the burden of proving by a preponderance of the evidence that claimant engaged in misconduct within the meaning of RCW 50.20.066(1) as more particularly defined in RCW 50.04.294. See, e.g., In re Verner, Empl. Sec. Comm'r Dec.2d 617 (1980).

II

*5 The Washington Administrative Procedure Act ("APA") provides in RCW 34.05.452 as follows:

*5 (1) Evidence, including hearsay evidence, is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. The presiding officer shall exclude evidence that is excludable on constitutional or statutory grounds or on the basis of evidentiary privilege recognized in the courts of this state. The presiding officer may exclude evidence that is irrelevant, immaterial, or unduly repetitious.

*5 (2) If not inconsistent with subsection (1) of this section, the presiding officer shall refer to the Washington Rules of Evidence as guidelines for evidentiary rulings. (Emphasis supplied.)

*5 As used in RCW 34.05.452(1) and (2) the term "presiding officer" means the administrative law judge of the Office of Administrative Hearings who conducts hearings and issues Initial Orders. The provisions quoted above considerably relax the standards for admissibility of evidence which apply in civil actions conducted in our state courts. Evidence which would be inadmissible in civil actions conducted in our state courts under the Washington Rules of Evidence is admissible in this administrative adjudicative proceedings "if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs."

III

*5 However, in RCW 34.05.461(4), the APA also imposes crucial limitations on the kinds of evidence upon which findings of fact in administrative adjudicatory proceedings may be based:

*5 Findings of fact shall be based exclusively on the evidence of record in the adjudicative proceeding and on matters officially noticed in that proceeding. Findings shall be based on the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. Findings may be based on such evidence even if it would be inadmissible in a civil trial. However, the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence. The basis for this determination shall appear in the order. (Emphasis supplied.)

*6 Thus, if a finding of fact in an administrative adjudicative proceeding is based exclusively on evidence that would be inadmissible in a civil trial in our state courts, the finding is invalid unless the administrative law judge (1) correctly determines that making the finding would not unduly abridge a party's opportunity to confront witnesses and rebut evidence, and (2) states the basis for that determination in the Initial Order,

IV

*6 With respect to review of Initial Orders, the APA provides in RCW 34.05.464 as follows:

*6 (4) The officer reviewing the initial order (including the agency head reviewing an initial order) is, for the purposes of this chapter, termed the reviewing officer. The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the reviewing officer upon notice to all the parties. In reviewing findings of fact by presiding officers, the reviewing officers shall give due regard to the presiding officer's opportunity to observe the witnesses.

*6 (5) The reviewing officer shall personally consider the whole record or such portions of it as may be cited by the parties. (Emphasis supplied.)

*6 By regulations adopted by the Department pursuant to rule-making authority granted by the legislature, the Commissioner has delegated to the review judges in the Commissioner's Review Office the duties and responsibilities of the Commissioner, as described in the APA, with respect to reviewing Initial Orders of the Office of Administrative Hearings. Chapter 192-04 WAC. Hence, it is incumbent upon us to find the facts in reviewing Initial Orders, and enter findings, including credibility findings, but in doing so to give "due regard" to the administrative law judge's "opportunity to observe the witnesses." RCW 34.05.464(4). See also discussion of the reviewing officer's fact-finding authority in Tapper v. Employment Security Dep't, 122 Wn.2d 397, 404-406, 858 P.2d 494 (1993); In re Engquist, Empl. Sec. Comm'r Dec.2d 740 (1983); In re Lynne, Empl. Sec. Comm'r Dec.2d 274 (1977); and In re Clarke, Empl. Sec. Comm'r Dec. 697 (1967). The Office of Administrative Hearings now conducts hearings by telephone. The administrative law judge "observes" the demeanor of witnesses only by their tone of voice, hesitancy in answering, evasiveness, and other factors bearing on credibility which are detectable by telephonic communication. The record upon which we review Initial Orders includes a digital audio recording of the telephonic hearing, not a written transcript of the hearing. Hence, in listening to the digital audio recording for purposes of review, we are essentially in the same position as the administrative law judge to "observe" the witnesses and assess their credibility.

V

*7 For purposes of this decision, we will assume, without deciding, that all of the evidence offered by the employer, and admitted by the administrative law judge, was "the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs" within the meaning of RCW 34.05.452(1). Even based on this assumption, the evidence offered by the employer and admitted into evidence by the administrative law judge cannot serve as the basis for findings of fact pursuant to RCW 34.05.461(4), quoted above, because it would be inadmissible in court under the Washington Rules of Evidence ("ER") and reliance upon such evidence unduly abridged claimant's rights to confront witnesses and rebut evidence, for the reasons set forth below.

VI

*7 ER 602 sets forth one of the most fundamental rules regarding testimonial evidence, namely, that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter." With one exception, the testimony of the employer's witnesses at both hearings concerning claimant's alleged misconduct, including the alleged misconduct on May 27, 2010 which resulted in claimant's discharge, was not based on personal knowledge. The witnesses did not observe the conduct in question. The human resources director did testify that she viewed a surveillance videotape (without audio) of claimant's conduct on May 27, 2010, and described what she saw on the videotape. As will be discussed below, the fact that the human resources director had personal knowledge of what she viewed on the videotape does not render that portion of her testimony admissible under the evidence rules governing proof of the contents of videotapes. The only testimony by employer witnesses based on personal knowledge of any of the alleged incidents of misconduct by claimant was given by the restaurant manager. The restaurant manager's testimony related to the October 31, 2008 incident, which occurred approximately one and one-half (1-1/2) years prior to claimant's discharge. Claimant was not discharged for his conduct on October 31, 2008. Although the restaurant manager's testimony on this point may support issuance of the written warning to claimant on November 4, 2008 (Exhibit 4, p. 2), the testimony does not relate to the alleged conduct on May 27, 2010, for which in claimant was discharged.

VII

*7 Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is "not admissible except as provided in these rules, by other court rules or by statute." ER 802. Hearsay included within hearsay "is not excluded under the hearsay rule if each part of the combined statement conforms with an exception to the hearsay rule provided in these rules." ER 805. ER 801(d)(1) and (2) provide that certain prior statements by a witness who testifies at the trial or hearing, and certain admissions by a party made outside trial or hearing, are not hearsay within the meaning of the general definition of hearsay in ER 801(c). ER 803 sets forth exceptions to the hearsay rule, making admissible certain types of statements by a declarant outside the trial or hearing to prove the truth of the matter asserted, even if the declarant is available to testify at the trial or hearing. ER 804 sets forth additional exceptions to the hearsay rule, making admissible certain types of statements by a declarant outside the trial or hearing to prove the truth of the matter asserted, but only if the declarant is not available to testify at the trial or hearing. All of the employer's witnesses who testified at the first and second hearings testified to what they had been told by some of claimant's coworkers concerning claimant's alleged conduct. Except as discussed below, all of this testimony constituted hearsay as defined in ER 801(c), which does not even arguably fall within any of the exceptions provided in ER 803 and ER 804, and would therefore be inadmissible in court under ER 802.

VIII

*8 One exception to the hearsay rule potentially applies to the human resource director's testimony about statements made by one of claimant's coworkers on May 28, 2010, when that employee was crying. Rule 803(a)(2) provides that even if the declarant is available to testify as a witness, an "excited utterance" is admissible to prove the truth of the matter asserted by the declarant. An excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Three requirements must be met for hearsay to qualify as an excited utterance: (1) a startling event or condition must have occurred, (2) the statement must have been made while the declarant was under the stress of the startling event, and (3) the statement must relate to the startling event or condition. *State v. Hardy*, 133 Wn.2d 701, 714, 946 P.2d 1175 (1997). Even assuming that claimant's alleged conduct on May 27, 2008 was a startling event, the statement by the crying coworker to the human resources director was made on May 28, 2010, the day after the possibly startling event. Passage of time alone, even a few hours, does not disqualify a statement made by a declarant still under the stress of a startling event from admissibility under the excited utterance exception. However, the exception rests on the assumption that the declarant making the statement did not have the time or mental capacity to reflect on the situation and fabricate concerning what happened. This is what renders an excited utterance more reliable than other types of hearsay. In this case, there is insufficient factual foundation, especially given the lapse of time of one day between the event and the statement, to support admissibility of the coworker's statements under the excited utterance exception to the hearsay rule.

IX

*8 A second exception to the hearsay rule arguably applies to the statement made on May 28, 2010 by the crying coworker, to the effect that she was "upset" at the time of the statement. ER 803(a)(3) provides an exception to the hearsay rule for "[a] statement of the declarant's then existing state of mind, emotion, sensation or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant's will." (Emphasis supplied.) Under this exception, the coworker's tearful statement that she was "upset" would be admissible to prove that, for whatever reason, she was, in fact, emotionally upset at the time of her interview, a day after claimant's alleged conduct. However, the coworker's statements of "the facts remembered or believed" by her concerning claimant's alleged conduct on May 27, 2010, are not admissible to prove the truth of those statements under the state of mind exception to the hearsay rule.

X

*9 A third exception to the hearsay rule potentially applies to the documentary evidence offered by the employer, consisting of the three written warnings (Exhibit 4, pp. 2-4) and the termination forms (Exhibit 4, pp. 5-6). An exception to the hearsay rule is referred to in ER 803(a)

(6), entitled "Record of Regularly Conducted Activity," which is reserved and refers to RCW 5.45, the Uniform Business Records Act. That Act provides in RCW 5.45.020 that "[a] record of an act, condition or event, shall in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." The forms offered by the employer constitute "hearsay included within hearsay" within the meaning of ER 805. They are statements written by declarants outside the hearing or trial, which in turn recite what other declarants told the writers of the documents outside the hearing or trial. Based on the foundational testimony of the employer's witnesses, the exhibits in question are admissible as business records under RCW 5.45.020, but only to prove that the warnings were given; what reasons claimant was given for the warnings; that claimant was discharged; and what reasons were provided to claimant for his discharge. However, the records are not admissible to prove the truth of the matters stated about claimant's alleged misconduct by claimant's coworkers to the persons who prepared the records. Those statements are hearsay, and they do not fall within any of the exceptions to the hearsay rule. Put differently in the language of RCW 5.45.020, the "sources of information" identified in the business records are not "such as to justify their admission" for the purpose of proving the truth of the matters asserted by those sources.

XI

***9** The only other evidence offered by the employer was the human resource director's testimony about what she observed in the videotape of the May 27, 2010 incident for which claimant was discharged. ER 1001(b) defines "photographs" to include "videotapes." ER 1002 provides in relevant part that "[t]o prove the content of a ... photograph [videotape], the original of the photograph [videotape] is required, except as otherwise provided in these rules or by rules adopted by the Supreme Court of this state or by statute." ER 1003 provides that "a duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original." As pertinent to this case, ER 1004 provides, in substance, that "other evidence" (e.g. testimony) of the contents of a photograph (videotape) is admissible only if (1) it has been lost or destroyed, (2) it cannot be obtained by judicial process, (3) it was or is in possession of the opposing party and appropriate notices to produce were given to that party, or (4) it is not related to a controlling matter (i.e., it relates to a collateral issue). In this case, the videotape was not offered in evidence. There is no evidence that the tape was lost or destroyed or that any of the other circumstances allowing proof of the contents of the videotape through testimony apply. Accordingly, pursuant to the Washington Rules of Evidence discussed above, the human resource director's testimony concerning the contents of the videotape would have been inadmissible in court.

XII

***10** In short, none of the evidence offered by the employer to prove misconduct by claimant would have been admissible in a civil action in our state courts under the Washington Rules of Evidence.

XIII

***10** The administrative law judge erred by entering findings of fact based exclusively on evidence that would not have been admissible in a civil action in our state courts. This error was compounded by the administrative law judge's failure to state any basis for determining that doing so "would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence" as required by the RCW 30.04.461(4). Based on our review of the entire record, we conclude that claimant was deprived of the opportunity to confront and cross-examine the witnesses with personal knowledge of the material facts, specifically, the coworkers who had personal knowledge of claimant's alleged misconduct. Claimant was also deprived of his rights with respect to the testimony of the employer's restaurant manager, the only employer witness with personal knowledge of any of claimant's conduct, specifically the October 31, 2008 incident. The restaurant manager testified at the first hearing, at which claimant did not appear for good cause. The restaurant manager did not appear at the second hearing, which claimant attended. Without providing an opportunity to object, the administrative law judge "incorporated" the audio recording of the first hearing into the record of the second hearing. This unduly abridged claimant's right to confront and cross-examine the restaurant manager. Because the videotape (without audio) of claimant's conduct on May 27, 2010, was not offered in evidence, claimant's right to present rebuttal testimony regarding his conduct as depicted in the videotape was also unduly abridged. In summary, claimant's rights to confront witnesses and rebut evidence were unduly abridged by entry of findings of fact based exclusively on evidence that would have been inadmissible in a civil trial in our state courts. The administrative law judge's decision was therefore erroneous under the governing provisions of the Administrative Procedure Act, Chapter 34.05 RCW, and the Washington Rules of Evidence as they apply in this proceeding.

XIV

***10** The same reasoning and conclusions apply to the administrative law judge's finding on the issue of credibility, fully quoted in Finding No. XIII, above. The administrative law judge found the human resource director's testimony more credible than claimant's "[b]ecause the employer presented direct testimony that the employer viewed the security tape and conducted an investigation and interviewed employees who worked that night (May 27, 2010)." However, the human resources director had no personal knowledge of claimant's conduct, and the fact that she provided inadmissible testimony concerning the contents of the videotape and the hearsay statements of claimant's coworkers provides no reasonable basis for finding the human resource director's testimony more credible than claimant's. Having reviewed the entire record and listened to the digital audio recording, we reject the credibility finding, and instead find and conclude that claimant's testimony, based on his personal knowledge, explaining what occurred on May 27, 2010, was more credible.

XV

***11** The employer did not carry its burden of proving by a preponderance of the evidence that claimant was discharged for misconduct under RCW 50.20.066(1) as more particularly defined in RCW 50.04.294. We do not question the wisdom of or business reasons for the employer's decision to discharge claimant. Rather, we conclude only that misconduct as defined by applicable unemployment insurance law has not been established.

XVI

*11 During the weeks at issue, claimant was available for, able to and actively seeking work as required by RCW 50.20.010(1)(c).

*11 Accordingly,

*11 IT IS HEREBY ORDERED that the Initial Order of the Office of Administrative Hearings issued on October 28, 2010, is REVERSED in part and AFFIRMED in part. Claimant is not disqualified pursuant to RCW 50.20.066(1). Claimant was able to, available for and actively seeking work during the weeks at issue as required by RCW 50.20.010(1)(c). *Employer*. If you are a base year employer for this claimant, or become one in the future, your experience rating account will be charged for any benefits paid on this claim or future claims based on past wages you paid to this individual. If you are a local government or reimbursable employer, you will be directly liable for any benefits paid. Benefit charges or liability will accrue unless this decision is set aside on appeal. See RCW 50.29.021. If you pay taxes on your payroll, any charges for this claim could be used to calculate your future tax rates. *Notice to Claimant*: Your former employer has the right to appeal this decision. If this decision is reversed because it is found you committed misconduct connected with your work, all benefits paid as a result of this decision will be an overpayment. State law says you will not be eligible for waiver of the overpayment, nor can the Department accept an offer of compromise (repayment of less than the total amount paid to you). The benefits must be repaid even if the overpayment was not your fault. See RCW 50.20.066(5).

*11 DATED at Olympia, Washington, December 30, 2010. ^{a1}

*11 Steven L. Hock

*11 Chief Review Judge Commissioner's Review Office

RECONSIDERATION

*11 Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9555, Olympia, Washington 98507-9555, and to all other parties of record and their representatives. The filing of a petition for reconsideration is not a prerequisite for filing a judicial appeal.

JUDICIAL APPEAL

*12 If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the superior court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such judicial appeal is filed, the attached decision/order will become final.

*12 If you choose to file a judicial appeal, you must both:

*12 a. Timely file your judicial appeal directly with the superior court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the superior court of Thurston County. See RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND

*12 b. Serve a copy of your judicial appeal by mail or personal service within the 30-day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General and all parties of record.

*12 The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park, Post Office Box 9555, Olympia, WA 98507-9555. To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the 30th day of the appeal period. See RCW 34.05.542(4) and WAC 192-04-210. The copy of your judicial appeal you serve on the Office of the Attorney General should be served on or mailed to the Office of the Attorney General, Licensing and Administrative Law Division, 1125 Washington Street SE, Post Office Box 40110, Olympia, WA 98504-0110.

Footnotes

a1 Copies of this decision were mailed to all interested parties on this date.

Empl. Sec. Comm'r Dec.2d 960 (WA), 2010 WL 6795726

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Court of Appeals Case Number: 49362-4

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