

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 293157

IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Thomas A. Mattson,

Appellant,

vs.

The State of Washington Department of Employment Security,

Respondent.

BRIEF OF APPELLANT

Richard A. Gittins
Attorney for Appellant
WSBA #17450
843 Seventh Street
P. O. Box 191
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I. INTRODUCTION

Thomas A. Mattson appeals from the order entered by the Asotin County Superior Court upholding the decision of the Commissioner of the Employment Security Department (Department) which denied Thomas A. Mattson unemployment benefits. The Decision of the Commissioner of the Department adopted the Office of Administrative Hearing's findings of fact and conclusions of law, and affirmed its decision, finding Thomas Mattson disqualified pursuant to RCW 50.20.066(1) (misconduct connected with his work). The incident alleged and found as the sole basis for termination was not misconduct pursuant to RCW 50.20.066(1), therefore Appellant asks this court to reverse the Superior Court's and Department's decision and allow unemployment benefits to Thomas A. Mattson.

II. ASSIGNMENTS OF ERROR

1. The Respondent erred in entering or adopting the order of the administrative law judge that implied finding the Appellant engaged in wilful or wanton disregard of the rights, title and interests of the employer or a fellow employee as defined in RCW 50.04.294(1)(a), justifying denial of unemployment benefits under RCW 50.20.066(1).

2. The Respondent erred in entering or adopting Finding of Fact #5 in interpreting or applying the law, specifically RCW 50.040.294(1)(a) and WAC 192-150-205, to the actions or conduct of the Appellant.

3. The Respondent erred in entering or adopting Finding of Fact #4 to the extent that it found “once that permission is granted, a visitor then travels to another location where they are required to stop and then be escorted into the restricted area” where there was insufficient evidence before the Respondent to show being escorted was required for a visitor to be in the restricted area.

4. The Respondent erred in entering or adopting Finding of Fact #6 to the extent that it found “the final incident occurred on August 12, 2009” when the evidence admitted and admission of the employer found that the incident on August 12, 2009, was the sole incident giving rise to termination from employment.

5. The Respondent erred in entering or adopting Finding of Fact #7 to the extent that it failed to include that “Keith” told the claimant that “at 2:00 you can go underneath the mill and fill the tank.”

6. The Respondent erred in entering or adopting Finding of Fact #8 to the extent that it found the claimant proceeded “past the escort

checkpoint” where there was insufficient evidence before the Respondent to show an escort checkpoint was in use or required by Clearwater Paper.

7. The Respondent erred in entering or adopting Finding of Fact #10 to the extent that it found the “claimant testified that he clearly understood his obligation to stop at the office and notify Clearwater Paper before proceeding into the restricted area” when the testimony in front of the administrative law judge, and the later submission of the Appellant to the Commissioner, indicated the claimant’s position that he was only to ask for permission to enter, not told to notify Clearwater Paper at a specific office.

8. The Respondent erred in entering or adopting Conclusion of Law #5, to the extent that the Conclusion implies Appellant was obligated to seek permission a second time upon arrival back at Clearwater Paper at 2:00 p.m. to enter the restricted area and that his failure to do so establishes statutory misconduct.

9. The Respondent erred in entering or adopting the conclusion or holding that the Appellant engaged in wilful or wanton disregard of the rights, title and interests of the employer or a fellow employee and that such was supported by evidence that is substantial when viewed in a light of the whole record.

Issues Pertaining to Assignments of Error

1. Did the Respondent err by concluding the Appellants conduct on August 12, 2009 constitute wilful or wanton disregard of the rights, title and interest of the employer or a fellow employee as defined by RCW 50.04.294(1)(a)? *Assignments of Error Nos 1 through 9.*

2. Did the Employer meet its burden of producing sufficient evidence that the Appellant should be denied unemployment benefits for termination constituting misconduct as defined by RCW 50.04.294? *Assignments of Error Nos 1, 2, 3, 5, 6, 7, 8 and 9.*

3. Whether the Commissioner's Decision constituted an error of law by finding substantial evidence supported Finding of Fact #4 in that a visitor, after receiving permission to enter the customer's restricted area, is required to be escorted into that area? *Assignments of Error Nos 3, 6, 7 and 8.*

4. Was there sufficient evidence to support the Commissioner's Decision that the Appellant engaged in actions constituting wilful or wanton disregard? *Assignments of Error Nos 1 through 9.*

III. STATEMENT OF THE CASE

Appellant, Thomas A. Mattson is a high school graduate, *Commissioner's Record (hereafter Clerk's Papers 10-119), Exhibit VII, page 73: CP 87 [Footnote 1]*, and heavy truck driver or equipment operator by normal line of work. *CP 26, Lines ("L") 5-7*. He was hired for full-time employment (*CR 16, L 2*) by Petro Concepts on January 5, 2009 (*CP 29, L 20*), and his employment officially ended with Petro Concepts on August 18, 2009. *CP 29, L 22*.

Thomas Mattson was separated from employment by discharge or firing, (*CP 39, L 10-13*) and at the time of his firing a co-owner of Petro Concepts, Tracy Popham, told him that “. . . I am going to have to let you go for a safety violation and the fact that I don't think you are enjoying your job.” *CP 17, L 21-25*. The sole reason later provided by the employer for Thomas Mattson's discharge or firing was a safety violation that occurred at an industrial customer, Clearwater Paper - a lumber sawmill, of Petro Concepts on August 12, 2009. *CP 37, L 7-8*;

¹The Administrative Record, or Commissioner's Record, was designated as Clerk's Papers page 10 to 119 in the submission to the Court of Appeals. Page one of the OAH transcript begins on Page 2 of the Administrative Record and is page 16 of the Clerk's Papers. The Decision of Commissioner is found at pages 102-105 of the Administrative Record which corresponds with Clerk's Papers, pages 116-119. Pursuant to RAP 10.4 page numbers throughout this brief, in reference to the Administrative or Commissioner's Record, refer to the Clerk's Papers, pages 10 through 119.

CP 38, L 10, L 13; CP 45, L 14-22. That safety violation being a breach of the policy or protocol of Clearwater Paper that indicated entry into a certain area could not be conducted without permission of Clearwater Paper for safety reasons because of moving logs overhead. *CP 39, L 5-10.*

Following an application for unemployment benefits, the Employment Security Department issued its determination on November 28, 2009 that Thomas Mattson was fired or suspended for work-connected misconduct, resulting in a denial of benefits beginning 08/16/2009 (*CP 73*). Appellant filed a “Redetermination/Hardship” statement (*CP 69-71*), that was treated by the Department as a Notice of Appeal and referred to the Office of Administrative Hearings. (*CP 67*).

On January 4, 2010, Thomas Mattson testified at the hearing of the Office of Administrative Hearings that he had gone out the morning of August 12, 2009 (*CP 50, L 18-20*) and filled two tanks (at Clearwater Paper). *CP 50, L 21-22.* He had one more tank to fill, underneath the log deck, *CR 51, L 20-25*, which apparently was in the area requiring permission to enter. Thomas Mattson went upstairs, sometime around lunch time or around noon (*CP 52, L 19*) to an office of Clearwater Paper

and asked “Keith” (an agent or officer of Clearwater Paper) for permission to enter the area. Keith, in response said:

“The window of opportunity - because the lunchtime is not going to be open, there is something that is going on. Can you come back at 2:00?”

And I said “I will be back at 2:00.”

He said “At 2:00 you can go underneath the mill and fill the tank.” *CP 52, L 2-8*

Thomas Mattson returned back to the plant, his employer’s location, and told Karen (Denevan) (as well as Alan Hobdey (*CP 108*)) that, “I have to go back to the mill at 2:00 to do the tank underneath the log deck.” *CP 53, L 4-6*. Petitioner returned to Clearwater Paper at 1:45 (*CP 70*), went underneath the log deck at 2:00 p.m., and filled the tank. (*CP 53, L 8-9*)

Karen Denevan, a co-owner of Petro Concepts (*CP 41, L 16-18*) testified at the hearing of the Office of Administrative Hearings that she had received a call from “Ron” at Clearwater Paper at 2:30 p.m. on August 12, 2009, notifying them that (referring to the Appellant, Thomas Mattson) had been underneath the deck without authorization and “the man did not know he was under there and they were surprised when Tom came out.” *CP 41, L 23-24; CP 42, L 1*. Miss Denevan also testified at

the hearing that “the fellow said he broke every safety rule.” *CP 42, L 1-2*. After receiving this notification from Clearwater Paper, Thomas Mattson was discharged by Petro Concepts for the incident that occurred at Clearwater Paper on August 12, 2009. *CP 45, L 19-22*.

At the hearing before the administrative law judge questioning focused, slightly, on the actual protocol or procedure required by Clearwater Paper, training on that procedure, and Thomas Mattson’s awareness of such. The Petitioner testified that he had been out to Clearwater Paper before (*CP 50, L13-15*) and was aware of their safety protocol. *CP 50, L13-16*. The only testimony regarding proper training and the safety protocol or procedure for Clearwater Paper, came from the employer’s representative, Mr. Hobdey. He testified only that, “Yeah, he had been out there, you know.” *CP 48, L 6-8*. Later, in response to the decision following the hearing, in the Appellant’s submission to the Commissioner, Thomas Mattson asserted:

“Prior training had never included proper protocol for entering the restricted area. I have no memory of my supervisor showing me where to go and who to ask for permission. That’s why the first time I was told by Alan, “you will need to ask for permission to go under the deck,” now the first person I asked happened to be a welder. He responded “I don’t have authority; you need to go up those stairs, take a right and go down the hallway and Keith Katzenberger’s office is on the left. If he’s not

in, there's two offices on the right, if no one is there go all the way to the end and there should be a Shop Steward there. There was not one specific area I was told to go to for permission. To the best of my knowledge there was 3 offices upstairs I would go to and if I couldn't find anyone in those offices I would look for a Shop Steward for permission." *CP 107; CP 108.*

Although it is indicated in the Commissioner's Record that an escort was part of the protocol, Thomas Mattson testified, and such was not controverted, that ". . . I was only ever escorted underneath there once, maybe twice (*CP 53, L12-14; CP 55, L 8*) out of the estimated close to one hundred times that he had been at Clearwater Paper. *CP 54, L 24-25; CP 55, L 5-6.* Regarding permission, Appellant testified that "every previous time I have always gotten permission and 99 percent of the time it was Keith or they would send me to a shop steward." *CP 39, L16-18.* Following the hearing and submitted to the Commissioner, Thomas Mattson asserted that on "August 12, 2009 the day I was to have committed the infraction in question I did exactly what I was told to do. That was to get permission to enter the restricted area. I went to the office of Keith Katzenberger who is charge of the hydraulic department, who then as he had in previous times, calls a Shop Steward for permission for me to enter the restricted area. The Shop Steward responded that there was a man lift and a fork lift in the road under the

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deck doing maintenance and entry was not possible but to be there at 2:00 pm and pump the oil in Room 8. I then confirmed that with Keith and left.” *CP 108*.

Thomas Mattson was asked at the administrative hearing if it occurred to him that he needed to stop and alert them (referring to Clearwater Paper) that he was back at 2:00, so they could shut down a line, or do whatever they needed to do. *CP 55, L 14-17*. He had previously responded that “I was under the assumption with already having talked to him, that when he said 2:00 I was back at 2:00 and that’s - that is - that was my bad.” *CP 53, L 23-25*. Regarding the question of alerting Clearwater paper that he was back so they could shut down the line: “Well, at 2:00 when I pulled up, the mill was already - that section was already down. They had a break.” *CP 55, L 14-19*. When asked if he actually saw the line not moving, Thomas Mattson testified “That’s correct. I’m watching the cranes. If there is any operators in the crane station - - I will wait for them to give a heads-up or signal, yeah, I’m okay with them, go ahead. When I pulled up there, the operators were not in the crane, I thought, “Okay, we are down, it is 2:00.” *CP 56, L 12-20*.

In response to Thomas Mattson's subsequent submission to the Commissioner, following the administrative hearing, Karen Denevan, a co-owner of the employer, asserted that Thomas Mattson's admissions of having earlier felt that he "screwed up" constituted a contradiction to his denial that he intentionally disregarded the Clearwater Paper protocol. *CP 114*. His testimony at the hearing was that in returning to Clearwater Paper, he went underneath the log deck and filled the tank. As he was leaving he noticed a couple of people on top of the log deck. He then went over to another tank that had been missed on the first filling and began filling that up. At that time, he had a gut feeling that somebody was going to be upset that he had not gone back upstairs again and told them that he was going to be underneath the deck (*CP 54, L 5-15*); however, he also testified that did not think he was violating policy at that time: ". . . I did not do that on purpose. I thought by talking to Keith and having him tell me I would be back at 2:00 and I told Karen I have to be back at two to take care of the tanks, I thought - I thought I was covered that day." *CP 59, L14-18*.

V. STANDARD OF REVIEW

Judicial review of decisions of the Commissioner of the Employment Security Department is to be in accordance with RCW

34.05.570 of the Administrative Procedure Act (APA). *RCW 50.32.120*.

In reviewing administrative actions the court sits in the same position as the superior court, applying standards of the APA directly to the record before the agency. *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). Pertinent to this appeal, RCW 34.05.570(3) provides in part:

The court shall grant relief from an agency order in adjudicative proceeding only if it determines that:

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

In cases involving an appeal of a decision by the Employment Security Department Commissioner, the Court of Appeals reviews only the commissioner's decision, not the administrative law judge's decision or the superior court's ruling, and the decision is based on only the Appellant's Brief

administrative record before the commissioner. *Markam Group, Inc., v. Employment Sec.*, 148 Wn.App. 555, 559, 200 P.3d 748 (2009), citing *Verizon NW., Inc. v. Employment Sec. Dep't*, 164 Wn.2d 909, 194 P.3d 255 (2008); *Kelly v. State*, 144 Wn.App. 91, 95, 181 P.3d 871, *review denied*, 165 Wn.2d 1004, 198 P.3d 511 (2008).

The duty of the reviewing court is to search the entire record for facts both supportive of and contrary to the agency' findings. *Franklin Cy. Sheriff's Office v. Sellers*, 97 Wn. 2d 317, 324, 646 P.2d 113 (1982), cert. denied, 459 U.S. 1106, 103 S.Ct. 730, 74 L.Ed.2d 954 (1983) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 71 S.Ct 456, 95 L.Ed 456 (1951)). With regard to factual determinations, the APA's clearly erroneous standard of review governs. *Franklin Cy. Sheriff's Office*, 97 Wn.2d at 324, 646 P.2d 113. This clearly erroneous test replaced an earlier substantial evidence test, indicating the Legislature's intent to allow broader, more intensive review of an agency's factual determinations. *Ancheta v. Daly*, 77 Wn. 2d 255, 259, 461 P.2d 531 (1969). A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. *United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 68 S.Ct 525, 542,

92 L.Ed. 746, 766 (1948) (cited with approval in *Ancheta* and *Franklin Cy. Sheriff's Office*).

The “error of law” standard of RCW 34.04.130(6)(d) (replaced by Chapter 34.05 RCW) is the standard to be applied to issues of law. *Franklin Cy. Sheriff's Office*, 97 Wn.2d at 325, 646 P.2d 113. Under this standard, the reviewing court essentially substitutes its judgment for that of the administrative agency, since issues of law are the responsibility of the judicial branch to resolve. *Franklin Cy. Sheriff's Office*, 97 Wn.2d at 325, 646 P.2d 114. While deference is to be given to the expertise of the administrative agency, *Ancheta*, 77 Wn.2d at 260, 461 P.2d 531, or accorded substantial weight to the agency’s interpretation if the agency has generalized expertise in the area, the court is not bound by the agency’s interpretation. *Language Connect. v. Employ. Sec.*, 149 Wn.App. 575, 580-81, 205 P.3d 924 (2009), citing *Affordable Cabs, Inc. v. Employment Sec. Dep’t*, 124 Wn.App. 361, 367, 101 P.3d 440 (2004), and *Bauer v. Employment Sec. Dep’t*, 126 Wn. App. 468, 481, 108 P.3d 1240 (2005). It is ultimately for the court to determine the purpose and meaning of statutes, even when the court’s interpretation is contrary to that of the agency charged with carrying out the law, and thus courts retain the ultimate responsibility for interpreting a statute or regulation

Gaines v. Employment Sec., 140 Wn.App. 791, 797, 166 P.3d 1257 (2007).

Mixed question of law and fact, that is, issues that involve the propriety of inferences drawn by an agency, or the process of comparing and applying the correct law and the correct facts to determine legal consequences shall be reviewed de novo. *Franklin Cy. Sheriff's Office*, 97 Wn.2d at 329-30, 646 P.2d 113. De novo review in such situations is again based on the inherent authority of the court to determine the correct law. *Franklin Cy. Sheriff's Office*, 97 Wn.2d at 330, 646 P.2d 113.

Whether facts constitute “misconduct” is properly reviewed as a question of law. *Ciskie v. Employment Sec. Dep't.*, 35 Wn.App. 72, 664 P.2d 1318 (1983), citing *Daily Herald v. Employment Sec. Dep't.*, 91 Wn.2d 559, 558 P.2d 1157 (1979). Accordingly, the court must decide independently whether undisputed facts concerning a petitioner’s conduct constitute work-related misconduct. *Ciskie v. Employment Sec. Dep't.*, 35 Wn.App. at 74, citing *Rasmussen v. Employment Sec. Dep't.*, 98 Wn.2d. 846, 658 P.2d 1240 (1983). While the question of whether an employee’s actions constitute misconduct is generally a mixed question of fact and law, *Tapper v. Employment Sec. Dep't.*, 122 Wn.2d at 402-403, where the facts themselves are not at issue on appeal, the question

before the court, of whether such action by the employee amounts to disqualifying misconduct, is a question of law, *Markam Group, Inc., v. Employment Sec.*, 148 Wn.App. at 561-62.

V. ARGUMENT

The Washington legislature specifically sets forth that the Employment Security Act (Act) is to be interpreted liberally, adding to its preamble: “this title shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum” and “for the compulsory setting aside of unemployment reserves to be used for the benefit of persons unemployed through no fault of their own.” *RCW 50.01.010*. This fault principle underlies a number of the statutory grounds for disqualification to receive benefits, including the misconduct disqualification set forth in *RCW 50.20.066*.

A. **The Employer Failed to Establish Thomas Mattson Committed Statutory Misconduct**

With respect to claims that have an effective date on or after January 4, 2004, *RCW 50.20.066(1)* provides that an individual “shall be disqualified from benefits beginning with the first day of the calendar week in which he or she has been discharged or suspended for misconduct connected with his or her work.”

As defined by statute under RCW 50.04.294(1), misconduct includes, but is not limited to, the following conduct by a claimant:

- (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.

“Willful” is defined under the Washington Administrative Code (WAC), in this context, as:

“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)*.

“Wanton” is also defined under the WAC, in this context, as:

“malicious behavior showing extreme indifference to a risk, injury, or harm to another that is known or should have been known to you. It includes a failure to act where there is a duty to do so, knowing that injury could result. *WAC 192-150-205(2)*.”

In enacting RCW 50.04.294, Washington's legislature provided several statutory examples of action that would constitute disqualifying misconduct:

"The following acts are considered misconduct because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee. These acts include, but are not limited to:

- (a) Insubordination showing a deliberate, willful, or purposeful refusal to follow the reasonable directions or instructions of the employer;
- (b) Repeated inexcusable tardiness following warnings by the employer;
- (c) Dishonesty related to employment, including but not limited to deliberate falsification of company records, theft, deliberate deception, or lying;
- (d) Deliberate acts that are illegal, provoke violence or violation of the laws, or violate the collective bargaining agreement. However, an employee who engages in lawful union activity may not be disqualified due to misconduct;
- (e) Violation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule; or
- (f) Violations of law by the claimant while acting within the scope of employment that substantially affect the

claimant's job performance or that substantially harm the employer's ability to do business." *RCW 50.04.294(2)*.

In the present case the matter, having been delegated by the Commissioner to the Commissioner's Review Office, such Office merely adopted the Office of Administrative Hearings' findings of fact and conclusions of law, ordered its decision affirmed and found the Appellant, Thomas Mattson, disqualified pursuant to *RCW 50.20.066(1) (CP 118)*. The conclusions of law contained within the Initial Order of the Office of Administrative Hearings indicated a "claimant shall be disqualified from benefits if discharged from employment for misconduct. *RCW 50.04.294(1)(a)* defines misconduct, in part as willful or wanton disregard of the rights title and interests of the employer or a fellow employee." *CP 97, Conclusions of Law 3*. The Initial Order concluded that:

"The facts in this case establish a single incident in which claimant violated an established safety protocol of a customer of the employer. Claimant's failure to follow this safety protocol could have resulted in extremely serious, if not life-threatening, injury to claimant. Claimant was clearly aware of the safety protocol, and it was incumbent on him to notify Clearwater Paper that he was wanting to enter the restricted area at 2:00 p.m.. Under these facts, this tribunal concludes that statutory misconduct has been established." *CP 98, Conclusion of Law 5*.

Regardless of the Conclusion of Law indicating the Appellant's conduct could have resulted in misconduct as defined under RCW 50.04.294(1)(c), that being carelessness or negligence that causes or would likely cause serious bodily harm to the employer or a fellow employee, and despite the fact such possible harm would have only been extended to the claimant, the Office of Administrative Hearings' order then focused on and determined that instead Appellant "was discharged due to a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee as defined in RCW 50.04.294(1)(a)." *CP* 98

There was no showing nor evidence suggesting serious bodily harm could have occurred to a fellow employee or to the employer as a result of Thomas Mattson being under the logdeck at Clearwater Paper, with or without permission, on August 12, 2009. Citing to that provision was either error or merely an erroneous attempt by the administrative law judge, and adopted by the Commissioner, to justify denial of benefits in a case where economic harm may have resulted to the employer in losing a customer. It does not, however, show willful or wanton disregard as such terms are defined or used in conjunction with disqualifying statutory misconduct.

B. The Administrative Record and the Conclusions of Law, as Adopted, Indicate the Commissioner's Decision that Disqualifying Misconduct Occurred was Due to Appellant's Failure to Obtain Permission on His Return To Clearwater Paper, which is Insufficient to Establish Statutory Misconduct.

In order to resolve the question of misconduct, the court must identify the findings of fact actually made by the Commissioner. When findings of fact are not explicitly delineated, or where those findings are buried or hidden within conclusions of law, it is within the prerogative of an appellate court to exercise its own authority in determining what facts have actually been found below. *Tapper v. Employment Security*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993).

The Commissioner, in adopting the findings of the administrative law judge, found that Thomas Mattson was responsible for delivering petroleum products to one customer of the employer, Clearwater Paper, which maintained a restricted area. In order to enter the area, one must first stop at the office to obtain permission. The administrative law judge also found that once permission is granted, a visitor travels to another location where they are required to stop and then be escorted into the restricted area. *CP 96, Findings of Fact 4*. The Appellant, in testimony at the hearing, denied this was the actual practice:

“Q: Did you get escorted into that area?”

A: Now, there is another contention that I have with this whole story. I was ever - only ever escorted underneath there once, maybe twice where someone was actually underneath the deck with me.” *CP 53, L 10-14*

“Q: So, in other words, you would have been out there - what? - close to 100 times?

A: Yes.

Q: And you had only been escorted twice?

A: Twice.”

Q: And on all of the other occasions, had - if you had to go under the log deck, had you always stopped?

A: Always stopped and asked permission, yes.: *CP 55, L 4-11*

The only contrary evidence, establishing the safety protocol required an escort, or whether an escort was in fact utilized or whether such was the actual practice, came from the testimony of Alan Hodbey, the employer’s dispatcher and accountant (*CP 36*), not a representative of the customer, Clearwater Paper, who indicated:

“Q: Okay. Just so that I’m understanding, so when you come in, you stop at C, you get permission then to enter the area, you drive along to A where you have to stop, they then shut down the log deck and turn on that light so it can’t –

A: (Inaudible)

Q: Okay. And so then you are actually escorted into the area that - sort of in the area that is outlined at Number B?”

A: That's right. *CP 37, L 23-25; CP 38, L 1-6*

Karen Denevan, a co-owner of the employer with general responsibilities of accounting (*CP 41*) testified that she received or took a call from Clearwater Paper on August 12th. Upon prompting by the administrative law judge, she indicated:

Q: Okay, And just to be real clear then, Ms. Denevan, is it your understanding that Mr. Mattson had actually proceeded into the restricted area B without stopping at the - the office C or waiting for the line to be shut down and the light turned on at A?

A: Yes, he did not wait for any authorization or to be escorted by (inaudible) supposed to be or for the light to come on.”
CP 42, L 9-16.

Neither Mr. Hodbey nor Ms. Denevan testified about the actual practice of the customer, nor did they provide any indication of first hand knowledge of the actual practice. Ms. Denevan only indicated what her understanding was of what had been reported as to what the Appellant did, or did not do, at Clearwater Paper on August 12. Mr. Hodbey apparently related to the administrative law judge his understanding of the protocol, but did not relate the actual practice followed by Clearwater Paper nor was there any evidence from the customer, Clearwater Paper, as to what exactly its protocol was or how it was actually implemented.

Consistent with his position at the hearing, the Appellant's application for unemployment mentions only, as to the incident that caused him to be fired, that he "went in to a safety area with out final permission." *CP 76*. In the employer's response to the unemployment application, Ms. Denevan indicated the final incident causing the Appellant, as claimant, to be discharged was a "Safety violation at a Clearwater Paper location. Tom was instructed not to cross under a logdeck with bulk oil truck w/o escort. He violated that safety procedure." *CP 80*.

The hearing before the administrative law judge focused on the permission granted, or not granted, in entering the restricted area or the area under the logdeck, and not whether or not an escort was required or the actual practice of the customer. The administrative law judge's findings, adopted by the Commissioner, notes the protocol included both the requirement to obtain permission, and "a visitor then travels to another location where they are required to stop and then be escorted into the restricted area" *CP 96, Findings of Fact 4*. Finding of Fact 10 indicates that although such might have been the stated protocol, the actual practice was that as testified to by the Appellant:

“Claimant’s testimony establishes that although he was aware that the safety protocol normally requires visitors to be escorted, the claimant himself was escorted only a couple of time during the approximate 100 times that he visited the Clearwater Paper plant.” *CP 97, Finding of Fact 10.*

The conclusions of law adopted by the Commissioner are silent at to whether failure to be escorted had any bearing on the finding of misconduct, focusing merely on the aspect of permission: “The facts in this case establish a single incident in which claimant violated an established safety protocol of a customer of the employer..... Claimant was clearly aware of the safety protocol, and it was incumbent on him to notify Clearwater Paper that he was wanting to enter the restricted area at 2 p.m. Under these facts, this tribunal concludes statutory misconduct has been established.” *CP 98, Conclusions of Law 5.*

In response to the administrative law judge’s findings and conclusions, the Appellant commented on Findings of Fact 5 and objected to Findings of Fact 10, *CP 110*. His submission or response indicated the same position as he had earlier stated:

“August 12, 2009 the day I was to have committed the infraction in question I did exactly what I was told to do. That was to get permission to enter the restricted area. I went to the office of Keith Katzenberger who is in charge of the hydraulics department, who then as he had in previous times, calls a Shop

Steward for permission for me to enter the restricted area. The Shop Steward responded that there was a man lift and fork lift in the road under the deck doing maintenance and entry was not possible but to be there at 2:00 pm and pump the oil in Room 8. I then confirmed that with Keith and left”..... “I then went back to the office and promptly told Karen (the Co-owner) and Alan Hobbey (the Dispatcher/Accountant) what had just transpired. Had either Karen with 20+years or Alan with 28 years right then and there told me that did not constitute permission to access that area I might still have a job. However, they told the judge that I questioned them on how to take a short cut which should have sent up a red flag and either one could have schooled me on proper protocol. I was not taking a short cut! On at least 2 other occasions Alan had talked with someone at the customers location and he dispatched me to deliver oil in the restricted area. Did he instruct me to stop for permission? NO! The customer instructed him to have the oil there at a specified time and place when the tower crane was shut down, to back in and pump the oil. Basically the same thing I was told on August 12, 2009 at about 11:45, to come back and at 2:00 pm when the deck shut down go under and pump the oil. And at 2:00 pm when I visually witnessed everything had stopped, I went under and pumped the oil as instructed earlier that day.” *CP 108*.

The Conclusions of Law, as adopted by the Commissioner, found that Appellant failed to seek or secure permission for entry upon his return at 2:00 p.m. to Clearwater Paper as the basis for concluding Appellant’s actions constituted statutory misconduct as defined by RCW 50.04.294(1), as either willful or wanton disregard of the rights, title and interests of the employer or a fellow employee. Appellant’s failure to ask for permission a second time is neither malicious behavior nor intentional. The record

does not support the Commissioner's conclusion and statutory misconduct was not established by the employer.

C. Appellant's Actions or Conduct on August 12, 2009, Indicate Only at Most Ordinary Negligence or An Error in Judgment During an Isolated Incident and as Such Do Not Rise to a Level of Statutory Misconduct Justifying Denial of Unemployment Benefits Under an Act that is to be Construed Liberally.

Good cause for discharge is not to be equated with misconduct disentitling the worker to benefits. *Ciskie v. Department of Empl. Sec.*, 35 Wn.App. at 76, citing 76 Am.Jur 2d Unemployment Compensation § 53 (1975). Not every deviation from the reasonable demands of an employer bars unemployment benefits. For example, ordinary negligence and good faith errors in judgment are not misconduct. *Ciskie v. Department of Empl. Sec.*, 35 Wn.App. at 76, citing *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 259-60, 296 N.W. 636 (1941).

Prior to enactment of the current version of RCW 50.04.294 and statutory definition of misconduct relative to unemployment benefits, Washington State's Supreme Court indicated that "it is well established that the operative principle behind the disqualification for misconduct is the fault of the employee." *Tapper v. Employment Security*, 122 Wn.2d 397, 409, 858 P.2d 494, citing *Macey v. Department of Empl. Sec.*, 110 Wn.2d 308, 318, 752 P.2d 373 (1988); *Durham v. Department of Empl.*

Sec., 31 Wn. App. 675, 678, 644 P.2d 154 (1982). “An employee is only guilty of misconduct when his or her behavior is such that the “unemployment is in effect voluntary.”” *Tapper v. Employment Security*, 122 Wn.2d at 409, citing *Macey*, 110 Wn.2d at 316.

The Court in *Macey* set out what was characterized as a 3 part test for analyzing on-duty violations of employer rules as misconduct under the Act. In *Tapper* the Supreme Court held the test included as a fourth element that “the violations must be intentional, grossly negligent, or continue to take pace after notice or warnings. That is, the behavior cannot be characterized as mere incompetence, inefficiency, erroneous judgment, or ordinary negligence.” *Tapper v. Employment Security*, 122 Wn.2d at 409, citing *Macey*, 110 Wn.2d at 318-319.

The statutory definition under RCW 50.04.294 generally still requires intentional conduct by the employee for such to be considered misconduct. Subparagraph (1)(a) indicates it includes “willful or wanton disregard...” and subparagraph (1)(b) includes as misconduct “deliberate violations or disregard of standards...”, both provisions generally requiring intentional acts or intentional conduct of the employee. While an “unintentional act can be misconduct,” *Markam Group, Inc., v. Employment Sec.*, 148 Wn.App. at 562, citing RCW 50.04.294(1)(c), subparagraph

(1)(c) applies only to carelessness or negligence that causes or would likely cause serious bodily harm “to the employer or a fellow employee.” *RCW 50.04.294(1)(c)*. The fourth element of the test announced in *Tapper* may not be specifically applicable given the now statutory definition of misconduct; however, its guidance continues as, in reference to unemployment benefits, *RCW 50.04.294(3)* mirrors that fourth element of *Tapper* and specifically provides that:

“(3) “Misconduct” does not include:

(a) Inefficiency, unsatisfactory conduct, or failure to perform well as a 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)

Violating an employer’s policy or an applicable protocol of a customer of the employer should not, by itself, be grounds for concluding misconduct has occurred. In *Ciskie v. Employment Sec. Dep’t.*, 35 Wn.App. 72, 664 P.2d 1318 (1983), the employee had been warned that no further absences from work would be tolerated, after missing several days’ work because of a felony arrest. The employee then violated the

company policy after being advised that his wife's son had been injured in an accident. The employee notified his immediate supervisor but did not wait until he was cleared to leave by his immediate supervisor's supervisor. He was then warned, when he returned to work, that another unexcused absence would cost him his job. The employee, later, received a telephone call at work that his wife's father was missing and the employee decided he would have to return home to help his wife through the crisis. His immediate supervisor's supervisor was on vacation and his immediate supervisor had not arrived at work. The employee asked a fellow employee to explain the emergency to his immediate supervisor and left, triggering his termination for violating the employer's policy of notifying an appropriate supervisor prior to leaving the job site. Division II of the Court of Appeals noted the employee's deviation from the proper notification procedure reflected poor judgment or negligence; however, he did attempt to comply with the employer's rule and such efforts were sufficient to dispel any inference that his conduct was motivated by bad faith or that he simply did not care about the consequences of his action. The Court concluded that employee's deviation from the notification procedure was not sufficiently culpable to constitute a willful or wanton

disregard of his employer's interests. *Ciskie v. Employment Sec. Dep't.*, 35 Wn.App. at 73-77.

In *Wilson v. Employment Sec. Dep't.*, the employee, Wilson, managed a jewelry store owned by Sterling, Inc. His dismissal from employment was based on two incidents, the first of which he had received five loose diamonds from a vendor, failed to log them into his stock, and failed to perform a daily diamond count. Because of this, one of the diamonds, valued at over \$900, was lost. In the second incident, approximately six months later, a fellow employee gave Wilson a loose diamond valued at \$490 in a clear plastic bag, which he then placed on his desk with several other clear plastic bags. Later, Wilson cleared his desk of the plastic bags and in so doing threw away the bag containing the diamond. The administrative law judge denied unemployment benefits on the grounds that Wilson's actions leading to his discharge amounted to misconduct. The Commissioner adopted the administrative law judge's findings and conclusions and affirmed the denial of benefits on the same grounds. Wilson appealed to the superior court, which affirmed. Division I of the Court of Appeals overruled holding the evidence was insufficient to establish that the employee had committed the kind of misconduct that would disqualify him from obtaining unemployment compensation, and

reversed the judgment, granting judgment in favor of the employee. The Court noted the statutory definition of misconduct under RCW 50.04.293, as well as the fourth part of the test of misconduct as set forth in *Tapper* as guidance for interpreting that portion of the statutory definition [Footnote 2]. The Court found no evidence in the record that Wilson acted with a deliberate intent to violate his employer's policy or in willful disregard of his employer's interest, nor any evidence that Wilson acted out of an intent to cause his employer harm. His acts were, even by his own admission, in violation of the employer's policy, but were found to at most amount to negligence, incompetence, or an exercise of poor judgment, and not enough to constitute misconduct under RCW 50.04.293. *Wilson v. Employment Sec. Dep't*, 87 Wn.App. 197, 940 P.2d 269 (1997).

In the instant case the Appellant asserted that he did nothing wrong, that "at 2:00 pm when I visually witnessed everything had stopped, I went under and pumped the oil as instructed earlier that day." *CP 108*. His expression of remorse, indicated after the event, that he was wrong or could have done something else, was mere hindsight and

² The current version of RCW 50.04.293 is applicable to claims that have an effective date before January 4, 2004 and provides that "misconduct" means an employee's act or failure to act in willful disregard of his or her employer's interest where the effect of the employee's act or failure to act is to harm the employer's business.

reflections of a man indicating that in all honesty and in retrospect he could have done it differently - but such were not admissions of intentional misconduct nor did his actions evidence a willful or wanton disregard of the safety protocol. They were at most inadvertence, ordinary negligence or a good faith error in judgment or discretion. Similar to the employee in *Ciskie*, Thomas Mattson attempted to comply with the safety protocol and asked for permission to enter the restricted area, returning to the area at the specific time in which he was informed to return. His actions were sufficient to dispel an inference that his conduct was motivated by bad faith or that he simply did not care about the consequences. In not seeking permission a second time, such deviation from the protocol, if any, is not sufficiently culpable to constitute a willful or wanton disregard of his employer's interests nor does the evidence support the conclusion such was either malicious or intentional behavior deliberately or knowingly done.

Attorney's Fees

In the event decision of the Commissioner is reversed or modified, the Appellant, pursuant to RAP 18.1 and RCW 50.32.160, requests reasonable attorneys' fees and costs. In accordance with RCW 50.32.160, applicable to review, hearings, and appeals regarding unemployment

compensation, if the decision of the commissioner shall be reversed or modified, such fee and costs shall be payable out of the unemployment compensation administration fund. *RCW 50.32.160; Ancheta v. Daly*, 77 Wn. 2d 255, 265-66, 461 P.2d 531 (1969).

Appellant requests attorneys' fees and costs, if Appellant prevails, in an amount to be determined by subsequent filing of an affidavit of fees and expenses as required under RAP 18.1(d) for costs and fees incurred in Appellant's appeal to both the Superior Court and the Court of Appeals. Such should be allowed as both are directly related to the review, hearing and appeal of the commissioner's decision or "court proceedings" as that term is used in RCW 50.32.160, and not for those expenses incurred in the administrative process prior to appeal to first the Superior Court. "When the commissioner denies unemployment compensation, the subsequent fees and costs incurred in court proceedings are compensable from state funds." *Albertson's v. Employment Security*, 102 Wn.App. 29, 47, 15 P.3d 153 (2000).

VI. CONCLUSION

Petitioner was found, as adopted by the Commissioner, to have been discharged due to willful or wanton disregard of the right, title, and interest of the employer or a fellow employee as defined in RCW

50.04.294(1)(a). The facts in this case do not support a conclusion Mr. Mattson's conduct was in willful or wanton disregard of his employer's interests, instead they support the notion that his performance or decision was merely inadvertence or ordinary negligence in an isolated incident, or a good faith error in judgment or discretion.

Thomas Mattson asked for permission to enter the area under the log deck and was told that at 2:00 he could go underneath the mill and fill the tank. He returned shortly before 2:00, saw that it was clear, and did precisely that and as he had done on previous trips to the same customer. As he stated at the hearing "I did not do that on purpose. I thought by talking to Keith and having him tell me I would be back at 2:00, and I told Karen I have to be back at two to take care of the tanks, I thought - I thought I was covered that day." *CP 59, L 14-18*; Similarly, in his later submission to the Commissioner, "Again I wish to state that I did not willfully ignore the safety procedures." *CP 109*.

As found by the Commissioner, and agreed upon by the employer at the administrative hearing, the incident on August 12 was the single or sole act for the discharge of the petitioner. The Appellant's actions were concluded or found by the Commissioner to constitute statutory misconduct. The incident and conduct of the Petitioner on that particular

day were isolated and at most an error in judgment or negligence. Such actions may have been a basis for separation from employment, but not “misconduct” as that term is used in RCW 50.20.066 and defined in RCW 50.04.294, justifying the denial of unemployment benefits. The Commissioner’s conclusion of such is an error of law. For the foregoing reasons, Appellant respectfully requests the Court reverse the Superior Court’s and Commissioner’s decision.

Respectfully submitted this 20 day of November, 2010.

LAW OFFICES OF DAVID A. GITTINS



By: _____

Richard A. Gittins, WSBA #17450
Attorneys for Appellant
843 Seventh Street
P.O. Box 191
Clarkston, WA 99403
(509) 758-2501