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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 293157

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

THOMAS A. MATTSON,

Appellant,

vs.

STATE OF WASHINGTON
DEPARTMENT OF EMPLOYMENT SECURITY,

Respondent,

BRIEF OF RESPONDENT

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I. INTRODUCTION

When an employer has a reasonable rule, an employee's violation of that rule constitutes misconduct for purposes of unemployment benefits eligibility. Thomas Mattson, a delivery truck driver for his employer, knew that he was required to follow customer rules. One customer's safety protocol required him to get permission immediately before entering a restricted area due to the danger involved. He had followed this protocol and obtained permission dozens of times previously. His failure to do so here resulted in inordinate risk and customer complaints to the employer, thereby harming the employer's relationship with its customer.

By failing to follow the protocol, Mr. Mattson knowingly violated a reasonable rule of his employer. As a result, the employer discharged him. Mr. Mattson's violation of the rule amounted to misconduct under the Employment Security Act, and the Commissioner properly denied his application for unemployment benefits. Accordingly, the Department requests that this Court affirm the Commissioner's Decision.

II. COUNTERSTATEMENT OF THE ISSUES

A. Did the Commissioner properly conclude that Mr. Mattson showed willful or wanton disregard for his employer's interest by violating the safety protocol of his employer's customer and therefore the employer's rule?

B. Does substantial evidence support the Commissioner's finding that anyone wanting to enter into the restricted area at Clearwater

was first required to stop at the office to obtain permission to go into the restricted area, then proceed to another location where they were required to stop again before entering the restricted area?

C. Did Mr. Mattson's actions exceed mere negligence or an error in judgment when he knew the significant risks involved in violating the customer's safety protocol but nevertheless disregarded the protocol?

III. COUNTERSTATEMENT OF THE CASE

Mr. Mattson had worked as a truck driver for Petro Concepts, the employer, for about seven months. CP at 29, 95 (Finding of Fact (FF) 2).¹ He was responsible for delivering petroleum products to customers of the employer. The employer had a rule that its employees follow the safety requirements of its customers. CP at 80. One such customer was Clearwater Paper, a logging and paper manufacturing operation. CP at 24, 96 (FF 4).

Clearwater maintains a restricted area, which includes a "log chain" area in which large logs are transported overhead. A year or two prior to Mr. Mattson's discharge, a serious accident occurred when a visitor entered the restricted log chain area without permission and a log fell on him causing considerable injury. CP at 42-43, 96 (FF 4). Due to the risk of just such an accident, Clearwater had a safety protocol whereby anyone wanting to enter the restricted area must first stop at the office to obtain permission to enter. Once that permission is granted, the visitor

¹ The Commissioner's review judge adopted in their entirety the findings and conclusions of the administrative law judge. CP at 118.

then travels to another location where they are required to stop and be escorted into the restricted area. CP at 37–38, 96 (FF 4). Mr. Mattson was aware of the safety protocol to be followed at Clearwater, though he testified he had been escorted into the restricted area only once or twice in approximately 100 deliveries to the customer. CP at 50, 56–57, 96 (FF 5), 97 (FF 10). He agreed in testimony, however, that “on all of the other occasions” that he had visited Clearwater and had to go under the log deck, he had “[a]lways stopped and asked permission” CP at 55. He also testified that he knew the protocol was in place because he “had been told that there had been a log fall on someone” CP at 56–57.

The precipitating incident occurred on August 12, 2009. That morning, Mr. Mattson spoke with the employer’s dispatcher regarding a delivery. CP at 38, 96 (FF 6). The dispatcher reminded Mr. Mattson of the safety protocol, and Mr. Mattson asked if he could take a shortcut to a particular tank which was at the edge of the restricted area. The dispatcher advised Mr. Mattson that this was not permissible. CP at 38, 96 (FF 6).

Mr. Mattson then proceeded to the Clearwater site. At approximately noon, he completed filling two oil tanks there. He had been able to access these tanks without going into the restricted area. He then visited the Clearwater office and spoke with an employee, asking whether he could proceed into the restricted area to fill a final tank. The employee

told him that he could not and that he needed to return at 2:00 p.m. CP at 52, 96 (FF 7). Mr. Mattson then left the Clearwater property.

Mr. Mattson returned to Clearwater at 2:00 p.m. that afternoon. He immediately proceeded past the office and past the escort checkpoint, driving underneath the log chain to fill the tank. CP at 53, 96 (FF 8), 97 (FF 10). Mr. Mattson looked at the log chain, and it appeared that the cranes were shut down. He thus believed that the plant was on a break. CP at 55–56, 96 (FF 10). When he finished, he began to leave the restricted area. He then noticed two Clearwater employees looking at him, recognizing that he had been in the restricted area. CP at 54, 96 (FF 8). He testified that at that time he had, “just a gut feeling that somebody was going to be upset that I had not, you know, gone back upstairs again and told them that I was going to be underneath [the log chain].” CP at 54, 97 (FF 10).

Shortly after Mr. Mattson left the restricted area at Clearwater, Karen Denevan, a co-owner of the employer, received two separate telephone calls from managers of Clearwater expressing “extreme concern” that Mr. Mattson had entered the restricted area without notifying anyone at the office and without being escorted. CP at 42–43, 96 (FF 9). One of the managers reviewed the safety protocol with Ms. Denevan to make clear that this customer expected the employer and

its employees to follow the established safety protocol. CP at 42, 96 (FF 9). Ms. Deneven was concerned that Mr. Mattson's actions had harmed the employer's relationship with Clearwater.

As a result of Mr. Mattson's unauthorized entry into the restricted area at Clearwater and the complaints that followed, the employer discharged him from employment on August 18, 2009. CP at 29–30, 45, 96 (FF 3). He later applied for unemployment benefits, which the Department denied in an initial determination notice. CP at 72–73. Mr. Mattson requested a hearing before an administrative law judge. Following the hearing, the administrative law judge entered an order holding that Mr. Mattson was discharged for misconduct, rendering him ineligible for unemployment benefits. CP at 98 (Conclusion of Law (CL) 5). Mr. Mattson petitioned for Commissioner's review, and the Commissioner's review judge adopted the findings and conclusions of the administrative law judge. CP at 118. Mr. Mattson then petitioned for judicial review, and the superior court affirmed the Commissioner's decision. CP at 120–22. This appeal followed.

IV. STANDARD OF REVIEW

The standard of review is of particular relevance in this case because Mr. Mattson challenges both findings of fact and conclusions of law. Judicial review of Employment Security Department decisions is

controlled by Washington's Administrative Procedure Act (APA). RCW 50.32.120; RCW 34.05.510; *W. Ports Transp., Inc. v. Emp't. Sec. Dep't*, 110 Wn. App. 440, 449, 41 P.3d 510 (2002). The Court of Appeals "sits in the same position as the superior court" on review of the agency action under the APA. *Tapper v. Emp't. Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The appellate court applies its review directly to the decision of the Commissioner's delegate. *Id.* at 404–05. The Commissioner's decision is considered prima facie correct and the burden of demonstrating the invalidity of an agency action is on the party challenging the validity of the action. RCW 34.05.570(1)(a); *Robinson v. Emp't. Sec. Dep't*, 84 Wn. App. 774, 777, 930 P.2d 926 (1996). The court should only grant relief if "it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d).

A. Review of findings of fact

In light of Mr. Mattson's challenges to factual findings entered by the Commissioner, it is noteworthy that an agency's findings of fact must be upheld if they are supported by substantial evidence. 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). "Substantial evidence is evidence that is sufficient to persuade a rational,

fair-minded person of the truth of the finding.” *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004) (citation omitted). The appellate court should “view the evidence and the reasonable inferences therefrom in the light most favorable to the party that prevailed” in the administrative proceeding below. *William Dickson Co.*, 81 Wn. App. at 411. This Court should not reweigh evidence or assess the credibility of witnesses. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). Any unchallenged findings of fact are treated as verities on appeal. RAP 10.3(g); *Tapper*, 122 Wn.2d at 407.

Mr. Mattson urges this Court to adopt the relaxed “clearly erroneous” standard when reviewing the challenged findings, relying on *Franklin County Sheriff’s Office v. Sellers*, 97 Wn.2d 317, 324, 646 P.2d 113 (1982). *See* Br. of Appellant at 13. That case interprets and cites to former RCW 34.04.130(6), a section from a former version of the Administrative Procedure Act. As stated above RCW 34.05.570(3)(e), enacted in 1988 and amended most recently in 2004, provides that findings are reviewed for support by substantial evidence.

B. Review of questions of law

A court reviews questions of law de novo. *Tapper*, 122 Wn.2d at 403. Courts, however, have consistently accorded a “heightened degree of deference” to the Commissioner’s interpretation of employment

security law in view of the Department's expertise in administering the law, including interpretation of statutes and regulations defining misconduct. *See W. Ports*, 110 Wn. App. at 449–50; *Safeco Ins. Cos. v. Meyering*, 102 Wn.2d 385, 391, 687 P.2d 195 (1984).

C. Review of mixed questions of law and fact

Whether a claimant engaged in misconduct is a mixed question of law and fact. When reviewing mixed questions of law and fact, the court must: (1) determine which factual findings are supported by substantial evidence; (2) make a *de novo* determination of the correct law; and (3) apply the law to the applicable facts. *Tapper*, 122 Wn.2d at 403. Factual findings should be upheld if they are supported by substantial evidence. RCW 34.05.570(3)(e). After establishing the relevant facts, the reviewing court is to exercise appropriate deference to the agency with expertise in the matter when making its determinations of the correct law. The court then applies the law to the facts found by the agency, as supported by substantial evidence. In reviewing a mixed question, the court is not free to substitute its judgment of the facts for that of the agency. *See Tapper*, 122 Wn.2d at 403.

D. Review of whether an agency order is arbitrary and capricious

Mr. Mattson also alleges that the Commissioner's Decision is arbitrary and capricious. When an order is alleged to be arbitrary or

capricious, the scope of review “is narrow, and the challenger carries a heavy burden.” *Keene v. Board of Accountancy*, 77 Wn. App. 849, 859, 894 P.2d 582 (1995). The question calls for the court to determine whether the Commissioner has engaged in “willful and unreasoning action, without consideration and in disregard of facts and circumstances.” *Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 609, 903 P.2d 433, (1995), *cert. den’d*, 518 U.S. 1006, 116 S. Ct. 2526, 135 L. Ed. 2d 1051 (1996). “Where there is room for two opinions, action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.” *Id.* “Action taken after giving [a party] ample opportunity to be heard, exercised honestly and upon due consideration, even though it may be believed an erroneous decision has been reached, is not arbitrary or capricious.” *Heinmiller*, 127 Wn.2d at 609–10.

V. ARGUMENT

The Employment Security Act (the Act) was enacted 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. In order for a claimant is to be eligible for benefits, the Act requires the reason for the unemployment to be external and apart from the claimant. *Cowles Publ’g Co. v. Dep’t of Emp’t. Sec.*, 15 Wn. App. 590, 593, 550 P.2d 712, 715 (1976). Consequently, a claimant is disqualified

from receiving unemployment benefits when he has been discharged from his employment for work-connected misconduct. RCW 50.20.066(1).

An employee engages in misconduct when, among other things, his actions demonstrate willful disregard of the employer's interests. RCW 50.04.294(1)(a). Violation of a company rule, if reasonable and known to the claimant, is misconduct because it signifies willful or wanton disregard of the interests of the employer. RCW 50.04.294(2)(f); *Smith v. Emp't. Sec. Dep't*, 155 Wn. App. 24, 34, 266 P.3d 263 (2010). Here, Mr. Mattson violated his employer's rule that he follow customer safety protocols when he failed to stop at Clearwater's offices and obtain permission before entering the restricted area. *See Id.* The Commissioner thus properly concluded that he engaged in misconduct.

A. Violation of a company rule, if reasonable and known to the employee, is per se misconduct.

An individual is disqualified from receiving unemployment benefits if he or she was discharged for work-related "misconduct". RCW 50.20.066(1); WAC 192-150-200(1). Under the Act, misconduct includes, but is not limited to:

- (a) Willful or wanton disregard of the rights, title, and interests of the employer or 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 employer; 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). The Act goes on to provide illustrative examples of behavior that constitutes misconduct. The examples provided in RCW 50.04.294(2)(a)–(g) are per se misconduct. Notably, the Act explicitly states that 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” is to be considered misconduct because it “signifies a willful or wanton disregard of the rights, title, and interests of the employer.” RCW 50.04.294(2)(f). Applying the standards set forth in the statutory definition, Mr. Mattson's conduct constitutes misconduct.

B. Mr. Mattson committed misconduct because he knowingly violated his employer's rule that he follow a customer's safety guidelines when he failed to obtain permission immediately before entering the customer's restricted area.

Mr. Mattson knew that his employer required him to follow the safety requirements of customers when making deliveries. CP at 50, 80. He knew the reason for the safety protocol, which supports the fact that Clearwater's safety protocol required him to obtain permission immediately before entering the restricted area. CP at 37–38, 96 (FF 4).

Because he knowingly failed to do this, he violated his employer's reasonable rule, which signifies willful disregard of the employer's interests and is therefore misconduct. *See* RCW 50.04.294(1)(a), (2)(f).

As stated above, Clearwater had developed the safety protocol around entering the restricted area because the area was dangerous. Large logs were transported overhead, and a year or two before Mr. Mattson's discharge, a serious accident had occurred when a visitor entered the restricted area without permission and a log fell on him causing considerable injury. CP at 42–43, 96 (FF 4). The protocol required visitors to have authorization from a Clearwater employee immediately before entering the restricted area. CP at 37–38, 96 (FF 4).

Mr. Mattson's violation of the safety protocol was knowing. He knew what the protocol required and knew the purpose for it. His testimony reflects that he was aware that, on this occasion, he was diverting from the requirements of the safety protocol because he had not obtained permission to enter immediately prior to entering. He testified that, when arriving at the restricted area at 2:00 p.m., that section was "already down" and on a break. CP at 55–56. When asked how, generally, he would know the line was on a break, he stated that his practice was to watch the crane operators and "wait for them to give me the heads-up or signal, yeah, I'm okay with them." CP at 55:11–18.

However, Mr. Mattson testified that on the day in question, “[w]hen I pulled up there, the operators were not in the crane. I thought, ‘Okay, we are down. It is 2:00 (inaudible).’” CP 55:18–20. This demonstrates that, though he would normally wait for clearance from a crane operator before entering the restricted area, on this occasion he did not see a crane operator, but nevertheless entered the area and began his delivery. Because Mr. Mattson knew that he was diverting from the normal procedure of checking in with Clearwater staff before entering the restricted area, he knowingly violated the safety protocol.

Moreover, the fact that Mr. Mattson had a “gut feeling” that someone would be upset he had not checked in before entering the restricted area demonstrates that he was, at that moment, conscious of Clearwater’s policy and that he was violating it. *See* CP at 54, 97 (FF 10). He has since argued that the “gut feeling” he described in testimony was “an expression of remorse” and recognition that he “could have done it differently” Br. of Appellant at 32–33. However, the Commissioner’s findings about his knowledge of the rule indicate the finding that the “remorse” he felt at that time was more comparable to consciousness of guilt. He was aware of the protocol and the requirement that he notify Clearwater at 2:00 of his desire to enter the restricted area at that time. CP 98 (CL 5). Such a knowing violation of a customer’s safety

protocol, and thus of the employer's reasonable rule, by statute shows willful disregard of the employer's interests. *See* RCW 50.04.294(2)(f). Mr. Mattson's acts therefore by statute constitute misconduct. *See* RCW 50.04.294(1)(a).

Mr. Mattson's failure to follow Clearwater's safety protocol is similar to the claimant's rule violation in *Smith*, 155 Wn. App. at 35–36. There, the claimant's employer, the county government, had a rule that barred county employees from recording members of the public without their consent. Testimony conflicted about whether the claimant knew of the rule. *Id.* at 35. The court upheld the Commissioner's finding that the claimant knew or should have known about the rule and did not substitute its judgment for the Commissioner's. Moreover, violation of the rule was held to be per se misconduct under RCW 50.04.294(1)(a) and (2)(f). Here, similar to the Court in *Smith*, this Court should hold that: Mr. Mattson knew or should have known the specifics of Clearwater's safety protocol; his failure to follow that protocol was a violation of his employer's rule; and violation of the rule is per se misconduct.

- 1. Substantial evidence supports the finding that Clearwater's safety protocol required a visitor wanting to go into the restricted area to stop at the office, check in, and receive permission immediately before entry.**

The employer's customer, Clearwater, required all visitors wanting to go into the restricted area to stop at the office, check in, and receive permission before entering. CP at 37–38; 42:9–16; CP at 98 (CL 5). The most reasonable reading of this requirement, supported by testimony and logic, is that a visitor must check in at the Clearwater office *immediately* before entering the restricted area. Substantial evidence in the record supports this finding.

It is undisputed that the employer had a rule that its employees follow the safety requirements of customers. CP at 80. It is also undisputed that this rule was reasonable. Mr. Mattson, however, disputes what Clearwater's safety protocol required. He suggests that the safety protocol was unclear because, of the 100 times he made deliveries requiring him to enter the restricted area, he was only escorted in perhaps twice. Appellant's Br. at 22. However, in his testimony Mr. Mattson did not dispute that the safety protocol always required a person to obtain permission before entering the restricted area. In fact, he stated that, except for the occasion that resulted in his termination, "Every previous time [I had entered the restricted area] I have always gotten permission, and 99 percent of the time it was with Keith or they would send me to a shop steward." CP at 53. He later confirmed that this was his practice:

ALJ: And on all other occasions, had – if you had to go under the log deck, had you always stopped?

Mr. Mattson: Always stopped and asked permission, yes.

CP at 55:9–11. From this testimony, a reasonable trier of fact could find that Mr. Mattson knew that the safety protocol required him to obtain permission to go into the restricted area *immediately* before entering, and that on this occasion he disregarded that requirement. CP at 97 (FF 10). Notably, Mr. Mattson did not testify that on even one prior occasion he had obtained permission to enter the restricted area earlier in a given day, then returned later in the day to proceed into the restricted area without checking in. From the evidence presented, the instance that led to his dismissal appears to have been the only occasion when that occurred.

Mr. Mattson argues that the Commissioner erred by failing to find that Clearwater’s employee, Keith, told him: “At 2:00 you can go underneath the mill and fill the tank.” This argument is flawed for two reasons. First, the standard of review in this case does not allow this Court to make findings of its own. *See* RCW 34.05.570(3); *Tapper*, 122 Wn.2d at 403.² By arguing that the Commissioner erred in failing to make an additional finding, Mr. Mattson is essentially asking this Court to weigh

² The role of the reviewing court on judicial review is to establish whether the administrative findings are erroneous, not to reweigh the evidence. The APA does not charge a court sitting in its appellate capacity with reviewing the administrative record to enter new findings of fact. Even if the agency failed to address an issue, the remedy is to remand to the agency, not retry the case on judicial review. *See* RCW 34.05.570(3)(f).

the evidence itself and make a further factual determination. Because the standard of review does not allow this, the Court should decline Mr. Mattson's invitation to find facts.

Second, the fact that Mr. Mattson testified that Keith, the Clearwater employee, gave him permission to enter the restricted area two hours later does not require the Commissioner to find as fact that Keith in fact made such a statement. A trier of fact is free to reject even uncontested testimony as not credible as long as it does not do so arbitrarily. *State v. Prestegard*, 108 Wn. App. 14, 23, 28 P.3d 817 (2001). The fact that the Commissioner did not adopt Mr. Mattson's contention about Keith giving him permission to enter the restricted area two hours before his actual entry is an implicit determination that the statement was not credible. The ALJ and Commissioner's findings reveal they resolved issues of credibility in the employer's favor. The reviewing court should defer to the trier of fact's credibility findings and not reweigh the evidence. *Smith*, 155 Wn. App. at 35–36. In *Smith*, another division of this Court reasoned:

Smith argues that substantial evidence does not support the Commissioner's finding because several witnesses testified that they were not aware of the county policy prohibiting employees from recording others without their consent. Smith is essentially asking this court to reweigh the evidence and to evaluate the credibility of witnesses. . . . *Although there was conflicting testimony regarding the*

existence of the county rule against recording without consent, the Commissioner apparently found Casteel's testimony credible, and we do not "substitute our judgment for that of the agency regarding witness credibility or the weight of evidence."

Id. (emphasis added). There the court declined the invitation to try facts from the evidence. Similar to the appellant in *Smith*, Mr. Mattson essentially asks this Court to reweigh the evidence and find additional facts. It should not do so.

Moreover, the Commissioner's credibility determination against Mr. Mattson is logical. The dangerous setting of the restricted area and relatively recent serious injury to another visitor make it unlikely that any Clearwater employee would give a visitor permission to enter the area without knowing, contemporaneously, that it was safe to do so. Indeed, the fact that two Clearwater employees called Mr. Mattson's employer to complain about his unauthorized entry lends further credence to this point. Additionally, Mr. Mattson had motivation to embellish upon Keith's statement to him: excusing his failure to follow Clearwater's safety protocol. As a result, the Commissioner did not err in declining to include in her findings that Clearwater's employee gave Mr. Mattson permission to enter the restricted area some two hours before the actual entry.

2. **The Commissioner found that Clearwater's safety protocol required a visitor wanting to go into the restricted area to stop at the office, check in, and receive permission immediately before entering.**

The Court should hold that the Commissioner found that Clearwater's safety protocol required, at a minimum, that a visitor wanting to go into the restricted area to stop at the office, check in, and receive permission *immediately* before entering. The Commissioner explicitly found:

In order to enter [Clearwater's] restricted area, a certain safety protocol must be followed. Specifically, anyone wanting to enter into the restricted area, which includes the "log chain" area, must first stop at the office to obtain permission to approach the restricted area. 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.

CP at 96 (FF 4). While this finding does not explicitly include that a visitor was required to check in with Clearwater offices immediately before entering the restricted area, the immediacy element is clear in light of the totality of the findings and conclusions. The inclusion of the requirement that, after checking in, the visitor must stop and be escorted implies that the visitor was required to make a Clearwater employee aware of the desire to enter contemporaneous with the entry. CP at 96 (FF 4).

This is further supported by the purpose for the safety protocol as included in the finding:

The purpose of this safety protocol is that the company operates a log chain in which large logs are transported overhead. Apparently, a year or two prior to claimant's discharge, a serious accident had occurred when a visitor had been in the restricted area without permission and a log had fallen on the visitor causing considerable injury.

CP at 96 (FF 4). Obtaining permission to enter the restricted area two hours before the intended time of entry would not serve the purpose of the safety protocol: to make Clearwater personnel aware that a visitor is entering so as to ensure *at that moment* that no activities posing a danger to a visitor are occurring in the restricted area. Rather, the most reasonable interpretation of the safety protocol is that a visitor to the restricted area was required to check in with Clearwater offices immediately prior to entering the area.

The fact that this is what the Commissioner found the protocol to require is further supported by additional factual findings included in

Conclusion of Law 5:

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 wanted to enter the restricted area at 2 p.m.

CP at 98 (Conclusion of Law (CL) 5).³ By finding that Mr. Mattson violated the safety protocol by failing to check in with the Clearwater office immediately before entering the restricted area, it naturally follows that the Commissioner must have found that the protocol required permission to enter granted just prior to entering. *See* CP at 98 (CL 5).

In addition, the Commissioner also found that Clearwater's safety protocol required a visitor to the restricted area to obtain permission in the office, proceed to the entrance, and then be escorted into the restricted area. CP at 96 (FF 4). Testimony from both the employer's dispatcher and Mr. Mattson supports this finding. CP at 38:4-7; 53:10-14. While Mr. Mattson stated that he had only been escorted one or two times in all his deliveries to the restricted area, he did not dispute that the protocol officially required an escort. Regardless the requirement of an escort, even if enforced only sporadically, indicates the need for permission to

³ Though this determination is included in Conclusion of Law 5, it is a factual determination and thus should be reviewed for support by substantial evidence. "If a determination concerns whether evidence shows that something occurred or existed, it is properly labeled a finding of fact However, if the determination is made by a process of legal reasoning from facts in evidence, it is a conclusion of law." *Inland Foundry Co. v. Dep't of Labor and Indus.*, 106 Wn. App. 333, 341, 24 P.3d 424 (2001). Findings of fact incorrectly denominated as conclusions of law are reviewed as findings for substantial evidence. *Valentine v. Dep't of Licensing*, 77 Wn. App. 838, 846, 894 P.2d 1352 (1995). Here, Conclusion of Law 5 involves almost entirely factual issues. Consequently, facts found therein should be reviewed for support by substantial evidence in the record.

enter from a Clearwater employee immediately before entering the restricted area.

Because Clearwater's safety protocol required permission to go into the restricted area immediately before entry, "permission" granted some two hours before, in the form of an instruction to come back at 2:00 p.m., was insufficient for compliance. Thus, the Department asks this Court to hold that the Commissioner found Clearwater's safety protocol to require a visitor wanting to go into the restricted area to stop at the office, check in, and receive permission *immediately* before entering.

3. Substantial evidence supports the finding that Mr. Mattson was aware that he was violating Clearwater's safety protocol when he entered the restricted area without permission granted immediately before the entry.

As discussed above, the Commissioner found that Mr. Mattson was aware of Clearwater's safety protocol, and that it was incumbent on him to notify a Clearwater employee at 2:00 that he intended to enter the restricted area. CP at 96 (FF 4, 5, 8), 98 (CL 5). Substantial evidence supports the finding that he was aware he was violating the protocol when he entered. Thus the Court should leave the finding undisturbed.

Mr. Mattson contends that he believed that, by checking in at the office approximately two hours before entering and receiving the instruction to come back at 2:00 p.m., he complied with the safety

protocol. Appellant's Br. at 25–26. The Commissioner properly did not adopt this contention as fact, as it is flawed for two reasons. First, it is inconsistent with the protocol as described by both the employer's dispatcher and Mr. Mattson. Both agreed that the protocol officially required that a visitor check in at the office, then proceed to the entrance of the restricted area where a Clearwater employee would escort the visitor in. CP 37–38, 56–57. Mr. Mattson stated that it was rarely adhered to, but such a protocol at a minimum requires permission to enter to be granted immediately before entry because it requires contemporaneous contact with a Clearwater staff member who gave permission for the entry.

Second, granting permission to enter the restricted area hours before the actual entry is inconsistent with the purpose of Clearwater's safety protocol, which Mr. Mattson understood: to avoid injury to a visitor by alerting Clearwater staff that a visitor intended to enter the restricted area. *See* CP at 56–57, 96 (FF 4). Instruction to return to the site some two hours later would not have fulfilled this purpose. Contemporaneous permission is the only logical protocol in light of the goal of safety.

Mr. Mattson points out that he testified that he believed he had complied with the protocol because he thought the instruction to come back at 2:00 constituted permission to enter then. CP at 59:15–18. However, other testimony discussed above leads to other reasonable

inferences about his belief at that time. Because the Commissioner sits as trier of fact, this Court should defer to the Commissioner's finding that Mr. Mattson "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." CP at 98 (CL 5); *see Smith*, 155 Wn. App. at 35–36.

Moreover, Mr. Mattson's contention that he believed the instruction to return in two hours constituted permission to enter is not supported by his testimony about his own practices. As discussed above, he testified that he had checked in with the Clearwater offices immediately before entering the restricted area "every previous time" CP at 53:16–18. He also agreed that, "on all of the other occasions [that he] had to go under the log deck," he had always stopped and asked permission. CP at 55:9–11. Because his practice was always to ask permission immediately before entering the restricted area, it is most likely that he understood the safety protocol to require exactly that: permission to go into the restricted area granted by a Clearwater employee immediately before entering. Thus, substantial evidence supports the finding that Clearwater's safety protocol required obtaining permission to go into the restricted area immediately prior to entry.

Additionally, Mr. Mattson's brief here relies on statements that are not competent evidence. In his brief, he cites to statements that he included in his petition for Commissioner review, submitted after the administrative law judge issued his order. *See* Appellant's Br. at 25–26 (citing CP at 108). However, the Commissioner's review judge sits as reviewing officer under the APA, and may not consider evidence outside the record developed by the administrative law judge. *See* RCW 34.05.464(5), (7); *Towle v. Dep't of Fish & Wildlife*, 94 Wn. App. 196, 205–06, 971 P.2d 591 (1999). Thus, Mr. Mattson's petition for Commissioner's review is essentially an appellate brief at the administrative level, not an evidentiary document. Statements made therein were not presented under oath and were not subject to cross examination. Thus, they are not treated as "evidence" of record for purposes of reviewing the findings in this proceeding. *See Id.* Even so, some of his testimony made similar points, but the Commissioner was not persuaded by his explanations. CP at 59–61. Rather, based on the evidence of record, the Commissioner properly found that Mr. Mattson was aware that he was violating Clearwater's safety protocol when he entered the restricted area without permission granted immediately before the entry.

4. Mr. Mattson's acts went beyond mere negligence or an error in judgment because he knew the safety protocol and the significant danger presented by ignoring it, but nevertheless disregarded it.

As discussed above, Mr. Mattson's failure to check in immediately before entering the restricted area, when he knew that the safety protocol required him to do so, amounted to misconduct. He knew the safety protocol and the understood the significant danger presented by ignoring it. Under these circumstances, failing to adhere to the protocol was not mere negligence or an error in judgment, but an intentional act signifying willful disregard of the employer's interest. *See* RCW 50.04.294(2)(f).

In addition to Mr. Mattson's knowledge of the rule, Clearwater's safety protocol, and the threat of significant bodily harm to his person—not to mention significant damage to the employer's delivery truck—brings this outside the realm of minor negligence. Rather, Mr. Mattson exposed himself to potentially life-threatening injury. CP at 98 (CL 5). While this does not adhere to the letter of the statutory provision establishing negligence as misconduct if it threatens serious bodily injury to the employer or a fellow employee (*see* RCW 50.04.294(1)(c)), it underscores the seriousness of Mr. Mattson's failure to follow Clearwater's safety protocol. The risk of harm to Mr. Mattson—and thus his employer—was significant. Because he was on the job while he did

this, it posed a risk of serious harm to the employer because, for instance, of the potential for litigation costs related to a possible workplace injury. Additionally, here Mr. Mattson's rule violation did harm the employer's relationship with its customer, whose managers called expressing concern. CP at 42-43, 96 (FF 9). The degree of the harm and risk of harm indicate that Mr. Mattson should have been aware of the employer's interest in his adherence to Clearwater's safety protocol. Failing to follow the protocol thus reflects willful disregard, not a mere error in judgment.

Mr. Mattson attempts to justify his eligibility for benefits by analogizing his actions to those of the claimant in *Ciskie v. Emp't Sec. Dep't*, 35 Wn. App. 72, 664 P.2d 1318 (1983). The comparison is inapt for two reasons. First, the Act did not define misconduct at that time, and the definition of misconduct adopted by the courts did not include violation of a reasonable and known employer rule as per se misconduct. Compare *Ciskie*, 35 Wn. App. at 75, with RCW 50.04.294(1)(a), (2)(f). Because the law applied in *Ciskie* differed in that way, treatment of the facts presented here under RCW 50.04.294 is different. Violation of an employer's rule, if the rule was reasonable and known to the employee, is per se misconduct because it signifies willful disregard of the employer's interest. RCW 50.04.294(2)(f).

Second, Mr. Mattson's actions are not like those of an employee attempting to comply with the letter of rule but failing to do so due to impossibility. *See Ciskie*, 35 Wn. App. at 74. In *Ciskie* the employer rule required an employee to receive approval from a supervisor if he or she needed to leave the worksite; otherwise, the absence would be considered unexcused. *See Id.* at 73–74. When the employee learned of a family emergency, he knew one supervisor was on vacation and a second had not arrived at work. He asked a fellow employee to inform his supervisor of his need to leave due to the emergency when the supervisor arrived. He then checked the parking lot for a third supervisor's car when leaving, but it was not in the company lot. *Id.* at 74. Nevertheless, he left due to the family emergency and was discharged for his unexcused absence. *Id.* The Court held that, because he had made every attempt to comply with the employer rule, he did not demonstrate that he did not care about the consequences of his actions, and therefore did not show willful disregard of his employer's interest. *See Ciskie*, 35 Wn. App. at 76.

In contrast, here nothing stood in the way of Mr. Mattson getting permission go into enter the restricted area immediately before entry, thereby complying with the requirements of Clearwater's safety protocol. CP at 37–38, 56–57, 96 (FF 4), 98 (CL 5). Mr. Mattson knew the protocol, but chose not to check in when he returned to the Clearwater site

at 2:00 p.m. Instead, he proceeded directly into the restricted area. Far from attempting to comply with the rule in several ways like the claimant in *Ciskie*, Mr. Mattson was aware of the safety protocol but knowingly failed to follow it. Under RCW 50.04.294(2)(f), this signifies willful disregard and is thus misconduct.

Mr. Mattson's failure to follow Clearwater's safety protocol is also distinguishable from the rule violation in *Wilson v. Emp't Sec. Dep't*, 87 Wn. App. 197, 940 P.2d 269 (1997). First, as discussed above, the definition of misconduct in RCW 50.04.294 had not been enacted, and thus rule violations were not per se misconduct at the time *Wilson* was decided. Second, the claimant's mistakes in *Wilson* are distinguishable from Mr. Mattson's actions on their facts. There, the claimant managed a jewelry store. In the course of his duties, he failed to log five diamonds in and perform a diamond count. As a result, one of the diamonds worth some \$900 was lost. *Wilson*, 87 Wn. App. at 199. On a second occasion, the claimant place a plastic bag with a diamond in it, valued at \$490, on his desk with a number of empty plastic bags. When he cleared his desk of the empty bags, he threw away the bag containing the diamond. While the facts state that he knew he should have placed the bag in the safe, there is no finding that there was a rule to that effect. *See Wilson*, 87 Wn. App. at 199. Additionally, while the loss there was substantial, it did not

approach in scope the risk of harm presented by Mr. Mattson's failure to follow the safety protocol at Clearwater given the risk to his life, body and employer property. Thus, due to the grave risk involved in Mr. Mattson's rule violation, his behavior amounted to misconduct.

Mr. Mattson argues that his failure to follow Clearwater's safety protocol amounts to either ordinary negligence or a good faith error in judgment and thus is not misconduct, relying on RCW 50.04.294(3). His reliance, however, is misplaced. Because his rule violation could have resulted in significant bodily harm to him, property loss to the employer, possibly an explosion because he was delivering petroleum products, and harm to the employer's relationship with its customer, it should not be considered mere negligence.

C. The Court should not award attorney fees in this matter unless it reverses or modifies the Commissioner's Decision.

Reasonable attorney fees in connection with judicial review may be recovered and paid from the unemployment administration fund "if the decision of the commissioner shall be reversed or modified." RCW 50.32.160. Mr. Mattson is only entitled to an award of attorney fees if this Court reverses or modifies the Commissioner's Decision. Moreover, if the Court remands the matter for further fact finding without reversing or modifying the Commissioner's Decision, it should not award

fees at this time. *See Albertson's, Inc. v. Emp't. Sec. Dep't*, 102 Wn. App. 29, 47, 15 P.3d 153, 157 (2000).

VI. CONCLUSION

Violation of an employer rule, if the rule is reasonable and known to the employee, is misconduct because it signifies willful disregard of the employer's interest. Mr. Mattson's failure to follow Clearwater's safety protocol for entering the restricted area violated his employer's reasonable rule, and thus is per se misconduct. The Commissioner properly held that Mr. Mattson's actions went beyond mere negligence, holding that the employer had established misconduct. The superior court concurred. The Department respectfully requests that this Court affirm the Commissioner's decision.

RESPECTFULLY SUBMITTED this 20th day of December, 2010.

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