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No. 362256-III

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

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MEDELEZ, INC.,

Respondent,

vs.

STATE OF WASHINGTON  
EMPLOYMENT SECURITY DEPARTMENT and  
JEFFREY L. METZENER,

Appellants.

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BRIEF OF APPELLANT JEFFREY METZENER

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## I. INTRODUCTION

Jeffrey Metzener was discharged by his employer after failing an alcohol test on a day that he was not scheduled to work. His employer, Medelez, Inc. (Medelez), had the burden of establishing misconduct by a preponderance of evidence and failed to do so before the Commissioner. Pursuant to the Administrative Procedure Act, this Court reviews the final agency decision of the Commissioner.

The Commissioner correctly concluded that Mr. Metzener did not commit misconduct. Mr. Metzener did not have reason to know that off-duty consumption of alcohol was prohibited, and therefore did not willfully or deliberately violate his employer's rights or interests, nor did he disregard standards of behavior which the employer has the right to expect of an employee. The Commissioner reasonably weighed the evidence before her, substantial evidence supports her findings, and her conclusions correctly applied the law. For these reasons, this Court should reverse the Superior Court's order and affirm the Commissioner's original decision granting Mr. Metzener unemployment benefits.

## II. ASSIGNMENT OF ERROR

The Franklin County Superior Court erred in reversing the Commissioner's decision for the following reasons:<sup>1</sup>

1. The Superior Court's Finding of Fact #7 is in error because it erroneously reweighs the evidence before the Commissioner and rejects Findings of Fact which are supported by substantial evidence.
2. The Superior Court's Finding of Fact #9 is in error because it erroneously reweighs the evidence before the Commissioner and rejects Findings of Fact which are supported by substantial evidence.
3. The Superior Court erred in rejecting the Commissioner's Conclusion of Law #12 because the Conclusion does not constitute an error of law and includes findings that are supported by substantial evidence, and because the Superior Court erroneously stated that the Commissioner concluded Mr. Metzener's actions constituted a good faith error in judgment.
4. The Superior Court erred in reversing the Commissioner's decision.

## III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Mr. Metzener had reason to know he could be subject to an off-duty alcohol test.
2. Whether Mr. Metzener expected to return to work prior to October 11th.

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<sup>1</sup> RCW 34.05 provides for appellate review of final administrative agency decisions. A Court of Appeals reviews the Commissioner's decision from the "same position as the superior court." *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494, 498 (1993).

### III. STATEMENT OF THE CASE

Jeffrey Metzener worked for Medelez, Inc. (“Medelez”) as a truck driver from February 15, 2016 to September 22, 2016. Commissioner’s Record (“CR”) 119. Prior to his employment with Medelez, Mr. Metzener applied for a job with another employer but tested positive for marijuana on a pre-employment drug screen. *Id.* In order to retain his Commercial Driver’s License, Mr. Metzener was therefore required to comply with a substance abuse plan. *Id.* This plan required him to take a return-to-duty drug screen before resuming safety sensitive duties, as well as six randomly administered follow-up drug screens within the next twelve months of performing safety sensitive duties. CR 20, 97. At the outset of his employment with Medelez in February 2016, Mr. Metzener informed Medelez of his drug screen results and provided relevant paperwork, including his substance abuse plan. CR 119–20. Mr. Metzener passed a drug screen before beginning his employment with Medelez, but it did not meet the procedural requirements of a return-to-duty drug screen. CR 22. Mr. Metzener testified that he believed he had taken the return-to-duty

drug screen and met this requirement of his substance abuse plan. CR 36. In September 2016, seven months into his employment relationship with Medelez, Mr. Metzener had not been asked to take any follow up drug screens, CR 120, despite having told his supervisors that they were required, CR 40.

Also in September 2016, Mr. Metzener was experiencing debilitating back pain that affected his ability to perform his job duties. CR 120. He had informed his supervisor and operations manager and was being provided with assistance for certain tasks. *Id.* He was prescribed pain medication but could not take it while driving for safety reasons, so only took it in limited quantity before sleep. *Id.*, CR 42. Mr. Metzener felt that his back was posing a safety issue and that he could not continue much longer. CR 42. On September 21, Mr. Metzener discussed his medical issues with Ms. Fischer. *Id.*

In mid-September, Medelez's new safety and compliance manager, Ms. Fischer, discovered that Mr. Metzener was subject to the terms of a substance abuse plan. CR 120. Mr. Metzener was told to bring his substance abuse plan paperwork to the office, because the office could not find it, and did so on September 21. CR 41. He and Ms. Fischer

both understood that he would be subject to the required “follow-up” drug tests. CR 120. Before Mr. Metzener departed the workplace that day, his supervisor, Mr. Rodriguez, took the keys to Mr. Metzener’s truck. *Id.* Mr. Rodriguez provided no explanation for this action to Mr. Metzener, but Mr. Metzener correctly understood that his keys would not be returned and he would not be allowed to drive for the employer until further notice. *Id.* He was told to contact Ms. Fischer and did so. CR 120–21.

On September 22, 2016, Mr. Metzener was not scheduled to work, because he and his wife had medical appointments. CR 121. That afternoon, he had a late lunch with his wife, which included two alcoholic beverages. *Id.* After finishing his lunch, Mr. Metzener was notified by Medelez that he must immediately report to a testing facility for a return-to-duty drug screen. *Id.* He did so and submitted to a urine specimen and Breathalyzer test. *Id.* His drug test was negative, but his Breathalyzer tests showed a blood alcohol content of .051 and .049 respectively. *Id.* As a result, Mr. Metzener’s Commercial Driver’s License was suspended, and since he could not perform his job for Medelez without it, Mr. Metzener was discharged. *Id.*

The Employment Security Department initially denied Mr. Metzener unemployment benefits following termination by Medelez. CR 96. Mr. Metzener appealed this decision and a hearing was held before Administrative Law Judge Aaron Naccarato. *Id.* ALJ Naccarato determined that Mr. Metzener, although able and available for work while applying for unemployment benefits, was discharged for misconduct as defined in RCW 50.04.294(1)(a) and therefore affirmed the Employment Security Department's determination. CR 100. Mr. Metzener then appealed ALJ Naccarato's decision to the Employment Security Department Commissioner, who concluded Medelez had not established that Mr. Metzener had reason to know that his off-duty consumption of alcohol was prohibited, CR 118–19. Accordingly, the Commissioner reversed ALJ Naccarato's order on the issue of job separation and determined that Mr. Metzener was eligible for unemployment benefits. CR 122–23.

Pursuant to RCW chapter 34.05, Medelez appealed the final agency decision to Franklin County Superior Court. CP 1. Honorable Judge Jacqueline Shea Brown reversed the decision of the Commissioner and denied benefits for Mr. Metzener. Judge Brown

determined that Mr. Metzener's actions constituted misconduct, and that the Commissioner erred in relying on Mr. Metzener's testimony.

#### IV. STANDARD OF REVIEW

The Administrative Procedure Act (APA) governs the review of final agency decisions by an appellate court. *Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 244, 350 P.3d 647 (2015); *see generally* RCW 34.05. Following review by a superior court acting in its appellate capacity, a court of appeals "sit[s] in the same position as the superior court and appl[ies] the APA standards directly to the administrative record." *Campbell v. Emp't Sec. Dep't*, 180 Wn.2d 566, 571, 326 P.3d 713 (2014). Thus, the Court of Appeals reviews the decision of the ESD commissioner, "not the ALJ's decision or the superior court's ruling." *Michaelson v. Emp't Sec. Dep't*, 186 Wn. App. 293, 298, 349 P.3d 896 (2015). The commissioner's decision is considered *prima facie* correct and the party challenging the commissioner's decision, here Medelez, bears the burden of showing the decision was in error. *Id.*, RCW 34.05.570(1)(a).

Pursuant to the APA, if the statute or agency rule upon which a decision is based is not "constitutionally infirm or otherwise invalid,"

*Campbell*, 180 Wn.2d at 571, an agency decision may only be overturned if “the decision is based on an error of law, the order is not supported by substantial evidence, or the order is arbitrary and capricious.” *Id.*; see RCW 34.05.570(3)(a)–(i).

Substantial evidence is “evidence that would persuade a fair-minded person of the truth or correctness of the matter” in light of the whole record. *DeFelice v. Emp’t Sec. Dep’t*, 187 Wn. App 779, 787, 351 P.3d 197 (2015). The substantial evidence standard is “highly deferential,” *ARCO Products co. v. Washington Utilities and Transp. Com’n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995), and the court will “view ‘the evidence and any reasonable inferences in the light most favorable to the party that prevailed in the highest forum with fact-finding authority,’” *Michaelson*, 187 Wn. App. At 299. Substantial evidence exists when there is “any reasonable view” that supports the fact finder’s findings, “even though there may be other reasonable interpretations.” *Fred Hutchinson Cancer Research Center v. Homan*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987) (quoting *Ebling v. Gove’s Cove, Inc.*, 34 Wn.App. 495, 501, 663 P.2d 132 (1983)). As such, this Court does not “substitute [its] judgment on witnesses’ credibility or the weight to be given conflicting

evidence” for the judgment of the Commissioner. *DeFelice*, 187 Wn. App. at 787 (quoting *W. Ports Transp., Inc.*, 110 Wn. App. 440, 449, 41 P.3d 510 (2002)).

Conclusions of law are reviewed de novo. *Id.* However, this Court gives “substantial weight to the commissioner’s interpretation of ‘misconduct,’ as it is defined under the Employment Security Act because of the agency’s special expertise. *Markam Group, Inc., P.S. v. Dept. of Emp’t Sec.*, 148 Wn. App. 555, 561, 200 P.3d 748 (2009).

## V. ARGUMENT

Under the Employment Security Act, the employer bears the burden of proving statutory misconduct to support a denial of benefits. *In re Dow*, Empl. Sec. Comm'r Dec. 2d 948 (2010). Medelez has not met its burden to establish misconduct, the Commissioner's essential conclusions of law are supported by substantial evidence, and the Commissioner applied the law correctly. Therefore, the Commissioner's order should be affirmed and Mr. Metzener should be granted benefits.

**A. The Commissioner's de facto finding that Mr. Metzener did not have reason to know he could be subject to an off-duty alcohol test is supported by substantial evidence.**

1. Medelez did not provide the specific terms of Mr. Metzener's Substance Abuse Plan.

During the hearing before ALJ Naccaratto, Ms. Fischer read the first page of a letter regarding Mr. Metzener's Substance Abuse Plan into the record. CR 19-20. The Commissioner commented on this letter in her decision, noting that Medelez had not presented "the substance abuse plan nor testimony of the claimant's substance abuse professional . . . – much less specific instructions provided to the claimant" but that "[p]lan-related provisions were referenced in a letter (at best, hearsay

evidence) that was read into the record by one of the employer's witnesses but did not specifically address off-duty consumption of alcohol." CR 119. This became a point of contention before the Superior Court, with Medelez arguing that the "Commissioner refused to consider the evidence of the substance abuse plan because it was read into the record and considered hearsay." Petitioner's Brief at 5. However, the fact that the Commissioner referred to the letter as hearsay does not mean she excluded it as evidence. Indeed, Washington's Administrative Procedure Act allows the Commissioner to consider this evidence and appropriately weigh it. RCW 34.05.461(4).

More important, however, are the Commissioner's unrefuted findings that neither the substance abuse plan itself nor testimony of Mr. Metzener's substance abuse professional, Mr. Ellis, was provided, and that the letter in question did not "specifically address off-duty consumption of alcohol." CR 119. While Medelez does not refute that it did not provide the substance abuse plan or Mr. Ellis's testimony, it points to the letter's requirement that Mr. Metzener "remain abstinent from all mind/mood altering chemicals except when prescribed by a physician" to argue that Mr. Metzener was on notice that consuming

alcohol while off duty would constitute misconduct. CR 20; Petitioner's Reply Brief 4. However, this broad statement cannot reasonably be interpreted as notice, much less clear notice, that Mr. Metzener could not drink alcohol on a day he was not scheduled to work. Read literally, this statement is incredibly far-reaching, and goes far beyond serving either the employer's or the state's interest. What constitutes a mind/mood altering chemical is not specified. This provision therefore cannot be read as putting Mr. Metzener on notice that he could be tested for alcohol consumption on the day in question.

Furthermore, to support its assertion that Mr. Metzener was on notice that he could be tested for alcohol on this day, Medelez points to a provision in the letter that "follow-up tests are to be unpredictable and unannounced." CR 14, 68. This does not, however, indicate that a follow-up test could happen on an employee's day off, and it would be reasonable to assume that it would only happen on a day that the employee is scheduled to work, since those are days when an employee's intoxication could affect the employer. Furthermore, the test in this case was not a follow-up test but a return-to-duty test. Nothing in the record suggests that return-to-duty tests are to be

randomly administered, unpredictable, or unannounced. Medelez did not provide any evidence that this is the case or that Mr. Metzener would have been expected to know that.

Medelez has argued that Mr. Metzener was aware of the testing requirements under his Substance Abuse Plan, and therefore “he knew that . . . he was required to participate in random testing at any time whether on duty or not and to abstain from alcohol.” Petitioner’s Brief 9. However, while Mr. Metzener was aware that the terms of his Substance Abuse Plan included a return-to-duty test and follow-up testing, Medelez has provided no other evidence that Mr. Metzener was on notice that he would be tested for alcohol or that he could be tested while off duty. The Commissioner, in weighing the evidence before her, therefore rightly determined that Mr. Metzener did not have “reason to know that off-duty consumption of alcohol was prohibited,” and thus did not commit misconduct. Especially given the deference owed to the Commissioner in weighing the evidence before her and in applying the law in the Employment Security Department’s area of expertise, this Court should not disturb that conclusion.

2. Medelez did not provide evidence that Mr. Metzener knew he could be subject to alcohol testing.

The Commissioner found that during their conversation on September 21, 2016, Ms. Fischer apprised or reminded Mr. Metzener that he had not taken the “requisite follow-up ‘return-to-duty’ drug screen test, which was required before he would be allowed to return to work.” CR 121. This finding confuses the distinction between return-to-duty and follow-up drug tests—two separate components of Mr. Metzener’s substance abuse plan, with separate requirements. The return-to-duty test was supposed to take place before Mr. Metzener started working for Medelez, whereas the six follow-up tests would happen over the next year.

Mr. Metzener and his employer thought he had already done the return-to-duty test, until some point in mid-September, when Ms. Fischer discovered he had not taken it and was directed by Mr. Ellis to immediately send him for testing. Mr. Metzener’s consistent testimony was that he had thought he had taken his return-to-duty test when he was hired with Medelez. CR 36.

This distinction is important because the two have significant differences, and because Medelez did not provide information regarding the requirements of return-to-duty testing. While the Ellis letter specifies that follow-up tests are to be unpredictable and unannounced, it does not say the same with regard to return-to-duty tests. CR 68, 19-20. Furthermore, the Substance Abuse Plan Regulations that Medelez submitted show that Mr. Ellis would be “the sole determiner” of whether Mr. Metzener’s follow-up tests would be “for drugs, alcohol, or both.” CR 115, § 40.307(c). Mr. Ellis’s determination on this matter would presumably be included in his “separate letter outlining the follow-up plan,” which Medelez failed to provide. CR 20. However, considering that Mr. Metzener was only given a substance abuse plan because he tested positive for marijuana, see CR 119, it seems likely that the follow-up testing would not include testing for alcohol.

Furthermore, the regulations provided by Medelez state that an employee will pass a return-to-duty test following “a negative drug test result *and/or* an alcohol test with an alcohol concentration of less than 0.02.” CR 114, § 40.305(a) (emphasis added). Nothing in the record suggests that, even if Mr. Metzener did know that he needed to take a return-to-duty test, he would know that it would include an alcohol test. Medelez has not provided any evidence that Mr. Metzener was on notice that any return-to-duty or follow-up testing he did would include alcohol testing.

3. Medelez did not provide evidence that Mr. Metzener knew he could be subject to off-duty tests.

While Mr. Metzener was aware that he needed to be taking follow-up tests to comply with his substance abuse plan and retain his Commercial Driving License, nothing in the record would suggest that it is normal or expected that testing would happen unscheduled and off-duty. The Commissioner therefore concluded that Mr. Metzener was not on notice that his off-duty consumption of alcohol would violate Medelez’s interests, and thus that Mr. Metzener did not

commit misconduct, and this Court should not disturb that conclusion.

Nothing in the letter from Mr. Ellis or the regulations submitted by the employer suggest that either a follow-up test or a return-to-duty test are to happen without notice when the employee is not at work. CR 19-20, 68, 112-15. While follow-up tests are to be unannounced, CR 68, there is no discernable reason that an employer would have a legitimate interest in testing an employee at a time when they were not scheduled to work, as this is a serious intrusion into the employee's life and does not relate to the employer's interest in having employees who are sober while driving for them. And while return-to-duty tests are to happen before the employee returns to work, there is no discernable reason for them to be unannounced, since this is, again, a serious intrusion into the employee's life that prevents them from having a responsible drink with their family. This is especially the case, where, as here, the employee is undergoing testing because of a violation that was unrelated to alcohol. Furthermore, while there may have been special circumstances in this case that required Medelez to

test when it did, because it had failed to conduct a return-to-duty previously, this does not affect this case. The inquiry into whether Mr. Metzener “exhibited willful or wanton disregard for his employer’s interest” is unchanged, because Mr. Metzener was not on notice that such a test could be conducted, and therefore could not have known that his conduct might affect his employer’s interest. *See* CR 121; RCW 50.04.294.

Because of the lack of evidence that there was any clear expectation that the terms of the SAP could be enforced without notice on a day off, the Commissioner concluded that Mr. Metzener did not commit misconduct. Given that this Court affords “substantial weight to the commissioner’s interpretation of ‘misconduct,’ as it is defined under the Employment Security Act because of the agency’s special expertise,” this Court should not disturb that conclusion. *See Markam Group, Inc., P.S. v. Dept. of Emp’t Sec.*, 148 Wn. App. 555, 561, 200 P.3d 748 (2009).

**B. The Commissioner's finding that Mr. Metzener did not expect to return to duty until October 11<sup>th</sup> is supported by substantial evidence.**

Medelez has argued, and the court below held, that Mr. Metzener was not credible, and therefore substantial evidence did not support the Commissioner's findings. *See* Petitioner's Brief 14; Order at 3. However, any inconsistent statements are irrelevant to whether Mr. Metzener knew off-duty alcohol consumption was prohibited, which was the determining factor before the Commissioner. *See* CR 122.

The superior court found that Mr. Metzener's testimony was inconsistent with a letter that he wrote. Excerpt of Proceedings 2. However, not only is this evidence reconcilable, other witnesses in the hearing supplied inconsistent testimony, and the superior court was inappropriately reweighing the credibility of the witnesses, contrary to this Court's standard that courts "do not reweigh the credibility of witnesses." *DeFelice v. State, Emp't Sec. Dep't*, 187 Wash. App. 779, 791, 351 P.3d 197, 202 (Div. 3 2015).

Mr. Metzener's testimony is consistent on the relevant issues. He is clear that he did not think off-duty consumption of alcohol was

prohibited, and therefore could not have been willfully violating his employer's interest.

The superior court found that the commissioner erred when she concluded that Mr. Metzener did not expect to return to work until October 11th. This was based on the purportedly contradictory nature of his statements in a letter and in the hearing. However, the letter and the hearing are reconcilable. In Mr. Metzener's letter, he wrote that he and Mario Rodriguez told Medelez that he was no longer capable of working until after his surgery. CR 57. Mr. Metzener's testimony at the hearing supports the conclusion that this was indeed his reasonable belief. He testified that he had told Mr. Rodriguez that he would not be able to work for at least two weeks after his operation. CR 43. This in itself supports his statement in the letter, because he told his supervisor that he was not capable of working, and he therefore could have reasonably believed that Mr. Rodriguez relayed that information to their employers.

Furthermore, the testimony of other parties in the hearing is inconsistent. For instance, Ms. Fischer stated in the hearing that Mr. Metzener had told her that he was on pain medications, CR 47, but in

an interview with the Employment Security Department following Mr. Metzener's discharge, said that she knew nothing about his back pain or having a prescription for medications, CR 94. Similarly, Ms. Fischer stated that when she was speaking with Mr. Ellis, she discovered that Mr. Metzener hadn't done a return to duty test, and was told to send him for it that day, CR 14, strongly implying that she learned he hadn't done a return to duty test on September 22<sup>nd</sup>. However, later Ms. Fischer states that she had Mr. Metzener's keys taken on the 21st because he hadn't taken his return-to-duty test. CR 22.

Especially given the wide variety of inconsistencies in the record, and the fact that any inconsistencies on Mr. Metzener's part are not related to the determinative issue, this Court should follow its precedent and decline to reweigh the evidence and credibility of the witnesses before the Commissioner. The question is whether there is "any reasonable view" that supports the fact finder's findings, regardless of whether there are other reasonable interpretations, and in this case, there is. *See Fred Hutchinson Cancer Research Center v. Homan*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987).

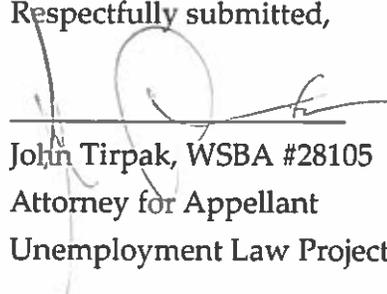
## CONCLUSION

The Commissioner correctly determined that Mr. Metzener had not committed misconduct and was therefore entitled to unemployment benefits. The Commissioner's factual findings that were necessary to support her legal conclusions were supported by substantial evidence. Further, the Commissioner applied the law correctly to the facts. Thus, the Superior Court erroneously reversed the decision of the Commissioner.

For the foregoing reasons, Mr. Metzener respectfully requests that this Court reverse the superior court's order and award his unemployment benefits.

Dated this 7<sup>th</sup> day of November 2018.

Respectfully submitted,



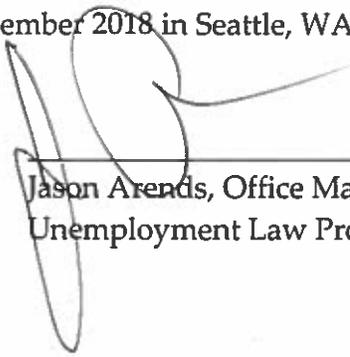
\_\_\_\_\_  
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**CERTIFICATE OF SERVICE**

I hereby certify that I caused the foregoing **Brief of Appellant Jeffrey Metzener** be filed with the Clerk of the Court by electronic filing. An earlier submission had the order of the Respondent and Appellants reversed on the title page.

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

DATED this 5<sup>th</sup> day of December 2018 in Seattle, WA.



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Jason Arends, Office Manager  
Unemployment Law Project

# UNEMPLOYMENT LAW PROJECT

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## Transmittal Information

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