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

MEDELEZ, INC., an Oregon Corporation,

Respondent,

v.

STATE OF WASHINGTON, EMPLOYMENT SECURITY
DEPARTMENT,

Appellant.

**REPLY BRIEF OF APPELLANT
EMPLOYMENT SECURITY DEPARTMENT**

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I. INTRODUCTION

Jeffrey Metzener's former employer, Medelez Inc., cannot meet its burden of demonstrating the Commissioner's decision granting Mr. Metzener unemployment benefits was in error. The Commissioner correctly concluded that Mr. Metzener did not commit disqualifying conduct when he failed an alcohol screening on his day off. The employer cites no policy, law, or regulation that prohibits a commercial driver from consuming alcoholic beverages off-duty. Nor does the employer demonstrate how Mr. Metzener's substance abuse plan prohibited him from consuming alcohol on his day off. Substantial evidence supports the finding that the plan did not address off-duty alcohol consumption.

To argue that Mr. Metzener committed disqualifying misconduct, the employer relies only on RCW 50.04.294(1)(d): "carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest."¹ But the employer does not analyze how this provision applies to Mr. Metzener. Mr. Metzener was not careless or negligent because he had no reason to know he could be tested for alcohol

¹ In its response brief, the employer no longer relies on RCW 50.04.294(1)(a) or argues that Mr. Metzener's conduct was in willful disregard of the employer's interests, as it did below. The Court should consider the argument abandoned. *Talps v. Arreola*, 83 Wn.2d 655, 657, 521 P.2d 206 (1974); *Anderson v. Dep't of Labor and Indus.*, 174 Wash. 702, 705-06, 26 P.2d 77 (1933).

on his day off, and he did not disregard the interests of the employer. The employer does not meet its burden to show that the Commissioner erred.

II. ARGUMENT IN REPLY

A. Substantial Evidence Supports the Factual Findings Actually Made by the Commissioner

The employer asks this Court to make new findings of fact and reweigh the evidence. Resp. Br. 14–22. But on review of an administrative decision, this Court’s role is to determine whether the Commissioner’s actual findings of fact are supported by substantial evidence, not look for evidence that might support contrary findings. 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); *see Mueller v. Wells*, 185 Wn.2d 1, 15–16, 367 P.3d 580 (2016) (“the appellate court’s role is to review findings supporting the conclusions the trial court *did* reach, not to look for evidence supporting an alternate conclusion the court *could have* reached.”).

Evidence may be substantial even if conflicting or susceptible to other reasonable interpretations. *See Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713–14, 732 P.2d 974 (1987). The reviewing court may not reweigh evidence or re-determine credibility. *Smith v. Emp’t Sec. Dep’t*, 155 Wn. App. 24, 35–36, 226 P.3d 263 (2010).

1. Substantial evidence supports the Commissioner's finding concerning off-duty alcohol testing

At the administrative proceedings and now, the employer suggests that Metzener should have known that off-duty alcohol consumption was prohibited by asserting that Metzener knew he could be tested "at any time." Resp. Br. 12; *see* AR 15.² But the Commissioner was "not persuaded the claimant had reason to know that his September 22, 2016 off-duty consumption of alcohol was prohibited." AR 119. This is supported by Mr. Metzener's testimony that he was not instructed that he should not have any alcohol even when he was off work, AR 45, and the employer's testimony that employees must submit to "random" testing, without specifying whether that testing could occur while off-duty. AR 15. The Commissioner's finding is based on Mr. Metzener's unrefuted testimony, which the Commissioner apparently found to be credible. *See* AR 122. The Court may not substitute its judgment as to the credibility of witnesses on appeal. *Smith*, 155 Wn. App. at 35–36.

2. The Court may not reevaluate the weight to give conflicting evidence or the credibility of witnesses

The employer argues that the Commissioner "erroneously" excluded or failed to give proper weight to the employer's testimony as to

² This brief cites the Administrative Record (AR), which is found at CP 35–166. The AR numbers are shown in boldface type at the bottom of the pages in the format "Page ___ of 129."

the contents of page one of the SAP (substance abuse professional's) plan. Resp. Br. 18–19. However, the Commissioner did not strike the testimony. It remains part of the record. AR 19–20, 120. Instead, it appears that the Commissioner assigned the testimony less weight because the employer did not submit the plan as an actual exhibit and did not call the SAP to testify. AR 122. The weight the Commissioner assigned to the evidence may not be revisited by this Court. *William Dickson Co.*, 81 Wn. App. at 411.

Further, the Commissioner properly found that the plan, as read into evidence, “did not specifically address off-duty consumption of alcohol.” AR 119. The employer’s witness, Dawn Fischer, testified that the SAP plan was issued after Mr. Metzener tested positive for marijuana, not alcohol. AR 19. She also testified that the plan required Mr. Metzener to take “six DOT follow-up drug screens”—not alcohol screens. AR 20. And, page two of the plan—which the employer submitted as an exhibit—refers to “urine screens” and “drug testing,” not alcohol testing. AR 89. The employer’s evidence concerning the SAP plan also supports the conclusion that Mr. Metzener did not have reason to know he was forbidden to drink alcohol off duty under the SAP plan.³

³ Although the employer claims that “mind/mood altering chemicals” include alcohol, the employer did not call the SAP as a witness to substantiate that claim at the hearing. On the contrary, the statement that Mr. Metzener must refrain from “all mind/mood altering chemicals except when prescribed by a physician” indicates that the term refers to drugs, pharmaceutical or otherwise. *See* AR 20. This reading is supported by

This Court should reject the employer’s argument that the Commissioner had no basis for “discounting” the testimony of Ms. Fischer because the ALJ had made a credibility determination in her favor. Resp. Br. 17. First, it is well settled that the Commissioner “is authorized to make [her] own independent determinations based on the record and has the ability and right to modify or to replace an ALJ’s findings, including findings of witness credibility.” *Smith*, 155 Wn. App. at 35 n.2.⁴ Second, the Commissioner gave Ms. Fischer’s testimony less weight because it was hearsay. AR 119, 122. Finally, as explained above, the Commissioner did consider Ms. Fischer’s testimony as to the contents of the SAP plan and still found that it “did not specifically address off-duty consumption of alcohol.” AR 119. The Commissioner’s finding that the SAP plan did not address off-duty alcohol consumption is supported by substantial evidence.

B. The Commissioner Properly Concluded That Mr. Medelez is Not Disqualified for Misconduct

Under RCW 50.04.294(1)(d)—the only misconduct provision the employer argues applies here—a worker commits misconduct if he or she

the plan’s caveat that it does not condone the use of marijuana even if prescribed by a physician. *Id.*

⁴ The employer argues that the Commissioner based her findings on a “reading of the cold record” and that the ALJ made personal evaluations based on an “in person hearing.” Resp. Br. 17. These statements are incorrect. This hearing took place over the phone and was recorded. AR 6 (“Be it remembered that the foregoing proceedings were taken from the *telephonic hearing* in the above-referenced matter heard on December 5, 2016 . . .”) (emphasis added). The Commissioner reviewed the record including the audio recording of the hearing. AR 118.

engages in “carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer’s interest.” Courts have found carelessness or negligence that rises above “ordinary negligence,” amounting to statutory misconduct, when the employee’s actions create a risk of impacting the employer’s interests in serving its customers and expose the employer to liability. *See Cuesta v. Dep’t of Emp’t Sec.*, 200 Wn. App. 560, 574–75, 402 P.3d 898 (2017); *Smith*, 155 Wn. App at 36. Here, the employer fails to show either that Mr. Metzener was negligent or that his actions disregarded the employer’s interest.

1. The employer did not establish that the SAP ordered alcohol testing under the return-to-duty regulations

The employer failed to show Mr. Metzener was careless or negligent in consuming alcohol while off-duty because it failed to show that he knew or should have known that he could be tested for alcohol.

“Carelessness” and “negligence” mean “failure to exercise the care that a reasonably prudent person usually exercises.” WAC 192-150-205(3). To show that Mr. Metzener was careless or negligent, the employer would need to show, in the very least, that Mr. Metzener knew or should have known that he could be tested for alcohol on his day off. The employer did not show that Mr. Metzener’s SAP plan or any federal rule required him to completely abstain from alcohol or put him on notice that he could be tested

for alcohol while off-duty. Thus the Commissioner correctly determined that the employer did not establish misconduct.

As explained above, the Commissioner found that the SAP plan did not specifically address off-duty alcohol consumption. AR 119. The employer now argues that Mr. Metzener knew or should have known that off-duty drinking was forbidden by federal law. Response Br. 7–13. But the federal regulations the employer cites do not prescribe an alcohol test under the circumstances here.

The employer cites 49 C.F.R. § 40.305(a), which requires a driver who has committed a drug or alcohol violation to pass a “return-to-duty” test before returning to safety-sensitive duties. That section states, “the employee must have a negative drug test result **and/or** an alcohol test with an alcohol concentration of less than 0.02 before resuming performance of safety-sensitive duties.” 49 C.F.R. § 40.305(a) (emphasis added). The language “and/or” plainly does not mean that both tests are always administered and the driver can fail one and return to work. Rather, “and/or” indicates that both tests are not always administered, and the return-to-duty test may be either a drug test or an alcohol test, or both, where prescribed by the substance abuse professional.

Additionally, the federal regulations on follow-up testing (the tests to be performed after the return-to-duty test) are consistent with this interpretation. They address the SAP's responsibilities. They state:

You are the sole determiner of the number and frequency of follow-up tests and whether these tests will be for **drugs, alcohol, or both**, unless otherwise directed by the appropriate DOT agency regulation. For example, if the employee had a positive drug test, but your evaluation or the treatment program professionals determined that the employee had an alcohol problem as well, you should require that the employee have follow-up tests for both drugs and alcohol.

49 C.F.R. § 40.307(c) (emphasis added).

Here, the employer did not show that the SAP plan required testing for alcohol, or that the SAP requested breath testing. AR 119, 121. On the contrary, the employer submitted an email, purporting to be from the SAP, that stated, "on September 22, 2016, Mr. Metzener was directed by me to go and perform a return to duty **urine screen**. . . . He was also told by me that he could not drive and was in a stand down position until his return to duty **drug screen** screen [sic] returned negative." AR 111 (emphasis added).⁵ This indicates that Mr. Metzener's return-to-duty test was to be a drug, not alcohol, test. The employer failed to show that Mr. Metzener

⁵ The employer attached this email to its response to Mr. Metzener's petition for Commissioner's review. AR 110-11. The Commissioner did not order that the email be made a part of the record. *See* RCW 50.32.080. Therefore, the email constitutes argument, rather than evidence. *See* RCW 34.05.558 (judicial review of facts confined to the agency record). In any event, it does not support the employer's arguments.

knew or should have known he would be tested for alcohol in a return-to-duty test based on any regulation, SAP plan provision, or employer policy.

See AR 119.

2. The employer does not show that any federal regulation put Mr. Metzener on notice that he could be tested on his day off

As discussed, the record supports the Commissioner's finding that the SAP plan did not address off-duty consumption of alcohol. AR 119. The employer now argues that tests are to be unpredictable and unannounced and the federal regulations put Mr. Metzener on notice that he could be tested for alcohol "at any time" including while off-duty. Br. Resp't 12. But the employer points to no regulation that allows the employer to test an employee on his day off.

The employer's citation to 49 C.F.R. § 40.309—the follow-up testing regulation—is unavailing because that section does not indicate that an employer may test a driver on his day off. Indeed, under the employer's logic, an employee could be called in for alcohol testing in the middle of an extended vacation. Further, Mr. Metzener was not tested under that regulation. And, the return-to-duty regulation, under which Mr. Metzener was tested, does not specify that a return-to-duty test must be unpredictable or unannounced. 49 C.F.R. § 40.305.

Even under federal regulations permitting unannounced alcohol testing, Mr. Metzener would not have been required to take a test on his day off. Commercial drivers subject to DOT regulations are subject to unannounced alcohol testing, whether they are following an SAP plan or not. 49 C.F.R. § 382.305. The random-testing regulation specifies “a driver shall only be tested for alcohol while the driver is performing safety-sensitive functions, just before the driver is to perform safety-sensitive functions, or just after the driver has ceased performing such functions.” 49 C.F.R. § 382.305(m). This regulation makes sense, because the federal regulations only prohibit a driver from consuming alcohol when they are on duty, for four hours prior to duty, and within eight hours of being in an accident. 49 C.F.R. § 382.205–209. Neither the return-to-duty regulation, nor the DOT alcohol prohibitions would have put Mr. Metzener on notice that he could be tested for alcohol on his day off. Mr. Metzener was not careless or negligent, because he had no reason to know he could be tested for alcohol on his day off.

3. The employer fails to show that Mr. Metzener’s actions intentionally or substantially disregarded the employer’s interests within the meaning of RCW 50.04.294(1)(d)

Mr. Metzener’s off-duty conduct was neither careless nor negligent, and it also did not “disregard [] the employer’s interest.” RCW 50.04.294(1)(d). His off-duty conduct did not conflict with his employer’s

interest in safety, minimizing liability risk, or maintaining its public image. *See Cuesta*, 200 Wn. App. at 574–75; *Smith*, 155 Wn. App. at 36. When Mr. Metzener tested positive for alcohol, he was not scheduled to drive for the employer in the near future. AR 119; *see* 49 C.F.R. § 382.207 (prohibiting the use of alcohol within four hours of driving). Nor does any evidence of record show that he drove a private vehicle under the influence. AR 119.

And, although the employer has an interest in its employees maintaining their Commercial Driver’s Licenses, the employer did not demonstrate that Mr. Metzener knew or had reason to know that his substance abuse plan prohibited him from drinking alcohol on his day off. AR at 119. By extension, he did not know or have reason to know that his off-duty conduct could jeopardize his CDL. The employer does not demonstrate that Mr. Metzener disregarded his employer’s interest when he had two drinks with lunch on his day off. *See* RCW 50.04.294(1)(d).

C. The Employer Is Not Entitled to Recover Attorney’s Fees or Costs

RAP 18.1 requires a party requesting attorney’s fees or costs to devote an argument in support of that request within its brief, if the law supports such a request. RAP 18.1(a), (b); *see In re Marriage of Ochsner*, 47 Wn. App. 520, 529, 736 P.2d 292 (1987) (denying requests for attorney’s

fees where requestors failed to cite a statute authorizing fee recovery or any basis in record supporting the fee request). The employer does not explain why, if it prevailed, it should be entitled to fees and costs. Importantly, the Employment Security Act's fee recovery provision precludes employers from recovering fees when they prevail on judicial review. RCW 50.32.160; *Pennsylvania Life Ins. Co. v. Emp't Sec. Dep't*, 97 Wn.2d 412, 645 P.2d 693 (1982).

Washington follows the American Rule concerning attorney's fees, under which litigants bear their own expenses unless fee recovery is authorized by a "contract, statute, or recognized ground in equity." *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993). The Employment Security Act (ESA) provides one such statutory exception to the American Rule in certain unemployment benefits cases. RCW 50.32.160. Specifically, a *claimant* may recover reasonable attorney fees in connection with judicial review—but not an employer:

It shall be unlawful for any attorney engaged in any appeal to the courts on behalf of an individual involving the individual's application for initial determination, or claim for waiting period credit, or claim for benefits to charge or receive any fee therein in excess of a reasonable fee to be fixed by the superior court in respect to the services performed in connection with the appeal taken thereto and to be fixed by the supreme court or the court of appeals in the event of appellate review, and if the decision of the commissioner shall be reversed or modified, such fee and the costs shall be payable out of the unemployment

compensation administration fund. . . . In other respects the practice in civil cases shall apply.

RCW 50.32.160 (emphasis added). This provision expressly allows for fees only for individual claimants who prevail on judicial review, not employers. And “in a statutory proceeding such as this, the court will allow only the attorney fees which are provided for in the statute.” *Pennsylvania Life Ins. Co.*, 97 Wn.2d at 417.

The Washington Supreme Court has held that the ESA’s attorney fee provision precludes employers from recovering fees even if they achieve a modification or reversal of the Commissioner’s order. *Pennsylvania Life Ins. Co.*, 97 Wn.2d at 418. In the case of an employer, the American rule applies. Accordingly, even if the employer prevails in this appeal, it must bear its own costs and fees.

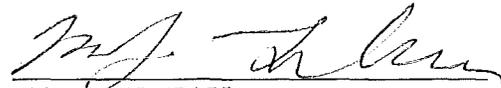
III. CONCLUSION

The employer failed to meet its evidentiary burden below to show that Mr. Metzener knew or should have known that any provision in his SAP plan or in an employer rule prohibited him from having two drinks on his day off. The employer cites no federal regulation that would have put Mr. Metzener on notice that he could be tested for alcohol on his day off.

The Department respectfully asks the Court to affirm the ruling of
the Commissioner.

RESPECTFULLY SUBMITTED this 19 day of February, 2019.

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

DATED this 19 day of February, 2019, at Olympia, Washington.



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AGO/LICENSING AND ADMINISTRATIVE LAW DIV

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