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Division III
State of Washington
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No. 36225-6

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

MEDELEZ, INC. an Oregon corporation,
Respondent-Defendant,

v.

STATE OF WASHINGTON, EMPLOYMENT SECURITY DEPARTMENT,
Appellant-Plaintiff,

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Respondent is Medelez, Inc. (hereinafter, Medelez). The Appellants, State of Washington Employment Security Division (hereinafter, ESD) and Jeffrey L. Metzener (hereinafter, Metzener), seek reversal of the Superior Court's order denying unemployment benefits and to the Appellant Metzener.

II. ASSIGNMENT OF ERRORS

1. Whether the Superior Court erred in allegedly making its own credibility finding.

2. Whether the Superior Court erred in allegedly reweighing the evidence.

3. Whether the Superior Court erred in concluding that the Commissioner's order is not supported by substantial evidence.

4. Whether the Superior Court erred in reversing the Commissioner's decision.

III. COUNTERSTATEMENT OF THE CASE

A. Facts.

Metzener was employed by Medelez from February 15, 2016 to September 22, 2016. CP 14. As a commercial truck driver with a commercial driver's license (CDL), Metzener was subject to drug and alcohol screenings under the Department of Transportation regulations.

CP 15. Prior to working for Medelez, Metzener took a drug screen after applying for employment with a different employer, and tested positive for marijuana. CP 23. Because of the test failure, Metzener was personally required to take a number of actions to restore and then maintain his CDL, a substantial portion of which included complying with a substance abuse plan. *Id*. The requirements for the substance abuse plan included that he also perform a "return to duty" test and six random tests within a 12-month period. CP 23-24.

Upon his hire with Medelez, Metzener was already subject to the plan and Metzener was responsible for providing Medelez with the pertinent information and paperwork regarding his substance abuse plan. CP 24. Metzener was aware that he was required to perform the foregoing tests, but made no effort to do so and initially performed no such tests. CP 15. In September 2016, Metzener met with Medelez Safety and Compliance Manager Dawn Fisher to discuss the lack of follow up testing and it was agreed that such testing needed to be done as soon as possible. CP 24.

On September 21, 2016 Metzener worked as scheduled and before he left for the day, Metzener's supervisor took his keys and instructed Metzener to contact Ms. Fisher. CP 24. That day, he contacted Ms. Fisher who informed him that he needed to complete the "return to duty" test

they recently discussed before he would be able to come back to work. CP 25. The next day, Metzener was not working and was called in for a drug and alcohol screening where his first test result found a BAC of .051 and a second BAC result of .049. *Id*. Medelez, or their agency, was required to notify the Department of Transportation of the test results, who suspended Metzener's CDL. *Id*. Because of Metzener's conduct he no longer had his CDL, and was unable to provide the services upon which he was hired for. *Id*. Thus, Medelez was forced to terminate Metzener's employment. *Id*.

B. Procedural History.

After being terminated, Metzener filed for unemployment compensation with the State. On October 21, 2016, ESD issued a Determination Notice denying Metzener unemployment benefits for violating the Medelez substance abuse testing policy. CP 89. The Department concluded Metzener committed misconduct that lead to his termination. *Id*.

Metzener then appealed that decision, and a hearing was held on December 5, 2016 by an administrative law judge. After hearing live testimony from both sides, the Office of Administrative Hearings issued an Initial Order for the Employment Security Department on December 9, 2016 again denying Metzener's claims. CP 14. The Administrative Law Judge determined that Metzener was discharged due to a willful or wanton

disregard of rights, title, and interests of the employer, and subject to disqualification for his testing positive for alcohol. CP 18. The judge found Metzener was on notice of the testing requirements and knew that he could be tested. *Id*.

In response, Metzener again appealed his claim to the Commissioner's Review Office. On January 5, 2017, the Commissioner, after reviewing only the record, set aside the Initial Order on the issue of job separation. CP 26. The Commissioner concluded that Metzener lacked notice that he was not permitted to consume alcohol while he was off duty. *Id*.

Thereafter, Medelez sought Superior Court review of the Decision of the Commissioner dated January 6, 2017 by the Franklin County Superior Court. CP 1. A hearing commenced on April 25, 2018. CP 206. After hearing argument from both sides, the Honorable Jacqueline Shea Brown reversed the decision of the Commissioner, aligning with the earlier decisions of the department and the ALJ and denied benefits to Metzener. CP 209. Judge Shea Brown found that Metzener's actions constituted misconduct and that the commissioner erred in relying extensively on Metzener's testimony. *Id*. Metzener and ESD now seek review and reversal by this Court.

IV. ARGUMENT

A. Standard of Review.

The Administrative Procedure Act, RCW 34.05.570(3), governs judicial review of agency orders in adjudicative proceedings. *Chi. Title Ins. Co. v. Office of Ins. Comm'r*, 178 Wn.2d 120, 133, 309 P.3d 372 (2013). In reviewing an agency order, the Court of Appeals applies "the standards of RCW 34.05 directly to the record before the agency, sitting in the same position as the superior court." *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd*., 136 Wn.2d 38, 45, 959 P.2d 1091 (1998). Under RCW 34.05.570(3), judicial relief from an agency order is available in nine enumerated circumstances. The following circumstances are applicable here:

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

RCW 34.05.570(3)(d), (e).

The Court of Appeals reviews challenges based on subsection (d) de novo. *Tri–City R.R. Co., LLC v. State*, 194 Wn. App. 642, 650, 377 P.3d 282 (2016), *review denied sub nom*. *Tri-City R.R. Co. v. State of Washington Utilities & Transportation*, 186 Wn. 2d 1029, 385 P.3d 112

(2016). The Court of Appeals reviews challenges under subsection (e) that an order is not supported by substantial evidence by determining whether there is "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *City of Redmond*, 136 Wn.2d 38, 46, 959 P.2d 1091.

The Court thus applies a two-part standard of review in this case: findings of fact are reviewed to determine if they are supported by substantial evidence, while conclusions of law are reviewed de novo to determine if the law was correctly applied. *Morgan v. Dept. of Social and Health Services*, 99 Wn. App. 148, 992 P.2d 1023 (2000), *review denied*, 141 Wn.2d 1014, 10 P.3d 1071 (2000); *State, Dept. of Ecology v. Lundgren*, 94 Wn. App. 236, 971 P.2d 948 (1999). To determine if the agency has erroneously interpreted or applied the law, the court will apply the "error of law" standard. *Cascade Court Limited Partnership v. Noble*, 105 Wn. App. 563, 566, 20 P.3d 997 (2001).

"For purposes of RCW 34.05.570(3)(e), substantial evidence is 'a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.'" *Alpha Kappa Lambda Fraternity v. Washington State University*, 152 Wn. App. 401, 418, 216 P.3d 451 (2009) (citing *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510 (1997)).

Despite the foregoing, it is the Appellants that are asking this court to overrule the decision of the Superior Court. Here, as determined by the Superior Court, several of the Commissioner's factual findings and legal conclusions are wholly contrary to the testimony and documentary evidence.

B. The Commissioner's Decision to award unemployment benefits to Metzener is not supported by Substantial Evidence.

Despite the higher standard of review regarding findings of fact, the Superior Court, when presented with these same issues on review, found that the Commissioner erred when she determined that Metzener had not committed misconduct when he failed a drug and alcohol screening test, which he was aware of and warned about, resulting in the suspension of his CDL. CP 208. This is because the evidence presented does not support the Commissioner's conclusion. The Superior Court's decision must be upheld.

1. Metzener had an individual duty to comply with the Federal CDL and testing regulations and failed to do so.

Title 49 of the Code of Federal Regulations (CFR) governs transportation. Part 383 thereof governs the CDL. It specifically states that no employer may allow, require, permit, or authorize a driver to operate a commercial motor vehicle in the United States if the employer knows "the driver does not have a current CLP or CDL". 49 C.F.R. § 383.37(a) (2018).

Part 382 of Title 49 governs controlled substances and alcohol use and testing in transportation as it relates to persons with CDLs. It applies to "every person…who operate[s] a commercial motor vehicle in commerce in any State and are subject to: (1) The commercial driver's license requirements of part 383." 49 C.F.R. § 382.103 (2018). It sets up a number of drug and alcohol tests such drivers are subject to and states explicitly that a driver cannot refuse to submit to any of the tests governed by Title 382. 49 C.F.R. § 382.211 (2018).

Part 40 of that Title provides the specific procedures for transportation workplace drug and alcohol testing programs**.** Part 40 tells all parties who conduct drug and alcohol tests required by the Department of Transportation (DOT) agency regulations how to conduct these tests and what procedures to use. 49 C.F.R. § 40.1(a) (2018). A SAP evaluation is required when an employee has violated DOT drug and alcohol regulations. An employee cannot again perform any DOT safety-sensitive duties for any employer until and unless the employee completes the SAP evaluation, referral, and education/treatment process set forth in subpart 40 and in applicable DOT agency regulations. 49 C.F.R. § 40.285(a) (2018).

When the employer decides it wants to permit the employee to return to the performance of safety-sensitive functions, the employee must

take a “return-to-duty test”. 49 C.F.R. § 40.305(a) (2018). The rules specifically state that no driver shall refuse to submit to a return-to-duty alcohol or controlled substances test. 49 C.F.R. § 382.211 (2018). As to the return-to-duty test itself, the regulations simply require that 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) (2018).

While there is no other written procedure for the test itself, the procedure for follow up tests is instructive. To that end, the regulations provide that the “decision on specific dates to test is the employer's.” 49 C.F.R. § 40.307(d)(3) (2018). Further, the regulations advise that the employer should schedule tests on “dates of your own choosing, but you must ensure that the tests are unannounced with no discernable pattern as to their timing, and that the employee is given no advance notice.” 49 C.F.R. § 40.309(b) (2018).

In this case, Metzener was employed as a truck driver for Medelez as a commercial driver, which required a CDL to complete the tasks he was employed to do. CP 15. To maintain that CDL, Metzener was required to comply with the foregoing regulations as well as follow a SAP plan that was put in place prior to his employment with Medelez. CP 23. That plan provided the sole means by which Metzener could maintain his

CDL, but only if its terms were complied with. To that end, the Commissioner concurred and found specifically that "the employer relies on the employer's truck drivers to comply with all DOT regulations." CP 26. In this case, Metzener did not comply with the plan and thereby did not comply with all DOT regulations and it was his responsibility to not only comply but to know these regulations and abide by them. It was Metzener's license not Medelez's license that was at issue. Metzener had the affirmative duty to know he was subject to test and once called could not refuse the test. With that knowledge to then beginning to drink in the early morning hours demonstrates why Metzener should not be rewarded with unemployment benefits at this time.

As stated above, because Metzener was subject to a SAP prior to being employed with Medelez, the foregoing regulations required Metzener to complete a return to duty test. Metzener was aware of this duty, as found by the Commissioner, who adopted Finding of Fact 11 from the ALJ, which states specifically that, "[t]he claimant was aware of the requirements for his return to work and the testing requirements." CP 26.

This derives from the following testimony of Metzener:

> Judge Naccarato: So you were subject to a – I – I guess it's called an SAP?
>
> Mr. Metzener: I was, yes.
>
> Judge Naccarato: And were you aware of the terms of this

> SAP?
>
> Mr. Metzener: Uh, basically I was. Um, but I did believe that my, uh – I was confused that when I initially hired with, uh, Medelez, uh, that my, uh, return to service, uh, was conducted at that time.
>
> Judge Naccarato: Okay. So, but did you understand the testing requirements?
>
> Mr. Metzener: Um, I – I basically understood that I had to have, uh, six, um, follow-up, uh, UA's from the time I – I started with, uh – um, Medelez within, uh, basically a one-year period.
>
> Judge Naccarato: Okay. So you were – so then you – you were aware of the requirements, then?
>
> Mr. Metzener: I – yeah, I believe so, yeah.

CP 73.

In this case, Metzener was informed by Medelez that he had not completed the return-to-duty test the day before the actual test was done. CP 25. The commissioner noted in her decision that Metzener was informed that he would be required to perform the return to duty test before he would be allowed to work again, on September 21, 2016. *Id*. The very next day, on September 22, 2016, Metzener was called in to perform his return to duty test. *Id*. Metzener was on notice that he would be required to perform a drug and alcohol screening the day before he was called in to do so.

Because Metzener was found to be aware of his testing requirements, Metzener was thus per se aware that he could not refuse the

test and the test was required to include a test for alcohol pursuant to the foregoing regulations. In this case, Metzener chose to consume alcohol within hours after being warned that he would be subject to a return-to-duty test and despite knowing he could be tested at any time and that he would be tested for alcohol.

Again, based on the Commissioner's own admissions, Metzener was aware that he was required to complete these drug and alcohol screenings and that he had yet to complete them. Although Metzener may or may not have remembered that he was not allowed to consume alcohol on his days off, he knew that because he had a previous positive test, to maintain his CDL, he was required to participate in testing at any time, could not refuse the test when called and was to abstain from alcohol. The Commissioner's decision again reflects this when she stated, "Based on mid-September conversations with the employer's safety and compliance manager (Ms. Fisher) and the employer's operations manager, the claimant understood and agreed that such tests were required." CP 24.

The crux of the Appellants' argument is that Metzener did not have notice that he could not drink while off-duty. However, the law is clear that a return-to-duty test requires this alcohol test and Metzener testified that he was aware of the requirements. CP 26. He knew he had to be tested to maintain his CDL and whether it was a return-to-duty test or a random

follow up test, the test occurred at a potentially foreseeable and authorized time.

Metzener also claims that he did not have reason to know he could be subject to an off-duty test. However, he admits via his brief that the tests were to be unpredictable and unannounced, which falls squarely within a test on your day off. His state of mind at the time is also important because he admits that he thought he already had his return to duty test, which would leave him subject to only random tests. The whole purpose of a random test is that it occurs at an unexpected time where it cannot be planned for and in fact that is what the CFR requires. Because Metzener was subject to the plan and admits he knew the terms of the plan, there is substantial evidence he knew he could be tested at any time.

Pursuant to the foregoing CFRs, Metzener was obligated to follow the outlined regulations to keep his CDL and was found to have knowledge of what was required of him. Because he was required to be tested, and once he is called to being tested he has to go, he was per se always subject to not drinking alcohol to fulfill his obligations to the employer and the government until all tests were complete. The evidence is clear that he failed to do so and is misconduct.

2. The Commissioner wrongfully failed to adopt the Conclusion of Law of the Initial Order finding misconduct.

A person is disqualified from unemployment benefits "beginning

with the first day of the calendar week in which he or she has been discharged or suspended for misconduct connected with his or her work." RCW 50.20.066(1). Under RCW 50.04.294, misconduct includes, "Carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest. RCW 50.04.294(1)(d). In this case it was clearly carelessness or negligence on the part of Metzener to drink alcohol knowing he could be subject to an alcohol test at any time. ESD takes issue with this argument being made for what they allege to be the first time, but provide no legal basis to exclude it.

Conclusion of Law 12 of the Initial Order of the ALJ found that Metzener was discharged for misconduct, as defined in RCW 50.04.294, as he was on notice of the testing requirements. CP 26; CP 18. The Commissioner failed to adopt this conclusion and instead listed what she determined to be the mitigating circumstances that lead to her decision to reverse the ALJ's findings, and premised that finding on the view that Metzener was off duty when he was called in for the drug and alcohol test and unaware that he was not allowed to drink. CP 26.

As shown previously, this finding is internally inconsistent as the commissioner previously noted in her decision that Metzener was informed on September 21 that he would be required to perform the return

to duty test before he would be allowed to work again, and the very next day, Metzener was called in to perform his return to duty test. CP 25. Metzener was put on notice that he would be required to perform a drug and alcohol screening the day before he was called in to do so. Additionally, the fact that he was not at work when he was called in to perform the test is irrelevant because the purpose of a random test is to in fact be random, and not occur at a predictable time. CP 126.

Additionally, in the Commissioner's Conclusion of Law 12, she takes issue with the fact that there was allegedly no evidence presented that Metzener had been told by his employer that off-duty alcohol consumption was prohibited. CP 26. It must be remembered that only Metzener could complete his duties under the substance abuse plan. The plan predated his employment and dictated what he had to do to maintain his CDL. He was aware that if he did not have his CDL, he was not employable.

Based on Metzener's testimony, which is outlined above, and the other evidence presented, it is clear that Metzener was aware that he would be tested for alcohol. Metzener testified that he was aware that he was subject to the substance abuse program and that he was aware of the terms of the substance abuse program. CP 73.

The first page of the letter read into evidence by Dawn Fisher

states that Metzener must refrain from using any "mind/mood altering substances". CP 57. Therefore, when Metzener testified he was aware of the terms of his substance abuse program, he was aware of the prohibition against using mind-altering substances. Alcohol is a mind-altering substance.

This was also implicitly confirmed by Metzener's attorney at the hearing when he stated in his closing remarks, "So his frame of mind was that he would not be tested. Had he known he would be tested, of course, he would not have consumed alcohol." CP 86. Metzener's testimony along with his attorney's closing statement are substantial evidence that Metzener was aware and on notice of the fact that he was not allowed to consume alcohol. There is substantial evidence that the Commissioner's findings are inconsistent and not based on substantial evidence. Again, three judicial entities have made this finding, including most recently the Superior Court, and that decision must be upheld.

3. The Commissioner's findings regarding credibility lack substantial evidence.

The Commissioner is statutorily required to "give due regard" to the ALJ's "opportunity to observe the witnesses". RCW 34.05.464(4). *See also State v. Collins*, 45 Wn. App. 541, 548-49, 726 P.2d 491 (1986) (trial judge is in best position to weigh probative value of evidence because the trial judge personally observes the testimony, and the appellate court

reviews only a cold record).

Here, the Commissioner's finding that misconduct was not established is not based on the hearing of any oral testimony by the parties, but instead was based upon her reading of the cold record. On the other hand, the Initial Order of the Administrative Law Judge was based on his personal evaluation of the parties' credibility from the hearing he personally conducted. Based directly on that in person hearing, in paragraph 11 of the ALJ's Initial Order, he concluded, "that the employer's witness' testimony is a **more credible** with regard to those facts set forth above. The undersigned **gives a great deal of weight to** the testimony of Dawn Fischer." CP 17 (**Emphasis Added**). This is a substantial credibility finding that should not have been simply overlooked or ignored by the commissioner. It is something that cannot be found in a paper record and is due some deference and weight. The credibility findings of the ALJ should have been given significantly more weight than what was provided by the Commissioner.

Instead, the Commissioner did the opposite and somehow discounted the testimony of Ms. Fisher and elevated the testimony of Metzener, without providing a basis for doing so. The fact the ALJ was able to hear from all parties in person and made such a finding can only be considered a substantial credibility finding in favor of one of the parties

after the testimony by those parties, must not simply later be dismissed by a Commissioner reading a cold record without providing a basis to do so. While the Appellants claim that it was the Superior Court judge that made a credibility determination, in reality she just found that the Commissioner had no basis to make hers. The Commissioner lacks substantial evidence to directly revert the credibility finding of the ALJ, as found by the Superior Court, and the decision of the Superior Court must be upheld.

C. The Commissioner erred and erroneously applied the law by Excluding or not giving the Proper Weight to the Substance Abuse Plan as evidence because it was hearsay.

In the hearing conducted before the Administrative Law Judge on December 5, 2016, Medelez wished to admit a letter from Metzener's Substance Abuse Professional detailing Metzener's substance abuse plan. However, there was some miscommunication at the hearing and instead of the plan becoming part of the record the letter was read into the record in part. CP 53-55. Upon subsequent appeal to the Commissioner, because of this imperfect record, the Commissioner chose to essentially ignore the evidence of the substance abuse plan because it was considered hearsay for having been read into the record. CP 26. This occurred despite the substantial reliance on this record by the ALJ who heard live testimony.

In making this decision, the Commissioner misapplied the law and created an unlawful decision-making process that adversely affected

Medelez. The Commissioner essentially wrongfully excluded this evidence as hearsay, contrary to the rules in the Washington Administrative Procedure Act. Additionally, this evidence came in without objection at the hearing, despite the fact Metzener was represented by legal counsel. As a result, Medelez was denied the chance to cure any evidentiary issues when the matter proceeded to the Commissioner.

The law on this subject is clear. Hearsay evidence may be admitted at an administrative hearing if the presiding officer determines that "it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs." RCW 34.05.452. That chapter provides further admissibility for such testimony where it states that:

> Findings may be based on such evidence even if it would be inadmissible in a civil trial. However, the presiding officer shall not base a finding exclusively on such inadmissible evidence unless the presiding officer determines that doing so would not unduly abridge the parties' opportunities to confront witnesses and rebut evidence.

RCW 34.05.461(4).

Here, there is separate evidence in the record, in addition to the reading of the letter that was considered hearsay, that lead the initial Administrative Law Judge to decide that Metzener was not eligible for unemployment benefits. The Administrative Law Judge found that Metzener was on notice of the testing requirements because of the conversations he had with Medelez Safety and Compliance Manager Dawn Fisher the day

prior to the actual test. CP 18. Both Ms. Fisher and Metzener testified to these conversations during the December 5, 2016 hearing. CP 60, 75. The transcript reads in pertinent part:

> Judge Naccarato: Okay. So was - was Mr. Metzener laid off then on the 21st?
>
> Ms. Fisher: No, he was never laid off. When I spoke with Mr. Metzener I had explained the entire process that had to happen.
>
> Judge Naccarato: And when was that?
>
> Ms. Fisher: … I know that it was before the 21st because I had put a phone call in, um, to talk to Mr. Ellis to find exactly how many tests were – were required… So during that whole timeframe when I was, um- like, I'm gonna say it had to have been September 18th. Somewhere around there when I started this whole process with Mr. Metzener. I called him on the phone. I spoke with him here in my office and let him know that he was gunna have to call, um, his SAP provider, Mr. Ellis… So I actually was working with SAP and Mr. Metzener to make sure that he was following, uh, what Mr. Ellis was requiring him to do.

CP 60. Metzener later testified:

> Mr. Metzener: … And my, uh, truck keys had been taken, um, on the 21st.
>
> Judge Naccarato: and were you told why your truck keys were being taken?
>
> Mr. Metzener: My, uh – my supervisor – my supervisor Mario Rodriguez had simply stated that, uh, he was told by Hermiston to take my, uh, truck keys until further notice. And that, um, I should call, uh – uh, Dawn Fisher. Uh, which I did.

CP 75. Both Metzener and Ms. Fisher testified that they had conversations regarding the fact that Metzener needed to be tested, which occurred prior

to Metzener being called in to take his test on September 22nd, 2016.

For that reason alone, the Commissioner should not have excluded the evidence of the letter or downplayed it because it was hearsay, as there was other evidence on the record that lead the Administrative Law Judge to believe that Metzener was on notice of the testing requirements.

Additionally, the letter should not have been downplayed or excluded from the Commissioner's decision because it falls squarely within the bounds of RCW 34.05.461(4). Although the letter, as it was presented in the hearing, may be hearsay, neither Metzener nor his counsel objected to the evidence. The letter is also a document that persons are accustomed to rely on to conduct their affairs as it spells out the requirements of follow up testing for Metzener. Ms. Fisher would have relied on the document to manage employee requirements and Metzener would have relied on the document to lay out his obligations to maintain his CDL. Further, Metzener has admitted in his appeal brief that this evidence can be considered.

While the evidence may have been inadmissible in a civil trial, the statute specifically calls for reliance on such evidence in administrative hearings. RCW 34.05.461(4). The admission of this evidence would not have abridged a party's opportunity to confront witnesses or rebut the evidence because Metzener testified that he was aware of the letter and the

requirements. CP 73. He had the opportunity to rebut the evidence and instead did the opposite and affirmed its existence. Further, the Administrative Law Judge did not just rely on the letter to make his determination, he also relied on the testimony of Ms. Fisher and Metzener regarding their conversations about Metzener needing to take a return to duty test. In this instance the Commissioner wrongfully refused to consider the letter as evidence or in the least failed to properly consider its contents, which was an error of law, and the decision of the Superior Court must be upheld.

D. Medelez is entitled to an award of attorney's fees from this Court.

Pursuant to RAP 18.1, Medelez would be entitled to an award of attorney's fees and costs for successfully defending against this appeal. Medelez respectfully requests that this Court award Medelez its fees and costs on appeal.

E. CONCLUSION

To date, three reviewing entities have assessed the facts and law regarding Metzener's failed drug and alcohol test and have found that those facts clearly establish that Metzener committed misconduct and is thus not entitled to unemployment benefits. On the other hand, only one

such reviewing entity made a decision in favor of Metzener. There are substantial reasons for this.

Metzener came to work for Medelez, for a job that required a CDL, already subject to a substance abuse plan that required random drug and alcohol testing to maintain his CDL. He testified he was aware of the plan and it was his duty to comply with the plan to be able to maintain his CDL and be employable by Medelez. He alone failed to do so. It was this failure that made him unable to drive a commercial truck and made him no longer employable. This negligent/reckless behavior is misconduct and the record substantially reflects that. The Commissioner's decision was erroneous and lacked a substantial factual or legal basis supporting it and must not be further sanctioned by this court. Mr. Metzener should not be rewarded for his negligent/reckless behavior and granted unemployment benefits. It was his CDL at issue and he should be held responsible for his actions.

DATED this 19th day of December, 2018.

MILLER, MERTENS & COMFORT, PLLC

By: *s/Kenneth A. Miller*

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CERTIFICATE OF SERVICE

I certify that on the 19th day of December, 2018, I caused a true and correct copy of the foregoing document to be served electronically on the clerk of the above entitled court and on the following in the manner indicated below:

John Tirpak Unemployment Law Project 1904 Third Ave., Suite 604 Seattle, WA 98101	VIA REGULAR MAIL VIA E-MAIL VIA FACSIMILE: LEGAL MESSENGER HAND DELIVERED	[ ] [X] [ ] [ ] [ ]
Kara Tebeau Assistant Attorney General 1125 Washington St. SE PO Box 40110 Olympia, WA 98504-0110	VIA REGULAR MAIL VIA E-MAIL VIA FACSIMILE: LEGAL MESSENGER HAND DELIVERED	[ ] [X] [ ] [ ] [ ]

DATED this 19th day of December, 2018 in Kennewick, Washington.

Kenneth A. Miller
KENNETH A. MILLER WSBA #10946
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MILLER MERTENS & COMFORT

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