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NO. 37414-9-III

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

WASHINGTON STATE DEPARTMENT OF EMPLOYMENT
SECURITY,

Appellant,

v.

WHITE WATER CONSTRUCTION, INC.,

Respondent.

REPLY BRIEF OF APPELLANT

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I. ARGUMENT

White Water Construction, Inc. (White Water) fired claimant Fred Stevens after he submitted inaccurate timesheets. The Commissioner of the Employment Security Department (Department) did not question his firing but determined that Mr. Stevens had committed an isolated mistake rather than disqualifying misconduct under the Employment Security Act and, because Mr. Stevens was otherwise able and available to work, awarded him unemployment benefits. Mr. Stevens' receipt of permanent partial disability benefits from the Department of Labor and Industries (L&I) was not in issue before the Commissioner. White Water appealed. The superior court reversed after improperly reweighing evidence and witness credibility and considering new evidence and issues on appeal. This was error.

The Department appeals and asks the Court to reinstate the Commissioner's order awarding Mr. Stevens unemployment benefits. The Department's opening brief addressed many of the arguments offered by White Water in its response brief. The Department provides this reply brief to clarify why White Water's arguments fail and to address additional arguments raised by White Water. Because the Commissioner correctly determined that Mr. Stevens was entitled to unemployment benefits, the Court should reverse the superior court, affirm the Commissioner's order, and deny White Water's request for attorney fees and costs.

A. The Commissioner’s Findings of Fact and Conclusions of Law Support the Commissioner’s Determination that Mr. Stevens Was Entitled to Unemployment Benefits

Viewing the whole record in the light most favorable to the Department, the Court should affirm the Commissioner’s order because it is supported by substantial evidence. *See* RCW 34.05.570 (3)(e); *Michaelson v. Emp’t Sec. Dep’t*, 187 Wn. App. 293, 299, 349 P.3d 896 (2015). Evidence is substantial where it could persuade a reasonable person of the matter’s truth, even if the evidence could have been interpreted differently. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987); *Smith v. Emp’t Sec. Dep’t*, 155 Wn. App. 24, 32-33, 26 P.3d 263 (2010). White Water asks the Court to consider “several other instances of dishonesty by Stevens” when the Commissioner was aware of the same evidence but was unpersuaded by it. *See* Response Br. 22-23. Instead of combing the evidence in search of findings and conclusions the Commissioner *could have* reached, however, the Court determines only whether the evidence reasonably supports the findings and conclusions the Commissioner *did* reach. *See Mueller v. Wells*, 185 Wn.2d 1, 15-16, 367 P.3d 580 (2016). The Court does not reweigh evidence or reevaluate credibility in the process. *See Michaelson*, 187 Wn. App. at 299.

The Commissioner’s order is also consistent with applicable law and neither arbitrary nor capricious. *See* RCW 34.05.570 (3)(d), (h), (i). An order cannot be arbitrary or capricious when issued after “due

consideration though it may be felt a different conclusion might have been reached.”” *Citizens for Safe Neighborhood v. City of Seattle*, 67 Wn. App. 436, 439, 836 P.2d 235 (1992) (quoting *Buell v. Bremerton*, 80 Wn.2d 518, 526, 495 P.2d 1358 (1972)). Generally, the Department’s interpretation of the statutes and regulations it administers, RCW 50 and WAC 192, is afforded great deference by the Court. *See Verizon NW v. Dep’t of Emp’t Sec.*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008).

Here, White Water challenges the Commissioner’s Findings of Fact 3-10 and 12, and the Commissioner’s Conclusions of Law 3, 10, and 12-15. *See* Response Br. 3-12.¹ White Water asks the Court to overstep its appellate role and substitute its judgment for that of the Commissioner’s. *See* Response Br. 3-12, 16-25; CP 83-85; *Michaelson*, 187 Wn. App. at 299. In doing so, White Water ignores evidence the Commissioner found persuasive, relies on evidence the Commissioner found unpersuasive, and presents issues and evidence that were not before the Commissioner. *See* Response Br. 3-12, 16-25. White Water also misinterprets and misapplies the law. *See* Response Br. 26-48. The Court should reject White Water’s challenges and affirm the Commissioner’s order. *See* RCW 50.32.150 (“[T]he decision of the commissioner shall be prima facie correct, and the burden shall be upon the party attacking the same.”).

¹ Findings and conclusions White Water does not challenge are verities on appeal. *See Cuesta v. Dep’t of Emp’t Sec.*, 200 Wn. App. 560, 570, 402 P.3d 898 (2017).

1. The record supports Findings of Fact 3 and 4

The Commissioner made the following findings:

Findings of Fact Nos. 3 and 4 are adopted and are augmented. On August 27, 2018, while at work, the claimant's hand was injured. The employer was notified, and the claimant proceeded to an emergency room for medical attention. The claimant required surgery and was unable to work for approximately four months. He opened an industrial insurance claim, which remained open for the remainder of the employment relationship. The employer maintained consistent communication with a Department of Labor and Industries representative and complied with procedure, as directed. The record indicates the claimant did so, as well.

In mid-December 2018, the claimant was released by his physician to return to work. Based on information provided by the claimant's physician, the employer limited the claimant's work to light duty. The employer determined that light duty field work (which the claimant preferred) could not be consistently planned, and office work (also acceptable to the claimant), such as conversations with clients, were duties that already were performed by others. The claimant was instead assigned to answer a phone in the shop. The claimant sometimes could not work a full shift, primarily due to medical appointments and lengthy physical therapy sessions. The office manager noted the claimant failed to consistently work full shifts, and his absence for appointments seemed unduly long.

Administrative Record (AR) 125, 146. These findings are supported by the testimony of White Water's owner, Wayne Terry, White Water's office manager, Janet Kopet, and Mr. Stevens. *See* AR 26-61, 125, 146.

Mr. Terry's testimony included the following:

[Terry] Well, um, [Mr. Stevens] was in charge of running crews, um, in charge of the, uh progression of jobs, quality safety. That's what a forman does. And, um, he carried out those duties, um, until he was injured. And at that point, um, you know, we started in with the L&I procedure and, um,

documented everything through L&I, um, to this point.

[ALJ²] All right. Um, so when was he injured?

[Terry] Um, 8/27/2018 around 11 a.m.

...

[ALJ] And was he, um – was that the last time he physically worked, or did he come back and begin working for your company again?

[Terry] Well he, only came back on light duty.

[ALJ] And do you remember when he came back on light duty?

[Terry] Um –

AR 35-36. “I believe it was on the 18th --” Ms. Kopet interjected. AR 36. Mr. Terry also testified that he kept Mr. Stevens on light duty answering phones because other light duty assignments were sporadic, performed by others, and deemed less safe for Mr. Stevens. AR 47-48.

Ms. Kopet’s testimony included the following:

[Kopet] Well, Fred was hired on 8/6/2018, and on the 27th, he hurt his hand. And so I immediately had recorded that. And I know that Wayne was with him at the ER. And then we talked with L&I and BIAW, and they had told us what – how we were supposed to proceed. And so we followed the whole procedure, I mean, that they had described to us to a T and constant contact with them.

And he came back on – he was supposed to possibly come back to work, you know, around

² Administrative Law Judge

the 17th of December, but it was more around the 19th, the timeframe of the 19th.

...

And I was here, uh, more than Mr. Stevens knows, and I did note coming and going through the window and made notes.

...

During the time that he was working here on light duty – we kept him on light duty because he brought back a note from the doctor. It was check marked that he could be – go to, um, a greater duty job or – or put on heavier duty work. But it was not signed off by the doctor, so, therefore, it's not legitimate unless I have a signed document. That was our decision to keep him on light duty until we would've had a – confirmation from the doctor.

...

[Y]ou [(Mr. Stevens)] were in and out as you chose. Like, sometimes you'd say you were taking lunch or had a doctor appointment. You would come back two and a half hours later.

AR 41-42, 44, 49.

Mr. Stevens' testimony, as it pertains to Findings of Fact 3 and 4, focused primarily on his work absences due to physical therapy and doctor appointments. AR 52-53. However, in one exhibit, a letter written by Mr. Stevens, he similarly detailed the circumstances of his injury, his return to work, and his light duty experience. AR 67-68. Collectively, this evidence is substantial and supports Findings of Fact 3 and 4. AR 125, 146.

2. The record supports Findings of Fact 5 through 10

The Commissioner made the following findings:

Findings of Fact Nos. 5 through 10 are adopted and are augmented. During the weeks that he was unable to work, pursuant to an industrial insurance-related KOS (kept on salary) option, the claimant was paid his full wage by the employer.

On or about January 7, 2019 (approximately three weeks after the claimant had returned to work), the claimant was informed by the employer's owner that he (the claimant) was required to submit time cards, beginning with the pay period ending December 30, 2018, and that his time card was due. The claimant had completed time cards prior to his injury, but given his ongoing medical/therapy appointments, coupled with his prior KOS status, the claimant wanted to clarify procedure with his Department of Labor and Industries case manager. The claimant tried to contact his case manager, but to no avail. The claimant completed his time card to the best of his recollection.

When the claimant completed his time card, he reported hours on December 24 and December 25, as well as December 31 and January 1. The claimant did not work those days but reported the hours because he understood he would receive holiday pay. The claimant was mistaken; the employer did not provide holiday pay. The claimant did not contact the owner to clarify that he would receive holiday pay. When the claimant submitted his time card, it was late in the day, and neither the office manager nor the owner were in the office. The claimant assumed that, if the owner questioned the claimant's time card, the owner would tell the claimant, which would provide an opportunity for clarification. That evening, the owner reviewed the claimant's reported hours and realized the claimant had reported hours on holidays (when work was not performed). The following morning, the office manager likewise noted the claimant's time card was not accurate. The owner (as well as the office manager) regarded the claimant's inaccurate time card to be an inherently dishonest, falsified record. Consequently, when the claimant arrived for work on January 10, 2019, he was discharged.

AR 125, 146-47. These findings are supported by the testimony from Mr. Terry, Ms. Kopet, and Mr. Stevens, as well as Mr. Stevens' letter. *See* AR 26-61, 67-68, 125, 146.

Collectively, their testimony and Mr. Stevens' letter established that before Mr. Stevens' injury, he submitted timesheets to receive pay. AR 41-42, 51-56, 67-68. After his injury, White Water paid him a full wage for several months pursuant to L&I's Kept-on-Salary program, during which Mr. Stevens did not need to submit timesheets. AR 35-36, 41-42, 49, 51-56, 67-68. On January 7, 2019, Mr. Terry asked Mr. Stevens to promptly submit timesheets for the previous two weeks. AR 37-38, 42-43, 51-56, 67-68. Mr. Stevens wanted to discuss his situation with L&I before submitting his timesheets, but he could not reach his case manager, so he completed them as best as he could recall despite his confusion. AR 51-56, 67-68.

Mr. Stevens' timesheets apparently reflected inaccurate hours, including for December 24, 25, and 31, 2018, and January 1, 2019. AR 37-40, 42, 51-56. Although White Water did not provide holiday pay, Mr. Stevens thought it did and reported those hours. AR 51-57, 67-68. After completing his timesheets, Mr. Stevens submitted his timesheets late in the day on January 9, 2019, and there was no one in the office at the time to question. AR 51-56, 67-68. Mr. Stevens thought he could address any potential inaccuracies with Mr. Terry the next day. AR 51-56. Instead, Mr. Terry fired him. AR 37-38, 42-44, 51-56, 67-68.

The Commissioner did not “ignore” evidence like White Water contends. *See* Response Br. 34. Instead, the Commissioner considered and weighed all the evidence, as demonstrated by the balanced findings in the order, and simply resolved the matter in Mr. Stevens’ favor; as the trier of fact, that decision-making authority belonged to the Commissioner. AR 125, 146-47; *see* RCW 50.32.080; *Michaelson*, 187 Wn. App. at 299. Findings of Fact 5-10 are supported by substantial evidence in the record, and the Court should not disturb them. *See* RCW 34.05.570(3)(e); *see Mueller*, 185 Wn.2d at 15-16; *Michaelson*, 187 Wn. App. at 299.

3. Finding of Fact 12 and Conclusion of Law 3

The Commissioner adopted the ALJ’s Finding of Fact 12 and Conclusion of Law 3, which established that Mr. Stevens was able to work, was available to work, and had actively sought work in order to be eligible for unemployment benefits. AR 125-26, 147. White Water did not challenge Mr. Stevens’ ability and availability to work until it sought judicial review. *See* Response Br. 4, 11, 38-40.³ But, as the Department explained in its opening brief, Mr. Stevens’ unrefuted testimony about his job search provided substantial evidence to support Finding of Fact 12, and this finding

³ White Water assigns error to Finding of Fact 12 and Conclusion of law 3 because Mr. Stevens stated he had become disabled in his petition for review by the Commissioner. *See* Response Br. 4, 11-12, 38-40. The Department addressed this argument in further detail in its opening brief. Opening Br. 32-39.

supports Conclusion of Law 3. AR 31-33; *see* RCW 50.20.010(1)(c); WAC 192-170-010. The Court should not disturb them, either.

4. The record supports Conclusion of Law 10

The Commissioner made the following conclusion:

Conclusion of Law No. 10 is adopted. As stated in the Initial Order, testimony of the parties conflicted on a material point: Whether the employer informed the claimant that holiday pay would be provided. In unemployment benefit appeals, proof beyond reasonable doubt is not required, but it must be determined what more likely happened. In *re* Murphy, Empl. Sec. Comm'r Dec.2d 750 (1984). To that end, all the evidence should be considered and weighed. *Id.* In this case, the administrative law judge determined the employer's testimony regarding holiday pay policy was more persuasive. Because there is evidential basis – sworn testimony based on personal knowledge of conversations at issue – the credibility finding will not be disturbed. *However, the credibility finding does not preclude a conclusion that the claimant misunderstood the employer's holiday pay policy.*

AR 147-48 (emphasis added). White Water challenges only what has been italicized above. *See* Response Br. 4, 29-31.

White Water relies on the ALJ's Conclusion of Law 10 but fails to recognize the extent to which the Commissioner expressly adopted it as her own. *See* Response Br. 29. According to the Commissioner, “[a]s stated in the Initial Order, testimony of the parties conflicted on a material point: [w]hether the employer *informed* the claimant that holiday pay would be provided.” AR 147 (emphasis added). All this establishes is that the parties’ testimony conflicted about whether Mr. Terry told Mr. Stevens he would be paid for the holidays; it does not, as the Commissioner common-sensibly

observed, preclude a conclusion that Mr. Stevens truthfully but mistakenly thought otherwise. AR 148.⁴ Regardless, even if White Water was correct that the Commissioner reweighed evidence and credibility, the Commissioner may freely substitute her judgment for the ALJ's and make her own determinations as she sees fit. *See Smith*, 155 Wn. App. at 36 n.2.

5. The record supports Conclusions of Law 12 and 13.

The Commissioner made the following conclusions of law:

Conclusions of Law Nos. 12 and 13 are not adopted. We conclude instead as follows. Here, the claimant reported holiday hours that he had not worked, which understandably gave the employer reason for concern. However, there were mitigating circumstances. First, after several months of KOS payment of his wage, the claimant was told he must submit a time card and that his time card was immediately due. Although the claimant knew how to complete a time card, he evidently had questions regarding the transition (from the KOS system) but was not able to contact his case manager within the limited time he had been given. The significance of reporting holiday hours he had not worked is not discounted but is excusable because the claimant (albeit mistakenly) thought his employer paid provided [sic] holiday pay. The claimant should have consulted the owner for clarification but was given little meaningful opportunity to do so. Time was short, and when he submitted his time card, he saw nobody in the office to question. More significantly, the claimant's course of action does not reflect dishonest intent. On the contrary, having reported four days of holiday hours (which evidence indicates nobody worked), the claimant submitted his time card with the knowledge that the hours he reported would be reviewed by the owner and the office manager. He anticipated that, if there were issues, the owner would tell him, which is exactly what happened. In short, the inaccuracy was too blatant to be described as deceptive. Absent evidence of prior dishonesty/falsification of records, the claimant's report of

⁴ Even the ALJ found that Mr. Stevens “believed” White Water “informed” Mr. Stevens “he would receive paid holidays on Christmas Eve, Christmas Day, New Years Eve, and New Years Day” based on the evidence in the record. AR 125.

holiday hours reflects an isolated incident of mistake or poor judgment, which does not equate with willful or wanton disregard for his employer's interest. The decision to discharge the claimant is not questioned, but for purposes of unemployment benefit eligibility, misconduct has not been established.

AR 148. The record supports the Commissioner's conclusion that Mr. Stevens' single submission of inaccurate timesheets was a mistake rather than disqualifying misconduct.

An employee who is discharged for work-related misconduct is disqualified from receiving unemployment benefits. *Michaelson*, 187 Wn. App. at 300 (citing RCW 50.20.066(1)). Misconduct, as defined by RCW 50.04.294(1) and (2) and WAC 192-150-200 through -210, "does not include [i]nadvertence or ordinary negligence in isolated instances or [g]ood faith errors in judgment or discretion." RCW 50.04.294(3)(b), (c). "Inadvertence or ordinary negligence in isolated instances' means that your action is an accident or mistake and is not likely to result in serious bodily injury." WAC 192-150-200(3)(b). Even multiple negligent acts do not necessarily "make a misconduct." *Michaelson*, 187 Wn. App. at 302 (Fearing, J., concurring). It was White Water's burden to prove Mr. Stevens committed disqualifying misconduct and not a mistake, and the Commissioner correctly concluded that White Water failed to meet that

burden. *See Markam Group, Inc., P.S. v. Dep't of Emp't Sec.*, 148 Wn. App. 555, 563, 200 P.3d 748 (2009).⁵

Case law illustrates why. In *Tapper v. Employment Security Department*, the claimant committed misconduct by reporting hours on her timesheet that her employer *expressly told her* to exclude. 122 Wn.2d 397, 406-07, 411-12, 858 P.2d 494 (1993). In *Cuesta*, the claimant committed misconduct by falsely certifying airplane parts he *knowingly* never inspected. 200 Wn. App. at 564-65, 571-72, 575-77. In *Daniels v. Department of Employment Security*, the claimant committed misconduct by violating policies about which he *knew*. 168 Wn. App. 721, 728-33, 281 P.3d 210 (2012). And in *Pacquing v. Employment Security Department*, the claimant committed misconduct by *intentionally* forging doctor notes. 41 Wn. App. 866, 867-70, 707 P.2d 150 (1985). In contrast, Mr. Stevens submitted inaccurate timesheets on a single occasion because he misunderstood White Water's pay policies and, given his legitimate questions concerning his Kept-on-Salary status, he hoped to discuss his timesheets the next day if there were issues. AR 51-56, 67-68, 146-47.

This case is more like two cases titled *Kirby v. Employment Security Department*. In the first, the Court affirmed the Commissioner's conclusion

⁵ The burden is by a preponderance of evidence. *See, e.g., Darneille v. Dep't of Emp't Sec.*, 49 Wn. App. 575, 576-77, 744 P.2d 1091 (1987). "Preponderance of evidence is' that evidence which, when fairly considered, produces the stronger impression, has the greater weight, and is the more convincing as to its truth when weighted against the evidence in opposition thereto." WAC 192-100-065.

that the claimant did not commit misconduct where her employer failed to prove that it maintained a social media policy that the claimant knew about. 185 Wn. App. 706, 723-29, 342 P.3d 1151 (2014). The employer further failed to prove that the claimant's conduct was intentional or in substantial disregard of the employer's interest. *Id.* at 725-26. And in the second, the Court affirmed the conclusion that the claimant did not commit misconduct when the claimant's conduct was caused by her "apprehension and confusion" about the employer's instructions and a breakdown in communication with the employer. 179 Wn. App. 834, 837, 844-50, 320 P.3d 123 (2014). Similarly, Mr. Stevens reported inaccurate hours, for both holidays and non-holidays, due to unclear pay policies, a breakdown in communication, and his mistaken belief that he could revise his timesheets if he needed to do so. AR 51-56, 67-68, 146-47; *see also Michaelson*, 187 Wn. App. at 301-02 (failing to "exercise reasonable care, the care a reasonably prudent person would have exercised in similar circumstances[,]" even multiple times, is not disqualifying misconduct).

Although White Water disputes Mr. Stevens' testimony that he was confused about his Kept-on-Salary status, that he thought he would receive holiday pay, that he could not reach his L&I caseworker, that he completed his timesheets to his best recollection, and that he expected Mr. Terry to contact him if any issues arose, the veracity of that testimony was for the Commissioner to decide. AR 51-56, 67-68; *see RCW 50.32.080*. The

Commissioner considered these circumstances, along with the undisputed fact that no one was around for Mr. Stevens to question when he submitted his timesheets, as mitigating factors, but more significantly, without any evidence of prior acts by Mr. Stevens, his inaccurate reporting of holiday and non-holiday hours this one time was simply too blantant to have been done intentionally. AR 148; *see Michaelson*, 187 Wn. App. at 301-02.

The Employment Security Act's purpose is to provide benefits for persons who have become unemployed through no fault of their own. RCW 50.01.010. Consequently, the Act "shall be liberally construed in order to reduce involuntary unemployment and suffering caused thereby to a minimum." *Id.*; *see Griffith v. Dep't of Emp't Sec.*, 163 Wn. App. 1, 8-11, 259 P.3d 1111 (2011). 163 Wn. App. at 8, 259 P.3d 1111 (2011) (quoting *Shoreline Comm. College Dist. 7 v. Emp't Sec. Dep't*, 120 Wn.2d 394, 842 P.2d 938 (1992) ("Construction of the benefits Statute that 'would narrow the coverage of the unemployment compensation laws' is viewed 'with caution.'"). Because the findings support Conclusions of Law 12 and 13, those conclusions are consistent with applicable law, and those conclusions align with the act's purpose and construction, the Court should affirm the Commissioner's order. *See* RCW 34.05.570(3)(e), (h).

6. The record supports Conclusions of Law 14 and 15

White Water assigns error to Conclusions of Law 14 and 15, which provide that "[i]n light of the foregoing," i.e. no misconduct, "there is no

overpayment and therefore no issue regarding liability for repayment.” AR 148. Because the Commissioner correctly determined that Mr. Stevens did not commit misconduct, the Commissioner correctly concluded that there was no overpayment issue to resolve.

7. Mr. Stevens may recover both unemployment benefits and permanent partial disability benefits

White Water asserts that Mr. Stevens cannot receive unemployment benefits from the Department because he received permanent partial disability benefits from L&I, an argument White Water did not raise before the Commissioner. *See* Response Br. 43-46. Contrary to White Water’s assertion that the Department agrees with White Water, *see* Response Br. 44-45, the Department’s opening brief discussed why White Water’s reasoning is mistaken in this case, Opening Br. 45.⁶ To reiterate here, claimants cannot recover both unemployment benefits from the Department and either permanent *total* disability benefits or temporary *total* disability benefits from L&I. RCW 50.20.085; RCW 51.32.060, .090. Mr. Stevens,

⁶ White Water cites a portion of a sentence in a footnote from the Department’s briefing in superior court to support this assertion. *See* Response Br. 44-45 (“ESD conceded in its briefing that ‘Mr. Stevens cannot collect worker’s compensation’”). The full sentence was “Clearly, Mr. Stevens cannot collect worker’s compensation and unemployment benefits that overlap, absent an overpayment waiver.” CP 67. As discussed below, Mr. Steven’s permanent partial disability benefits and unemployment benefits do not overlap for purposes of RCW 50.20.085.

however, received permanent *partial* disability benefits. CP 42-50; *see* RCW 51.32.080.⁷ Simply put, RCW 50.20.085 does not apply in this case.

But the Court should not even consider this new issue based on new evidence.⁸ First, a new issue may be raised only if “[t]he person did not know and was under no duty to discover or could not have reasonably discovered facts giving rise to the issue[.]” RCW 34.05.554(1)(a).⁹ Here, White Water, which had constant contact with L&I, knew well before the administrative hearing that Mr. Stevens had undergone a medical evaluation upon which his disability award, if any, would be based. AR 35-36, 41, 158-162; CP 46. In any event, even if White Water properly raised this issue for the first time on appeal, remand for the Department to consider it first is required. *See* RCW 34.05.554(2).

Second, judicial review of the Commissioner’s decision is generally confined to the administrative record, plus any other evidence the reviewing court allows. RCW 34.05.558; *see Okamoto v. Emp’t Sec. Dep’t*, 107 Wn. App. 490, 494, 27 P.3d 1203 (2001). New evidence may supplement the record on judicial review

⁷ *See also Sims v. Dep’t of Labor & Industries*, 195 Wn. App. 273, 278-79, 381 P.3d 89 (2016) (differentiating between permanent partial disability benefits and permanent total disability benefits).

⁸ *See* CP 42-50, 83.

⁹ No other basis under RCW 34.05.554(1) arguably applies here.

only if it relates to the validity of the agency action at the time it was taken *and* is needed to decide disputed issues regarding:

- (a) Improper constitution as a decision-making body or grounds for disqualification of those taking the agency action;
- (b) Unlawfulness of procedure or of decision-making process; or
- (c) Material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.

RCW 34.05.562(1) (emphases added). The court may also remand to the Department for further action if

- (a) The agency was required by this chapter or any other provision of law to base its action exclusively on a record of a type reasonably suitable for judicial review, but the agency failed to prepare or preserve an adequate record;
- (b) The court finds that (i) new evidence has become available that relates to the validity of the agency action at the time it was taken, that one or more of the parties did not know and was under no duty to discover or could not have reasonably been discovered until after the agency action, and (ii) the interests of justice would be served by remand to the agency;
- (c) The agency improperly excluded or omitted evidence from the record; or
- (d) A relevant provision of law changed after the agency action and the court determines that the new provision may control the outcome.

RCW 34.05.562(2). White Water has met none of these criteria. Thus, the superior court abused its discretion by considering evidence outside of the administrative record. *See Okamoto*, 107 Wn. App. at 495 (recognizing that

a court abuses its discretion when such is exercised manifestly unreasonably or based on untenable grounds).

B. White Water Is Not Entitled to Attorney Fees Under the Law

“The general rule for attorney fees in Washington, commonly referred to as the ‘American rule,’ is that each party in a civil action pays its own attorney fees and costs.” *Cosmopolitan Eng’g Grp., Inc. v. Ondeo Defremont, Inc.*, 159 Wn.2d 292, 296-97, 149 P.3d 666 (2006). Fees and costs may be available, however, when authorized by statute. *Pa. Life Ins. Co. v. Emp’t Sec. Dep’t*, 97 Wn.2d 412, 413, 645 P.2d 693 (1982). The Employment Security Act provides a statutory exception to the American rule where judicial review has been “brought on behalf of an individual involving the individual’s . . . claim for benefits” and the Commissioner’s decision is “reversed or modified.” RCW 50.32.160.¹⁰ This exception notably allows only *claimants* who prevail on judicial review to recover attorney fees and costs, not employers. *See Pa. Life*, 97 Wn.2d at 417-418.

White Water does not request fees under RCW 50.32.160; instead, pursuant to RAP 18.1, White Water requests fees and costs as provided under the Equal Access to Justice Act, RCW 4.84.350 (EAJA). *See* Response Br. 47-48.¹¹ The EAJA “provides for an award of attorney fees

¹⁰ Not just remanded, however. *See Hall v. Dep’t of Emp’t Sec.*, 4 Wn. App. 2d 648, 654, 423 P.3d 278 (2018).

¹¹ Definitions for the EAJA are set forth in RCW 4.84.340.

for those successfully challenging agency actions where both the party prevails and the agency action was not substantially justified[,]” unless another statute dictates otherwise. *Hall*, 4 Wn. App. 2d at 655 (citing RCW 4.84.350). In *Language Connection, LLC v. Employment Security Department*, an employer that successfully appealed an *assessment of contributions* was granted attorney fees under RCW 4.84.350 because no other statute triggered its exception clause. 149 Wn. App. 575, 587, 205 P.3d 924 (2009). However, “RCW 4.84.350 does not apply to *claims* under the Employment Security Act because the Act has its own attorney fees statute at RCW 50.32.160[,]” *Hall*, 4 Wn. App. 2d at 655 (emphasis added), and the legislature has already “considered . . . and determined that only successful appealing *employees* should recover costs[,]” *Pa. Life*, 97 Wn.2d at 418 (emphasis added). Therefore, White Water is not entitled to fees and costs under RCW 4.84.350 even if White Water prevails on appeal.

But even if White Water prevailed and the Court determined that RCW 4.84.350 applies in this case, fees and costs should be denied because the Department’s actions were substantially justified and an award would be unjust. *See* 4.84.350(1).¹² “‘Substantially justified’ means justified to a

¹² White Water must also be a “qualified party” in order to recover fees and costs under the EAJA. *See* RCW 4.84.340(5) (“Qualified party” means (a) an individual whose net worth did not exceed one million dollars at the time the initial petition for judicial review was filed or (b) a sole owner of an unincorporated business, or a partnership, corporation, association, or organization whose net worth did not exceed five million dollars at the time the initial petition for judicial review was filed, except that an organization described in section 501(c)(3) of the federal internal revenue code of 1954 as exempt from taxation under section 501(a) of the code and a cooperative association as

degree that would satisfy a reasonable person. An action is substantially justified if it had a reasonable basis in law and in fact. It need not be correct, only reasonable.” *Arishi v. Wash. State Univ.*, 196 Wn. App. 878, 910, 385 P.3d 251 (2016) (citing *Raven v. Dep’t of Soc. & Health Servs.*, 177 Wn.2d 804, 306 P.3d 920 (2013); *Silverstreak, Inc. v. Dep’t of Labor & Indus.*, 159 Wn.2d 868, 154 P.3d 891 (2007)). Given the conflicting evidence and given the legislature’s directive to construe RCW 50 liberally “for the purpose of reducing involuntary employment and the suffering caused thereby to the minimum[,]” the Department’s actions were substantially justified here. *See* RCW 50.01.010. The Court should deny fees and costs.

II. CONCLUSION

The Commissioner correctly awarded Mr. Stevens unemployment benefits. The Court should reverse the superior court, affirm the Commissioner’s order, and deny White Water’s request for fees and costs.

RESPECTFULLY SUBMITTED this 19th day of August, 2020.

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defined in section 15(a) of the agricultural marketing act (12 U.S.C. 1141J(a)), may be a party regardless of the net worth of such organization or cooperative association.).

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Reply Brief of Appellant to be filed with the Clerk of the Court, which will send notice of the filing to the following:

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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 19th day of August, 2020, at Spokane, Washington.

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