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NO. 37414-9-III

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

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WASHINGTON STATE DEPARTMENT OF EMPLOYMENT  
SECURITY,

Appellant,

v.

WHITE WATER CONSTRUCTION, INC.,

Respondent.

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**BRIEF OF APPELLANT**

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**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. ASSIGNMENTS OF ERROR.....2

1. The superior court erred by reweighing evidence and concluding that the Commissioner’s order is not supported by substantial evidence;.....3

2. The superior court erred by determining that the Commissioner erroneously applied the law; .....3

3. The superior court erred by determining that the Commissioner’s order contradicts agency rules;.....3

4. The superior court erred by determining that the Commissioner’s order is arbitrary or capricious; .....3

5. The superior court erred by determining White Water carried its burden to prove that Mr. Stevens committed disqualifying misconduct; .....3

6. The superior court erred by determining Mr. Stevens was ineligible for benefits because he was not able or available to work; .....3

7. The superior court erred by considering issues raised for the first time on judicial review;.....3

8. The superior court erred by considering evidence outside the administrative record; .....3

9. The superior court erred by determining Mr. Stevens was disqualified from receiving unemployment benefits because he received permanent partial disability benefits from L&I; and.....3

10. The superior court erred by making its own findings and reversing the Commissioner’s order granting Mr. Stevens unemployment benefits. ....3

III.	STATEMENT OF ISSUES.....	3
	1. Whether the Commissioner correctly determined that Mr. Stevens committed a mistake by submitting inaccurate timecards, rather than disqualifying misconduct, when the Commissioner’s determination was supported by substantial evidence, consistent with applicable law, and neither arbitrary nor capricious.....	3
	2. Whether the Commissioner correctly determined that Mr. Stevens was able and available to work when White Water’s challenge on judicial review was untimely, Mr. Stevens’ undisputed testimony provided substantial evidence, and judicial estoppel did not apply.....	4
	3. Whether Mr. Stevens was disqualified from receiving unemployment benefits for receiving permanent partial disability benefits from L&I, an issue based on evidence both improperly presented by White Water for the first time on judicial review, and which was not disqualifying.....	4
	4. Whether the Commissioner correctly determined that there was no overpayment in issue.....	4
IV.	STATEMENT OF THE CASE.....	4
	A. Mr. Stevens Suffered a Workplace Injury and was Kept-on-Salary.....	4
	B. In January, White Water Demanded That Mr. Stevens Immediately Complete Timecards for the Preceding Two Weeks, Causing Confusion.....	5
	C. White Water Immediately Discharged Mr. Stevens for Submitting Inaccurate Timecards.....	6
	D. Mr. Steven Applied for Unemployment Benefits and, Following Administrative Proceedings, the	

Commissioner Determined That He Had Committed a Mistake Rather than Disqualifying Misconduct .....	7
E. The Superior Court Reweighed Evidence and Witness Credibility, Considered New Issues and Evidence on Appeal, and Reversed the Commissioner’s Decision .....	9
V. STANDARD OF REVIEW .....	10
VI. ARGUMENT .....	11
A. The Commissioner Correctly Determined That Mr. Stevens Did Not Commit Disqualifying Misconduct .....	12
1. Substantial evidence supports the Commissioner’s findings that the inaccuracies in Mr. Stevens’ timecards were due to his confusion about his Kept-on-Salary status and his holiday pay .....	13
2. The Commissioner correctly concluded that Mr. Stevens committed a mistake rather than misconduct under RCW 50.04.294 .....	20
a. Mr. Stevens’ one-time submission of inaccurate timesheets did not constitute disqualifying misconduct .....	21
(1) Mr. Stevens did not commit misconduct under RCW 50.04.294(1)(a) or (2).....	22
(2) Mr. Stevens did not commit misconduct under RCW 50.04.294(1)(b) .....	26
(3) Mr. Stevens did not commit misconduct under RCW 50.04.294(1)(c) .....	27
(4) Mr. Stevens did not commit misconduct under RCW 50.04.294(1)(d) .....	27

b.	Mr. Stevens’ one-time mistake does not disqualify him from receiving unemployment benefits .....	29
3.	The Commissioner’s determination that Mr. Stevens did not commit misconduct was neither arbitrary nor capricious.....	31
B.	The Commissioner Correctly Concluded that Mr. Stevens Was Eligible for Unemployment Benefits Because He Was Able and Available To Work.....	32
1.	The Court should reject White Water’s untimely challenge to the Commissioner’s determination that Mr. Stevens was able and available to work .....	33
2.	Substantial evidence supports the determination that Mr. Stevens was able and available to work .....	36
3.	Judicial estoppel does not apply, nor does it prevent the determination that Mr. Stevens was able and available to work .....	37
C.	The Court Should Decline Consideration of Mr. Stevens’ Permanent Partial Disability Benefits from L&I, Which Was Raised for the First Time on Judicial Review by White Water .....	39
1.	White Water raised a new issue on appeal without meeting criteria under RCW 34.05.554.....	41
2.	The superior court erred by considering new evidence on appeal when White Water did not meet criteria under RCW 34.05.562.....	42
3.	Mr. Stevens’ claim for and receipt of permanent partial disability benefits from L&I did not disqualify him from receiving unemployment benefits under RCW 50.20.085 .....	45

D. Because Mr. Stevens Is Entitled To Unemployment Benefits, Overpayment Is Not in Issue .....	45
VII. CONCLUSION .....	46

## TABLE OF AUTHORITIES

### Cases

<i>Belling v. Emp't Sec. Dep't</i> , 191 Wn.2d 925, 427 P.3d 611 (2018) .....	40, 46
<i>Buell v. Bremerton</i> , 80 Wn.2d 518, 495 P.2d 1358 (1972) .....	31
<i>Citizens for Safe Neighborhood v. City of Seattle</i> , 67 Wn. App. 436, 836 P.2d 235 (1992).....	31
<i>City of Walla Walla v. \$401,333.44</i> , 164 Wn. App. 236, 262 P.3d 1239 (2011).....	19
<i>Cuesta v. Dep't of Emp't Sec.</i> , 200 Wn. App. 560, 402 P.3d 898 (2017).....	11, 12, 14, 20, 24, 25, 29
<i>Daniels v. Dep't of Emp't Sec.</i> , 168 Wn. App. 721, 281 P.3d 310 (2012).....	24, 25
<i>Darkenwald v. Emp't Sec. Dep't</i> , 183 Wn.2d 237, 350 P.3d 647 (2015).....	40
<i>Davis v. Globe Mach. Mfg. Co.</i> , 102 Wn.2d 68, 684 P.2d 692 (1984).....	43
<i>Delagrave v. Emp't Sec. Dep't</i> , 127 Wn. App. 596, 111 P.3d 879 (2005).....	40, 46
<i>Den Beste v. State</i> , 81 Wn. App. 330, 914 P.2d 144 (1996).....	37
<i>Fred Hutchinson Cancer Research Ctr. v. Holman</i> , 107 Wn.2d 693, 732 P.2d 974 (1987).....	13, 19
<i>Fuller v. Dep't of Emp't Sec.</i> , 52 Wn. App. 603, 762 P.2d 367 (1988).....	14

<i>Griffith v. Dep’t of Emp’t Sec.</i> , 163 Wn. App. 1, 259 P.3d 1111 (2011).....	10, 11, 24, 25, 29
<i>Hamel v. Emp’t Sec. Dep’t</i> , 93 Wn. App. 140, 966 P.2d 1282 (1998).....	28
<i>Hardee v. Dep’t of Soc. &amp; Health Servs.</i> , 152 Wn. App. 48, 215 P.3d 214 (2009).....	35
<i>King Cnty. v. Wash. State Boundary Review Bd. for King Cnty.</i> , 122 Wn.2d 648, 860 P.2d 1024 (1993).....	41
<i>Kirby v. Dep’t of Emp’t Sec.</i> , 179 Wn. App. 834, 320 P.3d 123 (2014).....	10, 11, 24, 25, 28
<i>Kirby v. Emp’t Sec. Dep’t</i> , 185 Wn. App. 706, 342 P.3d 1151 (2014).....	13, 24, 25
<i>Lenca v. Emp’t Sec. Dep’t</i> , 148 Wn. App. 565, 200 P.3d 281 (2009).....	31
<i>Lund v. Dep’t of Ecology</i> , 93 Wn. App. 329, 969 P.2d 1072 (1998).....	43
<i>Markam Grp., Inc., P.S. v. Dep’t of Emp’t Sec.</i> , 148 Wn. App. 555, 200 P.3d 748 (2009).....	10, 11, 21, 22
<i>Medelez, Inc. v. Dep’t of Emp’t Sec.</i> , 2019 WL 4885945 (Wash. Ct. App. 2019).....	17
<i>Michaelson v. Emp’t Sec. Dep’t</i> , 187 Wn. App. 293, 349 P.3d 896 (2015).....	10, 14, 21, 29, 30
<i>Motley-Motley, Inc. v. State</i> , 127 Wn. App. 62, 110 P.3d 812 (2005).....	41
<i>Mueller v. Wells</i> , 185 Wn.2d 1, 367 P.3d 580 (2016).....	20
<i>Nissen v. Pierce Cnty.</i> , 183 Wn.2d 863, 357 P.3d 45 (2015).....	26

<i>Okamoto v. Emp't Sec. Dep't</i> , 107 Wn. App. 490, 27 P.3d 1203 (2001).....	40, 43
<i>Pacquing v. Employment Security Department</i> , 41 Wn. App. 866, 707 P.2d 150 (1985).....	23, 25
<i>Robbins v. Dep't of Labor &amp; Indus.</i> , 187 Wn. App. 238, 349 P.3d 59 (2015).....	37, 38, 39
<i>Shoreline Comm. College Dist. 7 v. Emp't Sec. Dep't</i> , 120 Wn.2d 394, 842 P.2d 938 (1992).....	12
<i>Smith v. Emp't Sec. Dep't</i> , 155 Wn. App. 24, 26 P.3d 263 (2010).....	10, 11, 13, 17, 27, 28
<i>Tapper v. Emp't Sec. Dep't</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	2, 10, 11, 13, 20, 24, 25, 39
<i>Verizon NW v. Wash Dep't of Emp't Sec.</i> , 164 Wn.2d 909, 194 P.3d 255 (2008) .....	11
<i>W. Ports Transp. Inc., v. Emp't Sec. Dep't</i> , 110 Wn. App. 440, 41 P.3d 510 (2002).....	14
<i>Waste Mgmt. of Seattle, Inc. v. Utils. &amp; Transp. Comm'n</i> , 123 Wn.2d 621, 869 P.2d 1034 (1994).....	2
<i>Wilson v. Emp't Sec. Dep't</i> , 87 Wn. App. 197, 940 P.2d 269 (1997).....	20

**Statutes**

RCW 34.05 .....	2, 10, 11, 39
RCW 34.05.464 .....	10
RCW 34.05.534 .....	35
RCW 34.05.554 .....	40, 41, 42
RCW 34.05.558 .....	40

RCW 34.05.562 .....	40, 42, 43, 44
RCW 34.05.570 .....	2, 10, 11, 13, 20, 30, 31, 32
RCW 50.....	11
RCW 50.01.010 .....	11
RCW 50.04.294 .....	1, 22, 23, 25, 26, 27, 28, 29, 30
RCW 50.06 .....	40
RCW 50.20.010 .....	2, 32, 33, 36, 37
RCW 50.20.060 .....	24
RCW 50.20.066 .....	1, 12, 21, 46
RCW 50.20.085 .....	40, 41, 42, 45, 46
RCW 50.20.100 .....	37
RCW 50.20.190 .....	45, 46
RCW 50.32.040 .....	33, 34, 35
RCW 50.32.060 .....	34, 35
RCW 50.32.070 .....	7, 34
RCW 50.32.080 .....	35, 37
RCW 50.32.120 .....	2
RCW 50.32.150.....	10
RCW 51.32.060 .....	45
RCW 51.32.080 .....	45
RCW 51.32.090 .....	45

WAC 192.....	11
WAC 192-04-020.....	7
WAC 192-04-050.....	34
WAC 192-04-060.....	34, 35
WAC 192-04-063.....	34
WAC 192-04-110.....	35, 37
WAC 192-04-170.....	34, 35, 37
WAC 192-04-190.....	35
WAC 192-100-065.....	21
WAC 192-150-200.....	27, 30
WAC 192-150-205.....	22, 27, 28
WAC 192-150-210.....	23
WAC 192-170-010.....	36, 37
WAC 192-170-050.....	37
WAC 192-220.....	46
WAC 192-220-017.....	46
WAC 192-220-020.....	46
WAC 192-34.....	40

**Other Authorities**

<i>Black's Law Dictionary</i> 519 (10th ed. 2004).....	26
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**Rules**

RAP 10.3..... 2

## I. INTRODUCTION

This is a judicial review of an award of unemployment benefits to claimant Fred Stevens by the Commissioner of the Employment Security Department (Department). After receiving full pay for months without submitting timecards, Mr. Stevens was surprised when his employer, White Water Construction, Inc. (White Water), requested he promptly submit timecards reporting his hours for the preceding two weeks. Up to that point, Mr. Stevens had been paid in full by White Water without timecards through a Department of Labor and Industries (L&I) program known as Kept-on-Salary, following an injury he had suffered at work. To his best recollection, Mr. Stevens reported the hours for which he thought he was entitled payment, including for holidays and non-holidays. He assumed any discrepancies could be resolved with White Water thereafter. He reported inaccurate hours, though, and White Water immediately discharged him without affording him an opportunity to correct his timecards.

Mr. Stevens applied for unemployment benefits and the Commissioner granted them. While the Commissioner did not question White Water's decision to discharge Mr. Stevens, the Commissioner determined that he had committed a mistake rather than intentional, disqualifying misconduct under the Employment Security Act, RCW 50.04.294 and RCW 50.20.066. Mr. Stevens was also eligible for

benefits since he was able and available to work under RCW 50.20.010. Mr. Stevens' concurrent claim for permanent partial disability benefits from L&I was not brought before the Commissioner by White Water.

On judicial review, the superior court reversed the Commissioner's decision, overstepping its narrow appellate role to review only the administrative record and to reverse the Commissioner's decision only if White Water carried its burden under RCW 34.05.570(3). This was error. Because the Commissioner's decision was supported by substantial evidence, consistent with applicable law, and neither arbitrary nor capricious, the Court should reverse the superior court's order and affirm the Commissioner's decision.

## **II. ASSIGNMENTS OF ERROR<sup>1</sup>**

The Department assigns no error to the Commissioner's order. However, because the superior court erred in reversing the Commissioner's order, and the Department appeals that decision, the Department asserts the superior court erred as follows:

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<sup>1</sup> This is a judicial review under the Washington Administrative Procedure Act, chapter 34.05 RCW, where the Court of Appeals sits in the same position as the superior court and reviews the Commissioner's decision. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). Accordingly, White Water, which appealed the Commissioner's decision to superior court, must assign error to the Commissioner's findings and conclusions it challenges. See RAP 10.3(h); RCW 50.32.120 (judicial review of the Commissioner's decision is governed by the Administrative Procedure Act). "Assignment of error to the superior court findings and conclusions are not necessary in review of an administrative action." *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 633, 869 P.2d 1034 (1994).

1. The superior court erred by reweighing evidence and concluding that the Commissioner's order is not supported by substantial evidence;
2. The superior court erred by determining that the Commissioner erroneously applied the law;
3. The superior court erred by determining that the Commissioner's order contradicts agency rules;
4. The superior court erred by determining that the Commissioner's order is arbitrary or capricious;
5. The superior court erred by determining White Water carried its burden to prove that Mr. Stevens committed disqualifying misconduct;
6. The superior court erred by determining Mr. Stevens was ineligible for benefits because he was not able or available to work;
7. The superior court erred by considering issues raised for the first time on judicial review;
8. The superior court erred by considering evidence outside the administrative record;
9. The superior court erred by determining Mr. Stevens was disqualified from receiving unemployment benefits because he received permanent partial disability benefits from L&I; and
10. The superior court erred by making its own findings and reversing the Commissioner's order granting Mr. Stevens unemployment benefits.

### **III. STATEMENT OF ISSUES**

1. Whether the Commissioner correctly determined that Mr. Stevens committed a mistake by submitting inaccurate timecards, rather than disqualifying misconduct, when the Commissioner's determination

**was supported by substantial evidence, consistent with applicable law, and neither arbitrary nor capricious.**

- 2. Whether the Commissioner correctly determined that Mr. Stevens was able and available to work when White Water's challenge on judicial review was untimely, Mr. Stevens' undisputed testimony provided substantial evidence, and judicial estoppel did not apply.**
- 3. Whether Mr. Stevens was disqualified from receiving unemployment benefits for receiving permanent partial disability benefits from L&I, an issue based on evidence both improperly presented by White Water for the first time on judicial review, and which was not disqualifying.**
- 4. Whether the Commissioner correctly determined that there was no overpayment in issue.**

#### **IV. STATEMENT OF THE CASE**

##### **A. Mr. Stevens Suffered a Workplace Injury and was Kept-on-Salary**

Between August 6, 2018, and January 10, 2019, Mr. Stevens worked for White Water as a fulltime construction foreman. Administrative Record (AR) 34-35, 41, 67-68, 79-89, 125, 146 (Finding of Fact (FF) 2). On August 27, 2018, Mr. Stevens suffered an injury at work that required medical attention, time off, and a reduced work assignment. AR 35-37, 41, 67-68, 125, 146 (FF 3-4). While injured, Mr. Stevens was Kept-on-Salary through an L&I program and received full pay. AR 49, 51-56, 67-68, 125, 146 (FF 3-10). He also opened an industrial insurance claim with L&I, which White Water knew about, as a result of his injury. AR 35-36, 39, 41, 125, 146, 154-62 (FF 3-4). Although Mr. Stevens' injury prevented him

from returning to work without restrictions until mid-December 2018, he remained on light duty for the rest of his time with White Water. AR 36, 42, 44, 47-49, 67-68, 125, 146 (FF 3-4). Even on light duty, Mr. Stevens sometimes did not work full shifts due to medical and therapy appointments; White Water tracked his absences. AR 42, 44, 48-50, 52, 125, 146 (FF 3-4).

**B. In January, White Water Demanded That Mr. Stevens Immediately Complete Timecards for the Preceding Two Weeks, Causing Confusion**

Before Mr. Stevens' injury, he completed timecards to receive pay. AR 41, 51, 71, 125, 146 (FF 5-10). While Kept-On-Salary, he did not need to do so, yet he received full pay. AR 42, 49, 51, 67-68, 125, 146 (FF 5-10). On January 7, 2019, four months after his injury, White Water requested that Mr. Stevens immediately resume submitting timecards, beginning with pay periods running from December 24, 2018, through January 6, 2019. AR 41-44, 51, 67-68, 125, 146 (FF 5-10). Mr. Stevens was confused by White Water's request because he remained on light duty and thought he remained Kept-on-Salary. AR 51-56, 67-68, 125, 146 (FF 5-10). He tried clarifying with L&I but could not reach his case manager. AR 51-56, 67-68, 125, 146 (FF 5-10). Given that he had not been paid yet and that White Water demanded his timecards as soon as possible, Mr. Stevens completed them as best as he could recall. AR 51-56, 67-68, 125, 146 (FF 5-10).

His recall would prove inaccurate. AR 125, 146-47 (FF 5-10). For regular business days, Mr. Stevens reported the hours he recalled working, plus Kept-on-Salary hours, notated in parentheses, he thought would bring him to full pay. AR 37-41, 51-56, 69-70, 125, 146-47 (FF 5-10). Because Mr. Stevens also thought White Water would compensate him for holidays off, he reported those hours, too. AR 51-56, 67-70, 125, 147 (FF 5-10). It was late in the day on January 9, 2019, when Mr. Stevens turned in his timecards. AR 43, 51-56, 67-68, 125, 147 (FF 5-10). There was no one in White Water's office for him to consult, but he assumed he would have an opportunity to address his timecards with White Water the next day if there were any questions or concerns. AR 51-56, 67-68, 125, 147 (FF 5-10).

**C. White Water Immediately Discharged Mr. Stevens for Submitting Inaccurate Timecards**

White Water did not afford him that opportunity, however. AR 45-46, 51-56, 67-68, 125, 147 (FF 5-10). After comparing the hours Mr. Stevens reported on his timecards with the hours he worked as tracked by White Water, and considering Mr. Stevens was apparently no longer Kept-on-Salary and that White Water did not provide holiday pay, White Water regarded Mr. Stevens' timecards as "an inherently dishonest, falsified record. Consequently, when [Mr. Stevens] arrived for work on

January 10, 2019, he was discharged.” AR 37-41, 43-46, 57, 91-92, 125, 147 (FF 5-10).

**D. Mr. Steven Applied for Unemployment Benefits and, Following Administrative Proceedings, the Commissioner Determined That He Had Committed a Mistake Rather than Disqualifying Misconduct**

Mr. Stevens applied for and was initially granted unemployment benefits by the Department, but based upon information subsequently provided by White Water, the Department denied him future benefits and sought repayment of the benefits he had received. AR 63-66, 79-95, 124, 146 (FF 1). Mr. Stevens appealed. AR 67, 124, 146 (FF 1). Following a hearing, an administrative law judge (ALJ) with the Office of Administrative Hearings (OAH) determined that although Mr. Stevens was eligible for unemployment benefits because he was able and available to work, Mr. Stevens had committed disqualifying misconduct by submitting inaccurate timecards. AR 31-33, 125-27. Mr. Stevens sought administrative review by the Commissioner. AR 133-36.<sup>2</sup>

On review, the Commissioner adopted and modified the ALJ’s findings of fact. AR 146-47. The Commissioner agreed with the ALJ that Mr. Stevens was able and available to work. AR 125-26, 147 (FF 12);

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<sup>2</sup> Review judges from the Commissioner’s Review Office decide petitions for review on behalf of the Commissioner. *See* RCW 50.32.070; WAC 192-04-020(5).

Conclusions of Law (CL) 2-3). But the Commissioner rejected the ALJ's determination that Mr. Stevens had committed disqualifying misconduct, instead concluding in relevant part:

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. To that end, all the evidence should be considered and weighed. In this case, the [ALJ] 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.

An employer has a vested interest in maintaining a productive business. To that end, an employer relies on employees to report for work as scheduled and to work the hours for which they are paid. Certainly, an employer has the right to expect honesty in the employment relationship.

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 [Kept-on-Salary] 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 [Kept-on-Salary] 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 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 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 147-48 (CL 10-13) (internal citations omitted). Because misconduct had not been established, there was "no overpayment and therefore no issue regarding liability for repayment." AR 148 (CL 14-15).

**E. The Superior Court Reweighed Evidence and Witness Credibility, Considered New Issues and Evidence on Appeal, and Reversed the Commissioner's Decision**

The Commissioner denied White Water's request for reconsideration, so White Water sought judicial review in superior court. AR 152-66; CP 1-18. White Water again asserted Mr. Stevens had committed misconduct and that any resulting overpayment must be repaid, but for the first time on appeal, White Water also challenged Mr. Stevens' ability and availability to work and asserted his receipt of permanent partial disability benefits from L&I meant he could not receive unemployment

benefits from the Department. CP 1-18, 22-50, 70-78; RP 3-13, 25-27. The superior court accepted White Water's offer of evidence outside the administrative record and reversed the Commissioner's order on all grounds asserted by White Water. CP 79-85; RP 27-28. The Department appeals. CP 86-91.

## V. STANDARD OF REVIEW

Washington's Administrative Procedure Act, chapter 34.05 RCW, governs judicial review of final decisions by the Commissioner. *Tapper*, 122 Wn.2d at 402; *Markam Grp., Inc., P.S. v. Dep't of Emp't Sec.*, 148 Wn. App. 555, 560, 200 P.3d 748 (2009). The Commissioner gives due regard to an ALJ's opportunity to observe witnesses, but "the underlying ALJ decision" is considered on appeal only "to the extent it is adopted by the commissioner." *Michaelson v. Emp't Sec. Dep't*, 187 Wn. App. 293, 298, 349 P.3d 896 (2015) (citing *Griffith v. Dep't of Emp't Sec.*, 163 Wn. App. 1, 259 P.3d 1111 (2011)); see RCW 34.05.464(4). The Commissioner's decision is presumed "prima facie correct and the burden of demonstrating the invalidity of the agency action is on the party asserting the invalidity, here" White Water. See *Kirby v. Dep't of Emp't Sec. (Kirby I)*, 179 Wn. App. 834, 320 P.3d 123 (2014) (citing RCW 34.05.570(1)(a)); *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 26 P.3d 263 (2010)); RCW 50.32.150.

“In reviewing administrative action, this court sits in the same position as superior court, applying the standards” for judicial review under RCW 34.05 “directly to the record before” the Commissioner. *Tapper*, 122 Wn.2d 397 (citations omitted); *see also Markam Grp.*, 148 Wn. App. at 560. The Commissioner’s decision is reversible only if it is: (1) unsupported by substantial evidence; (2) based on an erroneous interpretation of law; (3) inconsistent with agency rules; or (4) arbitrary or capricious. *Tapper*, 122 Wn.2d at 402; *Kirby I*, 179 Wn. App. at 843; RCW 34.05.570(3)(d), (e), (h), (i). Although questions of law are reviewed de novo, substantial weight is given to the agency’s interpretation of the rules the agency promulgates and the statutes it administers. *Verizon NW v. Wash Dep’t of Emp’t Sec.*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008); *Smith*, 155 Wn. App. at 32. Here, those are WAC 192 and RCW 50.

## **VI. ARGUMENT**

“The Employment Security Act, Title 50 RCW, exists to provide compensation to individuals who are involuntarily unemployed ‘through no fault of their own.’” *Cuesta v. Dep’t of Emp’t Sec.*, 200 Wn. App. 560, 568, 402 P.3d 898 (2017) (citing RCW 50.01.010). The act “shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to a minimum.” RCW 50.01.010; *see Griffith*, 163 Wn. App. at 8 (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.’”). At superior court,<sup>3</sup> White Water asserted Mr. Stevens was unentitled to benefits because (A) he committed disqualifying misconduct, (B) he was unable and unavailable to work, and (C) he received permanent partial disability benefits from L&I. CP 1-18, 22-50, 70-78; RP 3-13, 25-27. White Water also asserted that (D) Mr. Stevens’ receipt of unemployment benefits was an overpayment that must be repaid. CP 1-18, 22-50, 70-78; RP 4-5. Because the Commissioner correctly determined that Mr. Stevens was entitled to unemployment benefits based on the administrative record, the Court should affirm the Commissioner’s decision.

**A. The Commissioner Correctly Determined That Mr. Stevens Did Not Commit Disqualifying Misconduct**

The Commissioner correctly determined that Mr. Stevens did not commit disqualifying misconduct. A claimant is disqualified from receiving unemployment benefits when he or she was discharged for work-related misconduct. *Cuesta*, 200 Wn. App. at 568-69 (citing RCW 50.20.066(1); *Kirby v. Emp’t Sec. Dep’t (Kirby II)*, 185 Wn. App. 706, 342 P.3d 1151

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<sup>3</sup> As it was in superior court, it remains White Water’s burden to prove the Commissioner erred under RCW 34.05.570(3). References to arguments made by White Water at superior court are in anticipation of arguments White Water may raise now.

(2014)). “The operative principle behind the disqualification for misconduct is the fault of the employee.” *Id.* at 569 (quoting *Tapper*, 122 Wn.2d 397). Whether a claimant was discharged for work-related misconduct is a mixed question of law and fact. *Tapper*, 122 Wn.2d at 402 (citations omitted). “Analytically, resolving a mixed question of law and fact requires establishing the relevant facts, determining the applicable law, and then applying the law to the facts.” *Id.* at 403. Because the Commissioner’s decision is (1) supported by substantial evidence, (2) consistent with applicable law, and (3) neither arbitrary nor capricious, the Court should affirm the Commissioner’s decision. *See* RCW 34.05.570(3).

**1. Substantial evidence supports the Commissioner’s findings that the inaccuracies in Mr. Stevens’ timecards were due to his confusion about his Kept-on-Salary status and his holiday pay**

The Commissioner’s findings of fact are reviewed “for substantial evidence in light of the whole record.” *Smith*, 155 Wn. App. at 32-33 (citing RCW 34.05.570(3)(e)). “Substantial evidence is evidence that would persuade a fair-minded person of the truth or correctness of the matter.” *Id.*; *see Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987) (recognizing that evidence is substantial if it reasonably supports the tribunal’s findings, even if the evidence may otherwise be disputed, be conflicting, or lead to other reasonable outcomes). The Court

must not reweigh evidence or reevaluate credibility and instead must “defer to factual decisions and view the evidence” and reasonable inferences therefrom “in the light most favorable to the party who prevailed in the highest forum with fact-finding authority,” which is the Department. *Michaelson*, 187 Wn. App. at 299; *see also Cuesta*, 200 Wn. App. at 570; *W. Ports Transp. Inc., v. Emp’t Sec. Dep’t*, 110 Wn. App. 440, 449, 41 P.3d 510 (2002). “Unchallenged findings of fact are verities on appeal.” *Cuesta*, 200 Wn. App. at 570 (citing *Fuller v. Dep’t of Emp’t Sec.*, 52 Wn. App. 603, 762 P.2d 367 (1988)).

Here, substantial evidence supports the findings of fact upon which the Commissioner concluded that Mr. Stevens did not commit disqualifying misconduct.<sup>4</sup> Evidence throughout the administrative record before the Commissioner, including Mr. Stevens’ testimony, shows the following: On August 6, 2018, Mr. Stevens began work as a construction foreman for White Water. AR 34-35, 41, 67-68, 79-89, 125, 146 (FF 2). On August 27, 2018, Mr. Stevens sustained an on-the-job injury that kept him from returning to work without restrictions for several months. AR 35-37, 41, 67-68, 125, 146 (FF 3-4). Even while on light duty, White Water regularly paid Mr. Stevens in full pursuant to L&I’s Kept-on-Salary program, during which timecards were neither required by White Water nor submitted by

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<sup>4</sup> White Water did not challenge the Commissioner’s Findings of Fact 1, 2, and 11 in superior court, so to the extent White Water does not challenge those here, they are verities on appeal. *See* CP 28-31. Substantial evidence supports these findings nevertheless.

Mr. Stevens. AR 41-42, 49, 51-56, 67-68, 125, 146-47 (FF 5-10).

Mr. Stevens remained on light duty assignment at White Water's discretion even though he was seemingly cleared to return to work without limitation by mid-December 2018. AR 36, 42, 44, 47-49, 67-68, 125, 146 (FF 3-4).

Mr. Stevens periodically left work to attend medical or physical therapy appointments; his absences went unaddressed by White Water but were duly noted. AR 44, 48-49, 67-68, 125, 146-47 (FF 5-10).

On January 7, 2019, over four months after his injury, approximately three weeks after he was seemingly cleared medically, and without warning, White Water told Mr. Stevens he would no longer be paid without submitting timecards, beginning with his immediate submission of timecards for the preceding two weeks. AR 41-44, 51, 67-68, 125, 146-47 (FF 5-10). For Mr. Stevens, who remained on light duty, who thought he remained Kept-on-Salary, and who had received full pay the past several months without submitting timecards, White Water's request was surprising. AR 51-56, 125, 146-47 (FF 5-10). Mr. Stevens reached out to L&I to clarify, but by the time he submitted his timecards on January 9, 2019, he had not heard back from his case manager. AR 43, 51-56, 125, 146-47 (FF 5-10). Mr. Stevens testified he completed his timecards to his best recollection, assuming that if an issue arose, he could address it thereafter. AR 51-58, 67-68, 125, 146-47 (FF 5-10).

Mr. Stevens' memory was imperfect, however, and his timecards were inaccurate and included holiday hours when White Water was closed. AR 37-42, 51-58, 68-70, 125, 146-47 (FF 5-10). Unfortunately, he also assumed wrong about having an opportunity to address his timecards with White Water because he was fired the next day. AR 37-48, 45-46, 51-56, 67-68, 103, 125, 146-47 (FF 2, 5-10). But while White Water's decision to discharge Mr. Stevens went unquestioned by the Commissioner, Mr. Stevens' testimony about ongoing medical and therapy appointments, his confusion about being Kept-on-Salary and holiday pay, his need to submit timecards to receive pay, his need to do so immediately, and his inability to meaningfully consult anyone when he finally did so, all convinced the Commissioner that disqualifying misconduct had not occurred. AR 51-56, 67-68, 125, 146-47 (FF 5-10; CL 12-13).

At superior court, White Water asserted that the Commissioner's findings regarding misconduct were unsupported by substantial evidence for three reasons. CP 34-38. First, White Water challenged findings supporting the Commissioner's determination that Mr. Stevens misunderstood White Water's holiday pay policy considering the ALJ's credibility determination on that issue went undisturbed by the Commissioner. CP 34-36. But upon closer inspection of the Commissioner's order, the Commissioner accepted that the testimony from

White Water’s owner “regarding holiday pay policy was more persuasive” than Mr. Stevens’ testimony in order to resolve a single, “material point: whether [White Water’s owner] *informed* [Mr. Stevens] that holiday pay would be provided.” AR 47-48 (CL 10) (emphasis added). As the Commissioner observed, though, finding that White Water’s owner never told Mr. Stevens he would receive holiday pay (rather than actually telling him that he would not) did not preclude determining that Mr. Stevens still mistakenly thought so. AR 147-48 (CL 10).

Contrary to White Water’s assertion in superior court that “no evidence” showed Mr. Stevens’ confusion, CP 35, even the ALJ, who White Water cited for support and approvingly, found that Mr. Stevens “believed” he would receive holiday pay based on his testimony. *See* AR 51-56, 125. In any event, nothing prevented the Commissioner from viewing the evidence differently. *See Smith*, 155 Wn. App. at 36 n.2 (recognizing that the Commissioner “is authorized to make his 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”).<sup>5</sup>

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<sup>5</sup> *See also Medelez, Inc. v. Dep’t of Emp’t Sec.*, 2019 WL 4885945, at \*6-7 (Wash. Ct. App. 2019) (unpublished, having no precedential value or binding effect, cited pursuant to GR 14.1 and only for such persuasive value as the Court deems appropriate) (questioning whether the Commissioner must give due regard to an ALJ’s findings where – like in this case – the hearing was telephonic and the Commissioner had the same opportunity to observe witnesses as the ALJ by listening to an audio recording afterward, to the extent that listening to witnesses speak over telephone without physically seeing them even constitutes making an observation).

Next, White Water challenged findings supporting the Commissioner's determination that Mr. Stevens' submission of inaccurate timecards was "an isolated incident of mistake and poor judgment, which d[id] not equate with willful or wanton disregard for [White Water]'s interest." AR 51-56, 146-148 (FF 5-10; CL 12-13); CP 36. As the Commissioner noted, the mitigating circumstances testified to by Mr. Stevens showed that White Water regularly paid him in full for several months, even for absences, without requiring timecards. AR 42, 49, 51-56, 67-68, 146-48 (FF 5-10; CL 12-13). White Water's request on January 7, 2019, dating back two weeks, caught Mr. Stevens by surprise because he remained on light duty. AR 51-56, 67-68, 146-48 (FF 5-10; CL 12-13). He tried clarifying with L&I, but given that he had not been paid yet, White Water demanded he submit his timecards promptly, no one was in the office to answer his questions when he did so, and he had not heard from L&I by then, his timecards were mistakenly inaccurate this one time. AR 51-58, 67-70, 146-48 (FF 5-10; CL 12-13). The evidence supports the Commissioner's findings, and White Water offered no other evidence at the administrative hearing to prove other mistakes like this occurred. AR 34-122.

Finally, White Water argued that the Commissioner failed to account for non-holiday hours Mr. Stevens did not work but reported. CP 36. While findings of fact should be sufficient to dispose of material

issues, they do not need to recite all admitted evidence in detail. *See City of Walla Walla v. \$401,333.44*, 164 Wn. App. 236, 254, 262 P.3d 1239 (2011); *Wagner v. Wagner*, 1 Wn. App. 328, 330-31, 461 P.2d 577 (1969). The Commissioner recognized that Mr. Stevens' confusion about Kept-on-Salary covered the entire two weeks for which he submitted timecards, including regular business days. AR 146-48 (FF 5-10; CL 12-13). White Water regularly paid him in full without timecards while on light duty, even for hours he did not work on regular business days, and he remained on light duty until he was fired. AR 36, 42, 49, 51-56, 67-68, 146-48 (FF 5-10; CL 12-13). The hours he reported for regular business days may have been incorrect, but his best recollection at least consistently reflected how White Water paid him while he was Kept-on-Salary, as the Commissioner acknowledged. AR 51-56, 67-70, 146-48 (FF 5-10; CL 12-13).<sup>6</sup>

In summary, even if the evidence supporting the Commissioner's findings could be disputed or interpreted differently, the evidence remains substantial enough to support the Commissioner's findings here. *See Fred Hutchinson*, 107 Wn.2d at 713. The "appellate court's role is to review

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<sup>6</sup> Substantial evidence supports the Commissioner's finding that White Water placed Mr. Stevens on light duty assignment in mid-December 2018 although his physician cleared him without restrictions. AR 36, 41-42, 48, 141. Other evidence suggests that Mr. Stevens returned to light duty sooner. AR 67-68; CP 28. If so, Mr. Stevens' confusion about being Kept-on-Salary and how to report his hours correctly is even more understandable because he would have been earning full pay without submitting timecards and without working full hours while on light duty for even longer..

findings supporting the conclusions the [Commissioner] *did* reach, not to look for evidence supporting an alternate conclusion the [Commissioner] *could have* reached.” *See Mueller v. Wells*, 185 Wn.2d 1, 15-16, 367 P.3d 580 (2016). Substantial evidence supports the Commissioner’s findings, and the superior court erred by reversing the Commissioner’s decision pursuant to RCW 34.05.570(3)(e).

**2. The Commissioner correctly concluded that Mr. Stevens committed a mistake rather than misconduct under RCW 50.04.294**

The Commissioner correctly applied the law to the facts in determining that Mr. Stevens committed a mistake by submitting inaccurate timesheets, not disqualifying misconduct. *See* RCW 34.05.570(3)(d), (h). “The question of discharge is independent of the question of misconduct.” *Cuesta*, 200 Wn. App. at 569 (quoting *Tapper*, 122 Wn.2d 397). Acts of an employee that may justify the employee’s discharge by the employer do not necessarily “constitute statutory misconduct that disqualifies him from unemployment benefits.” *Id.* (citing *Wilson v. Emp’t Sec. Dep’t*, 87 Wn. App. 197, 940 P.2d 269 (1997)). As the Commissioner likewise observed here, “[t]he decision to discharge” Mr. Stevens was “not questioned, but for purposes of unemployment benefit eligibility, misconduct ha[d] not been established.” AR 148 (CL 12-13). It was White Water’s burden to show by a preponderance of the evidence that

Mr. Stevens was discharged for (a) disqualifying misconduct rather than (b) ordinary negligence or poor judgment, and White Water did not meet its burden. *See Markam Grp.*, 148 Wn. App. at 563.<sup>7</sup>

**a. Mr. Stevens’ one-time submission of inaccurate timesheets did not constitute disqualifying misconduct**

“An employee is not entitled to unemployment benefits if he is discharged from employment for misconduct.” *Michaelson*, 187 Wn. App. at 300 (citing RCW 50.20.066(1)).

“Misconduct” includes, but is not limited to, the following conduct by a claimant:

- (a) Willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee;
- (b) Deliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee;
- (c) Carelessness or negligence that causes or would likely cause serious bodily harm to the employer or a fellow employee; or
- (d) Carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer’s interest.

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<sup>7</sup> “‘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.

RCW 50.04.294(1). At superior court, White Water argued Mr. Stevens committed disqualifying misconduct under RCW 50.04.294, but the law applied to the facts shows otherwise. CP 7, 24, 32-33, 38, 39-40; RP 7.

**(1) Mr. Stevens did not commit misconduct under RCW 50.04.294(1)(a) or (2)**

Mr. Stevens must have acted either willfully or wantonly in disregard of White Water’s interests to have committed misconduct under RCW 50.04.294(1)(a). “‘Willful’ means intentional behavior done deliberately or knowingly, where you are aware that you are violating or disregarding the rights of your employer[.]” *Markam Grp.*, 148 Wn. App. at 562-63 (quoting WAC 192-150-205(1)). “And ‘[w]anton’ means malicious behavior showing extreme indifference to a risk, injury, or harm to another that is known or should have been known to you.” *Id.* at 563 (quoting WAC 192-150-205(2)). Certain acts are considered misconduct *per se* “because they signify a willful or wanton disregard of the rights, titles, and interests of the employer[.]” including:

- (a) Insubordination showing a deliberate, willful, or purposeful refusal to follow the reasonable directions or instructions of the employer;

...

(c) Dishonesty related to employment, including but not limited to deliberate falsification of company records, theft, deliberate deception, or lying;<sup>8</sup>

...

(e) Deliberate acts that are illegal, provoke violence or violation of laws, or violate the collective bargaining agreement. However, an employee who engages in lawful union activity may not be disqualified due to misconduct; [and]

...

(f) Violation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule[.]<sup>9</sup>

RCW 50.04.294(2) (internal footnotes added).

Contrary to White Water's assertion in superior court, and compared to other reported cases, Mr. Steven's single submission of inaccurate timecards falls outside the scope of RCW 50.04.294(1)(a) and (2)(a), (c), (e), and (f). CP 7, 24, 32-33, 38, 39-40; RP 7. In *Pacquing v. Employment Security Department* for example, the claimant committed misconduct by forging doctor notes with the intent to deceive his employer. 41 Wn. App.

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<sup>8</sup> "Dishonesty related to employment' means the intent to deceive the employer on a material fact. It includes, but is not limited to, making a false statement on an employment application and falsifying the employer's records." WAC 192-150-210(2).

<sup>9</sup> "A company rule is reasonable if it is related to your job duties, is a normal business requirement or practice for your occupation or industry, or is required by law or regulation. The department will find that you knew or should have known about a company rule if you were provided an employee orientation on company rules, you were provided a copy or summary of the rule in writing, or the rule is posted in an area that is normally frequented by you and your co-workers, and the rule is conveyed or posted in a language that can be understood by you." WAC 192-150-210(4)-(5).

866, 867-70, 707 P.2d 150 (1985) (analyzing former RCW 50.20.060). In *Cuesta*, the claimant committed misconduct by certifying airplane parts he never inspected. 200 Wn. App. at 564-65, 575-77. In *Tapper*, the claimant committed misconduct by ignoring her employer's instructions and submitting a timecard that reported hours she was expressly told to exclude. 122 Wn.2d at 406-07, 411-12 (analyzing former RCW 50.20.060). And in other cases, claimants who violated workplace rules or expectations they knew or should have known about were found to have committed misconduct while claimants who had not been effectively told the rules or were legitimately confused about expectations were not. *Compare Daniels v. Dep't of Emp't Sec.*, 168 Wn. App. 721, 728-33, 281 P.3d 310 (2012) (claimant violated known policy several times by arriving late and out of uniform), *and Griffith*, 163 Wn. App. at 8-11 (claimant disregarded his employer's interests by harassing customers), *with Kirby II*, 185 Wn. App. at 723-29 (employer failed to show it had specific social media policies or that it had communicated expectations to claimant), *and Kirby I*, 179 Wn. App. at 844-50 (claimant's confusion was caused by a breakdown in communication with employer).

In contrast, Mr. Stevens' one-time submission of inaccurate timecards was both isolated and unintentional. As the Commissioner noted, his "inaccuracy was too blatant to be described as deceptive." AR 148

(CL 12-13). Mr. Stevens completed his timecards wanting clarification and expecting verification, which does not amount to intentional dishonesty. AR 51-56, 67-68, 146-48 (FF 5-10; CL 12-13); *see Cuesta*, 200 Wn. App. 560 at 575-77; *Pacquing* 41 Wn. App. at 867-70. Nor did he affirmatively ignore instructions or include hours he was expressly told to exclude; instead, he was told only that he needed to resume submitting timecards immediately without further explanation. AR 51-56, 67-68, 146-48 (FF 5-10; CL 12-13); *Tapper*, 122 Wn.2d 397. While requiring accurate timecards to receive accurate pay is reasonable, and while Mr. Stevens ideally would have obtained clarification before submitting timecards with potential inaccuracies, evidence that White Water's owner "never paid anybody for Christmas and New Years's since [he] started this company in 1984" does not, as White Water argued in superior court, prove that information was ever meaningfully conveyed to Mr. Stevens or disprove his confusion. AR 51-58, 67-68, 146-48 (FF 5-10; CL 12-13); CP 35; *cf. Kirby II*, 185 Wn. App. at 723-29; *Kirby I*, 179 Wn. App. at 844-50; *Daniels*, 168 Wn. App. at 729-33; *Griffith*, 163 Wn. App. at 8-11. The Commissioner correctly concluded that Mr. Stevens did not commit misconduct under RCW 50.04.294(1)(a) or (2) because he neither willfully nor wantonly disregarded White Water's rights, title, and interests when he submitted his timecards.

**(2) Mr. Stevens did not commit misconduct under RCW 50.04.294(1)(b)**

The Commissioner recognized that employers can reasonably expect their employees to report their hours accurately, which is why Mr. Stevens' discharge by White Water went unquestioned. AR 148 (CL 12-13). For similar reasons as those discussed above, though, Mr. Stevens' submission of inaccurate timecards should not be mischaracterized as "deliberate violations or disregard of standards of behavior" under RCW 50.04.294(1)(b). "Statutory interpretation starts with the plain meaning of the language; the plain meaning controls if it is unambiguous. We may use a dictionary to discern the plain meaning of an undefined statutory term." *Nissen v. Pierce Cnty.*, 183 Wn.2d 863, 881, 357 P.3d 45 (2015).

Deliberate means intentional, premeditated, and/or fully considered. *Black's Law Dictionary* 519 (10th ed. 2004). As the Commissioner correctly concluded based on Mr. Stevens' testimony, Mr. Stevens' inaccuracies resulted from his confusion about being Kept-on-Salary and holiday pay, and from his imperfect memory, and not because he was inaccurate on purpose or even indifferently. AR 51-56, 67-68, 148 (CL 12-13). The Commissioner correctly concluded that Mr. Stevens did not commit misconduct under RCW 50.04.294(1)(b).

**(3) Mr. Stevens did not commit misconduct under RCW 50.04.294(1)(c)**

White Water asserted that “Mr. Stevens’ falsification of his time cards constitute[d] misconduct” under RCW 50.04.294(1)(c), which required White Water to show any carelessness or negligence by Mr. Stevens caused or would likely cause White Water’s owner or other employees serious bodily harm. *See* CP 3; WAC 192-150-200(3)(a). It may have been scrivener’s error, but the superior court drew no distinction and agreed. CP 84. To be clear, there is absolutely no evidence whatsoever that shows Mr. Stevens caused anyone “serious bodily harm.” *See* WAC 192-150-205(4) (“‘Serious bodily harm’ means bodily injury which creates a probability of death or which causes significant permanent disfigurement, or which causes a significant loss or impairment of the function of any bodily party or organ.); *see also* WAC 192-150-205(3) (defining “carelessness” and “negligence”). The Commissioner correctly concluded Mr. Stevens did not commit misconduct under RCW 50.04.294(1)(c).

**(4) Mr. Stevens did not commit misconduct under RCW 50.04.294(1)(d)**

Consistent with the foregoing conclusions, Mr. Stevens did not exhibit “‘Carelessness or negligence of such a degree or recurrence to show an intentional or substantial disregard of [White Water’s] interest.’” *See Smith*, 155 Wn. App. at 36 (quoting RCW 50.04.294(1)(d)). “‘Carelessness’

and ‘negligence’ mean failure to exercise the care that a reasonably prudent person usually exercises.” WAC 192-150-205(3). An employer’s interests may be tangible or intangible, but the employee must have acted intentionally “in willful disregard for its probable consequences.” *Smith*, 155 Wn. App. at 27 (citing *Hamel v. Emp’t Sec. Dep’t*, 93 Wn. App. 140, 966 P.2d 1282 (1998)). “[A]n employee acts with willful disregard of an employer’s interest when the employee ‘(1) is aware of his employer’s interest; (2) knows or should have known that certain conduct jeopardizes that interest; but (3) nonetheless intentionally performs the act, willfully disregarding its consequences.’” *Kirby I*, 179 Wn. App. at 844 (quoting *Hamel*, 93 Wn. App. 140).

The mitigating circumstances identified by the Commissioner show that Mr. Stevens did not act with intentional or substantial disregard for White Water’s interests, nor was his conduct recurring or of sufficient degree to constitute misconduct under RCW 50.04.294(1)(d). AR 148 (CL 12-13); *see Smith*, 155 Wn. App. at 36. This becomes especially apparent when comparing this case with others. In *Smith*, for example, the claimant exposed his employer to litigation and reputational harm by surreptitiously recording conversations with co-workers and members of the public on several occasions. 155 Wn. App. at 36-41. In *Griffith*, the claimant harmed his employer’s interests by harassing a customer and

becoming banned from multiple delivery locations. 163 Wn. App. at 10-11. And in *Cuesta*, the claimant's failure to inspect parts he falsely certified potentially jeopardized the safety of the airplanes his employer manufactured as well as the passengers those airplanes would have carried. 200 Wn. App. at 571-72. In all three cases, the claimants demonstrated extraordinary carelessness or negligence.

In *Michaelson*, by contrast, the claimant's three car accidents in one year while making deliveries for his employer did not rise to "such degree or recurrence to show an intentional or substantial disregard to [his employer's] interest[,]'" as nothing about his behavior was "willful, reckless, or even grossly negligent." 187 Wn. App. at 301-02. "At most [the claimant] failed to exercise reasonable care, the care a reasonably prudent person would have exercised in similar circumstances." *Id.* at 301. Without minimizing the difference in pay Mr. Stevens claimed and whatever he was actually entitled to receive, when considering there was no other evidence of malfeasance and compared with other cases, the Commissioner correctly concluded that he did not commit misconduct under RCW 50.04.294(1)(d).

**b. Mr. Stevens' one-time mistake does not disqualify him from receiving unemployment benefits**

As discussed above, Mr. Stevens made a mistake by submitting inaccurate timecards, but while his discharge may have been warranted, his

mistake did not disqualify him from receiving unemployment benefits. “‘Misconduct’ does not include ... (b) Inadvertence or ordinary negligence in isolated instances; or (c) Good faith errors in judgment or discretion.” RCW 50.04.294(3). Under RCW 50.04.294(3)(b), “[i]nadvertence 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). In superior court, White Water stressed that Mr. Stevens reported inaccurate hours for seven days and therefore committed misconduct rather than a mistake. CP 21, 26, 36, 72; RP 7. But his submission of any inaccurate hours only once “reflects an isolated incident of mistake or poor judgment” more than anything else “[a]bsent evidence of prior dishonesty/falsification of records[.]” AR 51-56, 67-68, 146-48 (FF 5-10; CL 12-13); *see Michaelson*, 187 Wn. App. at 300-02.<sup>10</sup>

In summary, the Commissioner properly applied the law to the facts. Thus, the superior court erred by reversing the Commissioner’s order pursuant to RCW 34.05.570(3)(d) and (h).

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<sup>10</sup> Even multiple mistakes do not necessarily “make a misconduct.” *Michaelson*, 187 Wn. App. at 302 (Fearing, J., concurring).

**3. The Commissioner’s determination that Mr. Stevens did not commit misconduct was neither arbitrary nor capricious**

The Commissioner’s order is neither arbitrary nor capricious. *See* RCW 34.05.570(3)(i) (granting relief when an order is arbitrary or capricious). An agency acts arbitrarily or capriciously “if its actions are willful, unreasoning, and in disregard of facts and circumstances.” *Lenca v. Emp’t Sec. Dep’t*, 148 Wn. App. 565, 575, 200 P.3d 281 (2009) (citing *Wash. Waste Sys., Inc. v. Clark Cnty.*, 115 Wn.2d 74, 81, 794 P.2d 508 (1990)). For example, an agency official acts arbitrarily and capriciously by disregarding pivotal facts and refusing to admit proof of them into evidence. *Id.* at 576. Where two conclusions or findings are possible, though, an action cannot be arbitrary or capricious “when exercised honestly and upon 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)). To find that an order is arbitrary or capricious, then, it is not enough for the court to simply conclude the Commissioner’s decision is erroneous; rather, the Court must find that the Commissioner deliberately disregarded the facts and circumstances of the case. *See id.*

At superior court, White Water asserted that the Commissioner’s order was arbitrary and capricious because it “focused solely on the issue of holiday

pay and failed to consider the fact that Stevens inflated and falsified his time on non-holiday days.” CP 39. This argument is refuted by the record; the Commissioner considered non-holiday hours and concluded that Mr. Stevens’ inaccurate timecards reflected his Kept-on-Status confusion for regular business days as well. AR 51-56, 67-68, 146-48 (FF 5-10; CL 12-13). Mr. Stevens’ confusion was understandable because he remained on light duty and had been paid in full for such, even when he missed work for appointments. AR 36, 42, 49, 51-56, 146-48 (FF 5-10; CL 12-13). The Commissioner’s order was detailed and thorough enough to resolve the case completely. *See Walla Walla*, 164 Wn. App. at 254 (stating that findings of fact need only be sufficient to resolve material issues and need not detail all evidence). The superior court erred by reversing the Commissioner’s order pursuant to RCW 34.05.570(3)(i).

**B. The Commissioner Correctly Concluded that Mr. Stevens Was Eligible for Unemployment Benefits Because He Was Able and Available To Work**

A claimant’s weekly eligibility for unemployment benefits depends on, among other considerations, whether “[h]e or she is able to work, and is available to work in any trade, occupation, profession, or business for which he or she is reasonably fitted.” RCW 50.20.010(1)(c).

To be available for work, an individual must be ready, able, and willing, immediately to accept any suitable work which may be offered to him or her and must be actively seeking

work pursuant to customary trade practices and through other methods when so directed by the commissioner or the commissioner's agents.

RCW 50.20.101(1)(c)(i).<sup>11</sup> Both the ALJ and the Commissioner determined that Mr. Stevens was able and available for work based on his undisputed testimony. AR 125-26, 146-48 (FF 12; CL 2-3). White Water challenged that determination for the first time on judicial review in superior court. CP 30, 34, 74; RP 4, 11-12. The Court should affirm the Commissioner's determination that Mr. Stevens was able and available to work because (1) White Water's challenge was untimely, (2) substantial evidence supports that determination, and (3) judicial estoppel does not prevent it.

**1. The Court should reject White Water's untimely challenge to the Commissioner's determination that Mr. Stevens was able and available to work**

"In any proceeding involving an appeal relating to ... benefit claims, the appeal tribunal [(i.e. an ALJ with OAH)], after affording the parties reasonable opportunity for fair hearing, shall render its decision affirming, modifying, or setting aside" the Department's initial benefits claim decision. RCW 50.32.040. At this hearing,

all matters and provisions of this title relating to the individual's right to receive such ... benefits[,] including but not limited to the question of the claimant's availability for work within the meaning of RCW 50.20.010(1)(c)[,] shall be deemed to be in issue irrespective of the particular grounds

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<sup>11</sup> RCW 50.20.010(1)(c)'s subsections (i) and (ii) were amended effective July 28, 2019, but the amendments do not significantly alter their substance.

set forth in the notice of appeal in single claimant cases. The claimant's availability for work shall be determined apart from all other matters.

*Id.*

The parties shall be duly notified of [ALJ]'s decision together with its reasons therefor, which shall be deemed to be the final decision on the initial ... claim unless, within thirty days after the date of notification, whichever is the earlier, of such decision, further appeal is perfected pursuant to the provisions of this title relating to review by the commissioner.

*Id.*; see RCW 50.32.070. In addition, "The manner in which any dispute shall be presented [at OAH], and the conduct of hearings and appeals, shall be in accordance with regulations prescribed by the commissioner ...."

RCW 50.32.060.

Any party aggrieved by an ALJ's decision may petition for review by the Commissioner. WAC 192-04-050, -060, -170. An aggrieved party includes "[t]he department, a claimant, or an employer who receives an adverse decision" from OAH. WAC 192-04-063(2). Other parties may file a reply to the petition. WAC 192-04-170(3).

Any argument in support of the petition for review or reply thereto not submitted in accordance with the provisions of this regulation shall not be considered in the disposition of the case absent a showing that failure to comply with these provisions was beyond the reasonable control of the individual seeking relief.

WAC 192-04-170(6).

Here, Mr. Stevens was aggrieved by the outcome at OAH, so he petitioned for review by the Commissioner. AR 133-37. Although he challenged the ALJ's determination that he committed misconduct, he did not challenge the ALJ's determination that he was able and available to work. AR 125-26, 135-36. In reply, White Water also did not challenge the ALJ's determination that Mr. Stevens was able and available, nor did White Water raise the issue even when making other arguments outside the scope of those permitted when petitioning for reconsideration. AR 139-43; *see* WAC 192-04-190(2). The ALJ's determination that Mr. Stevens was able and available to work went undisputed, and the Commissioner adopted the ALJ's determination based on the same evidence. AR 31-33, 125-26; 146-48 (FF 12; CL 2-3). The Notice of Hearing issued by OAH expressly identified that Mr. Stevens' ability and availability to work would be in issue. AR 171-75. White Water may not raise that challenge on judicial review when nothing prevented White Water from first doing so in the administrative proceedings. *See* RCW 34.05.534; RCW 50.32.040, 060, .080; WAC 192-04-060, -110, -170; *cf. Hardee v. Dep't of Soc. & Health Servs.*, 152 Wn. App. 48, 57, 215 P.3d 214 (2009) (recognizing that a party who fails to raise a claim at the administrative level fails to preserve the issue for judicial review).

**2. Substantial evidence supports the determination that Mr. Stevens was able and available to work**

Even if the Court considers White Water's challenge to Mr. Stevens' ability and availability to work for the first time on judicial review, that challenge fails because substantial evidence supports the Commissioner's determination that he was indeed able and available. AR 31-33, 125-26, 147 (FF 12; CL 2-3). Mr. Stevens testified he was looking for fulltime work, he was making multiple job contacts per week, he kept records of his job contacts, he had transportation for interviews or work, he was available to work any hours he was offered, and nothing limited his ability to accept a job offer. AR 32-33. His testimony went undisputed by White Water's owner and office manager. AR 33. Nothing more was necessary. *See* WAC 192-170-010 (setting forth express criteria for when the Department considers a claimant available for work).

At superior court, White Water asserted Mr. Stevens was ineligible for unemployment benefits because he stated he was disabled in his petition to the Commissioner. AR 135-36; CP 24, 30, 31, 34; RP 11. First, because the ability and availability to work is a weekly eligibility requirement, Mr. Stevens' hearing testimony that he was able and available to work was not made unreliable if he later became unable or unavailable due to a disability. *See* RCW 50.20.010(1). Second, the Commissioner properly

based this determination only upon evidence submitted at the administrative hearing, such as Mr. Stevens' undisputed testimony. *See* RCW 50.32.080; WAC 192-04-110; *cf. Den Beste v. State*, 81 Wn. App. 330, 332, 914 P.2d 144 (1996) (citation omitted) ("With limited exceptions, facts pertinent to the review of administrative proceedings are established at the administrative hearing."). Anything submitted to the Commissioner by either party after that, including Mr. Stevens' disability statement and White Water's response thereto, was merely argument. *See* WAC 192-04-170 (parties provide argument along with their petitions and replies, not evidence). And third, White Water never explained how stating that he was disabled made Mr. Stevens automatically unable or unavailable to work as either a matter of fact or law. *See* RCW 50.20.010(1), .100; WAC 192-170-010, -050. Substantial evidence shows that Mr. Stevens was able and available to work and therefore eligible for unemployment benefits.

**3. Judicial estoppel does not apply, nor does it prevent the determination that Mr. Stevens was able and available to work**

Relying on *Robbins v. Dep't of Labor & Indus.*, 187 Wn. App. 238, 349 P.3d 59 (2015), White Water asserted for the first time in its superior court reply brief that Mr. Stevens' testimony at the administrative hearing concerning his ability and availability to work was invalidated by judicial

estoppel due to the disability statement he made in his petition to the Commissioner. AR 135-36; CP 75-76; RP 11.

Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position. The doctrine seeks to preserve respect for judicial proceedings and to avoid inconsistency, duplicity, and waste of time. Three core factors guide a determination of whether to apply the judicial estoppel doctrine[:] (1) whether a party's later position is clearly inconsistent with its earlier position, (2) whether judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or second court was misled, and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped.

*Robbins*, 187 Wn. App. at 255-56. (citations omitted). Judicial estoppel does not apply here.<sup>12</sup>

First, Mr. Stevens' disability statement, which came within his plea for an overpayment waiver, was not "clearly inconsistent" with his hearing testimony because those positions were not mutually exclusive; Mr. Stevens was still able and available to work when he testified, even if he was disabled, and even if he later sought an overpayment waiver due to incurring

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<sup>12</sup> *Robbins* is also distinguishable. There, Robbins accepted disability benefits from L&I after submitting an application to reopen his disability benefits claim. *Id.* at 241-45, 255. He later argued that the application he had submitted and received benefits for was deficient, in favor of an application for additional benefits he filed later. *Id.* at 251-56. Because he had originally benefitted from the first application by receiving disability benefits, the principles of judicial estoppel discussed above prevented him from subsequently claiming his first application was deficient. *Id.* at 255-56. Here, however, Mr. Stevens never wavered from his testimony at the hearing that he was able and available to work. AR 31-33, 135-36.

a disability. AR 31-33, 135-36; *see Robbins*, 187 Wn. App. at 255. Second, the Commissioner was the ultimate fact-finder here, so there should be no concern that “either [a] first or [a] second court [could be] misled[.]” *See Robbins*, 187 Wn. App. at 255. And third, Mr. Stevens obtained no “unfair advantage” and White Water suffered no “unfair detriment” by him pursuing an overpayment waiver from the Department based on his stated disability. AR 135-36; *see Robbins*, 187 Wn. App. at 255-56. And this all assumes judicial estoppel even applies considering that judicial estoppel is a judicial doctrine, not an administrative or unemployment law edict. *See Robbins*, 187 Wn. App. at 255-56. In short, judicial estoppel has no bearing on Mr. Stevens’ benefit eligibility.<sup>13</sup>

**C. The Court Should Decline Consideration of Mr. Stevens’ Permanent Partial Disability Benefits from L&I, Which Was Raised for the First Time on Judicial Review by White Water**

As already noted, judicial review of the Commissioner’s decision is subject to RCW 34.05. *See Tapper*, 122 Wn.2d at 402. “Generally, judicial review of an agency decision is confined to the agency record.” *Okamoto v.*

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<sup>13</sup> Even if it did apply, judicial estoppel only prevents a party from asserting a “later position” that is “clearly inconsistent with” the party’s “earlier position,” because the “inconsistent position in the later proceeding would create the perception that either the first or the second court was misled.” *Robbins*, 187 Wn. App. at 255 (emphasis added). In other words, judicial estoppel precludes the second inconsistent position, not the first. *Id.* If judicial estoppel applied here, Mr. Stevens could not subsequently assert he was disabled, his second position. AR 31-35, 135-36. Likewise, White Water could not subsequently assert that a disability made Mr. Stevens unable or unavailable to work when White Water did not dispute his testimony at the hearing and, in its reply to his petition for review, White Water emphasized that he was “**not disabled.**” AR 31-33, 139-40.

*Emp't Sec. Dep't*, 107 Wn. App. 490, 494, 27 P.3d 1203 (2001) (citing RCW 34.05.558). An appellate court may consider new issues and new evidence raised for the first time on judicial review only if the proponent meets the requirements set forth in RCW 34.05.554 and .562. *See Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 246 n.3, 350 P.3d 647 (2015); *Okamoto*, 107 Wn. App. at 494.

At superior court, White Water introduced new evidence to argue a new issue not before the Commissioner: Mr. Stevens' receipt of permanent partial disability benefits from L&I disqualified him from receiving unemployment benefits, pursuant to RCW 50.20.085. CP 13, 42-50, 76; RP 12. Merely claiming both disability benefits and unemployment benefits is neither prohibited nor uncommon. *See, e.g., Belling v. Emp't Sec. Dep't*, 191 Wn.2d 925, 427 P.3d 611 (2018); *Delagrave v. Emp't Sec. Dep't*, 127 Wn. App. 596, 111 P.3d 879 (2005); RCW 50.06; WAC 192-34. More importantly, though, the superior court erred by allowing White Water to (1) raise a new issue and (2) present new evidence, without meeting the burdens to do so. CP 83-85. Even if White Water had met its burdens, (3) RCW 50.20.085 did not disqualify Mr. Stevens like White Water asserted.

**1. White Water raised a new issue on appeal without meeting criteria under RCW 34.05.554**

“In order for an issue to be properly raised before an administrative agency, there must be more than simply a hint or a slight reference to the issue in the record[.]” and we did not even have that regarding disqualification under RCW 50.20.085 here. *See King Cnty. v. Wash. State Boundary Review Bd. for King Cnty.*, 122 Wn.2d 648, 670, 860 P.2d 1024 (1993) (citation omitted). “Issues not raised before the agency may not be raised on appeal, except to the extent that [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).<sup>14</sup> “The statute serves the important policy purpose of protecting the integrity of administrative decision making.” *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 73, 110 P.3d 812 (2005) (citing *King Cnty.*, 122 Wn.2d 648).

At superior court, White Water claimed it did not know about Mr. Stevens’ disability claim until after the Commissioner issued her decision. CP 76. Although Mr. Stevens may not have been awarded disability benefits until after the Commissioner’s decision, White Water knew about his pending claim and potential receipt of benefits at the time of the administrative hearing but failed to present evidence or argue that it

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<sup>14</sup> No other grounds under RCW 34.05.554(1) arguably apply here.

disqualified him under RCW 50.20.085. AR 91, 96, 103, 140-42, 153-62; CP 42-50. As Mr. Stevens' employer and a party interested in whatever benefits he receives at its expense, *see* CP 34 n.65, White Water knew about, had a duty to know about, and/or could have reasonably discovered facts giving rise to his claim, such that White Water should have raised this issue before judicial review. *See* RCW 34.05.554(1). White Water did not, however, and the superior court erred by considering it, especially when, even if White Water had met RCW 34.05.554(1)(a)'s criteria, remand to the Commissioner was required. *See* RCW 34.05.554(2) ("The court shall remand to the agency for determination of any issue that is properly raised pursuant to subsection (1) of this section.").

**2. The superior court erred by considering new evidence on appeal when White Water did not meet criteria under RCW 34.05.562**

Under RCW 34.05.562(1), a superior court, sitting in its appellate capacity,

may receive evidence in addition to that contained in the agency record for judicial review, *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.

*See Okamoto*, 107 Wn. App. at 494 (emphases added). ““The admission or refusal of evidence is largely within the discretion of the [superior] court and will not be reversed on appeal absent a showing of a manifest abuse of discretion.”” *Id.* at 494-95 (quoting *Lund v. Dep’t of Ecology*, 93 Wn. App. 329, 969 P.2d 1072 (1998)). ““A [superior] court abuses its discretion when its exercise of discretion is manifestly unreasonable or based upon untenable grounds or reasons.”” *Id.* at 495 (quoting *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 684 P.2d 692 (1984)).

Here, the superior court erred by admitting into evidence the L&I award letters White Water submitted with its opening brief. CP 42-50, 83-85. The award letters do not “relate to the validity” of the Commissioner’s decision “at the time it was” issued, nor are the award letters “needed to decide disputed issues” regarding “[i]mproper constitution [of] a decision-making body or grounds for disqualification of those taking agency action[, u]nlawfulness of procedure or of decision-making process[,] or [m]aterial facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record.” *See* RCW 34.05.562(1). The superior court erred by considering White Water’s new evidence, which requires reversal. *See Okamoto*, 107 Wn. App. at 494-95.

Nor does RCW 34.05.562(2) apply:

The court may remand a matter to the agency, before final disposition of a petition for review, with directions that the agency conduct fact-finding and other proceedings the court considers necessary and that the agency take such further action on the basis thereof as the court directs, 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.

Even if White Water had met criteria under RCW 34.05.562(2), which it did not, the superior court also erred by failing to remand to the Commissioner first for further proceedings. CP 83-85.

**3. Mr. Stevens' claim for and receipt of permanent partial disability benefits from L&I did not disqualify him from receiving unemployment benefits under RCW 50.20.085**

“An individual is disqualified from benefits with respect to any day or days for which he or she is receiving, has received, or will receive compensation under RCW 51.32.060 or 51.32.090.” RCW 50.20.085. RCW 51.32.060 pertains to permanent *total* disability benefits, and RCW 51.32.090 pertains to temporary *total* disability benefits. Mr. Stevens, however, received permanent *partial* disability benefits, CP 34, 42-50, 76, which is covered under an entirely different statute not listed in RCW 50.20.085. *See* RCW 51.32.080. Put simply, RCW 50.20.085 does not apply to Mr. Stevens. Thus, even if White Water had met criteria to introduce new issues and new evidence outside those in the administrative record, that evidence still would not have shown Mr. Stevens was disqualified under RCW 50.20.085. Both L&I and the Department determined he was entitled to the benefits he received, and nothing prevents it.

**D. Because Mr. Stevens Is Entitled To Unemployment Benefits, Overpayment Is Not in Issue**

An overpayment is the receipt of unemployment benefits by a claimant to which the claimant is unentitled, and generally the claimant must repay. RCW 50.20.190(1). The Commissioner may waive an overpayment when there is equity and good conscience to do so, except

where the overpayment is the claimant's fault. RCW 50.20.190(2); WAC 192-220-017. A claimant disqualified from benefits for committing misconduct is at fault for any benefits he or she receives and is thus ineligible for an overpayment waiver. RCW 50.20.066(5), .190(2); WAC 192-220-017, -020.

The Department initially provided unemployment benefits to Mr. Stevens, but when White Water reported he had been discharged for misconduct, the Department assessed an overpayment against him for the benefits he received, which the ALJ sustained. AR 63, 125, 127. Because the Commissioner ultimately determined Mr. Stevens did not commit misconduct, the Commissioner concluded that "there is no overpayment and therefore no issue regarding liability for repayment." AR 148 (CL 14-15). The superior court erred by reversing the Commissioner and in finding RCW 50.20.066(5) requires Mr. Stevens to repay the unemployment benefits he received.<sup>15</sup>

## VII. CONCLUSION

The superior court erred in reversing the Commissioner's determinations that Mr. Stevens did not commit disqualifying misconduct

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<sup>15</sup> Even if Mr. Stevens was ineligible under RCW 50.20.010 or disqualified under RCW 50.20.085, waiver might be possible but should be considered by the Commissioner first. *See Belling*, 191 Wn.2d 925; *Delagrave*, 127 Wn. App. 596; RCW 50.20.190; WAC 192-220.

and that he was able and available to work. The superior court also erred by considering issues and evidence outside the administrative record concerning Mr. Stevens' receipt of permanent partial disability benefits from L&I. For the foregoing reasons, the Court should reverse the superior court and affirm the decision of the Commissioner.

RESPECTFULLY SUBMITTED this \_\_\_\_\_ day of June, 2020.

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## CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing 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 18<sup>th</sup> day of June, 2020, at Spokane, Washington.

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