

FILED
Court of Appeals
Division III
State of Washington
7/20/2020 4:27 PM
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.

RESPONDENT'S ANSWERING BRIEF

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I. INTRODUCTION

This case involves judicial review of the denial of unemployment insurance benefits to claimant Fred Stevens (“Stevens”). There are three separate and distinct issues that were presented to the Superior Court that render Stevens ineligible to receive unemployment benefits. Each of these issues are independent of the other and separately render Stevens ineligible for benefits. Thus, a finding in favor of White Water Construction, Inc. (“White Water”) on one issue would render the remaining issues moot. Spokane Superior Court Judge Michael P. Price correctly ruled in favor of White Water based upon the applicable law and facts set forth in the administrative record.

Judge Price correctly held that Stevens was discharged for misconduct and therefore is ineligible to receive unemployment compensation benefits. Stevens was terminated from his employment by White Water after falsifying his time cards and attempting to get paid for hours he did not work and for which he was not entitled to payment over a two-week time frame. The issue is quite simple: Stevens understood that he was only to record the hours he worked on his time cards. When asked to fill out his time card by White Water, Stevens artificially inflated his time for non-holiday days, claiming more time than he worked and was entitled to receive payment for. For example, on December 26, 2018, Stevens claimed that he worked ten (10) hours when he only worked four (4) hours and fifteen (15) minutes. Stevens repeated this dishonest act of inflating his

time on five (5) non-holiday days. Stevens further claimed ten (10) hours for two holiday days, Christmas Day and New Years' Day, when he did not work either of those days. White Water has never paid anybody for these holiday days since the company started in 1984. The record demonstrates that Stevens acts were willful and dishonest, and his falsification of company records is misconduct per se.

Judge Price also correctly held that Stevens was ineligible for benefits pursuant to RCW 50.20.010(c) and/or RCW 50.20.085. RCW 50.20.010(c) requires that a claimant be able and available to work in order to receive unemployment benefits. Stevens testified at the April 30, 2019 hearing that he was able and available to work and there was nothing, including injury, illness or childcare issues, that would limit his ability to work. Furthermore, Stevens was cleared to return to work without restrictions on December 18, 2018. It was not until after the first hearing in front of the Administrative Law Judge (“ALJ”) that Stevens claimed to be disabled. (emphasis added). Stevens made this claim in connection with his request to be relieved from his obligation to repay benefits already received and which the ALJ determined he was not entitled to. Stevens claimed at the April 30, 2019 hearing to be able and available to work to gain a benefit—an award of unemployment compensation benefits. He shortly thereafter states the opposite—that he is disabled—to gain a benefit of waiver of overpayment, thus further highlighting Stevens’ dishonesty. Stevens’ own statements render him ineligible for benefits and the Superior Court correctly held that Stevens was ineligible.

Stevens further began pursuing a claim for permanent disability and was awarded permanent partial disability on November 7, 2019¹. The law does not permit a person to receive both unemployment benefits and workers' compensation benefits for the same period. RCW 50.20.085. The last issue relates to overpayment and whether Stevens was eligible for waiver of overpayment for benefits he received prior to the ALJ Order denying Stevens unemployment compensation. This issue is corollary to the above issues. Because Stevens committed misconduct in connection with this work, he is not entitled to waiver of the regular overpayment pursuant to law. RCW 50.20.066; RCW 50.20.190.

The Commissioner's June 21, 2019 Decision is not supported by substantial evidence, is contrary to agency's rules, is arbitrary and capricious, the Commissioner erroneously applied the law, and the Superior Court ruled correctly when it overturned the Commissioner's Decision.

II. ASSIGNMENTS OF ERROR

White Water does not assign any error to the trial court's order. In conjunction with Rule of Appellate Procedure 10.3(h), White Water

¹ As sated in the underlying appeal in Superior Court, White Water has appealed the award of disability benefits. As of the date of the filing of this brief, the appeal is still pending.

contends that the Commissioner of the Employment Security Department (“ESD”) committed the following errors.

1. The Commissioner erred as to Conclusion of Law No. 3.

The Commissioner adopted the ALJ’s Conclusion of Law No. 3, which states: “Here, during the weeks Claimant sought unemployment benefits, Claimant was able to work, was available for work and actively sought suitable work as required by RCW 50.20.010(1)(c)(ii).”²

2. The Commissioner erred as to Conclusion of Law No. 10.

Specifically, the Commissioner erred in concluding that the ALJ’s credibility finding that it adopted “does not preclude a conclusion that claimant misunderstood the employer’s holiday pay policy.”³

3. The Commissioner erred as to Conclusion of Law Nos. 12 and 13.

The Commissioner’s Conclusion of Law Nos. 12 and 13 states the following:

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

² Comm’r Rec. at p. 147, p. 126.

³ Comm’r Rec. at p. 148, p. 127. White Water does not challenge the Commissioner Review Office’s adoption of the ALJ’s credibility finding at Conclusion of Law No. 10.

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 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 hour 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 dishonestly/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.⁴

⁴ Comm'r Rec. at p. 148.

4. The Commissioner erred as to Conclusion of Law Nos. 14 and 15.

The Commissioner's Conclusion of Law Nos. 14 and 15 states the following:

Conclusions of Law Nos. 14 and 15 are not adopted. In light of the foregoing, there is no overpayment and therefore no issue regarding liability for repayment.⁵

5. The Commissioner's Review Office erred with respect to Findings of Facts Nos. 3 and 4.

Findings of Fact Nos. 3 through 4 state the following:

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

⁵ Comm'r Rec. at p. 148, 127.

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 were already 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.

White Water challenges the Findings of Fact not supported by the record and discussed below in the Statement of Facts presented in this brief. In sum, White Water contends that the Commissioner's Office erred based upon the record, which provides the following evidence.

Stevens had hand surgery on November 1, 2018.⁶ Stevens went back to work shortly after his surgery; per the Surgeon's instructions, Stevens was to be kept on light duty.⁷ The only job that White Water had fit for light duty and that White Water believed was safest for Stevens was for Stevens to answer the phone.⁸ On December 18, 2019, Stevens doctor released him to return to work without restrictions.⁹

Stevens actual time at the office was recorded by White Water's office manager, Ms. Kopet, who made notes when Stevens would arrive at

⁶ Comm'r Rec. at p. 67, ¶3.

⁷ *Id.*

⁸ Comm'r Rec. at p. 40, lines 15 to 18, p. 48, lines 8 to 11.

⁹ Comm'r Rec. at p. 141.

work and when he would leave.¹⁰ Not only did Stevens fail to work full shifts due to medical appointments, Stevens claimed that he was present for work when he was not and attempted to get paid for time not earned.¹¹ For example, on December 26, 2019, Stevens claimed 8.5 (+1.5) hours.¹² However, he only worked 4 hours and 15 minutes that day.¹³ Again, on December 31, 2019, Stevens claimed to have worked 10 hours, but only worked 8.¹⁴

6. The Commissioner erred with respect to Findings of Fact Nos. 5 through 10.

Findings of Fact Nos. 5 through 10 state the following:

Findings of Fact Nos. 5 through 10 are adopted and 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 his time card, 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 the

¹⁰ Comm'r Rec. at p. 42, lines 10 to 13, p. 44, lines 1 to 4.

¹¹ Comm'r Rec. at p. 42, lines 10 to 13, p. 69 to 70.

¹² Comm'r Rec. at p. 93.

¹³ *Id.*

¹⁴ Comm'r Rec. at p. 94.

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.

White Water challenges the Findings of Fact not supported by the record and discussed below in the Statement of Facts presented in this brief. In sum, White Water contends that the Commissioner's Office erred based upon the record, which provides the following evidence.

Stevens claimed that White Water agreed to pay him for holiday pay for Christmas Day and New Year's Day.¹⁵ Stevens worked on December 24 and December 31, 2018.¹⁶ However, Stevens claimed to have worked ten (10) hours on December 24, 2019 (6.0 + (4.0)) and ten (10) hours on December 31, 2019, when he actually worked only six (6) hours on December 24, 2019 and eight (8) hours on December 31, 2019.¹⁷ Stevens had ample opportunity, and in fact, three (3) days to ask White Water questions or seek clarification on how to fill out his time card, but failed to do so.¹⁸ White water requested that Stevens provide a time card on January 7, 2019.¹⁹ He did not submit his time card until January 9, 2019.²⁰ Stevens admitted that he would communicate with Mr. Terry via text message.²¹ Stevens also admitted that he asked Mr. Terry other questions on multiple occasions, specifically when he was going to return to non-light duty work.²² Stevens and Mr. Terry would sit and talk for periods of time ranging from five (5) minutes to thirty (30) minutes, with the discussion covering both work and personal topics, including conversations about Stevens' own son.²³ Additionally, the time cards provided by White Water

¹⁵ Comm'r Rec. at p. 68.

¹⁶ Comm'r Rec. at p. 40, line 19 to 41, line 1; p. 69-70.

¹⁷ Comm'r Rec. at 69.

¹⁸ Comm'r Rec. at p. 56, lines 15 to 17 (Stevens was only 20 steps away from the office).

¹⁹ Comm'r Rec. at p. 43, lines 10 to 23, p. 51, lines 16 to 18, p. 68 and 135.

²⁰ *Id.*

²¹ Comm'r Rec. at p. 67, ¶6.

²² Comm'r Rec. at p. 67, ¶5; Comm'r Rec. at 57, lines 3 to 9.

²³ Comm'r Rec. at p. 56, line 22 to 57, line 25.

are not complicated, but rather simple and Stevens had no issues filling them out in the past.²⁴

Stevens time card contained false hours for both holiday and non-holiday days, including the following:

Date	Hours Mr. Stevens Claimed on his Time Card	Hours Mr. Stevens Actually Worked	Difference between time Submitted and Time Actually Worked
12/24/2018	6 (+4)	6	4
12/25/2018	10	0	10
12/26/2018	8.5 (+1.5)	4.25	5.75
12/31/2018	10	8	2
01/01/2019	10	0	10
01/02/2019	9 (+1)	8	2
01/03/2019	9 (+1)	8	2
TOTAL FALSE HOURS CLAIMED			35.75²⁵

White Water terminated Stevens for misconduct for falsifying his time cards for both holiday and non-holiday days.²⁶

6. The Commissioner erred with respect to Findings of Fact No. 12.

The Commissioner adopted the ALJ Finding of Fact No. 12 that “During the weeks that Claimant sought unemployment benefits, Claimant was physically able to work, was available for work, and actively sought work, as required.”²⁷ However, in Stevens’ appeal of the ALJ Decision

²⁴ Comm’r Rec. at p. 41, lines 2 to 7, p. 52, lines 7 to 9, p. 71; Stevens included his resume as part of the record, which reveals he has an AAS Degree in Architecture Technology from Spokane Community College. See Comm’r Rec. at p. 76.

²⁵ Comm’r Rec. at p. 109-110.

²⁶ Comm’r Rec. at p. 69-70; p. 38, lines 2 to 11;

²⁷ Comm’r Rec. at p. 125 and 147.

dated May 30, 2019 (just one month after the hearing on April 30, 2019), Stevens states, “I am now a disabled employee after being injured while working for this employer.”²⁸ Stevens asserts that he is disabled in his plea for a waiver regarding benefits he received and that the ALJ ordered he must repay.²⁹

III. STATEMENT OF THE ISSUES

1. Whether Mr. Stevens was discharged for misconduct and disqualified for receiving benefits pursuant to RCW 50.20.066 and RCW 50.04.294?

2. Whether Stevens was ineligible for unemployment compensation pursuant to RCW 50.20.010(1)(c) given his admission that he was disabled?

3. Whether Stevens is ineligible for unemployment compensation due to receiving disability benefits on November 7, 2019?

4. Whether Stevens is eligible for waiver of the regular overpayment pursuant to RCW 50.20.066?

IV. STATEMENT OF THE CASE

A. Procedural History

On February 20, 2019, ESD issued a written Determination Letter denying Fred Stevens unemployment benefits because he was discharged for misconduct.³⁰ Stevens filed an appeal on March 15, 2019.³¹

²⁸ Comm’r Rec. at p. 136.

²⁹ Comm’r Rec. at p. 136.

³⁰ Comm’r Rec. at p. 124.

³¹ *Id.*

Administrative Law Judge (“ALJ”) Courtney Bebee affirmed the decision of the ESD in an April 30, 2019 Initial Order of the Office of Administrative Hearings.³² Judge Bebee found that Stevens was discharged for misconduct and disqualified from receiving benefits as per RCW 50.20.066 and RCW 50.04.294.³³ Judge Bebee further held that Stevens was not eligible for waiver of the regular overpayment pursuant to RCW 50.20.066.³⁴ Stevens submitted a petition for review of Judge Bebee’s April 30, 2019 Order on May 30, 2019.³⁵ Review Judge Annette Womac set aside the April 30, 2019 Initial Order on the issue of job separation and overpayment in a June 21, 2019 Decision.³⁶ Judge Womac held that Stevens is not disqualified pursuant to RCW 50.20.066(1) and that there was no overpayment.³⁷ On June 28, 2019, White Water filed a petition for reconsideration regarding Judge Womac’s June 21, 2019 Decision.³⁸ Judge Womac denied the Petition for Reconsideration on July 5, 2019.³⁹ White Water timely filed a Petition for Review of the Decision of the Commissioner with the Spokane Superior Court on August 5, 2019.⁴⁰

The Honorable Michael Price of the Spokane Superior Court overturned the Commissioner’s June 21, 2019 Decision.⁴¹ Judge Price held:

³² Comm’r Rec at p. 124-129.

³³ Comm’r Rec at p. 127.

³⁴ *Id.*

³⁵ Comm’r Rec. at p. 133 to 136.

³⁶ Comm’r Rec. at p. 149.

³⁷ *Id.*

³⁸ Comm’r Rec. at p. 153-154.

³⁹ Comm’r Rec. at 165.

⁴⁰ Clerks’ Papers (“CP”), p. 1-19.

⁴¹ CP, p. 83-85.

1. The June 21, 2019 Decision of the Commissioner contained in Review No. 2019-1976 (Docket No.066075) on the issue of job separation is set aside. Claimant Fred Stevens was discharged for misconduct as defined in RCW 50.04.294 and is ineligible for benefits pursuant to RCW 50.20.066(1).
2. The June 21, 2019 Decision of the Commissioner contained in Review No. 2019-1976 (Docket No.066075) on the issue of eligibility is set aside. Stevens is ineligible for benefits pursuant to RCW 5.20.010(c) and/or RCW 50.20.085.

The Court set aside the June 21, 2019 Decision of the Commissioner pursuant to RCW 34.05.570(3) on the following grounds: (1) the June 21, 2019 Decision is not supported by evidence that is substantial when viewed in light of the whole record before the court; (2) the agency has erroneously interpreted or applied the law; (3) the June 21, 2019 Decision is inconsistent with a rule of the agency; and (4) the June 21, 2019 Decision is arbitrary or capricious.

Judge Price further held that Stevens was not eligible for waiver of the regular overpayment pursuant to RCW 50.20.066(5) because he was discharged for misconduct.⁴²

B. Standard of Review

Judicial review of a final administrative decision of the Commissioner of the ESD is governed by the Washington Administrative

⁴² *Id.*

Procedure Act (WAPA). *Tapper v. State Employment Sec. Dep't*, 122 Wash. 2d 397, 402, 858 P.2d 494, 497 (1993). The WAPA states that the court shall grant relief from an agency order in an adjudicative proceeding only if it determines that (1) the order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter; (2) The agency has erroneously interpreted or applied the law; (3) the order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or (4) the order is arbitrary or capricious. *Id.*; RCW 34.05.570(3). In reviewing administrative action, this court sits in the same position as the superior court, applying the standards of the WAPA directly to the record before the agency. *Id.*

Whether an employee's behavior constitutes “misconduct,” is a mixed question of law and fact. *Smith v. Employment Sec. Dep't*, 155 Wash. App. 24, 32–33, 226 P.3d 263, 266 (2010). When the issue involves a mixed question of law and fact, the reviewing court must: (1) apply the substantial evidence standard to establish the relevant facts; (2) make a de novo determination of the correct law; and (3) apply the law to the facts. *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 403, 858 P.2d 494 (1993). The appellate court is charged with determining whether substantial evidence supports the commissioner’s factual findings, and if so, if these facts constitute disqualifying misconduct under the Employment Security Act.

Michaelson v. Employment Sec. Dep't, 187 Wash. App. 293, 299, 349 P.3d 896, 900 (2015), *as amended* (May 26, 2015). The Superior Court reviews the Commissioner's fact findings for substantial evidence in light of the whole record. *Smith v. Emp't Sec. Dep't*, 155 Wash.App. 24, 32, 226 P.3d 263 (2010). Substantial evidence is evidence that would persuade a fair-minded person of the truth or correctness of the matter. *Smith v. Employment Sec. Dep't*, 155 Wash. App. 24, 32–33, 226 P.3d 263, 266 (2010).

C. Statement of Facts

1. Stevens Employment at White Water, Injury, and Wage History

Stevens began working at White Water on August 6, 2018 as a job foreman.⁴³ Stevens was paid hourly at a rate of \$25.00 an hour.⁴⁴ Stevens recorded the time he worked on White Water's time cards.⁴⁵ White Water's time cards required the employees to simply record the hours worked on the date worked.⁴⁶ Both Stevens and White Water understood that employees were only to record time on their time cards for hours worked.⁴⁷

Stevens was injured on the job on August 27, 2018.⁴⁸ Stevens submitted a claim with the Department of Labor and Industries in connection with his work-related injury.⁴⁹ White Water placed Stevens on

⁴³ Comm'r Rec. at p. 34, lines 14-24.

⁴⁴ Comm'r Rec. at p. 34, line 25 to p. 36, line 2.

⁴⁵ Comm'r Rec. at p. 41, lines 2 to 7, p. 52, lines 7 to 9, p. 71.

⁴⁶ Comm'r Rec. at p. 41, lines 2-6,

⁴⁷ Comm'r Rec. at p. 52, lines 7-9, p. 155-157.

⁴⁸ Comm'r Rec. at p. 36, lines 3-4.

⁴⁹ Comm'r Rec. at p. p. 35, line 23 to p. 36, line 2, p. 41, lines 18-24.

a Kept-on-Salary (“KOS”) program as a result of his injury.⁵⁰ Stevens was not required to have to keep a time sheet while on KOS⁵¹ as per statute, Stevens was paid the wages he was earning at the time of the injury (regardless of the actual hours worked and temporary disability status).⁵² Stevens received full pay due to his KOS status from the date of his injury until he was cleared by his doctor to return to work without restrictions on December 18, 2019.⁵³ When Stevens was medically cleared to return to work, his temporary disability status and thus his entitlement to KOS payments ended.⁵⁴ At the time the administrative action was pending, the Department of Labor and Industries (“DLI”) had not received any paperwork regarding a claim for disability, as opposed to the prior injury claim of which he was cleared to return to work.⁵⁵

Given that Stevens was cleared to return to work without restrictions, White water requested that Stevens provide a time card on January 7, 2019.⁵⁶ He did not submit his time card until January 9, 2019.⁵⁷ Stevens included his resume as part of the record noting his work history and educational background.⁵⁸ Stevens has an AAS Degree in Architecture Technology from Spokane Community College.⁵⁹ His resume also states

⁵⁰ See RCW 51.32.090(8); Comm’r Rec. at p. 113-114.

⁵¹ Comm’r Rec. at p. 42, lines 20-21.

⁵² RCW 51.32.090; Comm’r Rec. at p. 42, lines 20-21.

⁵³ Comm’r Rec. at p. 141; See RCW 51.32.090.

⁵⁴ Comm’r Rec. at p. 141; See RCW 51.32.090.

⁵⁵ Comm’r Rec. at p. 140, ¶4-5.

⁵⁶ Comm’r Rec. at p. 43, lines 10 to 23, p. 51, lines 16 to 18; p. 68, p. 135.

⁵⁷ *Id.*

⁵⁸ Comm’r Rec. at p. 76.

⁵⁹ *Id.*

that he maintained an average “3.5 g.p.a. Honor Roll at Spokane Community College Architecture program.”⁶⁰

White Water’s time cards are simple and easy to understand and complete.⁶¹ The time card has a column for “Hrs Worked.”⁶² Stevens admits, with respect to the time cards in questions, that “when I filled in my timecards – my sheet, I guess. They’re not really cards – I put timing there for, um hours worked.”⁶³ The record evidences that Stevens put information related to his ongoing medical and physical therapy appointments in parentheses.⁶⁴ Stevens specifically stated, I filled it [time card] out for the hours I worked, hours for PT (physical therapy time) and added notes best I could with little information on how to fill it in for holiday pay.⁶⁵ However, the record reveals that Stevens inflated his time for non-holiday days and included time for two holiday days which he did not work and which Whitewater is not open.⁶⁶

⁶⁰ Comm’r Rec. at p. 76.

⁶¹ Comm’r Rec. at p. 155-157.

⁶² *Id.*

⁶³ Comm’r Rec. at p. 52, lines 7-9 (emphasis added).

⁶⁴ Comm’r Rec. at p. 54, lines 16-19.

⁶⁵ Comm’r Rec. at p. 68, ¶3 (emphasis added); ESD’s claim in its statement of facts that “Stevens recorded the hours he recalled working, plus Kept-on-Salary hours, notated in parentheses” is not supported by the record. Stevens admits in the record that he put the hours he attended physical therapy in parentheses.

⁶⁶ Comm’r Rec. at p. 109 to 110, p. 42, lines 10 to 13, p. 44, lines 1 to 4.

2. White Water Terminated Stevens for Misconduct for Falsifying his Time Cards for Both Holiday⁶⁷ and Non-Holiday Days

Stevens last day of work was on January 9, 2019.⁶⁸ White Water terminated Stevens on January 10, 2019 for falsifying his time cards and attempting to receive pay for hours he did not work and for which he was not entitled to payment during a two-week time frame.⁶⁹ On seven (7) days during this two-week period, Stevens actual time worked was either zero or was less than the inflated and false time he recorded on his time card.⁷⁰ For example, on December 26, 2018, Mr. Stevens wrote that he worked 10 hours when in fact he only worked 4.25 hours.⁷¹ Stevens committed this fraudulent act on the following dates for a total of 35.75 hours as outlined below.⁷²

Date	Hours Mr. Stevens Claimed on his Time Card	Hours Mr. Stevens Actually Worked	Difference between time Submitted and Time Actually Worked
12/24/2018	6 (+4)	6	4
12/25/2018	10	0	10
12/26/2018	8.5 (+1.5)	4.25	5.75
12/31/2018	10	8	2
01/01/2019	10	0	10
01/02/2019	9 (+1)	8	2
01/03/2019	9 (+1)	8	2
TOTAL HOURS CLAIMED THAT STEVENS DID NOT ACTUALLY WORK			35.75⁷³

⁶⁷ The only two holiday days at issue are December 25, 2018 and January 1, 2019. See Comm'r Rec. at p. 145-p. 146 (FF Nos. 5-10), p. 148 (CL Nos. 12 and 13).

⁶⁸ Comm'r Rec. at p. 34, lines 19-22.

⁶⁹ Comm'r Rec. at p. 34, lines 19 to 22, p. 37, lines 16 to 18, p. 46, lines 6-9.

⁷⁰ Comm'r Rec. at p. 109 to 110; p. 42, lines 10 to 13, p. 44, lines 1 to 4.

⁷¹ Comm'r Rec. at p. 109 to 110.

⁷² *Id.*

⁷³ Comm'r Rec. at p. 109-110.

a. Stevens Falsified his Time Cards on Non-Holiday Days

Stevens actual time at the office was recorded by White Water's office manager, Ms. Kopet, who made notes when Stevens would arrive at work and when he would leave.⁷⁴ Not only did Stevens fail to work full shifts due to medical appointments, Stevens claimed that he was present for work when he was not and attempted to get paid for time not earned.⁷⁵ Focusing on just non-holiday days and hours claimed that are not set forth in parentheses (which Stevens claims was time he was at physical therapy), the record demonstrates that Stevens inflated his time on his time card and claimed hours he did not work.

- On December 26, 2018, Stevens claimed to work 8.5 (+1.5) hours. However, Stevens "hours worked" only amounted to 4.25 hours.
- On December 31, 2018, Stevens claimed to have worked 10 hours. However, Stevens "hours worked" only amounted to 8 hours.
- On January 2, 2019, Stevens claimed to have worked 9 (+1) hours. However, Stevens "hours worked" only amounted to 8 hours.

⁷⁴ Comm'r Rec. at p. 42, lines 10 to 1; p. 44, lines 1 to 4, p. 58-59.

⁷⁵ Comm'r Rec. at p. 42, lines 10 to 13, p. 69 to 70.

- On January 3, 2019, Stevens claimed to have worked 9 (+1) hours. However, Stevens “hours worked” only amounted to 8 hours.⁷⁶

Stevens offered no evidence (and none exists in the record) to dispute or explain this inflated time.⁷⁷

b. Stevens Falsified his Time Cards for Holiday Days

Stevens claimed that he worked 10 hours each day for the holiday days of December 25, 2018 and January 1, 2019.⁷⁸ However, Stevens did not work any hours on these days.⁷⁹ White Water has never paid anybody for these days since the company started in 1984; nor did White Water’s owner, Wayne Terry ever inform Stevens that he would pay Stevens for these days as holiday pay.⁸⁰

3. Stevens Had Ample Opportunity to Seek Clarification on His Time Cards from White Water, but Failed to do so

Stevens had ample opportunity, and in fact, three (3) days to ask White Water questions or seek clarification on how to fill out his time card, but failed to do so.⁸¹ White water requested that Stevens provide a time card on the morning of Monday, January 7, 2019.⁸² He did not submit his time card until the end of the business day on Wednesday, January 9,

⁷⁶ Comm’r Rec. at p. 109-110.

⁷⁷ Comm’r Rec. p. 1-175.

⁷⁸ Comm’r Rec. at p. 109-110.

⁷⁹ Comm’r Rec. at p. 43, lines 4-11, p. 57, lines 21-25; p. 109.

⁸⁰ Comm’r Rec. at p. 57, lines 21-25.

⁸¹ Comm’r Rec. at p. 56, lines 15 to 17 (Stevens was only 20 steps away from the office).

⁸² Comm’r Rec. at p. 43, lines 10 to 23, p. 51, lines 16 to 18, p. 68, p. 135

2019.⁸³ Stevens was only 20 steps away from Mr. Terry's office on July 7, 8 and 9, 2018.⁸⁴ Stevens admitted that he would communicate with Mr. Terry via text message.⁸⁵ Stevens also admitted that he asked Mr. Terry other questions on multiple occasions, specifically when he was going to return to non-light duty work.⁸⁶ Stevens and Mr. Terry would sit and talk for periods of time ranging from five (5) minutes to thirty (30) minutes, with the discussion covering both work and personal topics, including conversations about Stevens' own son.⁸⁷

4. The Record Reveals Several Other Instances of Dishonesty By Stevens

The record also reveals additional instances where Stevens was dishonest. In a May 30, 2019 letter, Stevens claimed to be "disabled".⁸⁸ Stevens' admission that he is not able to work due to a disability renders him ineligible for benefits. See RCW §50.20.010. It is also contrary to his sworn testimony. Just one month prior at the hearing with Administrative Law Judge Courtney Bebee, Stevens testified to the following:

- Judge Bebee: And does anything limit your ability to accept a job, such as injury, illness, or childcare?
- Stevens: No.⁸⁹

⁸³ *Id.*

⁸⁴ Comm'r Rec. at p. 56, lines 15 to 17.

⁸⁵ Comm'r Rec. at p. 67, ¶6.

⁸⁶ Comm'r Rec. at p. 67, ¶5, p. 57, lines 3 to 9.

⁸⁷ Comm'r Rec. at p. 56, line 22 to p. 57, line 25.

⁸⁸ Comm'r Rec. at p. 136.

⁸⁹ Comm'r Rec. at p. 32, lines 18 to 20

- Judge Bebee: Are you available to work any hours that would be offered to you?
- Stevens: Yes.⁹⁰

Additionally, Stevens was released by his doctor on December 18, 2018 to return to work without limitations.⁹¹

Stevens also claimed that White Water had him sit inside a cold garage on a hard, bent stool while he was on light duty following his injury.⁹² The evidence reveals that this is not true and that Stevens was not provided with a “hard bent stool.”⁹³ Stevens also reported to the IME examiner on February 12, 2019, that he has never suffered a prior injury.⁹⁴ The evidence reveals that this is also not true; Stevens reported several on the job injuries through the Department of Labor and Industries.⁹⁵

5. Following the April 30, 2019 Hearing, Stevens Claimed for the First Time to be Disabled

Stevens was released by his doctor on December 18, 2018 to return to work without limitations.⁹⁶ On April 30, 2019, Stevens testified that there

⁹⁰ Comm’r Rec. at p. 32, lines 21-23.

⁹¹ Comm’r Rec. at p. 141.

⁹² Comm’r Rec. at p. 32, lines 21-23.

⁹³ Comm’r Rec. at p. 38, line 25 to 39, line 13, and at p. 107.

⁹⁴ Comm’r Rec. at p. 154, p. 159.

⁹⁵ Comm’r Rec. at p. 160-162.

⁹⁶ Comm’r Rec. at p. 141.

was nothing that would limit his ability to accept a job, including injury, illness or childcare.⁹⁷

Pursuant to RCW 50.20.010(c), to be eligible for benefits, Stevens must have been (1) able to work; (2) actively seeking suitable work; and (3) available to immediately begin suitable work. Mr. Stevens took the position that he was able to work in order to gain the benefit of receiving unemployment benefits.⁹⁸

The ALJ ruled that Stevens had committed misconduct and not eligible for waiver of the regular overpayments.⁹⁹ The ALJ held that Stevens was liable for repayment of the regular overpayment in the amount of \$2,690.00.¹⁰⁰ In response to the order directing Stevens to repay benefits previously paid, Stevens asserts an entirely inconsistent position to gain a benefit—relief from having to repay the overpaid benefits. Stevens states,

WAIVER SHOULD BE GRANTED FOR ALL
BENEFITS RECEIVED
Repayment of benefits received would cause an
unfair hardship for me. **I am now a disabled
employee** after being injured while working with
this employer...¹⁰¹

Stevens makes this inconsistent statement just one month after providing his testimony at the hearing in front of the ALJ stating that

⁹⁷ Comm'r Rec. at p. 32, lines 18 to 20.

⁹⁸ Comm'r Rec. at p. 32, lines 18 to 20.

⁹⁹ Comm'r Rec. at p. 127-128.

¹⁰⁰ Comm'r Rec. at p. 128, p. 63.

¹⁰¹ Comm'r Rec. at p. 136 (emphasis added).

nothing, including illness, injury or childcare, limited his ability to accept work. (emphasis added).¹⁰²

6. Stevens Was Awarded Disability Benefits on November 7, 2019, Well After the Pendency of This Matter at the Administrative Level

Stevens was awarded disability benefits for permanent partial disability in the amount of \$35,754.42 on November 7, 2019.¹⁰³ During the pendency of this matter at the administrative level, Stevens had a claim as an injured employee, but there had never been a claim for disability.¹⁰⁴ As of the date of White Water’s reply being submitted, White Water understood from DLI that DLI had not received any paperwork or claim of disability.¹⁰⁵ Stevens had been cleared to return to work without restrictions due to his injury on December 18, 2018.¹⁰⁶ White Water stated in its reply to Stevens appeal:

I talked with Labor & Industries and it has never been established that he [Stevens] is “disabled” from working with White Water Construction, Inc. As of June 11th, 2019, no paperwork has been received from L & I to substantiate any claim of “disability”. They do show that he was **injured – not disabled**. Again, he was released on December 18, 2018 to be able to work without restrictions. I am attaching a copy of the doctor’s release dated December 18, 2018.¹⁰⁷

¹⁰² Comm’r Rec. at p. 136 (emphasis added).

¹⁰³ CP, 48-50.

¹⁰⁴ Comm’r Rec. at p. 140, ¶ 4-5.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ Comm’r Rec. at p. 140.

V. ARGUMENT

A. The Law on Disqualifying Misconduct

A claimant may not receive unemployment benefits if he was terminated from his job due to misconduct, furthering the legislative intent to preserve state resources for workers who are unemployed through no fault of their own. RCW 50.01.010, 50.20.066. As RCW 50.20.066 (1) provides:

With respect to claims that have an effective date on or after January 4, 2004:

An individual shall be disqualified from benefits beginning with the first day of the calendar week in which he or she has been discharged or suspended for misconduct connected with his or her work and thereafter for ten calendar weeks and until he or she has obtained bona fide work in employment covered by this title and earned wages in that employment equal to ten times his or her weekly benefit amount. Alcoholism shall not constitute a defense to disqualification from benefits due to misconduct.

In 2003, the Legislature chose to define the term “misconduct” more specifically. RCW 50.04.294 states:

(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.

Thus, “willful”¹⁰⁸ behavior is not the only thing that will constitute misconduct under the amended statute. “Wanton,¹⁰⁹” “careless,” and “negligent” action constitute misconduct under the law. “‘Carelessness’ and ‘negligence’ mean failure to exercise the care that a reasonably prudent person usually exercises.” WAC 192-150-205 (3).

Additionally, RCW 50.04.294(2) sets forth specific acts “that are considered misconduct because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer...These acts include, but are not limited to:

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

¹⁰⁸ “Willful“ means intentional behavior done deliberately or knowingly, where you are aware that you are violating or disregarding the rights of your employer or a co-worker. Wash. Admin. Code 192-150-205.

¹⁰⁹ “Wanton“ means malicious behavior showing extreme indifference to a risk, injury, or harm to another that is known or should have been known to you. It includes a failure to act when there is a duty to do so, knowing that injury could result.

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

(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;

(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.

The burden of establishing misconduct is met when misconduct is established by a preponderance of the evidence. *In re: ROBERT V. DOW*, 2010 WL 6795714, at *2. “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. White Water met its burden by demonstrating that Stevens committed misconduct based upon the preponderance of the evidence and the Superior Court correctly agreed.

B. White Water is Entitled to Relief Because the Order is Not Supported by Substantial Evidence

A court shall grant relief from an agency order in an adjudicative proceeding if it determines that “[t]he order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any

additional evidence received by the court under this chapter.” RCW 34.05.570(3)(e).

1. The Order is Not Supported by Substantial Evidence as it Relates to the Issue of Job Separation and Whether Stevens Committed Misconduct— The Commissioner’s Order That Stevens Was Somehow Confused as to the Holiday Pay Policy at White Water is Not Supported by Substantial Evidence

Taken as a whole, the record does not support the Agency’s finding that Stevens did not commit misconduct. The Review Judge adopted the ALJ’s Conclusion of Law No. 10, which stated in full:

The parties’ testimony conflicted on material points. In resolving these conflicts, the demeanor and motivation of the witness was considered, as well as the logical persuasiveness of the parties’ evidence, including testimony. The undersigned finds the Employer’s testimony more logically persuasive. In entering this finding, the tribunal need not be persuaded beyond a reasonable doubt as to the true state of affairs, nor must the evidence be deemed clear, cogent, and convincing. It is only necessary to determine what likely happened. *In re Murphy Empl. Sec. Comm’r Dec. 2d 750 (1984).*¹¹⁰ (emphasis added).

The Review Judge stated that the ALJ’s credibility finding would not be disturbed. However, the Review Judge went on to state that “the credibility finding does not preclude a conclusion that the claimant

¹¹⁰ Comm’r Rec. at p. 147, p. 127.

misunderstood the employer's holiday pay policy.” This latter conclusion is not supported by substantial evidence in the record and is directly contrary to the ALJ's credibility determination. Stevens stated that “Mr. Terry had stated that I would be paid for New Year's Day and Christmas Day.”¹¹¹ Mr. Terry denied that he ever made this statement to Stevens and in fact, had never paid any employee for New Year's Day or Christmas Day since the company started in 1984.¹¹² It is unfathomable why Mr. Terry after thirty years would tell a relatively new employee he would pay him for Christmas and New Year's days. The ALJ determined that Mr. Terry's testimony regarding holiday pay was more persuasive—a finding that was not disturbed by the Review Judge.

Aside from Stevens' unsupported assertion (that Mr. Terry told Stevens he would pay Stevens for New Year's Day and Christmas day) that was refuted by Mr. Terry, there is no evidence in the record that Stevens was confused somehow as to whether he would receive holiday pay. In addition, Stevens had three (3) days from when he was requested to provide a time card until he turned in his time card to request clarification; there was ample opportunity for Stevens to ask questions or clarify whether or not he was to be paid for these two holidays either in person or via text message as he had done in the past with respect to other issues.¹¹³ *See Smith v. Employment Sec. Dep't*, 155 Wash. App. 24, 226 P.3d 263 (2010) (Even if

¹¹¹Comm'r Rec. at p. 135, p. 51, lines 19 to 21.

¹¹² Comm'r Rec. at p. 57, lines 21-25.

¹¹³ Comm'r Rec. at p. 67, ¶6.

claimant was unaware of county policy against recording conversations with co-workers or others without their consent, claimant still engaged in misconduct by doing so, and thus, was ineligible for unemployment compensation, where recording of conversations without consent represented carelessness or negligence).

The Review Judge also erred with respect to Conclusions of Law Nos. 12 and 13. The Review Judge's determination that "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[]" is in error and fails to take into account the entire record. Stevens falsified his time card on seven (7) separate days, only two of which were holidays Christmas Day and New Year's Day. Even if it was shown that Stevens was somehow confused as to whether he would be paid for Christmas Day and New Year's Day, Stevens sought payment for additional hours he did not work and for which he was not entitled to payment on additional non-holiday days.

2. The Commissioner’s Order is Not Supported by Substantial Evidence as it Relates to the Issue of Job Separation and Whether Stevens Committed Misconduct—Stevens Committed Disqualifying Misconduct by Falsifying Non-Holiday Time for “Hours Worked”

White Water’s time cards are simple and easy to understand and complete.¹¹⁴ The time card has a column for “Hrs Worked.”¹¹⁵ Stevens admits that “when I filled in my timecards – my sheet, I guess. They’re not really cards – I put timing there for, um hours worked.” (emphasis added).¹¹⁶ The record is clear that both Stevens and White Water understood that employees were only to record time on their time cards for hours worked. (emphasis added).¹¹⁷ There is nothing in the record to support the conclusion that Stevens was somehow confused about how to fill out his time card. Moreover, Stevens again also had ample opportunity to seek clarification on his time card or ask any questions he may have had either in person or via text, as he had with other issues.¹¹⁸

The record clearly evidences that Stevens falsified his timecards and committed disqualifying misconduct for non-holiday hours.

- On December 26, 2018, Stevens claimed to work 8.5 (+1.5) hours. However, Stevens “hours worked” only amounted to 4.25 hours.

¹¹⁴ Comm’r Rec. at p. 155-157.

¹¹⁵ Comm’r Rec. at p. 155-157.

¹¹⁶ Comm’r Rec. at p. 52, lines 7-9 (emphasis added).

¹¹⁷ Comm’r Rec. at p. 52, lines 7-9, 155-157.

¹¹⁸ Comm’r Rec. at p. 67, ¶6.

- On December 31, 2018, Stevens claimed to have worked 10 hours. However, Stevens “hours worked” only amounted to 8 hours.
- On January 2, 2019, Stevens claimed to have worked 9 (+1) hours. However, Stevens “hours worked” only amounted to 8 hours.
- On January 3, 2019, Stevens claimed to have worked 9 (+1) hours. However, Stevens “hours worked” only amounted to 8 hours.¹¹⁹

Stevens offered no evidence (and none exists in the record) to dispute or explain this inflated time. There is no evidence in the record to support a conclusion that this is a good faith error in judgment. ESD’s argument that Stevens was somehow confused is belied by the record. Stevens understood that he was to record “hours worked” on his time card. Stevens act in reporting more hours than he actually worked on his time cards constitutes misconduct per se. *See Daniels v. State, Dep’t of Employment Sec.*, 168 Wash. App. 721, 281 P.3d 310 (2012) (“[c]ertain types of conduct are misconduct per se.” These acts include “[d]ishonesty related to employment, including but not limited to deliberate falsification of company records, theft, deliberate deception, or lying.”); See RCW 50.04.294(2)(c); *See also* WAC 192-150-210(2) (“Dishonesty related to employment” means the intent to deceive the employer on a material fact.

¹¹⁹ Comm’r Rec. at p. 109-110.

It includes, but is not limited to, making a false statement on an employment application and falsifying the employer's records.).

ESD argues that Stevens was confused as to how to fill out his time card given that he was on KOS status previously and given his ongoing medical and therapy appointments and that this confusion was somehow understandable.¹²⁰ However, this ignores significant facts in the record. The record demonstrates that Stevens testified that he put information related to his ongoing medical and physical therapy appointments in parentheses.¹²¹ Stevens specifically stated, I filled it [time card] out for the hours I worked, hours for PT (physical therapy time) and added notes best I could with little information on how to fill it in for holiday pay.”¹²² However, when looking at the time cards, Stevens cannot and does not explain why his time for “hours [] worked”¹²³ is false. There is nothing in the record that would support a conclusion that Stevens inflation of his time for “hours worked” on non-holidays days (as noted above) was anything other than willful and dishonest.

ESD’s KOS confusion argument is simply a red herring. What Stevens was asked to do was fill out a time card for the hours he worked. Whether he is on KOS status or not, he was asked to record the time he actually worked. Stevens recording that he worked 8.5 hours when he only worked 4.25 is a lie.¹²⁴ If Stevens was on KOS status he would have

¹²⁰ Response Brief at p. 7, lines 9-12.

¹²¹ Comm’r Rec. at p. 54, lines 16-19.

¹²² Comm’r Rec. at p. 68, ¶3 (emphasis added).

¹²³ Comm’r Rec. at p. 68, ¶3.

¹²⁴ Comm’r Rec. at p. 109-110.

received full pay regardless of the number of hours he worked.¹²⁵ It is not logical for him to artificially inflate his time as he did. Stevens artificially inflated his time in order to receive a larger paycheck—which constitutes theft, is illegal and is misconduct per se pursuant to RCW 50.04.294(2)(c). Stevens actual time at the office was recorded by White Water’s office manager, Ms. Kopet, who made notes when Stevens would arrive at work and when he would leave.¹²⁶ The record is devoid of any evidence to refute Ms. Kopet’s record-keeping as to Stevens actual hours worked. Stevens’ inflated time is not the result of a good faith mistake in judgment, but rather a willful and intentional attempt to be paid for hours he did not work in order to receive a larger paycheck than what he earned based on the hours he actually worked.

RCW 50.04.294(2) provides that dishonesty related to employment, including deliberate falsification of company records, theft, deliberate deception or lying are considered misconduct. *See also Pacquing v. Employment Sec. Dep't of State*, 41 Wash. App. 866, 707 P.2d 150 (1985) (Intentionally dishonest act of forging return-to-work slips in doctor's name, in violation of employer's reasonable rule or order, committed for purpose of affecting employee's work situation, was work-connected misconduct per se, and thus, employee was not entitled to recover unemployment compensation benefits); *Griffith v. State Dep't of Employment Sec.*, 163 Wash. App. 1, 11, 259 P.3d 1111, 1115 (2011) (Holding that claimant acted

¹²⁵ Stevens understood the KOS program. See Comm’r Rec. at p. 67, ¶3, p. 68, ¶2.

¹²⁶ Comm’r Rec. at p. 42, lines 10 to 13, p. 44, lines 1 to 4.

intentionally, if also mistakenly, and harmed his employer; claimant thus committed misconduct); *Daniels v. State, Dep't of Employment Sec.*, 168 Wash. App. 721, 281 P.3d 310 (2012) (holding that evidence supported conclusion of Commissioner for the State Department of Employment that unemployment compensation claimant committed willful misconduct by violating employer's policy regarding uniforms at the worksite, such that he was ineligible to receive benefits).

As noted by the court in *Daniels v. State, Dep't of Employment Sec.*, 168 Wash. App. 721, 281 P.3d 310 (2012), “[c]ertain types of conduct are misconduct per se.” These acts include “[d]ishonesty related to employment, including but not limited to deliberate falsification of company records, theft, deliberate deception, or lying.” RCW 50.04.294. Stevens’ actions in falsifying his time card on seven (7) separate days is misconduct per se. There is nothing in the record that supports the conclusion that his acts of inflating his time to include hours he did not work on December 24, 26 and 31, 2018 and January 2 and 3, 2019 constituted a good faith error in judgment as argued by ESD. Claiming 10 hours when he only worked 8 or 4.25 is misconduct per se and as such, Stevens is not entitled to benefits. In *Tapper v. State Employment Sec. Dep't*, 122 Wash. 2d 397, 411, 858 P.2d 494, 503 (1993), the court held that claimant acted willfully when she affirmatively “ignored” directions to follow company procedure to record her tardiness on her time card. Claimant arrived 15 minutes late to work on a single day and was ordered to record the tardiness on her time card as “leave without pay”, but claimant recorded a full eight

(8) hours on her time card. *Id.* at 407. Similarly, in this matter, Stevens actions in recording time that he did not work was willful and renders him ineligible for benefits. It was not only known to Stevens that he was only to record hours worked, but a reasonable person would understand that he or she should not artificially inflate time to include hours not worked as this would constitute theft.

The Commissioner's Order is limited to Stevens' reporting of holiday hours and failed to consider the entire record, which evidences that Stevens also falsified non-holiday time as discussed above. The Order does not address Stevens reporting of non-holiday pay.¹²⁷ A court shall grant relief from an agency order if it determines the order is not supported by evidence that is substantial when viewed in light of the whole record. RCW 34.05.570(3)(e) (emphasis added). There is no evidence in the record to rebut, explain or refute the evidence demonstrating that Stevens falsified his time cards with respect to the non-holiday hours. The record when considered as a whole does not support the Commissioner's decision that Stevens did not commit disqualifying misconduct and the Commissioner's failure to address the non-holiday pay issue renders the Commissioner's Order arbitrary and capricious.

¹²⁷ Comm'r Rec. at p. 145-146 (FF Nos. 5-10), p. 148 (CL Nos. 12 and 13).

3. The Order is Not Supported by Substantial Evidence as it Relates to the Issue of Job Separation--Stevens' Inconsistent Claim that he is Disabled and Unable to Work Renders Him Ineligible for Benefits

The record does not support the finding that Stevens is eligible for benefits pursuant to RCW 5.20.010(1)(c). This Statute states that an unemployed person seeking unemployment benefits must be: (1) able to work; (2) actively seeking suitable work; and (3) available to immediately begin suitable work. Although White Water takes no position on whether Stevens is in fact disabled in this brief, Stevens claimed to be disabled in a May 30, 2019 letter appealing the ALJ's Decision.¹²⁸ By his own admission, and under the plain language of the statute, he is not eligible under RCW 5.20.010(1)(c).

On April 30, 2019, Stevens testified to the following:

- Judge Bebee: And does anything limit your ability to accept a job, such as injury, illness, or childcare?
- Stevens: No.¹²⁹
- Judge Bebee: Are you available to work any hours that would be offered to you?
- Stevens: Yes.¹³⁰

Mr. Stevens took the position that he was able to work in order to gain the benefit of receiving unemployment benefits.¹³¹ The ALJ ruled that

¹²⁸ Comm'r Rec. at p. 136.

¹²⁹ Comm'r Rec. at p. 32, lines 18 to 20

¹³⁰ Comm'r Rec. at p. 32, lines 21-23.

¹³¹ *Id.*

Stevens had committed misconduct and not eligible for waiver of the regular overpayments.¹³² In response to the order directing Stevens to repay benefits previously paid, Stevens asserts an entirely inconsistent position to gain a benefit—relief from having to repay the overpaid benefits. Stevens states,

WAIVER SHOULD BE GRANTED FOR ALL
BENEFITS RECEIVED
Repayment of benefits received would cause an
unfair hardship for me. **I am now a disabled
employee** after being injured while working with
this employer...¹³³

Stevens takes two inconsistent positions in order to receive a benefit each time. It is undisputed that Stevens claimed to be disabled just one month after the hearing.¹³⁴ ESD admits that “Mr. Stevens’ disability claim only related to his request for an overpayment waiver.”¹³⁵ 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. *Robbins v. Dep’t of Labor & Indus.*, 187 Wash. App. 238, 255, 349 P.3d 59, 67 (2015).

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

¹³² Comm’r Rec. at p. 127-128.

¹³³ Comm’r Rec. at p. 136 (emphasis added).

¹³⁴ CP at p. 16, lines 23-24.

¹³⁵ *Id.*

would create the perception that either the first or the 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....As the doctrine is primarily a means of shielding the judicial system, a court may invoke the doctrine at its discretion, without being subject to the same strictures imposed on equitable defenses that were implemented primarily with litigants in mind.

Id. (internal citations omitted). In *Robbins*, the court held that the workers' compensation claimant was judicially estopped from asserting that his initial application to reopen claim form was deficient because the second page was not signed by any physician where both the Department of Labor and Industries and claimant had considered the initial application to reopen operative, and as a result, claimant had been awarded permanent partial disability based on the aggravation of his work injury. *Id.* Similarly, in this matter, Stevens should be judicially estopped from claiming he is able to work and eligible for benefits when he has taken the inconsistent position that he is disabled (in order to receive a separate benefit—an overpayment waiver).

4. Stevens is Ineligible for Waiver of the Overpayment Because Stevens Committed Misconduct

Because Stevens committed misconduct, Conclusion of Law 14 and 15 are also in error. Stevens was discharged for misconduct and is not

eligible for waiver of the regular overpayment. Stevens is not eligible for waiver of the regular overpayment pursuant to RCW 50.20.066(5).

C. White Water is Entitled to Relief Because the Agency Erroneously Applied the Law

A court shall grant relief from an agency order in an adjudicative proceeding if it determines that “[t]he agency has erroneously interpreted or applied the law.” RCW 34.05.570(3)(d). The evidence demonstrates that Mr. Stevens engaged in misconduct by falsifying his time cards in violation of company policy and the law on seven (7) separate occasions in a brief two-week period. “Wanton,” “careless,” and “negligent” action constitute misconduct under the law. RCW 50.04.294. Mr. Stevens’ falsification of his time cards constitutes misconduct. *See* RCW 50.04.294(1)(a)-(c), as well as 50.04.294(2)(a), (c), (e) and (f); WAC 192-150-210.¹³⁶ The Department erred in permitting benefits given this misconduct.

D. White Water is Entitled to Relief Because the Order is Contrary to Agency Rule

A court shall grant relief from an agency order in an adjudicative proceeding if it determines that “[t]he order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and

¹³⁶ WAC 192-150-210(2) states: “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.”

reasons to demonstrate a rational basis for inconsistency.” RCW 34.05.570(3)(h).

1. The Commissioner’s Order is Contrary to Agency Rule as Stevens Committed Misconduct

Agency rules state that a claimant for unemployment benefits is disqualified from benefits if he commits misconduct. RCW 50.20.066; RCW 50.04.294. Mr. Stevens falsified his time cards for seven (7) separate days over a brief two-week period. Because the evidence demonstrates that Mr. Stevens committed misconduct, the Department’s decision is in error.

2. The Commissioner’s Order is Contrary to Agency Rules as Stevens Admitted he is Disabled

As stated above, Stevens admitted that he was disabled in order to be relieved of the regular overpayment in the amount of \$2,690.00.¹³⁷ Stevens admission renders him ineligible for benefits pursuant to RCW 50.20.010(c) (claimant must be able to work) and is thus, contrary to agency rule. It was not until after the initial hearing that Stevens claimed to be disabled. (emphasis added)¹³⁸ Stevens admission is set forth in the administrative record and is eligibility to receive benefits pursuant to RCW 50.20.010(c) was at issue at the administrative level. RCW 34.05.558. In addition, equity mandates that Stevens should be judicially estopped from claiming he is able to work and eligible for benefits when he has taken the inconsistent position that he is disabled (in order to receive a separate

¹³⁷ Comm’r Rec. at p. 63, p. 66, p. 128, p. 136..

¹³⁸ Comm’r Rec. at p. 136.

benefit—an overpayment waiver). *Robbins v. Dep't of Labor & Indus.*, 187 Wash. App. 238, 255, 349 P.3d 59, 67 (2015).

3. The Commissioner's Order is Contrary to Agency Rule as Stevens Cannot Receive Concurrent Benefits for Unemployment and Disability

Stevens has been awarded benefits from DLI for Partial Permanent Disability.¹³⁹ White Water requested that the Court consider Stevens award of DLI benefits that he received after the April 30, 2018 administrative hearing related to Stevens claim for unemployment compensation pursuant to RCW 34.05.554 and RCW 34.05.562. RCW 34.05.554(d) allows issues not raised before the agency to be raised on appeal when the interests of justice would be served by resolution of an issue arising from agency action occurring after the person exhausted the last feasible opportunity for seeking relief from the agency. RCW 34.05.562(1)(c) allows a court to receive evidence in addition to that contained in the agency record for judicial review if it relates to the agency action at the time it was taken and is needed to decide disputed issues regarding material facts in rule making, brief adjudications, or other proceedings not required to be determined on the agency record. RCW 34.05.562(2)(b) provides that the court may remand a matter to the agency with directions that the agency conduct fact-finding if 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

¹³⁹ CP at p. 42-50.

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.

Generally, judicial review of an agency action is confined to the agency record. RCW 34.05.558. However, the court may receive evidence which was not contained in the agency record only if it relates to the validity of the agency action at the time and is necessary in deciding issues regarding (1) the possibility of disqualifying those who took the agency action; (2) unlawfulness of the procedure; or (3) material facts in rule making, brief adjudication, or other proceedings not required to be decided on the agency record. RCW 34.05.562(1).

“The admission or refusal of evidence is largely within the discretion of the trial court and will not be reversed on appeal absent a showing of a manifest abuse of discretion.” *Okamoto v. State of Washington Employment Sec. Dep't*, 107 Wash. App. 490, 494–95, 27 P.3d 1203, 1205 (2001). The DLI decision is relevant and admissible as it relates to the possibility of disqualifying Stevens. The law does not permit a person to receive both unemployment benefits and workers' compensation benefits for the same period. RCW 50.20.085. RCW 50.20.085 states that “[a]n 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.”¹⁴⁰ ESD conceded in its briefing that

¹⁴⁰ RCW 51.32.090 provides for compensation to an injured worker for temporary total disability. RCW 51.32.060 provides for compensation to an injured worker for permanent total disability.

“Mr. Stevens cannot collect worker’s compensation.... (page 17, footnote 14).

RCW 34.05.554(1)(a) gives this Court the authority to consider issues not raised before the agency where “[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 34.05.562.¹⁴¹ The DLI Order awarding Stevens an award for permanent partial disability is dated November 7, 2019, well after the administrative hearing.¹⁴² Moreover, during the pendency of this matter at the administrative level, Stevens had a claim as an injured employee, but there had never been a claim for disability.¹⁴³ As of the date of White Water’s reply being submitted, White Water understood from DLI that they had not received any paperwork or claim of disability.¹⁴⁴ Stevens had been cleared to return to work without restrictions due to his injury on December 18, 2018.¹⁴⁵ White Water stated in its reply to Stevens appeal:

I talked with Labor & Industries and it has never been established that he [Stevens] is “disabled” from working with White Water Construction, Inc. As of June 11th, 2019, no paperwork has been received from L & I to substantiate any claim of “disability”. They do show that he was **injured – not disabled**. Again, he was released on December 18, 2018 to be able to work without restrictions.

¹⁴¹ See also RCW 34.05.562.

¹⁴² CP, 48-50.

¹⁴³ Comm’r Rec. at p. 140, ¶ 4-5.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

I am attaching a copy of the doctor's release dated December 18, 2018.¹⁴⁶

The new evidence (November 7, 2019 DLI Order) is relevant to the issues in this matter as it affects Stevens eligibility for unemployment benefits. A person is disqualified from receiving unemployment compensation if he or she is receiving or will receive industrial insurance disability benefits. RCW 50.20.085. RCW 50.20.085 states that “[a]n 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.”¹⁴⁷ See *Delagrave v. Employment Sec. Dep't of State of Wash.*, 127 Wash. App. 596, 604, 111 P.3d 879, 883 (2005) (Generally, when one is overpaid as a result of overlapping ESD and L & I payments he or she must repay the amount overpaid to ESD. RCW 50.20.190(1)). Stevens should not be permitted to double recovery of benefits, only to force ESD to attempt to seek to recover any overpayments.

E. White Water is Entitled to Relief Because the Order is Arbitrary and Capricious

A court shall grant relief from an agency order in an adjudicative proceeding if it determines that “[t]he order is arbitrary or capricious.” RCW 34.05.570(3)(i). An administrative agency's decision is arbitrary and capricious, such that a court may grant relief from the decision, if it is willful

¹⁴⁶ Comm'r Rec. at p. 140.

¹⁴⁷ RCW 51.32.090 provides for compensation to an injured worker for temporary total disability. RCW 51.32.060 provides for compensation to an injured worker for permanent total disability.

and unreasoning and disregards or does not consider the facts and circumstances underlying the decision. *Stewart v. State, Dept. of Social & Health Services* (2011) 162 Wash.App. 266, 252 P.3d 920, review denied 172 Wash.2d 1021, 268 P.3d 224. The conclusion that Stevens did not commit misconduct focused solely on the issue of holiday pay and failed to give due consideration (if any at all) to the fact that Stevens inflated and falsified his time on non-holiday days. *See Lenca v. Employment Sec. Dep't of State*, 148 Wash. App. 565, 575, 200 P.3d 281, 285 (2009) (“An agency acts in an arbitrary and capricious manner if its actions are willful, unreasoning and in disregard of facts and circumstances.”)¹⁴⁸.

F. White Water Requests and Award of Attorney Fees

White Water requests an award of reasonable attorney fees in compliance with RAP 18.1(d) and pursuant to RCW 4.84.350. RCW 4.84.350 states that, “...a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.” The government has the burden of showing that attorney fees for the prevailing party in a judicial review of an agency action

¹⁴⁸ See Comm’r Rec. at p. 146-147 (FF 5-10) (Commissioner only notes holiday days (December 24 and 25 and December 31 and January 1; Commissioner does not address December 26 or January 2 or 3 in the Order at any time. The Order ignores the non-holiday pay issue.

should be denied. *Union Elevator & Warehouse Co. v. State ex rel. Dep't of Transp.*, 144 Wash. App. 593, 608, 183 P.3d 1097, 1105 (2008). Substantial justification requires the agency to show that its position is reasonable both in law and fact. *Id.*

VI. CONCLUSION

White Water Requests that the Court Set Aside the Commissioner's Order and requests the following relief:

1. For a determination that Stevens is ineligible for benefits pursuant to RCW 5.20.010(c) and/or RCW 50.20.085;
2. Reversing the Decision of the Commissioner contained in ESD Review No. 2019-1976 (Docket No.066075) on the issue of job separation;
3. Denying unemployment insurance benefits to claimant for misconduct according to RCW 50.04.294 and disqualification under RCW 50.20.066(1); and
4. The provisions of RCW 50.20.190, WAC 192-220-010, WAC 192-220-020, and WAC 192-220-030 apply; and
5. Stevens is not eligible for waiver of the regular overpayment pursuant to RCW 50.20.066(5);
6. An award of reasonable attorney fees;
7. Awarding any further relief this court deems just and proper.

DATED this 20th day of July 2020.

s/Alicia L. Dragoo

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CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing Respondent's Answering Brief to be filed with the Clerk of the Court, which will send notice of the filing to the following:

Brandon.stallings@atg.wa.gov

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

DATED this 20th day of July 2020.

s/Alicia L. Dragoo

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July 20, 2020 - 4:27 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 37414-9
Appellate Court Case Title: White Water Construction, Inc. v. Washington State Department of Employment Security
Superior Court Case Number: 19-2-03436-4

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