

ORIGINAL

No. 73619-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JUSTIN M. ROBINSON,

Appellant,

vs.

EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

REPLY BRIEF OF APPELLANT

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I. SUMMARY OF RESPONSE

The interested employer, Target, failed to present non-hearsay evidence that Robinson actually resigned. Robinson submitted a notice of resignation, rather than quit immediately. He wrote in a text: “Hey, Julia, it’s Justin. I’m really sorry. And I have been thinking about the past few days, *I’m going to have to put in my two weeks* and step away from Target.” CR 22: 8-11; CR 18:3-6; CR 78-79. The “circumstantial” evidence presented by the Employer at the hearing is insufficient to support a finding that Robinson resigned “effective immediately.” The Superior Court correctly found that there was not substantial evidence in the record to support the Commissioner’s Decision, but instead of reversing the decision, remanded the matter for the taking of additional evidence, in violation of the APA, RCW 34.05.562.

While before the Superior Court, the Department never argued that the matter should be remanded back to the Office of Administrative hearings; nevertheless, the Department now argues in the alternative that “the agency failed to prepare or preserve an adequate record.” Brief at 20. However, the Employment Security Department was not a party to the hearing, was not present at the administrative hearing, and had no obligation to prepare a record. It had no duty to call witnesses--for either the claimant or the employer. The Department does not contend that there

was a technical problem or that the Administrative Law Judge improperly excluded evidence. Each party to the hearing had a full and fair opportunity to present evidence and to create a full record. There is simply no basis to reopen the record pursuant to RCW 34.05.562, making a remand improper.

Finally, attorney's fees should be awarded in the event the Court affirms the Superior Court's decision to remand. No Washington court has interpreted RCW 50.32.160 with regard to the jurisdictional requirement of RCW 50.32.150. The APA cannot "fill in the gaps" of the Employment Security Department's jurisdictional statement contained in RCW 50.32.150. To do so would require an absurd result: it would require the court to conclude that prior to the enactment of the first APA in 1959, courts did not have jurisdictional authority to remand cases back to the Employment Security Department. In fact, RCW 50.32.150 does not have any gaps: the definition of a "modification" includes the power to remand.

II. ARGUMENT IN REPLY

A. The Superior Court Correctly Determined That There Was Not Substantial Evidence to Support the Finding That Robinson Resigned Effective Immediately.

At the hearing, the employer offered evidence which can be placed into two categories: hearsay evidence and circumstantial evidence. The

Department argues that it was not improper for the Commissioner to rely on hearsay evidence, but that even if the hearsay evidence was not considered, the remaining circumstantial evidence would still be “substantial evidence.” Respondent’s Brief at 16-19. However, the Superior Court correctly determined that this evidence did not support the findings of fact adopted by the Commissioner.

1. *Only inadmissible and unreliable hearsay supports Target’s claim that Robinson resigned “effective immediately,” making Finding of Fact 9 invalid.*

The evidence presented at the hearing by Target that Robinson resigned “effective immediately” consisted of hearsay evidence. The remaining “circumstantial” evidence is not substantial. The Washington Administrative Procedure Act (“APA”) provides in RCW 34.05.452 that hearsay evidence is admissible if it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs. However, a finding of fact in an administrative adjudicative proceeding is invalid if it is based exclusively on evidence that would be inadmissible in a civil trial in Washington state court (e.g., inadmissible hearsay evidence), unless the administrative law judge (1) correctly determines that making the finding would not unduly abridge a party's opportunity to confront witnesses and rebut evidence, and (2) states the basis for that determination in the Initial Order. *In re Andrus*, Empl. Sec.

Comm'r Dec.2nd 960 (2010); RCW 34.05.461(4). Because the ALJ in the present case never made a determination that the finding of fact that Robinson resigned "effective immediately" did not unduly abridge Robinson's opportunity to confront witnesses, this finding is invalid and not supported by substantial evidence.

The only evidence Target provided to contradict Robinson's testimony about his conversation with Emily Hughes was testimony from Ms. Kroshus. However, Ms. Kroshus' testimony was based solely on inadmissible hearsay and speculation; it cannot serve as the basis for a finding of fact. In fact, Ms. Kroshus lacked any personal knowledge of the conversations between Robinson and Ms. Hughes, nor of the facts surrounding Robinson's employment. The Washington Rules of Evidence ("ER") 602 sets forth "one of the most fundamental rules regarding testimonial evidence, namely, that '[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.'" *In re Andrus*, Empl. Sec. Comm'r Dec.2nd 960 (2010). See also, *Yurkovich v. Rose*, 68 Wn. App. 643, 651, 847 P.2d 925 (1993), where the Court prohibited a witness from testifying as to what happened at a meeting because the witness had not been present at the meeting. "Evidence cannot be presented that an event

occurred in the absence of a witness with personal knowledge or other assurances of reliability approved by the Rules of Evidence.” *Id.*

None of Ms. Kroshus’ testimony concerning claimant’s separation of employment with Target was based on personal knowledge. She did not observe the conversation in question, but relied on emails written by Emily Hughes—which themselves were not made exhibits. CR 24:15-20; CR 25:11-16; CR 26:9-21; CR 25:11-16; CR 26:22-27:5. The information from Ms. Hughes emails is hearsay—“a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). Finding of Fact 9 is exclusively based on hearsay evidence that would be inadmissible in Washington State courts, and is therefore invalid.¹

2. *The remaining admissible evidence demonstrates that Robinson was taken off the schedule after he provided his notice of resignation and effectively terminated.*

None of the other evidence cited by the Department refutes Robinson’s testimony that he did not resign “effective immediately.” Kroshus’ testimony about standard business practices does not refute

¹ In fact, Ms. Kroshus’ testimony is *hearsay within hearsay*, as the emails alone are hearsay when offered for the truth of the matter asserted (that the statements in the emails are true as to what happened), yet Ms. Kroshus is also testifying as to what the emails say, and she is offering that testimony for the truth of the matter asserted (that being, that the emails say what she says they say).

Robinson's testimony, and the document to which Kroshus was referring was also not made part of the record, and thus would also be hearsay. Note that Robinson gave notice of resignation because of "ongoing issues" with his team leader," (CR 65) making it reasonable for Human Resources to conclude that it was better to simply to cut ties with Robinson at the time he gave notice. Because one can draw reasonable inferences either way, this evidence does not refute Robinson's uncontradicted testimony.

After setting aside the testimony of Ms. Kroshus, the remaining evidence supports Robinson's position that he was terminated after providing notice of resignation on May 17, 2014 by texting his supervisor to put in his "two weeks and step away from Target." *Id.* At the hearing, Robinson stressed that he was putting in his two-weeks' notice. CR 37:19-25; CR 38:17-23. Robinson never said that he was resigning effective immediately. *Id.* To the contrary, Robinson twice attempted to call human resources to ask why he was not on the schedule, but was never provided an explanation. CR 20; FF 4.

The Department contends that the employer's witness, John Randall, "refuted" this testimony because Randall "never saw or spoke with Robinson on the day he claimed he came to work" and that Robinson never called him that day. Brief of Respondent at 4. But Randall testified that if Robinson tried to clock in and could not, he would have talked to

the leader on duty. CR 31:11. This is entirely consistent with Robinson's testimony that he spoke with the leader on duty. CR 32:1. Robinson never claimed that he saw Randall or even went to the area of the store where Randall worked. Robinson's conversation with the leader on duty occurred in a different area than where Randall worked, and Randall confirmed that Robinson could have spoken with the leader on duty. 30:23-31:11. Thus, Randall's testimony does not contradict Robinson's testimony that he did speak with the leader on duty. No adverse inference can be taken from this testimony.

The Department also argues that the "separation date" document is evidence that Robinson resigned "effective immediately." Brief of Respondent at 3. Again, this testimony is hearsay because the document itself was not made part of the record. Moreover, it was Ms. Hughes, not Ms. Kroshus, who input the date into the system, so only Hughes could testify why that date was input in the system. One may reasonably infer that Hughes decided not to keep Robinson on the schedule due to his conflict with his manager.

Even if the "eligible for rehire" evidence was not hearsay, there still is not substantial evidence to draw the inference that Robinson resigned "effective immediately." Robinson's discussion with Emily Hughes indicated that Ms. Hughes was willing to place Robinson at

different store when an opportunity arose in the future. This would explain why Hughes would want to remove Robinson from his continued exposure to the current manager, John Randall, (with whom he had a personality conflict), while still considering him eligible for rehire. The employer's "eligibility for rehire" policy was not made part of the record, so there is no basis to consider what is required for someone to be determined to be eligible for rehire. From the evidence presented at the hearing, it is likely that Emily Hughes simply decided to no longer schedule Robinson for work because he was unhappy and had a personality conflict with his supervisor. It is clear that Robinson was not terminated for misconduct, so of course it would make sense that he was still eligible for rehire. The record does not contain enough information about Target's eligibility for rehire policy to support an inference that everyone who is terminated, for whatever reason, is not eligible for rehire. Furthermore, when the Administrative Law Judge asked Ms. Kroshus about Target's policy regarding whether employees' resignations are always effective immediately or if an end date was discussed, Ms. Kroshus responded, "So it is typically circumstantial." CR 25:22. She did not testify that employees are always allowed to work through their notice periods. This evidence is insufficient to support an inference finding that Robinson resigned "effective immediately."

Finally, the Department argues that the absence of Target's "standard business form" used when employees voluntarily resign with advance notice is evidence that Robinson resigned "effective immediately." Brief of Respondent at 17. However, according to Robinson's testimony, which is supported by the evidence, he gave his two-weeks' notice by text message and by a telephone call with Ms. Hughes. CR 18:3-10. Robinson wasn't present at the store when he gave his notice of resignation, so of course he would not have filled this form out until the next time he was actually at Target. When Robinson did go to work for his next shift, he was unable to punch in and was told he was not on the schedule. CR 19:4-9. Neither Robinson's "team lead" or his "ETO" were in that day, and Ms. Hughes was not in the office. CR 19:9-13. Therefore, the absence of a form that presumably would have been completed on-site with HR does not support the argument of the Department, and is instead is entirely consistent with Robinson's testimony.

The Commissioner's finding that Robinson was not "credible" is not "evidence." His credibility cannot be weighed against Ms. Hughes', as she was not subject to cross examination. There remains no non-hearsay evidence in the record that Robinson resigned "effective immediately."

The circumstantial evidence, standing alone, does not constitute substantial evidence that Robinson quit “effective immediately.” Indeed, this may be demonstrated by the employer’s argument in summation, which recounted the hearsay evidence. The employer argued:

Um, again, based on the correspondence that I have received regarding Justin ending of his – of employment, it is simply that Emily, uh communicated on May 18th that Justin had spoken to her on the 17th requesting to voluntarily resign his –his employment with Target effective immediately.

There can be no question that the Commissioner relied on hearsay from a witness lacking personal knowledge in finding that Robinson resigned “effective immediately.”

This case may be distinguished from *Nationscapital Mortgage Corporation v. State Department of Financial Institutions*, 133 Wn.App. 723, 137 P.3d 78 (2006). In that case, the hearsay evidence was comprised of consumer questionnaires. The court found that the restitution order would stand “even absent the survey results” because of Nationscapital’s failure to provide an adequate written explanation of the fee increases and the absence of signed, dated disclosures in the loan files. Thus, Nationscapital had the opportunity to present evidence of compliance, but could not.

In contrast, there is no basis to find substantial evidence in the record absent the hearsay evidence. This case presents the classic “he said/she said” dispute. Unlike the situation in *Nationscapital*, Robinson *did* present evidence that he did not resign “effective immediately.” Because the Commissioner’s Delegate relied on hearsay evidence to prove that Robinson resigned “effective immediately,” doing so unduly abridged Robinson’s right to cross-examination pursuant to RCW 34.05.461. No reasonably prudent person would find that a person resigned “effective immediately” where there is a text message providing two-weeks’ notice of resignation, based on testimony from a human resources person about a document that was not itself produced and Randall’s testimony that he didn’t receive a call from Robinson. Hughes’ testimony is necessary to reach the conclusion that Robinson resigned “effective immediately.” The Superior Court was correct that there is not substantial evidence to support this finding.

B. The Superior Court Erred by Reopening the Agency Record on Remand without Statutory Authority

The Department does not argue, and thus concedes, that there is no basis to reopen the agency record to take new evidence under either RCW 34.05.562(2)(b) or (c). Thus, the Department implicitly admits that Emily Hughes’ testimony is not “new evidence” that the employer or the

Commissioner did not know of and was under no duty to be discovered until after the agency action. RCW 34.05.562(2)(b). The Department also implicitly concedes that the agency did not improperly exclude or omit evidence from the record. RCW 34.04.562(c).

Instead, the Department argues that the agency failed to “prepare or preserve an adequate record.” RCW 34.05.562(2)(a). This argument is a non-starter because the Employment Security Department was not a party at the Office of Administrative Hearings and only became a party after Robinson filed a petition for review with the Superior Court pursuant to RCW 50.32.090.²

Because the agency in this case was not a party at the Office of Administrative Hearings, the cases cited by the Department³ are easily distinguished from the present case, as those cases all involve agency

² **RCW 50.20.090 Finality of commissioner's decision.** Any decision of the commissioner involving a review of an appeal tribunal decision, in the absence of a petition therefrom as provided in chapter 34.05 RCW, becomes final thirty days after service. The commissioner shall be deemed to be a party to any judicial action involving any such decision and shall be represented in any such judicial action by the attorney general.

³ *Gunstone, State ex. Rel. v. Washington State Highway Comm'n*, 72 Wn.2d 673, 674-675, 434 P.2d 734 (1967); *McDaniel v. Department of Social and Health Services*, 51 Wn. App. 893, 894-98, 756 P.2d 143 (1988); *Hong v. Department of Social and Health Services*, 146 Wn. App. 698, 192 P.3d 21 (2008).

actions where the agency was a party was justifying an agency action that adversely affected another party.

The Department suggests that remand is appropriate “as a safety valve”⁴ where the reviewing court requires a “second look” at situations, citing *Gunstone, State ex. Rel. v. Washington State Highway Comm’n*, 72 Wn.2d 673, 434 P.2d 734 (1967). Not only is this case distinguishable because the agency was a party to the hearing, the sole purpose of the review was to determine if there was an adequate hearing pursuant to RCW 47.52.133. In *Gunstone*, certain members of the public objected to the location of the road and proposed an alternate location. In ordering a remand, the court was concerned that the State Highway Commission may have acted on incomplete or inadequate information. The State Highway Commission, charged with providing “competent evidence” of its proposal pursuant to RCW 47.52.135, failed to do so by not explaining the basis for its cost analysis. Notably, this was not a substantial evidence case.

⁴ To the extent that the Commissioner required a “safety valve” to ensure cases are fully and fairly adjudicated at the agency hearing, such mechanism exists at the agency level. Robinson specifically appealed to the Commissioner on the basis of hearsay in his petition for review. CR 100, paragraph 7. The Commissioner had full knowledge that Emily Hughes had not testified at the hearing. The Commissioner had full authority at that time and had the authority to remand the matter back to the Office of Administrative Hearings pursuant to RCW 50.32.080. He chose not to and issued a final agency decision.

The Department also points to *Hong*, which involved an agency action revoking an adult home license. *Hong v. State Dept. of Soc. & Health Services*, 146 Wn. App. 698, 192 P.3d 21 (2008). As in *Gunstone*, the agency a party in the original hearing, and was the obligated to develop an adequate record to support the agency action at the hearing. Moreover, the appellant, Hong, did not appeal the decision to remand to allow for cross examination because there was clearly substantial evidence in the record to support the agency finding without consideration of the hearsay evidence. *Hong* stands for the proposition that a remand is proper to allow a person the opportunity to cross examine the witnesses against him or her and ensure due process. However, it does not stand for the proposition that a remand is proper to enable one party a second opportunity to present evidence it could have provided at the original hearing. As the *Hong* court noted, judicial interest in finality requires that there be a determinable point in time at which litigation ceases. *Id.* at 710. As in *Gunstone*, Hong did not appeal on the basis that there was not substantial evidence in the record to affirm the agency action.

McDaniel, another case which the Department relies on, also involved an agency action where DSHS relied on hearsay statements. *McDaniel v. Department of Social and Health Services*, 51 Wn. App. 893, 756 P.2d 143 (1988). That case was decided prior to the enactment of

RCW 34.05.562. *McDaniel* does not stand for the proposition that agencies are entitled to remands for additional evidence when other parties would not be so entitled.

All of the cases cited by the Department justifying remands occurred in actions where the agency itself was party to the action. None of these cases involved the situation, as we have here, where the appellant argued that RCW 34.05.562(2) prohibited reopening the agency record. The Department does not even attempt to distinguish the cases cited by Robinson in his opening brief⁵ where parties requested the opportunity to reopen the record and were not allowed to pursuant to this statute.

The plain language of RCW 34.05.562(a) indicates that a remand is proper if the agency failed to prepare an adequate record. But the Department was not a party to the hearing, so there is no basis for the Department to appear and subpoena witnesses. That was the obligation of the employer. It was the employer, and not the Department, that failed to call Ms. Hughes as a witness. It would be remarkable if the Department were to appear and advocate either the employer's position or the

⁵ *Samson v. City of Bainbridge Is.*, 149 Wn. App. 33, 64-65, 202 P.3d 334, 350 (2009); *Motley-Motley, Inc. v. Pollution Control Hearings Bd.*, 127 Wn. App. 62, 76-79, 110 P.3d 812 (2005); *Keenan v. Employment Sec. Dep't*, 81 Wn. App. 391, 396, 914 P.2d 1191 (1996); *Herman v. State Shorelines Hearing Bd.*, 149 Wn. App. 444, 445, 204 P.3d 928 (2009).

claimant's position in an administrative hearing regarding an individual's eligibility for unemployment benefits.

The Department misconstrues Appellant's argument with regard to procedural fairness and *Darkenwald v. Employment Security Dept.*, 1983 Wn.2d 237, 350 P.3d 647 (2015). Appellant does not argue that the case involves a remand under RCW 50.32.652. Rather, *Darkenwald* demonstrates that different outcomes could result based on what happened (or didn't happen) below. The Department should not be allowed to re-litigate a case where the employer may have made an error at the administrative level when claimants, such as the claimant in *Darkenwald*, are not entitled to re-litigate when they have made errors at the administrative level.⁶

C. Attorney Fees Should Be Awarded.

The Department does not address Appellant's argument that the definition of a "remand" is the functional equivalent of a "modification" under RCW 50.32.150. To do so would only reveal the functional similarity between the two. The lack of this argument is telling.

⁶ This is especially true where the petition for review to the Commissioner of the Department expressly raised the issue of hearsay. CR 100. The Commissioner had the opportunity to take additional evidence or order further proceedings prior to closing the record pursuant to RCW 50.32.080.

Instead, the Department relies on language in the APA, as opposed to the Employment Security Act, that a “remand” is distinct from a “modification.” The Department’s reasoning involves a sleight of hand that picks and chooses language from different acts to arrive at a result that clearly was never intended by the legislature.

The jurisdictional statement of RCW 50.32.150 is primary, and incorporates the word “shall”:

If the court shall determine that the commissioner has acted within his or her power and has correctly construed the law, the decision of the commissioner **shall** be confirmed; otherwise, it shall be reversed or modified.

(emphasis added).

The Court’s jurisdiction leaves no room for a “gap,” as the Department contends, unless the Department were to argue that the Superior Court lacks jurisdiction to remand a matter in the first place. Rather, the statutory definition of “modification” includes the power to remand. RCW 50.32.150 continues:

In case of a modification or reversal the superior court shall refer the same to the commissioner with an order directing him or her to proceed in accordance with the findings of the court.

Instead of conceding that a “remand” is form of “modification,” the Department contends that RCW 34.05.574 “fills the gap” between a

modification and a remand, and thus leaps to the conclusion that parties who obtain a remand should not be entitled to an award of attorney's fees. The better, and simpler, conclusion is that a remand is authorized pursuant to RCW 50.32.150. Otherwise, the court must determine whether the legislature intended the old APA or the new APA to modify or supplant RCW 50.32.150. There is no need to do so when the plain language of the statute allows the court to send the matter back to the agency for further action.

The Department's "fill the gap" argument is inherently inconsistent. The Department's argument requires that RCW 34.05.574 "fills the gap" when it comes to the jurisdictional requirements of 50.32.150, but RCW 4.84.350 doesn't fill the resulting gap in RCW 50.32.160. An allowance of attorney's fees pursuant to RCW 50.32.160 in this case would be consistent with other cases arising under the APA where attorney's fees may be awarded in the event of a "remand." *Eidson v. State Dept. of Licensing*, 108 Wn. App. 712 (2001).

III. CONCLUSION

The Superior Court correctly ruled that there was not substantial evidence to affirm the Commissioner's decision. The finding that Robinson resigned "effective immediately" is derived entirely from hearsay. The remaining "circumstantial evidence" is insufficient to

support that finding. However, the Superior Court erred by remanding the matter for the taking of additional evidence. There is no basis to take new evidence pursuant to RCW 34.05.562. In the event that the Court affirms the Superior Court's decision to remand, attorney's fees should be awarded pursuant to RCW 50.32.160 and because Robinson substantially prevailed by obtaining a decision that complied with RCW 34.05.461(4).

RESPECTFULLY SUBMITTED this 21st day of October, 2016:

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CERTIFICATE OF SERVICE

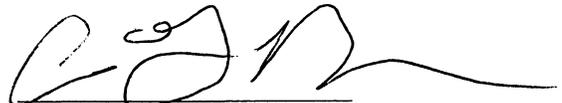
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