

NO. 75405-0

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

JOSE CUESTA,

Respondent,

v.

STATE OF WASHINGTON, DEPARTMENT OF EMPLOYMENT
SECURITY,

Appellant.

APPELLANT'S OPENING BRIEF

ROBERT W. FERGUSON
Attorney General

R. JULY SIMPSON
Assistant Attorney General
WSBA No. 45869
PO Box 40110
1125 Washington Street SE,
Olympia, WA 98504-0110
(360) 534-4850

FILED
Sep 07, 2016
Court of Appeals
Division I
State of Washington

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ASSIGNMENTS OF ERROR	1
	1. The superior court erred in concluding the Commissioner misinterpreted and misapplied the law. CP 39.	2
	2. The superior court erred in reversing the Commissioner’s decision. CP 39-40.	2
III.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	2
	1. Whether substantial evidence in the record supports the Commissioner’s factual findings. Assignments of error 1-2.	2
	2. Whether the Commissioner correctly concluded that Cuesta committed disqualifying misconduct under the Employment Security Act by demonstrating carelessness or negligence of such degree as to show a substantial disregard of his employer’s interest, RCW 50.04.294(1)(d), when he approved airplane parts as complete and inspected when he had not actually inspected the parts. AR 80. Assignments of Error 1-2.	2
	3. Whether this Court should also affirm the Commissioner’s decision on the basis that Cuesta committed per se misconduct under RCW 50.04.294(2)(f) when he violated his employer’s reasonable rule prohibiting approving parts as complying with engineering requirements without first inspecting the parts. AR 104. Assignments of Error 1-2.	2
IV.	STATEMENT OF THE CASE	2
V.	STANDARD OF REVIEW.....	5

VI. ARGUMENT	8
A. Substantial Evidence Supports the Commissioner’s Factual Findings.....	11
B. Cuesta Was Terminated for Disqualifying Misconduct Under the Employment Security Act.....	13
1. Cuesta’s conduct was carelessness or negligence of such a degree as to show a substantial disregard of his employer’s interests, RCW 50.04.294(1)(d).....	14
2. Cuesta violated a reasonable company rule which he knew or should have known, RCW 50.04.294(2)(f)	20
VII. CONCLUSION	21

TABLE OF AUTHORITIES

Cases

<i>Campbell v. Emp't Sec. Dep't</i> , 180 Wn.2d 566, 326 P.3d 713 (2014).....	6, 7
<i>Daniels v. Dep't of Emp't Sec.</i> , 168 Wn. App. 721, 281 P.3d 310 (2012).....	6, 9, 20
<i>Delagrave v. Emp't Sec. Dep't</i> , 127 Wn. App. 596, 111 P.3d 879 (2005).....	6
<i>Fred Hutchinson Cancer Research Ctr. v. Holman</i> , 107 Wn.2d 693, 732 P.2d 974 (1987).....	7
<i>Galvin v. Emp't Sec. Dep't</i> , 87 Wn. App. 634, 942 P.2d 1040 (1997).....	6
<i>Griffith v. Dep't of Emp't Sec.</i> , 163 Wn. App. 1, 259 P.3d 1111 (2011).....	8
<i>Guijosa v. Wal-Mart Stores, Inc.</i> , 101 Wn. App. 777, 6 P.3d 583 (2000).....	14
<i>In re Estate of Jones</i> , 152 Wn.2d 1, 93 P.3d 147 (2004)	7
<i>Johnson v. Emp't Sec. Dep't</i> , 64 Wn. App. 311, 824 P.2d 505 (1992).....	15, 16
<i>Lige & Wm. B. Dickson Co. v. County of Pierce</i> , 65 Wn. App. 614, 829 P.2d 217 (1992).....	7
<i>Markam Group, Inc. v. Dep't of Emp't Sec.</i> , 148 Wn. App. 555, 200 P.2d 748 (2009).....	8
<i>Michaelson v. Emp't Sec. Dep't</i> , 187 Wn. App. 293, 349 P.3d 896 (2015).....	15, 18, 19

<i>Smith v. Emp't Sec. Dep't</i> , 155 Wn. App. 24, 226 P.3d 263 (2010).....	7, 15, 17, 18
<i>State v. Costich</i> , 152 Wn.2d 463, 98 P.3d 795 (2014).....	10, 21
<i>Tapper v. Emp't Sec. Dep't</i> , 122 Wn.2d 397, 858 P.2d 494 (1993).....	2, 6, 7, 8, 9, 10, 11, 17
<i>William Dickson Co. v. Puget Sound Air Pollution Control Agency</i> , 81 Wn. App. 403, 914 P.2d 750 (1996).....	6, 7, 8

Statutes

RCW 34.05	2, 5
RCW 34.05.452(1).....	13
RCW 34.05.558.....	6
RCW 34.05.570(1)(a)	6
RCW 34.05.570(3)(d).....	7
RCW 34.05.570(3)(e)	6
RCW 50	8
RCW 50.01.010	8, 17
RCW 50.04.294	8, 9
RCW 50.04.294(1)(d).....	1, 2, 5, 9, 10, 14, 18, 20, 21
RCW 50.04.294(2).....	9
RCW 50.04.294(2)(f).....	1, 2, 9, 10, 12, 14, 20, 21
RCW 50.04.294(3).....	14
RCW 50.20.066(1).....	5, 8

RCW 50.32.120	2, 6
RCW 50.32.150	6

Rules

RAP 10.3(h)	2
RAP 2.5(a)	10, 21

Regulations

WAC 192-150-210(4).....	20
WAC 192-150-210(5).....	20
WAC 192-150-205(3).....	9

I. INTRODUCTION

Jose Cuesta was discharged from his job as an airplane parts inspector by his employer, the Boeing Company, for approving airplane wing parts as satisfying engineering requirements without first physically inspecting them, in violation of company policy. Because safety is of the utmost importance in the construction of commercial airplanes, a single violation is grounds for discharge. Because this negligence created a significant risk to the safety of the flying public, showed a substantial disregard of Boeing's interests in producing safe, functional aircraft, and exposed Boeing to liability, Cuesta's behavior amounted to misconduct that disqualifies him from unemployment benefits under RCW 50.04.294(1)(d). Additionally, Cuesta committed *per se* misconduct by violating a reasonable employer rule of which he was aware under RCW 50.04.294(2)(f). This Court should reverse the superior court's decision concluding otherwise and reinstate the Commissioner's decision denying Cuesta unemployment benefits.

II. ASSIGNMENTS OF ERROR

The Department assigns no error to the final decision of the Department's Commissioner. However, because the King County Superior Court erred in reversing the Commissioner's decision, and the Department

is now an appellant, the Department assigns error to the following aspects of the superior court's order:¹

1. The superior court erred in concluding the Commissioner misinterpreted and misapplied the law. CP 39.
2. The superior court erred in reversing the Commissioner's decision. CP 39-40.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether substantial evidence in the record supports the Commissioner's factual findings. Assignments of error 1-2.
2. Whether the Commissioner correctly concluded that Cuesta committed disqualifying misconduct under the Employment Security Act by demonstrating carelessness or negligence of such degree as to show a substantial disregard of his employer's interest, RCW 50.04.294(1)(d), when he approved airplane parts as complete and inspected when he had not actually inspected the parts. AR 80. Assignments of Error 1-2.
3. Whether this Court should also affirm the Commissioner's decision on the basis that Cuesta committed per se misconduct under RCW 50.04.294(2)(f) when he violated his employer's reasonable rule prohibiting approving parts as complying with engineering requirements without first inspecting the parts. AR 104. Assignments of Error 1-2.

IV. STATEMENT OF THE CASE

¹ This is a judicial review of a final agency decision under the Washington Administrative Procedure Act, chapter 34.05 RCW. The Court of Appeals sits in the same position as the superior court and reviews the Commissioner's decision. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). Accordingly, the Respondent, Cuesta, must assign error to the Commissioner's findings and conclusions he challenges. See RAP 10.3(h); RCW 50.32.120 (judicial review of the Commissioner's decision is governed by the Administrative Procedure Act).

Jose Cuesta worked full time as an airplane assembly and installation inspector for Boeing Company from May 25, 2007, until June 30, 2015. Administrative Record (AR) 77 (FF 3). Cuesta inspected fabricated airplane parts to ensure they met engineering requirements before they were installed on aircraft. AR 23, 27, 78 (FF 4). Specifically, Cuesta was assigned to inspect the SPAR—the spine of an airplane wing. AR 27. Cuesta was required to physically inspect these parts, AR 27-29, 78 (FF 5), and was given training, tools, and step-by-step instructions on how to inspect each part. AR 29, 78 (FF 5). Boeing inspectors ensure the integrity and performance of parts prior to installation on commercial aircraft, making an inspector's job vital to the safety of passengers traveling on aircraft manufactured by Boeing. AR 36, 78 (FF 4). Because of this, Boeing has company rules that require inspectors to perform physical inspections of parts after they are manufactured by mechanics and before they are installed on the aircraft. AR 18-19, 21, 23.

On March 25, 2015, Cuesta was assigned to cover for another inspector in an area outside his usual assignment. AR 37-38, 78 (FF 6). Cuesta's direct supervisor, Vance Church, was observing the area because he had been approached the previous day by two inspectors who reported Cuesta was not appropriately inspecting parts. AR 29-30. Church was discussing the other inspectors' concerns about Cuesta's work when

Church observed that the computer system showed a part in Cuesta's area as ready for inspection. AR 30-31, 78 (FF 7). The notification remained on the screen for a while, then showed the part as inspected and approved. AR 30-31, 78 (FF 7). Church observed Cuesta was not in sight and could not have inspected the part from the time it was ready for inspection and the time Cuesta entered it as approved. *Id.* Boeing began an investigation into Cuesta's work. AR 32, 78 (FF 9).

The next day, Boeing discovered Cuesta had approved another part as inspected and approved even though he had not physically inspected the part. AR 33, 78 (FF 9). In this instance, Cuesta certified airplane wing holes as satisfying the required size and configuration. AR 33, 78 (FF 5). Yet the holes had not been drilled into the wings. AR 33, 78 (FF 9). Given the potentially catastrophic consequences of these faulty inspections, Boeing disassembled the partially assembled aircraft to inspect the remaining component parts that Cuesta had marked as inspected. AR 34, 78 (FF 10).

Boeing's investigation ultimately concluded that, on two occasions, Cuesta had approved airplane parts without physically inspecting the parts. AR 19. This was in violation of Boeing rules. AR 19, 78-79 (FF 11). Cuesta was discharged for failing to inspect parts he had approved and verified as inspected. AR 18-19, 22, 26, 79 (FF 14).

Cuesta applied for unemployment benefits, which the Department initially allowed. AR 60-61, 77 (FF 1). Boeing appealed, and, after an administrative hearing, an administrative law judge (ALJ) determined Cuesta was discharged for misconduct under RCW 50.20.066(1) and RCW 50.04.294(1)(d), AR 79-80, and, therefore, disqualified from receiving benefits. AR 77-78 (FF 1). Cuesta petitioned the Department's Commissioner for review of the ALJ's initial order. AR 88-94. The Commissioner adopted the ALJ's findings of fact and conclusions of law and affirmed the initial order. AR 96-97.

Cuesta appealed to the King County Superior Court. Cuesta did not dispute any of the Commissioner's factual findings. CP 7-22. Rather, Cuesta argued that (1) his conduct was not misconduct because two instances amounts to only inadvertence or ordinary negligence and (2) he should get a new hearing before the ALJ because parts of the recording were inaudible and Cuesta's primary language is Spanish. *Id.* The superior court reversed the Commissioner's decision, CP 39-40, and the Department now appeals to this Court.

V. STANDARD OF REVIEW

The appellate court's "limited review of an agency decision is governed by the Administrative Procedure Act (APA), chapter 34.05 RCW." *Campbell v. Emp't Sec. Dep't*, 180 Wn.2d 566, 571, 326 P.3d 713

(2014); RCW 50.32.120. This Court sits in the same position as the superior court and applies the APA standards directly to the administrative record. *Campbell*, 180 Wn.2d at 571. Thus, the decision on review is the Commissioner's final order, which adopted the ALJ's factual findings and legal conclusions. *Id.*; *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993); *Delagrave v. Emp't Sec. Dep't*, 127 Wn. App. 596, 604, 111 P.3d 879 (2005) (superior court's findings of fact and conclusions of law are superfluous to appellate court's review). Because Cuesta appealed the Commissioner's decision to superior court, it is his burden to demonstrate the invalidity of the decision to this Court. RCW 34.05.570(1)(a); RCW 50.32.150; *Campbell*, 180 Wn.2d at 571.

Under the APA, the court gives "[g]reat deference" to the Commissioner's factual findings and substantial weight to the agency's interpretation of the law. *Daniels v. Dep't of Emp't Sec.*, 168 Wn. App. 721, 727, 281 P.3d 310 (2012) (quoting *Galvin v. Emp't Sec. Dep't*, 87 Wn. App. 634, 641, 942 P.2d 1040 (1997)). The Commissioner's findings of fact must be upheld if supported by substantial evidence in the agency record. RCW 34.05.558; RCW 34.05.570(3)(e); *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). Unchallenged factual findings are verities on appeal. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993). Evidence is

substantial if it is “sufficient to persuade a rational, fair-minded person of the truth of the finding.” *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); *Campbell*, 180 Wn.2d at 571. Evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987). The reviewing court is to “view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed” at the administrative proceeding below—here, the Department. *William Dickson Co.*, 81 Wn. App. at 411; *see also Tapper*, 122 Wn.2d at 403 (court gives deference to agency’s factual findings).

The process of reviewing for substantial evidence “‘necessarily entails acceptance of the fact-finder’s views regarding credibility of witnesses and the weight to be given reasonable but competing inferences.’” *William Dickson Co.*, 81 Wn. App. at 411 (quoting *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992)); *Smith v. Emp’t Sec. Dep’t*, 155 Wn. App. 24, 35-36, 226 P.3d 263 (2010). A court may not substitute its judgment of the facts for that of the agency. *Tapper*, 122 Wn.2d at 403.

The Court reviews questions of law de novo, under the error of law standard. RCW 34.05.570(3)(d); *Tapper*, 122 Wn.2d at 407. Because the

Department has expertise in interpreting and applying unemployment benefits law, the Court should accord substantial weight to the agency's decision. *Markam Group, Inc. v. Dep't of Emp't Sec.*, 148 Wn. App. 555, 561, 200 P.2d 748 (2009); *William Dickson Co.*, 81 Wn. App. at 407.

Whether a claimant committed statutory misconduct is a mixed question of law and fact. *Griffith v. Dep't of Emp't Sec.*, 163 Wn. App. 1, 8, 259 P.3d 1111 (2011). To resolve a mixed question of law and fact, the Court engages in a three-step analysis in which it: (1) determines whether the Commissioner's factual findings are supported by substantial evidence; (2) makes a de novo determination of the law; and (3) applies the law to the facts. *Tapper*, 122 Wn.2d at 403. The court is not free to substitute its judgment of the fact for that of the agency. *Id.* The process of applying the law to the facts is a question of law, subject to de novo review. *Id.*

VI. ARGUMENT

The Employment Security Act, title 50 RCW, was enacted to provide compensation to individuals who are "involuntarily" unemployed "through no fault of their own." RCW 50.01.010; *Tapper*, 122 Wn.2d at 408. As such, a claimant is disqualified from receiving unemployment benefits if he has been discharged from his job for work-connected "misconduct." RCW 50.20.066(1); RCW 50.04.294. This rule advances

the policy that it is unfair to require an employer to compensate employees who engage in conduct harmful to its interests. *Tapper*, 122 Wn.2d at 409.

In general, the Act provides four broad categories of misconduct that will disqualify an applicant from receiving unemployment benefits. RCW 50.04.294. Relevant here, “misconduct” is defined as “[c]arelessness or negligence of such a degree *or* recurrence to show an intentional or substantial disregard of the employer’s interest.” RCW 50.04.294(1)(d) (emphasis added). “Carelessness” and “negligence,” in turn, are defined as the “failure to exercise the care that a reasonably prudent person usually exercises.” WAC 192-150-205(3).

The statute also identifies specific examples of conduct as *per se* misconduct “because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee.” RCW 50.04.294(2); *Daniels v. Dep’t of Emp’t Sec.*, 168 Wn. App. 721, 728, 281 P.3d 310 (2012) (“Certain types of conduct are misconduct *per se*.”). One such act of *per se* misconduct is a “[v]iolation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule.” RCW 50.04.294(2)(f) (emphasis added).

In this case, substantial evidence supports the Commissioner’s findings that Cuesta’s job was to physically inspect fabricated parts before

installation on Boeing aircraft and that, on two occasions, Cuesta approved airplane parts when he had not inspected the parts. Substantial evidence also supports the findings that Cuesta's work was integral to ensuring the integrity and performance of airplane parts and, ultimately, the safety of the flying public. Because of the vital nature of this work, Boeing had a rule prohibiting approving mechanic work without physically checking the work, and Cuesta was aware of this rule. The purpose of the rule is to protect the public from the consequences of flying in defective aircraft. Thus the Commissioner correctly concluded that Cuesta's conduct amounted to carelessness or negligence of such degree as to show a substantial disregard of an employer's interest under RCW 50.04.294(1)(d). AR 96-97.

Although the Commissioner did not conclude that Cuesta committed per se misconduct for having violated a reasonable company rule under RCW 50.04.294(2)(f), the Commissioner made the relevant findings of fact necessary to reach this conclusion, and those findings of fact are supported by substantial evidence. This Court applies the law to the facts de novo and may affirm on any legal ground supported by the record. *Tapper*, 122 Wn.2d at 403; RAP 2.5(a); *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2014).

A. Substantial Evidence Supports the Commissioner's Factual Findings

Cuesta did not challenge any of the Commissioner's factual findings in the superior court, and this Court should consider these unchallenged factual findings as verities on appeal. *Tapper*, 122 Wn.2d at 407. Regardless, the Commissioner's factual findings are supported by substantial evidence.

First, substantial evidence supports the Commissioner's findings that Cuesta's job was to inspect fabricated airplane parts before installation on aircraft to ensure they met engineering requirements. The evidence also showed that this job was vital to the safety of passengers on the aircraft manufactured by Boeing because it ensures the integrity and performance of each part. AR 78 (FF 4). D.J. Haapala, Boeing's human resource generalist, AR 17, testified that it is the responsibility of inspectors to inspect, validate, and verify that the configuration of the airplane parts complies with engineering requirements and installation plans. AR 27, 78 (FF 4). Haapala testified this step is critical to ensure the safety of the flying public. AR 23. Cuesta also acknowledged the importance of his work and the potential for harm if parts are not properly inspected. AR 44, 46.

Substantial evidence further supports the Commissioner's finding that Boeing had rules prohibiting approving work as complete without first checking the work, that the rule was reasonable because it protected the public from the consequences of flying in defective aircraft, and that Cuesta was aware of the rule. AR 79 (FF 11, 12); *see* RCW 50.04.294(2)(f). Haapala testified that the company has rules prohibiting stamping work complete without physically checking the work. AR 18-19, 21-22. He also testified that a single instance is enough for discharge because of how critical the rule is to ensuring the integrity of Boeing's systems and, ultimately, the safety of the flying public. AR 23. Cuesta knew or should have known of this rule because all employees learn the rules at orientation, and the company rules are contained on the internal Boeing web site, which can be accessed by anyone. AR 18-19.

Substantial evidence also supports that Cuesta was trained and given step-by-step instructions in how to inspect parts and measure the holes drilled and the gaps between the holes. AR 78 (FF 5). Vance Church, Cuesta's direct supervisor (AR 27), testified that inspectors are given measurement tools (calipers and gauges), engineering drawings, and installation plans with specific step-by-step details on how to perform the physical inspection. AR 27-29. These are items Cuesta was familiar with to allow him to perform his work. *Id.*

Finally, substantial evidence supports the findings that Cuesta twice failed to inspect parts but nonetheless approved them. AR 78 (FF 7 and 9). In the first instance, Church testified that he was working in the area where Cuesta was inspecting parts. AR 30. Church testified that he observed the computer system showing a part as ready for inspection, that notification remained on the screen for a while, and then the screen showed the part as inspected and approved. AR 30-31. Church testified that the part had not been inspected and that Cuesta was not in sight where he could have inspected the part. AR 31. In the second instance, Church testified that he was informed² that Cuesta had approved holes drilled into an airplane wing as conforming with the required size and configuration, but the holes had not actually been drilled yet. AR 33. Cuesta did not dispute these incidents occurred, and had no explanation other than that they were the result of a mistake. AR 48-49.

Thus, substantial evidence supports the Commissioner's findings of fact.

B. Cuesta Was Terminated for Disqualifying Misconduct Under the Employment Security Act

Cuesta was terminated for disqualifying misconduct under the Employment Security Act. Thus, the Commissioner properly concluded

² Under the APA, hearsay is admissible if it is the kind of information on which reasonably prudent persons are accustomed to rely upon in the conduct of their affairs. RCW 34.05.452(1). Regardless, Cuesta did not dispute this finding of fact.

that Cuesta's conduct amounted to disqualifying misconduct under RCW 50.04.294(1)(d), carelessness or negligence of such a degree as to show a substantial disregard of Boeing's interests. Furthermore, because this Court applies the law to the supported facts de novo, this Court should also conclude that Cuesta's conduct amounted to disqualifying misconduct under RCW 50.04.294(2)(f), violation of Boeing's reasonable company rule of which Cuesta was aware.

1. Cuesta's conduct was carelessness or negligence of such a degree as to show a substantial disregard of his employer's interests, RCW 50.04.294(1)(d)

Misconduct includes "carelessness or negligence of such degree or recurrence to show an intentional or substantial disregard of the employer's interest." RCW 50.04.294(1)(d). Thus, if a worker engages in a single significant incident of carelessness or negligence ("such a degree"), or repeatedly fails to exercise the care that a reasonably person usually exercises (such "recurrence"), he has committed "misconduct" under RCW 50.04.294(1)(d). *Guijosa v. Wal-Mart Stores, Inc.*, 101 Wn. App. 777, 790, 6 P.3d 583 (2000) (courts generally presume the use of "or" in a statute as disjunctive absent clear legislative intent to the contrary.) In contrast, misconduct does not include "inadvertence or ordinary negligence in isolated instances." RCW 50.04.294(3); *Michaelson v. Emp't Sec. Dep't*, 187 Wn. App. 293, 301, 349 P.3d 896

(2015). The existence of a statutory exclusion for “isolated” instances of ordinary negligence demonstrates the clear intent to treat serious or repeated acts of negligence differently than insignificant or occasional mistakes.

When the carelessness or negligence is of a sufficient degree, misconduct can arise from a single instance. *See Johnson v. Emp’t Sec. Dep’t*, 64 Wn. App. 311, 316, 824 P.2d 505 (1992) (holding that a single serious incident amounts to disqualifying misconduct). Thus, the failure to exercise reasonable care may be a single instance if that instance evinces a substantial disregard for the employer’s interest. The level of carelessness or negligence rising above “ordinary negligence” has been found when (1) unintentional actions and violations of policies create a significant public safety risk or (2) when actions create a risk of impacting the employer’s interests in serving its customers and exposes the employer to liability. *Johnson*, 64 Wn. App. at 316, *Smith v. Emp’t Sec. Dep’t*, 155 Wn. App 24, 36, 226 P.3d 263 (2010).

In *Johnson v. Emp’t Sec. Dep’t*, Virginia Johnson worked as a King County Metro bus driver. *Johnson*, 64 Wn. App. at 313. Unknown to Johnson, her husband placed her gun into her handbag before she left for work. *Id.* Johnson testified that she did not see the gun in her bag while at work. *Id.* Johnson’s gun was later found on the bus she had been driving.

Id. The Court reasoned that Johnson's failure to be aware that her gun was in her purse, had fallen out of her purse on the bus, and that she left it on the bus was grossly negligent because it presented a serious risk to the public. *Id.* at 317. Johnson's single instance of negligence was of such a degree as to disqualify her from unemployment benefits. *Id.* at 317.

Similarly here, Cuesta's conduct of approving airplane parts as conforming to engineering requirements without actually inspecting the parts was negligence of a substantial degree because it presented a serious risk of harm to the flying public. The work of Boeing inspectors is critical to preventing the potentially catastrophic consequences of allowing the public to fly in defective aircraft. AR 23, 36, 78-79 (FF 4, 11). Nonetheless, Cuesta twice stamped work as complete without physically inspecting the work. AR 30-31, 33, 78 (FF 7 and 9).

Cuesta's core function as an inspector was to ensure parts met the engineering requirements to prevent the potentially catastrophic consequences of allowing the public to fly in defective aircraft. AR 23, 36, 78-79 (FF 4, 11). AR 23, 27. Cuesta had no explanation for his failure to inspect the work. AR 49, 79 (FF 13). The failure to inspect airplane parts constitutes such a significant risk to the flying public that a single instance results in discharge under the Boeing policies and Boeing was required to disassemble partially assembled aircraft to inspect the remainder of the

parts. AR 23, 34, 78 (FF 10). By failing to exercise the care that a reasonably prudent person would exercise in inspecting airplane parts, Cuesta acted in a careless and negligent manner that created a risk to public safety and showed a substantial disregard to Boeing's interests in ensuring properly manufactured aircraft and passengers' safety. It cannot be said that Cuesta was unemployed through no fault of his own. RCW 50.01.010; *Tapper*, 122 Wn.2d at 408

In *Smith v. Emp't Sec. Dep't*, the Court held that recording conversations with co-workers or members of the public without their consent constituted carelessness or negligence of such degree as to show intentional or substantial disregard of a county employer's interest. *Smith*, 155 Wn. App at 36. Smith alleged that he was unaware that his government employer had a policy prohibiting his recording of conversations with co-workers and members of the public without their consent. *Id.* at 34. Nonetheless, the Court held that even an unknowing violation of the employer policy constituted negligence of such degree as to show substantial disregard of the employer's interest. *Id.* at 36. This was because public knowledge of Smith's recordings could have adversely impacted the county's interests in serving its constituents by making citizen's less willing to discuss issues with county employees and because it could have exposed the county to litigation and liability. *Id.* at 36. The

Court found it irrelevant that no one knew of the recordings because it is the mere potential for harm to the employer—including reputational harm—that matters. *Id.* at 36. No intended harm to the employer’s reputation is required. *Id.* at 37.

Here, Boeing has rules governing the process of inspecting airplane parts because of the gravity of the potential consequences of allowing the public to fly in defective aircraft. (FF 4, 11, 12). Boeing’s reputation and success rise and fall on their customer’s, and the public’s, perception that the aircraft Boeing constructs is safe to travel in. Inherent in the trust in Boeing aircraft, is the knowledge that each part necessary for the structural integrity of the airplane has been properly manufactured and put together. At best, knowledge that Boeing inspectors are failing to inspect all parts signed off on—regardless of the reason—could adversely impact Boeing’s reputation. At worst, a plane crashing because the spine of an airplane wing was not up to engineering specifications would most definitely adversely impact Boeing’s reputation.

The Department anticipates Cuesta will argue that his behavior was ordinary negligence and thus more analogous to *Michaelson v. Emp’t Sec. Dep’t*, 187 Wn. App. 293, 349 P.3d 896 (2015). In that case, the court considered whether a delivery driver’s three preventable driving accidents within a year constituted misconduct under RCW 50.04.294(1)(d). There,

Michaelson was a Food Service Association delivery driver who backed into a parked car, rolled back into a stopped car, and backed into a loading dock during a 12-month period. *Michaelson v. Emp't Sec. Dep't.*, 187 Wn. App. 293, 296-97, 349 P.3d 896 (2015). The Court held that in light of Michaelson's "generally good driving record," it could not say the "accidents evidence the necessary misconduct to disqualify him from receiving unemployment benefits." *Id.* Accordingly, the record lacked any basis for finding Michaelson's conduct was of "such degree or recurrence" to qualify under RCW 50.04.294(1)(d). *Id.* at 301-02. Thus, three accidents, without more, demonstrated only that the employee "failed to exercise reasonable care." *Id.* at 301. The court further noted that "[n]othing indicates Mr. Michaelson's behavior was willful, reckless, or even grossly negligent." *Id.* at 302.

In contrast here, Cuesta's conduct was not accidental. He took an active step to enter a part into the computer as inspected when he had not physically inspected it. Cuesta was aware of the requirement that he physically inspect parts before signing off on them, yet twice he affirmatively took steps to approve them without having inspected them. AR 78 (FF 7 and 9). This conduct was willful and in substantial disregard of Boeing's interest in keeping passengers safe.

The Commissioner properly concluded that Cuesta's failure to inspect airplane parts before approving them was misconduct under RCW 50.04.294(1)(d). The Court should affirm the Commissioner's decision.

2. Cuesta violated a reasonable company rule which he knew or should have known, RCW 50.04.294(2)(f)

Additionally, this Court should affirm the Commissioner's decision because the record supports the conclusion that Cuesta violated a reasonable company rule that he knew or should have known, which is per se misconduct. RCW 50.04.294(2)(f); *Daniels*, 168 Wn. App. at 728. "A company rule is reasonable if it is related to your job duties, is a normal business requirement or practice for your occupation or industry, or is required by law or regulation." WAC 192-150-210(4). "The department will find that you knew or should have known about a company rule if you were provided an employee orientation on company rules, you were provided a copy or summary of the rule in writing, or the rule is posted in an area that is normally frequented by you and your co-workers, and the rule is conveyed or posted in a language that can be understood by you." WAC 192-150-210(5).

Here, Boeing had a rule prohibiting inspectors from stamping work on parts as complete without first physically inspecting the part. AR 21-22, 78-79 (FF11). That rule was directly related to Cuesta's job duties as

an airplane inspector and was essential to ensuring the reliability of Boeing's products and the safety of its customers. AR 21-22, 78-79 (FF 11). Finally, Cuesta was aware of this rule because he was made aware of it during his orientation, his union was aware of it, and it was available to him on the Boeing website. AR 18-19. Thus, by twice stamping aircraft components as inspected when, in fact, he had not physically inspected them, Cuesta violated a reasonable company rule of which he was aware and committed misconduct per se. RCW 50.04.294(2)(f). Because the Court applies the law to the facts de novo and may affirm on any ground "if the record has been sufficiently developed to fairly consider the ground," RAP 2.5(a), the Court should conclude Cuesta's conduct also amounted to misconduct under RCW 50.04.294(2)(f) and affirm the Commissioner's decision. RAP 2.5(a); *State v. Costich*, 152 Wn.2d 463, 477, 98 P.3d 795 (2014).

VII. CONCLUSION

The Commissioner correctly concluded Cuesta was discharged from employment for misconduct under RCW 50.04.294(1)(d) and was, therefore, disqualified from receiving unemployment benefits. In addition, this Court should affirm because the record supports that Cuesta violated a reasonable company rule that he either knew or should have been aware of, RCW 50.04.294(2)(f). The Commissioner's decision is supported by

substantial evidence and is free of errors of law. The Department asks the Court to reverse the superior court's decision and affirm the Commissioner's decision denying Cuesta unemployment benefits.

RESPECTFULLY SUBMITTED this 7th day of September, 2016.

ROBERT W. FERGUSON
Attorney General


R. JULY SIMPSON
Assistant Attorney General
WSBA No. 45869
PO Box 40110
1125 Washington Street SE,
Olympia, WA 98504-0110
(360) 534-4850

PROOF OF SERVICE

I, Amy Phipps, certify that I caused a copy of this document—
Department’s Opening Brief—to be served on all parties or their counsel
of record on the date below as follows:

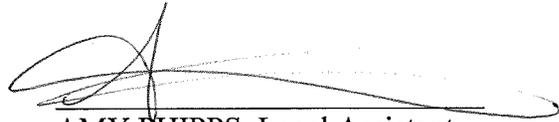
By agreed electronic service to:

Andres Munoz
John Tirpak
Unemployment Law Project
1904 3rd Ave., Ste. 604
Seattle, WA 98101
Via e-mail to jtirpak@ulproject.org and aemunoz@ulproject.org

Electronically Filed with:
Court of Appeals Division I

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

DATED this 17th day of September, 2016, at Olympia,
Washington.


AMY PHIPPS, Legal Assistant