

FILED
Jun 15, 2015
Court of Appeals
Division III
State of Washington

No. 33202-1

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

MICHAEL A. BOISE,

Appellant,

vs.

STATE OF WASHINGTON,
DEPARTMENT OF EMPLOYMENT SECURITY,

Respondent.

APPEAL FROM THE BENTON COUNTY SUPERIOR COURT
Honorable Alex Ekstrom

BRIEF OF APPELLANT

MARK BUNCH
PRESZLER & BUNCH, PLLC
8797 W Gage Blvd., Ste B.
Kennewick, WA 99336
Phone: (509) 783-9635
Fax Number: (509) 783-7269
Attorney for Appellant

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in determining that the Commissioner's decision to make new findings of fact beyond the scope of the previous Court order was proper.
2. The trial court erred in not reaching the substantive issue before it, whether the Commissioner employed a subjective analysis of whether the change in the conditions of employment violated a sincerely held moral belief of the appellant, as requested by the Superior court.
3. The trial court's Order contains an error of law insofar as it affirms the Commissioner's Decision.

II. STATEMENT OF THE CASE

On May 6, 2013 Mike A. Boise petitioned the Commissioner of the Employment Security Department (Commissioner) to review an order by the Office of Administrative Hearings (OAH) issued April 16, 2013, CP 103-109. The Commissioner's order, dated May 31, 2013, upheld the OAH, CP 111-113. On appeal to Benton County Superior Court, the Hon. Bruce Spanner issued an order on February 25, 2014 remanding the case back to the Commissioner "to issue a decision after employing a subjective analysis of whether a change in conditions of employment violated a sincerely held moral belief of the appellant." ("First Appeal") CP 129-131. The Employment Security Department moved for reconsideration, which was denied, making the February 24, 2014 order final, CP 125-129.

On remand, the Commissioner Review Judge (Review Judge) issued an order, dated April 11, 2014, finding that the appellant's work conditions had not changed, CP 133-139. The Review Judge found that the appellant had quit because he was concerned with the prospect of a reduction in wages if he could not meet performance objectives and that the appellant's work conditions had **not** changed (emphasis added). *Id.* In the alternative the Review Judge found that, even if the employee's work

conditions had changed, the employee's moral beliefs were not sincerely held. *Id* at 137. In making the latter ruling, the Review Judge considered the generally held consensus in the industry with respect to marking-up bids. *Id* at 134. In addition, the Review Judge found Mr. Boise had stayed with his employer for approximately two weeks after learning about his employer's mark-up scheme. *Id*. Therefore, the Review Judge inferred, Mr. Boise did not hold a subjective belief against pricing mark-ups. After his request for reconsideration at the Commissioner's level was denied, Mr. Boise appealed this second Commissioner's decision to the Benton County Superior Court. CP 1-3. ("Second Appeal") The matter was heard by the Hon. Alex Ekstrom, who affirmed the Commissioner's Decision on the grounds that 1. the Commissioner had reversed herself from the prior decision (on the identical record before her previously) and determined that the work conditions had not changed; 2. that this finding was supported by substantial evidence and; 3. this finding did not constitute an error of law. RP 29-30, CP 162-164. As a result of the court's finding on the issue of whether or not the work conditions changed, it did not reach the issue of whether or not the record contained substantial evidence to uphold the Commissioner's determination that Mr. Boise, did not, in fact, hold such subjective beliefs to qualify for an exception to the standard disqualification from benefits for voluntarily quitting enumerated in

RCW 50.20.050(2). Mr. Boise timely appealed the Superior Court's Order to this Court.

III. STANDARD OF REVIEW

The Washington Administrative Procedure Act (APA), codified under RCW Title 34 governs judicial review of a final decision by the Employment Security Department Commissioner. *Verizon Nw., Inc. v. Employment Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). The court reviews the decision of the Commissioner, not the underlying decision of the ALJ. *Verizon*, 164 Wn.2d at 915 (citing *Tapper v. Employment Sec. Dep't*, 122 Wn.2d 397, 405-06, 858 P.2d 494 (1993)). The court shall consider a Commissioner's decision to be prima facie correct, and the "burden of demonstrating the invalidity of agency action is on the party asserting invalidity." RCW 34.05.570(1)(a); *Anderson v. Employment Sec. Dep't*, 135 Wn. App. 887, 893, 146 P.3d 475 (2006). The court reviews questions of law de novo, giving substantial weight to the agency's interpretation of the statutes it administers. *Everett Concrete Prods., Inc. v. Dep't of Labor & Indus.*, 109 Wn.2d 819, 823, 748 P.2d 1112 (1988). The court shall review the Commissioner's findings of fact for substantial evidence in light of the whole record. RCW 34.05.570(3)(e); *Lee's Drywall Co. v. Dep't of Labor & Indus.*, 141 Wn.

App. 859, 864, 173 P.3d 934 (2007). "Substantial evidence" is evidence that would persuade a fair-minded person of the truth or correctness of the matter. *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000).

Where an agency fails to address an issue or supplies no reason for a decision based on an erroneous legal conclusion that leads the agency to either not decide or inadequately decide an issue, a court must remand under RCW 34.05.370(3)(f) and the agency must conduct further proceedings to decide the issue. *Suquamish Tribe v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 156 Wn. App. 743, 778 (2010) (emphasis added). Where an issue is not decided but remains relevant, the court must remand, and the agency must decide the issue. *Id.* However, the court may reverse the Commissioner's decision if the Commissioner based his or her decision on an error of law, if substantial evidence does not support the decision, or if the decision was arbitrary or capricious. RCW 34.05.570(3)(d), (e), (i).

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IV. ARGUMENT

1. The Court below erred in determining there was not a change in work conditions.

Instead of complying with the trial court's order on remand in the first appeal, the Review Judge modified the Commissioner's original factual findings to find that the employment conditions had not changed after all, providing an alternate basis for denial of benefits, that was neither raised in her original decision, nor by the agency's counsel on appeal in the original matter. Clearly, the Superior Court had inferred previously determined that changes in appellant's employment had occurred, even if not explicitly stated in the Order, CP 129-131. The question the Hon. Bruce Spanner posited to the Employment Security Department on Remand presupposes changes have occurred. *Id.* If the agency believed that Order was incorrect, it had the opportunity then to appeal that order, but it did not.¹ However, as of the time of the second appeal, that original order was final. The task then, presented to the Employment Security Department, was to determine whether those changes violated a subjectively held moral belief of appellant. The Commissioner was not ordered to, and thus arguably not permitted, on remand, modify her factual

¹ The Department did, however, move for reconsideration of the order, which was denied, CP 125-128.

findings from scratch in order to reach a de novo legal conclusion contrary to the superior court order without conducting any further inquiry as to appellant's subjective beliefs. For that reason, the Commissioner's decision constitutes a clear error of law, and by endorsing the Commissioner's *sua sponte* recasting of the evidence in the second appeal, the Court has also committed an error of law, and practically speaking, issued inconsistent orders. Because a remand is unlikely to remedy this error, based on the prior actions of the Commissioner, this Court should reverse the decision on appeal and order the Employment Security Department to allow benefits to the appellant as requested originally.

2. The Court below erred in determining that the Commissioner's failure to order further proceedings consistent with the court's prior ruling, was not a clear error of law.

As stated in the appellant's superior court trial brief, because the Commissioner did not conduct "further proceedings," its decision to deny the appellant benefits is a clear error of law, and given that the trial court has already given the agency the opportunity to correct its mistake and it has not done so, a reversal was the appropriate remedy at the second trial. Where an agency fails to address an issue or supplies no reason for a decision based on an erroneous legal conclusion that leads the agency to

either not decide or inadequately decide an issue, a court must remand under RCW 34.05.370(3)(f), which the trial court did on March 10, 2014. Upon such a remand, the agency must conduct further proceedings to decide the issue. *Suquamish Tribe v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 156 Wn. App. 743, 778 (2010).

In the present matter, the Review Judge decided, contrary to the agency's original decision and without any additional factual support, that the appellant knew or should have known about the employer's objectionable billing practices and acquiesced in those practices by not objecting to those practices in a timely manner. CP 136-137. Rather than conducting further proceedings to provide a factual basis on which to analyze the narrow question of law presented to it by the court, the Review Judge decided to alter the agency's original factual reasons for denying benefits in order to avoid the legal issue. Instead of analyzing appellant's moral beliefs with respect to the price mark-up scheme of employer, the Review Judge found that the appellant should be denied benefits because he was dissatisfied with pay. CP 136. This basis of denial is precisely the sort of objective analysis of a subjective question the trial court ordered the agency to avoid.

In short, the Commissioner did not conduct the additional fact-finding proceedings to determine whether the changed terms of employment violated a subjective moral belief of appellant. As this was in clear opposition to both the substance and intent of the original Superior Court order remanding the issue, such failure constituted an error of law and the trial court in the second appeal erred in not holding a such.

3. The Commissioner's decision to deny benefits was not supported by substantial evidence.

In addition, or perhaps better stated, in the alternative, the agency's decision to deny benefits is not supported by substantial evidence because it made new factual findings diametrically opposed to its original findings without engaging in the additional fact-finding investigation demanded by the Court on remand to support such new factual findings, which should have been invalidated by the superior court in the second appeal pursuant to RCW 34.05.570(3)(e). For example, as stated in the appellant's trial brief, the Revised Finding of Fact Number 1 is not supported by substantial evidence. In Finding of Fact Number 1, the Commissioner indicates appellant quit because of a disagreement with pay, CP 133. The record clearly indicates appellant not only had a disagreement with pay, he was also dissatisfied with the practice of marking-up bids without

informing consumers. CP 27-28. In fact, this finding is contradicted by the Commissioner's finding on page three (CP 135), which states the appellant also quit due to weekly salary goals and the price mark-up scheme. CP 135. This position also contradicts the agency's position it originally argued before the trial court. Clearly, Finding of Fact Number 1, that appellant quit solely for pay-related issues, is not supported by substantial evidence and is contradicted by the remainder of the Commissioner's decision. CP 135-137.

In addition, the Commissioner did not adopt her former findings of fact 2-6. Instead it adopted certain unnumbered findings. Some of these unnumbered findings are not supported by substantial evidence. For instance, appellant did not work for two weeks with knowledge of the employment compensation plan. CP 27-28. The appellant informed the employer two days after receiving the plan that he had objections to that plan, not two weeks later. *Id.* Nothing in the record supports this erroneous factual conclusion.

Next, there is no evidence in the record to support the Commissioner's finding that it "is common in the construction industry" to mark-up bids. CP 134-135. This finding appears out of thin air. Although the employer did testify that it was common practice, the

appellant presented conflicting evidence on this point, and the Commissioner did not support this finding with anything more. A bald conclusion by the employer as to industry practice which is heartily contradicted by the appellant should not form the basis of a factual finding.

Last, there is nothing in the record to support the conclusion that appellant was reimbursed for cleaning the company car, CP 135. In fact, he was not.

V. CONCLUSION

The Commissioner clearly ignored the trial court's original order that it engage in a fact-finding inquiry as to the appellant's subjectively held moral beliefs. Instead of reaching the sole issue presented to it on remand, the agency instead decided to uphold its prior decision on an entirely new finding altogether—that appellant's work had not changed. This finding of fact is contrary to the trial court's original order which presupposed that the work had *not* changed, contradictory to the agency's earlier position in the matter, and was reached without conducting any additional factual investigation.

In addition, the agency's legal conclusions are not supported by substantial evidence. Up to the agency's most recent decision, all parties, and indeed the trial court, had agreed appellant had quit due to a change in the work conditions resulting in disagreements with pay and the mark-up provisions of employer. In addition, the Commissioner found that the appellant's moral beliefs were not objectively reasonable because those beliefs were contrary to business custom. Not only is that finding in direct conflict with the agency's task on remand, that finding is also not supported by any evidence whatsoever.

Based on the foregoing, the appellant respectfully requests that the Court reverse the Superior Court's February 18, 2015 order and remand this matter back down with direction to find that the appellant's work had changed as contemplated in RCW 50.20.050(2)(x) as a matter of law, and thereafter issue an order reversing the Commissioner's decision, and allowing the appellant's claim for benefits.

Respectfully submitted this 15th day of June, 2015.



Mark L. Bunch, WSBA # 37099
Attorney for appellant

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CERTIFICATE OF SERVICE

12 I hereby certify that on this 15th day of June 2015, I served a copy of the Brief of Appellant to:

13
14 R. July Simpson, AAG
State of Washington,
15 Department of Employment Security
PO Box 40110
16 Olympia, WA 98504-110

Via US Postal Service

17
18 Leah Harris, AAG
State of Washington,
19 Department of Employment Security
800 5th Avenue, Ste. 2000
20 Seattle, WA 98104-3188

Via US Postal Service

21
22
23 Dated this 15th day of June, 2015.

24
25 
26 _____
27 Launna Stafford
28 Legal Assistant