

71038-9

71038-9

NO. 71038-9-I

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

MICHAEL AND MELODY GIBSON,
Appellants,

v.

WASHINGTON STATE DEPARTMENT OF EMPLOYMENT
SECURITY,

Respondent,

BRIEF OF RESPONDENT

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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2014 MAR 28 PM 2:50

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I. INTRODUCTION

Between 2008 and 2012, Appellants Michael and Melody Gibson obtained \$63,316 in unemployment benefits to which they were not entitled by falsely reporting to the Employment Security Department (Department) that they had not worked or earned any money when in fact they had been working for and getting paid by a non-profit organization they founded. In doing so, they knowingly made false statements concerning facts material to their receipt of benefits with the intent that the Department would rely on those statements and grant them unemployment benefits. This amounts to misrepresentation under the Employment Security Act and requires them to repay the improperly paid benefits. RCW 50.20.070; RCW 50.20.190; WAC 192-100-050; WAC 192-220-017(3)(a); WAC 192-220-020(1)(a).

The Commissioner's decision is supported by substantial evidence, is free of errors of law, and is not arbitrary or capricious. The Department, therefore, respectfully requests that this Court affirm the Commissioner's decision.

II. COUNTERSTATEMENT OF THE ISSUES

1. The Gibsons admitted they received wages and provided services to Operation Lookout, nearly each week they applied for unemployment benefits, and Internal Revenue Service tax forms 990, which were filed on behalf of the Gibsons' employers, identified the Gibsons as working in one or more different

capacities for 40 hours each week. Does substantial evidence support the findings that the Gibsons worked and were paid wages for their work?

2. The Gibsons applied for and received unemployment benefits, certifying to the Department that they did not work and did not receive earnings, when they were, in fact, working and earning wages for their services. Did the Commissioner correctly conclude that the Gibsons' actions amounted to fraud and misrepresentation under RCW 50.20.070(2) and WAC 192-100-050(1) and (3)?
3. An unemployment benefits claimant is entitled to reasonable attorney fees and costs under RCW 50.32.160 only if the Commissioner's decision is modified or reversed. If this Court affirms the Commissioner's decision, should this Court deny the Gibsons attorney fees?

III. COUNTERSTATEMENT OF THE CASE¹

In 1984, Mr. and Mrs. Gibson and other community members founded Operation Lookout, a non-profit organization that provides services to family members of missing children. Clerk's Papers (CP) at 289-90², 651 (Finding of Fact (FF) 2), 670, 2746-47, 2878 (FF 2, 5), 2897.

¹ The Court should not mistake the Gibsons' statement of the case for a statement of the Commissioner's factual findings. Their statement of facts includes numerous assertions that are not found in the Commissioner's findings or do not support those findings.

This Court's role is to determine whether the Commissioner's actual findings of fact are supported by substantial evidence. RCW 34.05.570(3). Accordingly, this Court should treat the Gibsons' statement of facts, where it differs from the Commissioner's findings, as an argument that the Commissioner's factual findings are not supported by substantial evidence.

² The hearings before the Office of Administrative Hearings (OAH) were consolidated into a single hearing. There are two copies of the transcript from the administrative hearing in the Clerk's Papers—one copy that is part of Mr. Gibson's administrative record and one copy that is part of Mrs. Gibson's administrative record. For consistency, this brief cites to the transcript that is part of Mr. Gibson's administrative record.

The Gibsons have worked for Operation Lookout since its inception. CP at 274, 290, 292, 307, 651 (FF 3), 670, 2732, 2747, 2878 (FF 5), 2897. From 1987 through 2012, Mr. Gibson's only source of income from an employer came from Operation Lookout. CP at 307, 651 (FF 5), 670.

From October 12, 2008, through March 10, 2012, Mr. Gibson worked at Operation Lookout as the head case manager, president, registered agent, and computer technician. CP at 282, 285, 462-63, 651 (FF 1), 670. During that time, Mrs. Gibson was employed as the executive director and treasurer for Operation Lookout. CP at 2672, 2704, 2732, 2877 (FF 1), 2897. Mrs. Gibson also worked for Caring for Our Children Foundation, which she also founded with her husband, and NXT2NU, a thrift store operated by Caring for Our Children. CP at 2642-43, 2723, 2732-34, 2744, 2878 (FF 3), 2897, 3096.

Between October 12, 2008, through March 10, 2012, Mr. Gibson applied for and received unemployment benefits.³ CP at 349-52, 598-608, 651 (FF 8), 670 (FF 1). Each week he applied for benefits on the Department's website, he reported he had no work and no earnings. CP at

³ Mr. Gibson did not apply for unemployment compensation for each week during this time period. See CP at 338-41, 649 (FF 8), 668.

349-52, 469-593⁴, 651 (FF 7), 668. The Department relied on this information as truthful and paid Mr. Gibson a total of \$41,135 in benefits. CP at 349-52, 651 (FF 7), 668.

Similarly, Mrs. Gibson applied for unemployment benefits October 12, 2008 through October 17, 2009; and from June 19, 2011 through February 18, 2012.⁵ CP at 2639-41, 2764-2821, 2825-55. Each week she filed a claim unemployment benefits, Mrs. Gibson reported she had no work and no earnings. CP at 114-15, 2764-2821, 2825-55, 2878 (FF 8), 2897. The Department relied on Mrs. Gibson's weekly certifications as truthful and paid her a total of \$22,181 in unemployment benefits. CP at 2639-41, 2878 (FF 8), 2897.

After paying the Gibsons tens of thousands of dollars in unemployment benefits, the Department determined, based on tax forms filed on behalf of Operation Lookout and Caring for Our Children, that the Gibsons had failed to report that they worked 40 hours per week and had earned income during the weeks they collected unemployment benefits. CP at 157-58, 162, 169-70, 642 (FF 10, 11), 660, 2878 (FF 10, 11), 2897,

⁴ Exhibits 161 and 163 are missing from the Clerk's Papers. See CP at 495-97. The exhibits are computer printouts for Mr. Gibson's claims for weeks ending April 19, 2009, and May 2, 2009.

⁵ Mrs. Gibson was not entitled to benefits from August 2, 2009 through October 17, 2009, and June 19, 2011 through February 18, 2012, and, thus, she did not receive benefits during those weeks. CP at 349-52, 2639-41. She did, however, still apply for unemployment benefits from June 19, 2011, through February 18, 2012, and certify that she had no earnings and was not working. CP at 349-52, 2807-21, 2825-55.

3096. The Department sent the Gibsons questionnaires, asking them to clarify their employment status and wages during the time they claimed unemployment benefits. CP at 106-09, 355-62, 650 (FF 12), 660, 2626-31, 2644-46, 2878 (FF 12), 2897. Mrs. Gibson provided the Department spreadsheets, listing weekly payments the Gibsons had received. CP at 108-110, 434-37, 650 (FF 13), 668, 2626, 2650-53, 2879 (FF 17), 2897. The Gibsons claimed the earnings were deferred wages. CP at 362, 650 (FF 13) 659, 2611, 2643, 2879 (FF 13), 2897.

The employer's annual IRS tax filings revealed that Mr. Gibson earned \$45,991 in 2008, \$23,278 in 2009, and \$18,037 in 2010 from Operation Lookout. CP at 163, 169-70, 179, 650-51 (FF 13, 18), 668. The spreadsheet Mrs. Gibson submitted to the Department revealed that she had earned \$66,635.00 from October 8, 2008, through February 4, 2012. CP at 2650-53, 2879 (FF 13), 2897. In addition, the annual tax forms for Operation Lookout listed Mrs. Gibson as working 40 hours per week in various positions and showed that she earned over \$80,000 for her services for 2008, 2009, and 2010. CP at 162, 170, 179, 2878 (FF 10), 2897.

The Department sent the Gibsons separate Determination Notices, notifying each of them that (1) because they were not unemployed during the weeks they filed claims for unemployment benefits, they were not

eligible for benefits and had been overpaid by the Department, and (2) they were disqualified from unemployment benefits because they had fraudulently obtained them. CP at 342-48, 2632-38. The notifications also informed the Gibsons that they were required to repay the resulting overpayment. CP at 344, 2634. The Gibsons requested hearings to contest the determinations. CP at 339, 2607. The hearings before the Office of Administrative Hearings (OAH) were consolidated.⁶

At the administrative hearing, Suzanne Gibb from the Department's Office of Special Investigations, testified about the Department's fraud investigation. Ms. Gibb testified that there was no clear distinction between the employer, Operation Lookout, and the claimants, the Gibsons. CP at 102, 271-72. She also testified that the Department had no record that the Gibsons sought to clarify how to report

⁶ In their statement of the case, the Gibsons have a section entitled "procedural irregularities." Appellants' Amended Opening Br. at 6. The Gibsons reference a motion to strike evidence submitted by the Department. At the administrative hearing, the Gibsons and the Department offered additional exhibits. CP at 66-67. The Gibsons objected to the Department's evidence, asserting that they had received the exhibits two days before the hearing. The ALJ reserved ruling on the admission of the exhibits and did not formally admit the exhibits at the hearing. CP at 67, 78. However, many of these exhibits were discussed by the witnesses during the hearing, after the Gibsons raised issues related to the exhibits, and it appears that the ALJ ultimately relied on the testimony regarding the exhibits. See CP at 158.

The Gibsons present no argument on the ALJ's admission of the exhibits, and their statement of the case contains no citation to authority. Appellants' Amended Opening Br. at 6-7. Courts do not generally consider arguments that are not supported by appropriate citation to authority. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); see also RAP 10.3(a)(4), (5).

their income or employment status between October 2008 and March 2012. CP at 113-15, 120, 122, 259-60, 469-591, 2764-2821.

Accountant Martin Eller appeared on behalf of the employer, Operation Lookout, and testified about the IRS tax documents he had filed on behalf of Operation Lookout. Mr. Eller testified that he received the information that the Gibsons were volunteers and collected deferred wages from the Gibsons. See CP at 172, 180-81. Counsel for the Gibsons argued that Mrs. Gibson worked as a volunteer and was not required to report her volunteer hours. CP at 314-16, 2878 (FF 9), 2897. Similarly, Mr. Gibson testified that when he and his wife received unemployment benefits, they volunteered their time and were paid deferred wages. CP at 281-82, 652 (FF 17), 670. Mrs. Gibson did not testify at the hearing.⁷

⁷ In their statement of the case, the Gibsons mention the ALJ's denial of their motion for a continuance, stating that Ms. Gibson was unable to testify because the continuance was denied. Appellants' Amended Opening Br. at 6. Courts do not generally consider arguments that are not supported by appropriate citation to authority. *Cowiche Canyon Conservancy*, 118 Wn.2d at 809. The Gibsons fail to cite to authority or present argument on the issue; thus, to the extent their reference to the motion constitutes an argument that it was improperly denied, this Court should decline to review the issue.

Nevertheless, the ALJ did not abuse her discretion when she denied the motion for a continuance. "Any party to a hearing may request a postponement of a hearing at any time prior to the actual convening of the hearing. The granting or denial of the request will be at the discretion of the presiding administrative law judge." WAC 192-04-120. Due to an illness in the family, the Gibsons had to care for their grandchildren during the hearing. CP at 68. The ALJ properly exercised her discretion and denied the continuance. CP at 71 ("They can help their grandkids and nothing still prevents them from calling in for their one- or two-hour proceeding today."); *see also* CP at 73. In fact, Mr. Gibson was able to testify at the hearing.

In two separate initial orders, the administrative law judge (ALJ) determined that the Gibsons failed to report their employment status, hours worked, and earnings during the weeks they claimed unemployment benefits. CP at 653 (Conclusion of Law (CL) 2), 2880 (CL 2). The ALJ also determined that the Gibsons had made false statements regarding a material fact or knowingly failed to report a material fact and, as a result, had obtained unemployment benefits fraudulently. CP at 653-54 (CL 4, 8); 2880-81 (CL 4, 8).

In reaching her conclusion, the ALJ explicitly found Mr. Gibson's testimony to be "not credible." CP at 653 (FF 18). The ALJ determined that the Gibsons' argument that they were "unemployed when 'volunteering' and without earnings when [they] collected deferred wages not logically persuasive" and "clearly motivated by self interest so as to avoid the disqualification pursuant to RCW 50.20.070 and RCW 50.20.010."⁸ CP at 653 (FF 18), 2879 (FF 20). The Gibsons

⁸ The ALJ also concluded that even if the Gibsons' wages were deferred wages dating back to 2001 and they were not employed because they were volunteering their services, they would still be subject to disqualification of benefits during all weeks they claimed benefits because they would lack the necessary base year hours and wages to establish a valid claim from year to year. CP at 655 (CL 8), 2882 (CL 8).

A "benefit year" is the period following an initial claim during which a claimant may receive benefits. RCW 50.04.030. To establish a benefit year, a claimant must have earned wages in "employment" in at least 680 hours during the "base year." RCW 50.04.030. A "base year" is "the first four of the last five completed calendar quarters or the last completed calendar quarters immediately preceding the first day of the individual's benefit year." RCW 50.04.020.

petitioned the Commissioner for review of the ALJ's decisions, and the Commissioner affirmed the ALJ's determination that the Gibsons had fraudulently obtained unemployment benefits. CP at 670-71, 2897-99.

The Gibsons appealed to the superior court, and the cases were consolidated for review. CP at 8. The superior court affirmed the Commissioner's decisions. CP at 5-7. This appeal follows. CP at 1-4.

IV. STANDARD OF REVIEW

The Gibsons seek judicial review of the final decision of the Department's Commissioner, which is governed by Washington's Administrative Procedure Act (APA), chapter 34.05 RCW. RCW 34.05.510; RCW 50.32.120; *Rasmussen v. Dep't of Emp't Sec.*, 98 Wn.2d 846, 849, 658 P.2d 1240 (1983). Although this is an appeal from the superior court's order affirming the Commissioner's decision, this Court "sits in the same position as the superior court" and reviews the Commissioner's decision, applying the APA standards "directly to the record before the agency."⁹ *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993); see also RCW 34.05.558; *Emps. of Intalco Aluminum Corp. v. Emp't Sec. Dep't*, 128 Wn. App. 121, 126, 114 P.3d

⁹ The Gibsons improperly assign error to the superior court's decision. Appellants' Amended Opening Br. at 2. Pursuant to RAP 10.3(h), the brief of an appellant who is challenging an administrative order under the APA "shall set forth a separate concise statement of each error which a party contends was made by the agency issuing the order[.]" They have not done this.

675 (2005) (“The appellate court reviews the findings and decision of the commissioner, not the superior court decision . . .”). The court’s review is limited to the record of the administrative body. *Devine v. Emp’t Sec. Dep’t*, 26 Wn. App. 778, 781, 614 P.2d 231 (1980).

In this appeal, the Commissioner’s decision is *prima facie* correct, and the burden of proving otherwise rests on the party attacking the Commissioner’s decision—here, the Gibsons. RCW 50.32.150; *see* RCW 34.05.570(1)(a); *Safeco Ins. Cos. v. Meyering*, 102 Wn.2d 385, 391, 687 P.2d 195 (1984). Under the APA, a reviewing court may reverse if, among other things, the Commissioner’s decision (1) is not based on substantial evidence, (2) is based on an error of law, or (3) is arbitrary or capricious. RCW 34.05.570(3).

The standard of review is of particular importance in this case because the Gibsons ask this court to reweigh the evidence. On judicial review of disputed issues of fact, the APA limits the Court’s review to the agency record, RCW 34.05.558, and the Court reviews the Commissioner’s findings of fact for substantial evidence in the agency record. 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); *Tapper*, 122 Wn.2d at 403 (agency’s findings of fact are critical on

judicial review, as court may not substitute its judgment for that of the agency as to the facts).

Substantial evidence is evidence sufficient to persuade a rational, fair-minded person of the finding's truth. *Maplewood Estate, Inc. v. Dep't of Labor & Indus.*, 104 Wn. App. 299, 304, 17 P.3d 621 (2000). 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.

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 court cannot substitute its judgment on witness credibility or the weight to be given conflicting evidence. *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 35, 226 P.3d 263 (2010); *W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 449, 41 P.3d 510 (2002). Unchallenged factual findings are verities on appeal.¹⁰ *Tapper*, 122 Wn.2d at 407.

¹⁰ The Gibsons did not make a separate assignment of error for each finding of fact that they contend was improperly entered and have thus failed to comply with RAP 10.3(g). Appellant's Opening Br. at 2.

Questions of law are reviewed under the error of law standard and are subject to *de novo* review. *W. Ports Transp.*, 110 Wn. App. at 449. While review is *de novo*, courts have consistently accorded a “heightened degree of deference” to the Commissioner’s interpretation of employment security law in view of the Department’s expertise in administering the law. *Id.* at 449–50; *Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 391, 687 P.2d 195 (1984).

Where there are mixed questions of law and fact, the court must: (1) determine whether factual findings are supported by substantial evidence; (2) make a *de novo* determination of the correct law; and (3) apply the law to the applicable facts. *Tapper*, 122 Wn.2d at 403.

Finally, an agency’s decision is arbitrary and capricious only if it is “willfully unreasonable, without consideration and in disregard of facts or circumstances.” *W. Ports Transp., Inc. v. Emp’t Sec. Dep’t*, 110 Wn. App. at 450. “If the decision is the result of honest and due consideration, it is not arbitrary and capricious even if reasonable minds could disagree with the result.” *Stephens v. Emp’t Sec. Dep’t*, 123 Wn. App. 894, 905, 98 P.3d 1284 (2004).

V. ARGUMENT

The Legislature enacted the Employment Security Act, RCW Title 50, to provide compensation to individuals who are “unemployed through

no fault of their own.” RCW 50.01.010. Thus, in order to be eligible, a person must be “unemployed.” RCW 50.20.010(d). “An individual is ‘unemployed’ in any week during which the individual performs no services and with respect to which no remuneration is payable[.]” RCW 50.04.310(1).

Between 2008 and 2012, the Gibsons applied for and received unemployment benefits while they were working and being paid. Despite being asked each week they claimed benefits whether they had worked or had any earnings, the Gibsons never reported that they had worked or received any earnings until they were contacted by the Department after receiving tens of thousands of dollars in unemployment compensation. They were therefore properly disqualified from unemployment benefits because they “knowingly made a false statement or representation involving a material fact or knowingly failed to report a material fact” and, as a result, obtained or attempted to obtain benefits. RCW 50.20.070(2)(a).

The Commissioner properly weighed the evidence, found Mr. Gibson’s testimony to be not credible, and ultimately determined that the Gibsons worked and collected earnings during the weeks they were paid unemployment benefits. They are thus required to repay the benefits to which they were not entitled, and are disqualified for an additional 26

weeks for fraud. RCW 50.20.070(2)(b)(i), RCW 50.20.190. Because the Commissioner's decision is supported by substantial evidence and is free from errors of law, this Court should affirm the Commissioner's decision.

A. Substantial Evidence Supports the Findings that the Gibsons Worked and Were Paid While They Claimed Unemployment Benefits¹¹

During the weeks the Gibsons requested benefits, the Gibsons performed services for and earned wages from Operation Lookout. These findings are supported by IRS tax documents and unemployment tax insurance documents. The Gibsons eventually reported their weekly earnings to the Department, but only after the Department requested wage verification information from them. CP at 114-15, 122, 134-35, 2626-31, 2644-53.

The IRS tax documents—Form 990—filed by Operation Lookout in 2008, 2009, and 2010 listed the Gibsons as employees working 40 hours per week, in one or more different capacities, for the organization. According to the documents, in 2008, Mrs. Gibson served as executive

¹¹The Gibsons assert that this Court should issue findings that during the time period at issue, the Gibsons received back pay under WAC 192-190-040. Appellants' Amended Opening Br. at 25-27. But a reviewing court may not make factual findings on appeal. Contrary to the Gibsons' assertion, under the APA, judicial review is limited to whether the findings are supported by substantial evidence. RCW 34.05.570(3).

The Gibsons improperly request, in the alternative, a remand to determine whether the Gibsons received backpay. Appellants' Amended Opening Br. at 28. A reviewing court may remand a matter to the agency with directions "that the agency conduct fact-finding" under specific circumstances, none of which the Gibsons allege is present here. RCW 34.05.562 (2).

director, and Mr. Gibson served as president and head of case management; and, in 2009 and 2010, Mrs. Gibson served as executive director and treasurer, and Mr. Gibson served as president and head of case management. CP at 157-58, 162-63, 169-70, 179-80, 991, 1025, 1047. The Form 990s stated that the “[a]verage hours per week” for the Gibsons amounted to a minimum of 40 hours per week. CP at 162, 169-70, 179-80, 991, 1025, 1047. The Form 990s also identified “reportable compensation from the organization” that was paid to the Gibsons for their services. CP at 162, 169-70, 179-80, 991, 1025, 1047.

In addition, during the Department’s investigation, the Gibsons reported to the Department that they had received wages during the weeks they received unemployment benefits. Mrs. Gibson submitted a spreadsheet prepared by Operation Lookout’s bookkeeper that listed the weekly wages the Gibsons received while they collected unemployment benefits.¹² CP at 108-12, 434-37, 2650-53. From 2008 through 2012, however, each week they filed for benefits, the Gibsons certified to the Department that they did not work and received “no other earnings.” CP at 113-15, 349-52, 469-593, 2764-2821, 2825-55. Substantial evidence supports the Commissioner’s findings that the Gibsons received

¹² The amount of the wage payments varied from \$110.91 per week to \$2,214.15 per week, and there are some weeks the Gibsons did not receive wages. CP at 434-37, 2650-53.

earnings—which they did not report to the Department—during the weeks they received unemployment benefits.

Moreover, the Gibsons performed the same services for Operation Lookout when they claimed to be unemployed that they had performed for the organization when they acknowledged they were employed. At the administrative hearing, Mr. Gibson characterized the work he performed while collecting benefits as “a volunteer head of case management, developing policies, procedures, hiring administration, [and he was] kind of the onsite or on-call computer technician for staff if there were problems[.]” CP at 287; *see also* 285, 289 (Mr. Gibson admitted he volunteered on a daily basis); *see also* 180-81 (accountant Martin Eller, who filed IRS documents on behalf of Operation Lookout, testified that Mrs. Gibson told him Mr. Gibson was laid off and volunteered as head of case management). This is the same work he did for the organization when he said he was “employed” by the organization. CP at 282-83, 288.

Unemployment insurance tax documents identified Mrs. Gibson as Operation Lookout’s executive director while she claimed benefits. CP at 2672, 2674, 2676-81; *see also* CP at 181 (accountant Mr. Eller also testified that Mrs. Gibson told him she was laid off and “volunteered” as executive director); 2642-43 (Mrs. Gibson told Office of Special Investigations that she provided “volunteer work” to non-profit

organizations), 2672 (shared work compensation plan application identified Mrs. Gibson as the executive director), 2704 (organization's registration detail with the Washington Secretary of State listed Mrs. Gibson as one of the governing persons of Operation Lookout), 2732 (Mrs. Gibson's LinkedIn page identified her as the executive director and treasurer for Operation Lookout from 1984-2011), 2877 (FF 1), 2897. She was also the executive director when she was "employed" by the organization. See CP at 181, 2732, 2877 (FF 1), 2897.

At the administrative hearing, the Gibsons did not dispute that they performed services for Operation Lookout when they requested unemployment benefits; however, they asserted that they were justified in reporting they had worked zero hours because they had "volunteered" their services. The Commissioner explicitly rejected the Gibsons' assertion that they were volunteers, taking into account the Gibsons' authority within Operation Lookout and finding their argument to be "clearly motivated by self interest so as to avoid disqualification" under the Act. CP at 650-51 (FF 18), 668, 2879 (20), 2897. This Court is not to reweigh the evidence or credibility determinations. *Smith*, 155 Wn. App. at 35; *W. Ports Transp., Inc.*, 110 Wn. App. at 449; see CP at 651 (FF 18), 668, 2879 (FF 20), 2897. The Commissioner's finding that the

Gibsons worked for Operation Lookout when they received unemployment benefits is supported by substantial evidence.

Importantly, in rejecting the Gibsons' characterization of their wages and services as "deferred wages" and "volunteer work," the Commissioner considered the significant authority the Gibsons had over Operation Lookout. As Suzanne Gibb, from the Department's Office of Special Investigations, testified, there was no clear distinction between the employer and the claimant. CP at 99. Operation Lookout submitted documents to the Department that showed the Gibsons controlled Operation Lookout. For example, Mrs. Gibson signed Separation Statements for the company's employees, including her own Separation Statement. CP at 124, 220-22, 2676-81. Mrs. Gibson signed an authorization request form from the Department, certifying that she was the officer authorized to represent Operation Lookout's account. CP at 2684. The Department had Mrs. Gibson's email address listed as the employer email address for Operation Lookout. CP at 223, 430, 2687. Furthermore, the Department had Mrs. Gibson listed as a board member for Operation Lookout and Mr. Gibson listed as the President of Operation Lookout. CP at 220-21, 431, 2688. As Ms. Gibb testified, "[The Gibsons] are the contact individuals for the corporation involving all matters of records involving employee, employer to the Department if you look at

their tax records.” CP at 36, 221. Substantial evidence supports the Commissioner’s findings that while the Gibsons reported to the Department that they were unemployed, they worked and earned wages for their work.

The Gibsons contend that the Commissioner’s finding is “arbitrary” because the IRS Form 990 from 2010 indicated that “neither the organization nor any related organization compensated any current officer, director, or trustee” and stated that “[a]ny compensation received by [the Gibsons] in 2010 is based on unpaid past due wages from previous years that was approved by the Board of Directors.” Appellants’ Amended Opening Br. at 28-30; CP at 1056, 1092. The Gibsons also contend that the testimony of accountant Martin Eller supported their argument that they were volunteers who collected deferred wages.¹³ Appellants’ Amended Opening Br. at 29-30. The Gibsons’ argument improperly asks this Court to reweigh the evidence.¹⁴

¹³ Mr. Eller testified that he received the information that the Gibsons were volunteers and collected deferred wages from the Gibsons. See CP at 177, 180-81.

¹⁴ For example, Ms. Gibb testified, in response to the Gibsons’ argument, “[T]he Gibsons are the contact individuals for the corporation involving all matters of records involving employee, employer to the Department if you look at their tax records. . . . There is no other involvement by the other board members to decide or to – that included as a – they are the controlling members. As far as when I spoke to Michael Gibson, they are not in the office and they don’t – they don’t have involvement with the corporation. It is run by themselves.” CP at 221; *see also* CP at 222-25,

An agency's decision is arbitrary and capricious only if it is "willfully unreasonable, without consideration and in disregard of facts or circumstances." *W. Ports Transp., Inc.*, 110 Wn. App. at 450; *see* Appellants' Amended Opening Br. at 28, 30. Here, the Commissioner considered the evidence, including the evidence cited by the Gibsons, and rejected the Gibsons' characterization of the services they provided for their organizations as "voluntary" and the wages they collected while they received unemployment benefits as "deferred compensation." He determined that the Gibsons' argument that their wages were deferred wages is "not logically persuasive" and "clearly motivated by self interest so as to avoid the disqualification pursuant to RCW 50.20.080 and RCW 50.20.010." CP at 651 (FF 18), 668, 2879 (FF 20), 2897. Even if reasonable minds could disagree with the Commissioner's ultimate conclusions, the Commissioner's decision is not arbitrary and capricious. *See Stephens*, 123 Wn. App. at 905.

The Gibsons also contend that they could not have reported their earnings on the weekly certifications. Appellants' Amended Opening Br. at 23-25. The Gibsons weekly certifications reveal that they never reported "work" or "other earnings" to the Department, and according to the testimony of Ms. Gibb, the Department had no record that the Gibsons sought to clarify how to report their income or employment status between

October 2008 and March 2012. CP at 114-15, 122, 134-35, 469-591, 2326, 2328, 2764-2821. As the Commissioner concluded, the Gibsons used their position as employer *and* employee to “manipulate” their employment statuses—labeling their wages as “deferred wages” and their services as “volunteer services”—so that they could be eligible for unemployment benefits.¹⁵ CP at 652 (CL 8), 668, 2881 (CL 8), 2897. The Gibsons should have reported that they were working and receiving earnings during the weeks at issue.¹⁶

B. The Commissioner Correctly Concluded That the Gibsons Fraudulently Obtained Unemployment Benefits and, Accordingly, They Must Repay the Benefits

The Gibsons committed fraud as defined by the Act when they applied for unemployment benefits and falsely certified to the Department that they had not worked and had no earnings. *See* RCW 50.20.070;

¹⁵ During the time period at issue, the Act also stated that an “officer of a corporation who owns ten percent or more of the outstanding stock of the corporation, or a corporate officer who owns ten percent or more of the outstanding stock of the corporation, whose claim for benefits is based on any wages with that corporation, is: ... [n]ot ‘unemployed’ in any week during the individual’s term of office or ownership in the corporation, even if wages are not being paid.” RCW 50.04.310.

Operation Lookout is a non-profit organization and, thus, this statute does not apply to it. However, the statute shows how, by analogy, the Gibsons, in their unique position as employer and employee, should not have been allowed to collect unemployment benefits by labeling their wages as “deferred wages” and their services as “volunteer work.”

¹⁶ Moreover, if the Gibsons were, in fact, volunteers, they should have reported this information to the Department, as it would have likely affected their ability to be “able” and “available” for work and, thus, eligible for unemployment benefits. *See* RCW 50.20.010; CP at 136-37.

WAC 192-100-050. Accordingly, they must repay all of the benefits, and are disqualified from receiving benefits for an additional 26 weeks. RCW 50.20.190(1); RCW 50.20.190(2); WAC 192-220-017(1), (3)(a);

1. The Gibsons' actions constituted fraud under the Employment Security Act

Five elements establish the Gibsons misrepresented facts to the Department under RCW 50.20.070: (1) they made a statement or provided information; (2) the statement was false; (3) they knew the statement was false or did not know whether it was true or false when making it; (4) the statement concerned a fact that was material to their rights and benefits; and (5) they made the statement with the intent that the Department would rely on it when taking action. WAC 192-100-050(1); *Engbrecht v. Dep't of Emp't Sec.*, 132 Wn. App. 423, 428-29, 132 P.3d 1099 (2006). The Department is only required to prove that the Gibsons "reported [a material fact] without knowledge as to the truth [or falsity] thereof, with the intent that the Department should act in reliance thereon." *Engbrecht*, 132 Wn. App. at 429.

Circumstantial evidence, rather than direct evidence, is enough to establish fraud if the evidence is clear, cogent, and convincing. WAC 192-100-050(2). That a fact "must be proven by clear, cogent and convincing evidence . . . is the equivalent of saying that the ultimate fact

in issue must be shown to be ‘highly probable.’” *Douglas Nw, Inc. v. Bill O’Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 678, 828 P.2d 565 (1992) (citation omitted). “The clear cogent and convincing burden of proof contains two components: (1) the amount of evidence necessary to submit the question to the trier of fact or the burden of production, which is met by substantial evidence; and (2) the burden of persuasion.” *Endicott v. Saul*, 142 Wn. App. 899, 909-10, 176 P.3d 560 (2008).

With regard to the burden of persuasion, “the trier of fact, not the appellate court, must be persuaded that the fact in issue is ‘highly probable.’” *Endicott*, 142 Wn. App. at 910 (quoting *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 726, 734-35, 853 P.2d 913 (1993)). “[O]n appellate review, in determining the sufficiency of the evidence to support a finding of fraud or misrepresentation, we need only consider the evidence most favorable to the prevailing party.” *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963).

The Gibsons reported information to the Department that they knew was false, the information was material to their rights and benefits, and they provided the information so that the Department would rely on it to pay them unemployment benefits. They thus are at fault in causing the overpayment because they committed fraud and must repay all the benefits improperly paid to them.

a. The Gibsons falsely certified to the Department that they worked no hours and did not earn wages

Each week a claimant files a claim for unemployment benefits, he or she must truthfully report “[a]ny earnings and the number of hours worked during the week claimed.” WAC 192-140-005(5)(g). During each of the weeks the Gibsons claimed benefits, they worked 40 hours and were paid money. However, the Gibsons falsely reported to the Department that they worked no hours and did not earn wages. When the Gibsons received unemployment benefits, they worked for Operation Lookout—a company they had founded and worked for since its inception in 1984—and performed the same services they performed when they were not collecting unemployment benefits. CP at 282-83, 285, 290, 292, 307, 462-63, 649 (FF 1, 2), 668, 2482, 2500, 2703-04, 2877 (FF 1), 2878 (FF 5), 2897. And as the Commissioner found, the Gibsons also received wages from the company during this time for the services performed, not “deferred wages.” CP at 439, 441, 443, 445, 447, 650 (FF 13), 668, 2315-16, 2650-53, 2879 (FF 13), 2897. Accordingly, they made false statements to the Department.

b. The Gibsons knew their statements were false

Second, the Gibsons knew their statements that they were not working or earning wages were false. The Gibsons falsely identified

themselves as volunteers, who received “deferred wages,” so that they could obtain unemployment benefits.

The Gibsons were on notice that they were required to report work and income earned each week and that the Department would consider any misleading information to be fraud. Every individual claiming unemployment benefits must review and affirmatively respond to a fraud warning each time he or she files a weekly claim for benefits. CP at 609, 646, 2875. The warning reads: “Answer the questions on this form truthfully. You are responsible for the answers you give. False answers may result in overpaid benefits which you must pay back. If you provide information that you know is false or misleading, it is considered fraud, and is punishable by law.” CP at 609, 646, 2875. The claimant must respond that they understand the fraud warning or they are disconnected from applying for benefits via the internet and told to contact their Unemployment Claims Telecenter. CP at 609, 646, 2875.

In addition, the Gibsons were both provided an Unemployment Claims Kit (Kit). CP at 607-08, 629, 2856-59. The Kit warned the Gibsons that they were “responsible for reading and understanding the information in [the Kit].” CP at 630, 2860. The Kit informed the Gibsons that they were required to report “all work and income earned each week.” CP at 630, 2860. The Kit also warned the Gibsons that the Department

would compare their reported earnings with those reported on his employer's records and that misrepresentation would result in a denial of benefits and additional penalties:

We are on the Lookout for False Claims

We have many ways to find out if someone is receiving unemployment benefits by making false claims or not giving us information as required. Some of these are:

- Comparing the earnings you report with those reported on employer's records

...

Misrepresenting or knowingly withholding information about your claim is fraud, and will result in a denial of benefits and additional penalties as follows:

- 1st occurrence – Denial of benefits for 26 weeks beginning the Sunday of the week the decision is mailed and you must repay any benefits paid for the fraud weeks

CP at 636, 2865.

Despite the fraud warning and warnings in the Kit, the Gibsons never sought to clarify whether they were required to report what they asserted were their "deferred wages." CP at 113, 120, 122, 259-61. Instead, the Gibsons chose to never report that they had worked or received wages, or had "other earnings to report," until they were contacted by the Department. CP at 114-15, 259-61. Given the facts and circumstances of the case, the Commissioner correctly concluded that the

Gibsons worked for the employer and, as the employer, “manipulated” their employment statuses so they could claim unemployment benefits. CP at 652 (CL 8), 668, 2881 (CL 8), 2897. The Gibsons knew the information they provided to the Department to obtain benefits was not accurate.

c. The statements concerned facts that were material to the Gibsons’ eligibility for unemployment benefits

The Gibsons’ weekly hours and earnings were material to their rights to unemployment benefits. In order to be eligible for unemployment benefits, a person must, among other things, be “unemployed.” RCW 50.20.010. A person is “unemployed” in any week during which the individual performs no services and with respect to which no remuneration is payable to the individual, or in any week of less than full-time work, if the remuneration payable to the individual with respect to such week is less than one and one-third times the individuals’ weekly benefit amount plus five dollars. RCW 50.04.310.

The Department allowed the Gibsons’ claims for unemployment benefits because the Gibsons falsely reported that they were not performing any services and not earning any wages. Even if the Gibsons were unemployed during certain weeks because they performed less than full-time work or their remuneration was less than one and one-third times

the individuals' weekly benefit amount plus five dollars, their hours and earnings would still have materially affected their weekly benefit amount—even small amounts of earnings are deducted from an individual's weekly benefit amount. *See* RCW 50.20.130(2)(a); CP at 637, 2874 (Department's earnings deduction chart shows that when a claimant earns as little as \$5.01 in gross earnings, a small amount is deducted from a claimant's weekly benefit amount); *see also Engbrecht*, 132 Wn. App. at 429-30 (claimant disqualified from unemployment benefits under the misrepresentation disqualification provision of the Act when he *underreported* his earnings and could have easily ascertained the correct amount of his earnings and reported them accordingly). Accordingly, the Commissioner properly determined that this element of fraud was satisfied by clear, cogent, and convincing evidence.

d. The false statements were made with the intent the Department would rely on the statements and grant the Gibsons unemployment benefits

Finally, the Gibsons made the false statements with the intent that the Department would act in reliance on them. The Gibsons continued to work for their organizations and collect wages, construing their weekly hours as volunteer hours and their earnings as deferred wages in order to obtain unemployment benefits. They reported no work and no earnings in order to receive unemployment compensation.

The Commissioner explicitly rejected the Gibsons' assertion that they volunteered and collected deferred wages during the weeks at issue, determining that Mr. Gibson "was well aware of the fact he was working 40 hours per week and he expected to be paid and was paid," CP at 650 (FF 17), 668, and Mrs. Gibson "would have the Employment Security Department believe that she worked during the period of time at issue with no expectation of wages when she had no other sources of income and had worked exclusively for the employer." CP at 2880 (FF 21), 2897. As the Commissioner pointed out, the Gibsons' argument that their wages were deferred wages is "not logically persuasive" and "clearly motivated by self interest so as to avoid the disqualification pursuant to RCW 50.20.080 and RCW 50.20.010." CP at 651 (FF 18), 668, 2879 (FF 20), 2897.

The Gibsons assert that the Commissioner erred in determining that the Gibsons made false statements to the Department when they failed to report their alleged deferred wages. Appellants' Amended Opening Br. at 21-22. But the Commissioner weighed the conflicting evidence and found the Gibsons' arguments that they were not employed because they were providing volunteer services and being paid deferred wages to be not credible. CP at 652 (CL 8), 668, 2881 (CL 8), 2897. As stated above, this Court cannot substitute its judgment on witness credibility or the weight to

be given conflicting evidence. *Smith*, 155 Wn. App. at 35; *W. Ports Transp., Inc.*, 110 Wn. App. at 449.

In sum, the Commissioner correctly concluded that clear, cogent, and convincing evidence showed the Gibsons committed fraud and were disqualified from receiving benefits, because they knowingly made false statements to the Department concerning facts material to their rights and benefits, and they made the statements with the intent that the Department would rely on them when taking action.

2. The Gibsons Must Repay All the Benefits and Are Disqualified for an Additional 26 Weeks

An individual who is paid any amount of unemployment benefits to which she is not entitled shall be liable for repayment of the amount overpaid. RCW 50.20.190(1); *Edinger v. Emp't Sec. Dep't*, 58 Wn. App. 525, 529, 793 P.2d 1004 (1990). The Department's Commissioner may waive an overpayment of benefits only "if the commissioner finds that the overpayment was *not* the result of fraud, misrepresentation, willful nondisclosure, or fault attributable to the individual and that the recovery thereof would be against equity and good conscience." RCW 50.20.190(2) (emphasis added); WAC 192-220-017(1), (3)(a); *see also In re Dullanty*, Emp't Sec. Comm'r Dec.2d 352 (1977) ("If an individual knowingly fails to report a material fact and thereby obtains

benefits to which the individual is not entitled, then the individual must be disqualified *completely* for the weeks with respect to which the misrepresentation was made.”) (emphasis added).¹⁷ Because the Gibsons are at fault for the overpayment of benefits, they must repay all of them.

The Gibsons are also disqualified from receiving benefits for an additional 26 weeks. Individuals who engage in misrepresentation are disqualified from receiving future benefits for an additional 26 weeks following the determination. *See* RCW 50.20.070(2)(b)

C. Because This Court Should Affirm the Commissioner’s Decision, the Gibsons Should Not Receive Attorney Fees and Costs

The Gibsons are entitled to reasonable attorney fees and costs only if this Court ultimately modifies or reverses the Commissioner’s decision. RCW 50.32.160. Because the Court should affirm the Commissioner’s decision, the Court also should deny the Gibsons’ request for attorney fees and costs.

VI. CONCLUSION

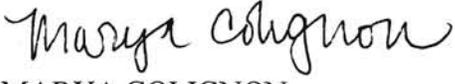
For the foregoing reasons, the Commissioner correctly determined that the Gibsons were disqualified from receiving unemployment benefits because they had knowingly misrepresented their eligibility to the

¹⁷ Under RCW 50.32.095, the Commissioner may designate certain Commissioner’s decisions as precedents. These precedents are to be treated as persuasive authority by a reviewing court. *Martini v. Emp’t Sec. Dep’t*, 98 Wn. App. 791, 795, 990 P.2d 981 (2000). This case is attached to this brief as Attachment 1.

Department and received benefits as a result. The Commissioner's decision is supported by substantial evidence and is free of errors of law. The Department respectfully asks the Court to affirm the Commissioner's decision.

RESPECTFULLY SUBMITTED this 28th day of March 2014.

ROBERT W. FERGUSON
Attorney General


MARYA COLIGNON,
WSBA # 42225
Assistant Attorney General
Attorneys for Respondent

PROOF OF SERVICE

I, Roxanne Immel, declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.
2. That on the 28th day of March 2014, I caused to be served a copy of **Brief of Respondent** on the counsel of record on the below stated date as follows:

U.S. mail postage prepaid

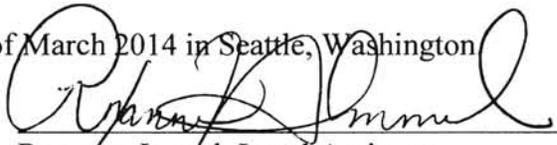
MICHAEL A. JACOBSON
119 FIRST AVENUE SOUTH #200
SEATTLE, WA 98104

Filed with (original + 1 copy)

RICHARD JOHNSON, CLERK
COURT OF APPEALS, DIVISION I
ONE UNION SQUARE
600 UNIVERSITY STREET
SEATTLE, WA 98101-1176

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

Dated this 28th day of March 2014 in Seattle, Washington


Roxanne Immel, Legal Assistant

Appendix

**Washington State
Employment Security Department
Precedential Decisions of Commissioner**

WEST.

[Home](#)

IN RE KAREN E. (LEETCH) DULLANTY PETITIONER

Empl. Sec. Comm'r Dec.2d 352
October 06, 1977

Term 

Empl. Sec. Comm'r Dec.2d 352, 1977 WL 191895 (WA)

Commissioner of the Employment Security Department
State of Washington
IN RE KAREN E. (LEETCH) ◀DULLANTY▶ PETITIONER

October 6, 1977

Case No.
352
Review No.
27446
Docket No.
6-14530

DECISION OF COMMISSIONER

KAREN E. ◀DULLANTY▶ duly petitioned the Commissioner for a review of a Decision of an Appeal Tribunal entered in this matter on the 21st day of December, 1976. Having now completed a thorough examination of the record and files herein, thereby being fully advised in the premises, the undersigned hereby enters the following:

FINDINGS OF FACT

I

The petitioner filed for and was paid her maximum weekly benefit amount of \$93 for each of the weeks ending May 15, May 29, June 5, June 12, June 19, and June 26, 1976, totalling \$558. When she claimed these weeks she reported she was totally unemployed and had earned no wages during any of these weeks at issue.

II

The petitioner was employed by Highline Community College during each of the weeks at issue and earned wages as follows: during the week ending May 15, she earned \$24.20; during the week ending May 29, she earned \$26.40; during the week ending June 5, she earned \$45.10; during the week ending June 12 she earned \$45.10; during the week ending June 19, she earned \$60.50; during the week ending June 26, she earned \$20.90. She did not report any of these earnings because she felt she needed her full unemployment insurance benefits in addition to the earnings in order to finance her education. She was a student at Highline Community College. She was aware that she was required to report any wages earned during a week for which she was drawing benefits.

From the foregoing Findings of Fact, the undersigned frames the following:

ISSUES

I

Did the petitioner receive benefits in excess of her entitlement pursuant to RCW 50.20.130 during the weeks at issue?

II

Is the petitioner subject to disqualification pursuant to RCW 50.20.070?

III

Is the petitioner liable for refund of benefits pursuant to RCW 50.20.190?

From the Issues as framed, the undersigned draws the following:

CONCLUSIONS

RCW 50.20.130 provides that each eligible individual who is unemployed in any week shall be paid with respect to such week, a benefit in an amount equal to his weekly benefit amount less 75% of that part of the remuneration payable to him with respect to such weeks which is in excess of \$5. Had the petitioner correctly reported her earnings she would have been paid a reduced benefit amount for each of the weeks at issue.

RCW 50.20.070 provides as follows:

"Disqualification for misrepresentation. Irrespective of any other provisions of this title an individual shall be disqualified for benefits for any week with respect to which he has knowingly made a false statement or representation involving a material fact or knowingly failed to report a material fact and has thereby obtained or attempted to obtain any benefits under the provisions of this title, and for an additional twenty-six weeks commencing with the first week for which he completes an otherwise compensable claim for waiting period credit or benefits following the date of the delivery or mailing of the determination of disqualification under this section: PROVIDED, That such disqualification shall not be applied after two years have elapsed from the date of the delivery or mailing of the determination of disqualification under this section, but all overpayments established by such determination of disqualification shall be collected as otherwise provided by this title."

The petitioner contends she should only be required to refund the difference between the amount she was paid and the amount she would have been paid had she properly reported her earnings. However, RCW 50.20.070 is clear. If an individual knowingly fails to report a material fact and thereby obtains benefits to which the individual is not entitled, then the individual must be disqualified completely for the weeks with respect to which the misrepresentation was made. That is the situation here and the petitioner must be totally disqualified for each of these weeks at issue and has been overpaid in the total amount of \$558.

RCW 50.20.190 provides that the Commissioner may waive an overpayment if he finds that said overpayment was not the result of fraud, misrepresentation, wilful nondisclosure or fault attributable to the individual. However, the overpayment here was the result of fraud, misrepresentation and wilful nondisclosure and the overpayment cannot be waived. The petitioner is liable for the refund of the full amount of the overpayment, \$558. Accordingly,

IT IS HEREBY ADJUDGED that the petitioner received benefits in excess of her entitlement pursuant to RCW 50.20.130 for each of the weeks ending May 15, 29; June 5, 12, 19, 26, 1976. Petitioner is disqualified for these same weeks pursuant to RCW 50.20.070. She has been overpaid in the amount of \$558 and is liable for the refund of that amount pursuant to RCW 50.20.190.

DATED at Olympia, Washington, OCT 6 1977

Felix F. King
Commissioner's Delegate

Empl. Sec. Comm'r Dec.2d 352, 1977 WL 191895 (WA)

END OF DOCUMENT

 Term

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