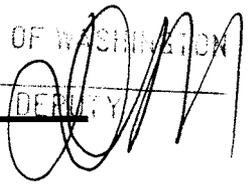


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
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NO. 38009-9

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

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LARRY HUGHES,

Appellant,

v.

EMPLOYMENT SECURITY DEPARTMENT,  
STATE OF WASHINGTON

Respondent.

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**BRIEF OF RESPONDENT**

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## I. INTRODUCTION

Larry Hughes received unemployment benefits for over one year while being “unable to work,” in violation of RCW 50.20.010. Additionally, for approximately nine months during that period, Mr. Hughes received both unemployment benefits *and* industrial insurance, in violation of RCW 50.20.085. Upon learning Mr. Hughes had been receiving unemployment benefits in violation of law for over one year, the Commissioner of the Employment Security Department (“Department”) engaged in a redetermination under RCW 50.20.160(4)(c), seeking to recover all benefits improperly paid.

Week after week for a period of over one year, Mr. Hughes reported to the Department that he was “able to work” while simultaneously receiving industrial insurance for being “unable to work.” The Commissioner determined that both Mr. Hughes’ failure to inform the Department that he was “unable to work” for over one year, and his failure acknowledge that he was receiving dual benefits for approximately nine months during that period amounted to acts of “willful nondisclosure” under RCW 50.20.160(4), and therefore assessed an overpayment of \$22,630.00.

Mr. Hughes unsuccessfully appealed the Commissioner’s decision to Thurston County Superior Court. Mr. Hughes now appeals to this

Court. The Department respectfully requests that this Court affirm the Commissioner's decision finding Mr. Hughes liable to the Department in the amount of \$22,630.00 under RCW 50.20.160(4), and ineligible for a waiver, as the overpayment in this case was caused by Mr. Hughes' failure to disclose material facts which would have rendered him ineligible for benefits under the Employment Security Act ("Act").

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. Does substantial evidence support the Commissioner's finding that Mr. Hughes willfully failed to disclose material facts related to his benefit eligibility, thereby justifying a redetermination of benefits under RCW 50.20.160(4)(c)?
2. Should the Commissioner have waived Mr. Hughes' obligation to reimburse the Department under RCW 50.20.190, when the overpayment was caused by Mr. Hughes' willful failure to disclose material facts related to his benefit eligibility?

## **III. COUNTERSTATEMENT OF THE CASE**

### **A. Statutory Background**

In order to receive unemployment benefits under the Act, claimants must, among other things, establish that they are "able and available" to work during the week in which benefits are claimed. *See* RCW 50.20.010(c). Claimants are therefore required to file weekly claims by telephone by calling the Department's claims center and answering a series of questions related to their eligibility under the Act. WAC 192-140-005. Among the several questions asked, the Department inquires

about the claimant's weekly income and about his or her availability to work during the week in question. WAC 192-140-070. Additionally, claimants are asked whether they have either applied for or received industrial insurance from the Department of Labor & Industries ("L&I") for that particular week. The Department relies on this information in determining whether to award weekly benefits.

If a claimant fails to establish that he or she is "available" to work, benefits are denied for that week. WAC 192-140-070. Similarly, if a claimant has received industrial insurance, benefits are denied, as the Act prohibits claimants from receiving unemployment benefits if they have received industrial insurance for a particular week. RCW 50.20.085.<sup>1</sup> If a claimant is eligible for benefits, however, the Department will issue an "initial determination" allowing benefits in an amount designated by the Act.

If, at any time after awarding benefits, the Department learns that a claimant received benefits to which he or she was not entitled, the Commissioner may "redetermine" an award of benefits. RCW 50.20.160.

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<sup>1</sup> RCW 50.20.085 disqualifies claimants from simultaneously receiving both unemployment benefits and industrial insurance for any given week. This is because in order to qualify for unemployment benefits, a claimant must show, *inter alia*, that he or she is able, available, and actively seeking work. See RCW 50.20.010(c) (emphasis added). Conversely, in order to be eligible for industrial insurance, a claimant must show that he or she is unable to work as a result of injury. See RCW 51.32. These benefits schemes are thus mutually exclusive, since a claimant cannot simultaneously be able and unable to work.

In order to redetermine a prior award of benefits, however, the Commissioner must find that benefits were procured through fraud, misrepresentation, or an act of willful nondisclosure. RCW 50.20.160(4)(c). If, after an investigation, a claimant is found to be “at fault” in causing the overpayment, he or she will be ordered to reimburse the Department for any amounts improperly obtained. RCW 50.20.190.

**B. Factual Background**

Shortly after his discharge from Sunoco on July 26, 2001, Mr. Hughes filed an application for unemployment benefits under the Act. Commissioner’s Record (CR) at 249; Finding of Fact (FF) 8.<sup>2</sup> Mr. Hughes’ application was approved, and he was awarded benefits from September 8, 2001 through November 9, 2002, collecting a total of \$22,630.00 over a sixty-two week period. CR at 249; FF 5, 8. In filing his weekly unemployment claims by telephone, Mr. Hughes reported to the Department that he was “able and available” to work, and that he was *not* receiving industrial insurance from the Department of Labor and Industries (“L&I”). CR at 103-168. During this time, however,

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<sup>2</sup> Findings of Fact are those made by the Administrative Law Judge of the Office of Administrative Hearings in the Initial Order, as adopted by the Commissioner. Both the ALJ’s Initial Order and the Commissioner’s decision affirming the order can be found at pp. 239-244, and pp. 264-270, of the Commissioner’s Record, respectively. For the Court’s convenience, the Commissioner’s Decision has been attached to this brief as “Appendix A.” The ALJ’s initial order is also attached to this brief as “Appendix B.”

Mr. Hughes *was* receiving industrial insurance and reporting to L&I that he was “unable to work” because of a work-related accident. CR at 249; FF 5. As a result, Mr. Hughes was also awarded industrial insurance every two weeks while receiving unemployment benefits every week, also known as “double-dipping.” CR at 549; FF 5, 7. Approximately four years later, upon learning Mr. Hughes had improperly received unemployment benefits for a period of over one year, the Department engaged in a redetermination under RCW 50.20.160(4)(c) to recover all benefits improperly obtained by Mr. Hughes. CR at 249; FF 5.

After the redetermination, the Department arrived at two conclusions. First, the Department found that Mr. Hughes had been concurrently receiving unemployment benefits and industrial insurance from September 9, 2001 through May 15, 2002, in violation of RCW 50.20.085. CR at 71-72. The Department relied on information received from L&I showing Mr. Hughes had indeed applied for and received time-loss benefits during the relevant periods as a result of a prior work-related injury. CR at 96-102. Second, the Department found that for each and every week in which he applied for benefits, Mr. Hughes either knowingly made a false statement or knowingly failed to disclose material facts regarding his eligibility. CR at 72. The Department based its findings on Mr. Hughes’ weekly unemployment filings during a period

of over one year in which he stated, in response to a specific question, that he was *not* receiving industrial insurance for that week, and that he *was* “able and available” to work. CR 103-168.

In filing his weekly unemployment claims by telephone, Mr. Hughes gave these answers to the following “YES” or “NO” questions:

Q: Are you able and available to work?

A: Yes.

Q: Are you receiving worker’s compensation?

A: No.

*See* CR at 103-168.<sup>3</sup> Week after week, Mr. Hughes provided these answers to the Department’s questions. CR at 103-168. After concluding Mr. Hughes was improperly awarded benefits, the Department mailed Mr. Hughes an “Overpayment Advice of Rights” form setting forth the basis for its findings, allowing Mr. Hughes to explain the discrepancy. CR at 82.

In a written response, Mr. Hughes admitted that he had collected dual benefits during the weekly periods at issue. CR at 82. In fact, Mr. Hughes also admitted that he was not “able” or “available” to work

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<sup>3</sup> The Commissioner’s Record includes computer screen printouts for each week Mr. Hughes claimed unemployment benefits by telephone. *See* CR at 103-168. These printouts contain Mr. Hughes’ answers to the series of questions asked of all unemployment claimants.

during the periods in which he collected unemployment benefits, as required under the Act. CR at 83; *see* RCW 50.20.010(c). However, Mr. Hughes claimed that he was not aware that industrial insurance and unemployment benefits were “overlapping.” CR at 82. He also reported that he “did not know what he was doing” as a result of a head injury. CR at 82. Based on this evidence, the Department concluded that Mr. Hughes was at fault for the overpayment. CR at 71.

Specifically, the Department found that Mr. Hughes failed to disclose potentially disqualifying information in filing his weekly unemployment claims. CR at 71. In particular, the Department found that he was receiving dual benefits for a significant period of time. CR at 71. Moreover, the Department determined that for the entire time in which he received unemployment benefits, Mr. Hughes was “unable to work” as a result of injury. CR at 70-75. Thus, the Department concluded that Mr. Hughes was liable for all amounts improperly obtained and ineligible for a waiver. CR at 74. Mr. Hughes appealed the Department’s overpayment assessment to the Office of Administrative Hearings (“OAH”). CR at 78, 80.

At the hearing, Mr. Hughes was represented by counsel and offered testimony regarding the circumstances surrounding his unemployment benefits claim. CR at 6. Bob Wohlers appeared as

representative of the Department. CR at 6. Mr. Hughes testified that as a result of an on-the-job car accident on March 10, 1995, he suffered traumatic brain injuries which caused him to suffer severe memory problems. CR at 13-15. Mr. Hughes stated that he had no recollection of the exact date on which he initially filed for unemployment benefits. CR at 16. Similarly, Mr. Hughes could not recall the date on which he filed for industrial insurance. CR at 16. Mr. Hughes could not remember how long he received unemployment benefits or how he had managed to fill out the required information for his initial application. CR at 17.

Mr. Hughes did acknowledge understanding that in order to establish eligibility for unemployment benefits he was required to be actively “looking for work.” CR at 16. Mr. Hughes also testified that he could not recall if anyone had assisted him in filling out his unemployment benefits claims. CR at 17. However, Mr. Hughes testified that his psychologist, Dr. Stallone, had assisted him in filling out his application for industrial insurance. CR at 22.

Mr. Hughes had some recollection of the manner in which he received his unemployment benefit payments, stating that he received them “by check, I think.” CR at 22. When asked by his attorney whether he had personally deposited the unemployment checks into a bank, Mr. Hughes responded, “Yeah, I’m sure I did.” CR at 22, 264. Moreover,

Mr. Hughes remembered that he had initially applied for unemployment benefits by “[going] down to the unemployment office.” CR at 22.

Mr. Wohlers, the Department’s representative, had the opportunity to ask Mr. Hughes questions regarding his unemployment filings for the period of September 8, 2001 through November 9, 2002. When Mr. Wohlers asked Mr. Hughes why he had reported to the Department each week that he was *not* receiving industrial insurance, Mr. Hughes said he did not know. CR at 47-48. When Mr. Wohlers asked Mr. Hughes why he had consistently reported to the Department that he was “able and available” to work, while at the same time giving L&I contrary information, Mr. Hughes said he could not remember. CR at 47-48.

The focus of the hearing then turned to Mr. Hughes’ receipt of industrial insurance from L&I. When asked by his attorney whether he remembered filling out his time-loss notification, Mr. Hughes stated that he did not remember filling it out.<sup>4</sup> CR at 50. Mr. Hughes did recall that shortly after filing for industrial insurance, he authorized his friend Marilyn Coster, in a letter to L&I dated September 26, 2001, to act on his behalf with respect to his industrial insurance claim. CR at 50. Ms. Coster prepared a letter to L&I, which Mr. Hughes signed, informing L&I that he was:

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<sup>4</sup> Mr. Hughes’ time-loss notification, as received by L&I, forms part of the Commissioner’s Record at page 90.

... [giving] permission to have Marilyn Coster discuss and communicate via fax, phone, computer, etc. any issues regarding my claim. Claim # is P054571.

CR at 91. Mr. Hughes testified Ms. Coster was helping him with his claim for industrial insurance. CR at 50. Since Mr. Hughes and Ms. Coster were living together at the time, Mr. Hughes testified that it was possible she had also assisted him in filing his weekly unemployment claims. CR at 54.

The ALJ issued an Initial Order affirming the Department's initial determination. CR at 248-52.<sup>5</sup> On petition for review, the Commissioner affirmed the initial order and adopted the ALJ's findings and conclusions, with some exceptions and modifications. CR at 264-265. First, the Commissioner found that Mr. Hughes had in fact been receiving both unemployment benefits and industrial insurance during the relevant periods. CR at 249, 264-265; FF 5. Additionally, the Commissioner determined that Mr. Hughes was "unable to work" during each and every

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<sup>5</sup> The ALJ's decision is comprised of two (2) Initial Orders bearing consecutive docket numbers, Docket No. 06920 and Docket No. 06921, respectively. This is because the Department had two separate bases upon which to assess an overpayment: (1) Mr. Hughes' simultaneous receipt of unemployment benefits and industrial insurance, and (2) Mr. Hughes' decision to report that he was "able and available" to work while he was in fact unavailable as a result of injury. While the two orders are identical in substance, the ALJ's Findings of Fact and Conclusions of Law have different numeration. For purposes of this brief, the Department will adhere to the numeration in the first order, Docket No. 06920, found on page 239 through 244 of the Commissioner's Record. See Appendix A.

week in which he received unemployment benefits. CR at 249, 264-265; FF 6.

The Commissioner recognized that Mr. Hughes' memory was deeply affected as a result of the accident, and found that Mr. Hughes had little, if any, recollection of filing his weekly unemployment claims. CR at 249, 264-265; FF 1, 7. However, the Commissioner relied on Mr. Hughes' weekly claims, as well as his testimony, and found that Ms. Coster had assisted him in filing his unemployment claims. CR at 264-265. Moreover, the Commissioner concluded that Mr. Hughes, either alone or with Ms. Coster's assistance, informed the Department week after week that he was "able to work" while simultaneously receiving industrial insurance for being "unable to work." CR at 265.

With respect to the issues of Mr. Hughes' eligibility for unemployment benefits and his indebtedness to the Department, the Commissioner set forth the legal standard under which the Department determines whether a "misrepresentation" has occurred, and found that:

[t]o disqualify an individual for benefits for any week with respect to which he has knowingly misrepresented a material fact and has thereby obtained benefits, the Department must establish, by clear, cogent, and convincing evidence, five essential elements:

- a: the claimant has made a statement or implied a statement by his silence;
- b: the statement was false;

- c: the claimant was aware that the statement was false or was without knowledge with respect to its truth or falsity;
- d. the statement concerned a fact material to the claimant's rights and benefits;
- e. the statement was made with the intent that the Department should act in reliance thereon.

CR at 251, 264; Conclusion of Law (CL) 8. Applying that standard, and taking into account Mr. Hughes mental status during the periods in question, the Commissioner determined that the record did not contain clear, cogent and convincing evidence that Mr. Hughes knowingly misrepresented or withheld information with the intent to obtain unemployment benefits improperly. CR at 251; CL 9 (emphasis added).

The Commissioner then noted that in addition to fraud and misrepresentation, RCW 50.20.160(4)(c) permits the Department to make a determination in the event of willful nondisclosure.<sup>6</sup> CR at 265. The Commissioner concluded as follows:

... [Mr. Hughes] filed weekly claims and received weekly unemployment checks for fourteen months while simultaneously receiving worker's compensation benefits every two weeks. *Either he alone or he and Ms. Coster together informed the Department each week that he was able to work while, at the same time, he was receiving biweekly benefits for being unable to work. He personally deposited the Department's payments into his bank account.* On this evidence, we are satisfied that his failure to either question the Department about his conflicting

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<sup>6</sup> RCW 50.20.160 permits the Department to make a redetermination in the event benefits were procured through fraud, misrepresentation, or willful nondisclosure.

reports or to inform it of the fact of the simultaneous claims and payments was wilful [sic].

CR at 265 (emphasis added).

The Commissioner thus determined that Mr. Hughes' failure to inform the Department he was receiving dual benefits amounted to "willful nondisclosure" under RCW 50.20.160(4)(c). CR at 265. Since Mr. Hughes' actions in failing to disclose material facts regarding his eligibility amounted to an act of "willful nondisclosure," the Commissioner determined Mr. Hughes was at fault for the overpayment and ineligible for a waiver. CR at 265. Accordingly, the Commissioner ordered Mr. Hughes to reimburse the Department in the amount of \$22,630.00. CR at 265.

Mr. Hughes unsuccessfully appealed the Commissioner's order to Thurston County Superior Court. Clerk's Papers (CP) 4-12, 66-69. This appeal follows.

#### **IV. STANDARD OF REVIEW**

The Washington Administrative Procedure Act (APA) governs judicial review of the Commissioner's decision. RCW 34.05.510, 50.32.120; *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993). An appellate 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.” *Tapper*, 122 Wn.2d at 402. The APA directs the Court to affirm the Commissioner’s decision if supported by substantial evidence and in accord with the law, provided that proper process was followed. RCW 34.05.570(3). Although this Court reviews questions of law *de novo*, due deference is given to the agency’s interpretation of the statutes it implements. *Spain v. Empl. Sec. Dep’t*, 185 P.3d 1188 (2008).

The standard of review for factual determinations is particularly relevant in this case, as Mr. Hughes has only challenged one finding of fact: the Commissioner’s finding that he personally deposited his benefit payments into his bank account. *See* CR at 264; Appellant’s Brief at 3. All other findings of fact are verities on appeal. RAP 10.3(g), (h); *Tapper*, 122 Wn.2d 397 at 407. With respect to that finding, this Court should assess whether there is substantial evidence to support such a finding, and affirm the Commissioner’s order if the evidence in the record is sufficient to “persuade a fair-minded person of the truth of the declared premise.” *Heinmiller v. Dep’t of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995). In doing so, this Court should not re-weigh evidence or re-assess witness credibility. *W. Ports Transp., Inc. v. Empl. Sec. Dep’t*, 110 Wn. App. 440, 449, 41 P.3d 510 (2002).

## V. ARGUMENT

The Commissioner correctly determined that Mr. Hughes' actions in failing to disclose material facts in his weekly claims amounted to acts of "willful nondisclosure" under RCW 50.20.160(4)(c). Based on Mr. Hughes' testimony, his written response to the Department's redetermination, and his responses to the Department's questions in his weekly claims during the course of over one year, the Commissioner correctly found Mr. Hughes engaged in an act of "willful nondisclosure" in failing to report he was receiving industrial insurance and that he was "unable to work." Since Mr. Hughes engaged in an act of "willful nondisclosure," the Department's redetermination under RCW 50.20.160(4)(c) was a valid redetermination, and Mr. Hughes is liable to the Department for all amounts wrongfully paid.

Mr. Hughes' primary contention is that the Commissioner erred in finding the record did not contain clear, cogent and convincing evidence he *knowingly withheld or misrepresented* information to the Department, while simultaneously finding that the record contained sufficient evidence to conclude his actions amounted to *willful nondisclosure*. Appellant's Brief at 4 (emphasis added). Mr. Hughes argues that under "pain of contradiction," the Commissioner could not find there was no "knowing withholding of information," while simultaneously finding that the failure

to disclose material information constituted an act of “willful nondisclosure.” Appellant’s Brief at 31.

Mr. Hughes’ argument fails to recognize the crucial, longstanding distinction between a *knowing misrepresentation or withholding* of information, which requires a higher degree of intentionality, and an act of *willful nondisclosure*, which requires a less culpable state of mind. *See Engbrecht v. Empl. Sec. Dep’t*, 132 Wn. App. 423, 428-429, 132 P.3d 1099, 1001-1002 (2006). Indeed, a finding of misrepresentation or withholding of information requires proof by clear, cogent, and convincing evidence, which according to case law, is more akin to a fraudulent act. *Id.* On the other hand, an act of willful “nondisclosure” is, according to prior Commissioner’s decisions, analogous to negligent oversight or inadvertence, and does not require intent to defraud. *In re Potts*, Empl. Sec. Comm’r Dec. 425, (1959).<sup>7</sup> Simply because one degree of culpability is found not to exist in a particular case, as here, it does not automatically follow that another, lower degree cannot be present and serve as the basis for a valid redetermination under RCW 50.20.160(4)(c).

Mr. Hughes’ actions in failing to report material facts relevant to his eligibility for benefits, although not done fraudulently considering his

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<sup>7</sup> The Commissioner’s precedential decision in *In re Potts* is attached to this brief as “Appendix C.”

mental capacity at the time, were nonetheless an act of willful nondisclosure. Because Mr. Hughes' actions in failing to report he was receiving dual benefits and failing to acknowledge he was "unable to work" amounted to an act of willful nondisclosure under RCW 50.20.160(4)(c), and that decision is supported by substantial evidence, the Department respectfully requests that this Court affirm the Commissioner's decision.

**A. The Commissioner Did Not Err In Finding Mr. Hughes Did Not Knowingly Misrepresent Or Withhold Information While At The Same Time Finding Willful Nondisclosure, As The Two Represent Different Bases For Making A Redetermination Under RCW 50.20.160(4)(c)**

In this case, the parties agree that Mr. Hughes did not *knowingly misrepresent or withhold* information from the Department. Similarly, there is no disagreement that Mr. Hughes was in fact receiving industrial insurance during the same periods in which he received unemployment benefits, and that he was "unable to work" during the entire period in which he received unemployment benefits. The only question, therefore, is whether Mr. Hughes' actions in failing to disclose information relevant to his benefit eligibility rose to the level of "willful nondisclosure" for purposes of a redetermination under RCW 50.20.160(4)(c). As will be more fully set forth below, the distinction between the two was crucial to

the Commissioner's reasoning, and is equally important in deciding the outcome of this case.

**1. Misrepresentation under the act is governed by the heightened clear, cogent, and convincing evidentiary standard and requires proof of intent to defraud**

An unemployment claimant who receives benefits to which he or she is not entitled is liable for the repayment of the overpaid benefits. RCW 50.20.190(1). Accordingly, if after awarding benefits the Commissioner learns that benefits were procured through fraud, misrepresentation, or willful nondisclosure, the Act authorizes the Department to engage in a redetermination and seek recovery of all overpaid amounts. RCW 50.20.160(4)(c). In this case, Mr. Hughes called the Department's claims center on a weekly basis for a period of over one year and informed the Department that he was "able to work," and that he was not receiving industrial insurance. CR at 103-169. Although Mr. Hughes' actions may not have risen to the level of "misrepresentation," as that term is used in the Act, his actions were nonetheless acts of "willful nondisclosure," therefore placing him within the purview of RCW 50.20.160(4)(c) and making him liable for the overpayment.

In *Engbrecht*, the court determined the quantum of evidence required and the applicable burden of proof in establishing a

“misrepresentation” under the Act. *Engbrecht*, 132 Wn. App. at 428-430. There, the claimant underreported the amount of his total earnings in filing his weekly unemployment benefits claims. *Id.* at 426. Initially, the claimant had reported at least 80 to 90 percent of his gross earnings. *Id.* However, during a significant period of time thereafter, the claimant reported only 46 percent of his earnings. *Id.* The Department discovered this discrepancy and assessed an overpayment. *Id.*

At an administrative hearing, the claimant in *Engbrecht* admitted he had underreported his earnings, but argued there was insufficient evidence to show he had done so “knowingly” for purposes of the Act’s misrepresentation provision. *See* RCW 50.20.070. The claimant testified that since he did not know the *exact* amount of his earnings when claiming benefits each week, the Department failed to carry its burden under the clear, cogent and convincing evidentiary standard in RCW 50.20.070 to show he had knowingly misrepresented his income. *Engbrecht* at 426.

Noting that there was no case law on what evidence constitutes disqualification under RCW 50.20.070, the court deferred to the Commissioner’s published decisions interpreting that provision of the Act.<sup>8</sup> *Id.* at 428. Under the Commissioner’s precedents, the court noted,

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<sup>8</sup> Under RCW 50.32.095, the Commissioner may designate certain Commissioner’s decisions as precedent. Such precedents are not binding, but are

clear, cogent and convincing evidence of the following five elements is required to establish disqualification under RCW 50.20.070:

- (1) The claimant has made a representation or statement;<sup>9</sup>
- (2) The statement was false;
- (3) The claimant was aware that the statement was false or was without knowledge with respect to its truth or falsity;
- (4) The statement concerned a fact material to the claimant's rights and benefits; and
- (5) The statement was made with the intent that the Department should act in reliance thereon.

*Engbrecht* at 429; see *In re Uhri*, Empl. Sec. Comm'r Dec.2d 624 (1980); *In re Psomos*, Empl. Sec. Comm'r Dec.2d 117 (1975); *In re Olson*, Empl. Sec. Comm'r. Dec. 636 (1965).<sup>10</sup>

Applying the above standard, the Court determined that RCW 50.20.070 did not require the claimant to have actual knowledge of his earnings, as long as he had reported his earnings without knowledge as to the truth of the amount thereof. *Id.* The court found the Commissioner's decisions consistent with Washington's law on fraud and concluded the claimant had knowingly made a false statement or failed to report a material fact, thereby fraudulently obtaining benefits and making him liable for the overpayment. *Id.* at 430.

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persuasive authority for the courts. See *Martini v. Empl. Sec. Dep't*, 98 Wn. App. 791, 795, 990 P.2d 981, 984 (2000).

<sup>9</sup> RCW 50.20.070 also disqualifies a claimant if he or she fails to report a material fact. Thus, both acts of omission and commission are covered under the misrepresentation provision of the Act.

<sup>10</sup> For the Court's convenience, the three precedential Commissioner's decisions relied upon by the *Engbrecht* court are attached to this brief as "Appendix D."

The case at bar does not involve the disqualification for misrepresentation provision, RCW 50.20.070. Rather, this case concerns the application of the redetermination provision of the Act, but both subsections use the term “misrepresentation.” See RCW 50.20.070; 50.20.160(4)(c). Since both subsections use the same term, this Court should presume that the Legislature intended the words to have the same meaning. See *State v. Keller*, 98 Wn. App. 381, 383-384, 990 P.2d 423, 425 (1999). Thus, for purposes of both a disqualification for misrepresentation under RCW 50.20.070 and a redetermination for misrepresentation, the *Engbrecht* court’s reasoning, as it relates to the quantum of evidence and the burden of proof, should apply.

In this case, the Commissioner determined that in light Mr. Hughes mental status during the periods at issue, the evidence was insufficient to show, under the heightened clear, cogent and convincing standard, that he knowingly misrepresented (or withheld) information from the Department. CR at 242, 265; FF 9. However, such a finding does not preclude the Commissioner from finding Mr. Hughes liable under the “willful nondisclosure” prong of the redetermination statute, as the two are governed by different burdens of proof and involve differing degrees of intentionality.

**2. Willful nondisclosure is more akin to negligent oversight or inadvertence, and does not require proof of intent to defraud**

The Act's provisions authorize the Department to engage in a redetermination of previously paid benefits in the event the Commissioner determines benefits were wrongfully awarded. *See* RCW 50.20.160. First, RCW 50.20.160(3) permits the Department to engage in a redetermination within two years following the benefit year in which benefits were awarded in the event benefits were procured through fraud, misrepresentation, or nondisclosure. RCW 50.20.160(3). The Act therefore places time restrictions on the Commissioner's ability to redetermine a prior award of benefits under RCW 50.20.160(3). *See* RCW 50.20.160(3). The next subsection, however, places no time limitations on the Department's ability to engage in a redetermination if the Commissioner finds benefits were procured through fraud, misrepresentation, or *willful* nondisclosure. RCW 50.20.160(4)(c) (emphasis added).<sup>11</sup> While both subsections govern factual scenarios involving fraud and misrepresentation, their provisions differ with respect to acts of "nondisclosure." *See* RCW 50.20.160(3)-(4).

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<sup>11</sup> Mr. Hughes emphasizes the fact that the Department's redetermination was made nearly four years after Mr. Hughes received his last benefits check. Appellant's Brief at 12. However, there are no time limitations on the Department's ability to engage in a redetermination in the event the Commissioner finds benefits were procured through an act of willful nondisclosure. RCW 50.20.160(4)(c).

The crucial distinction between the two provisions is the Legislature's insertion of the adjective "willful" before "nondisclosure" in RCW 50.20.160(4)(c). From a grammatical standpoint, the adjective "willful" modifies the noun "disclosure." See *Jordan v. O'Brien*, 79 Wn.2d 406, 411, 486 P.2d 290, 293 (1971) (in the phrase "for each year of full service after eighteen years," the adjective "full" modifies the word "service"). From a legal standpoint, when different words are used in the same statute to deal with related matters, we must presume that the Legislature intended those words to have different meanings. *Keller*, 98 Wn. App. at 384 (citing *State v. Jackson*, 65 Wn. App. 856, 860, 829 P.2d 1136 (1992)). Since the difference here is an obvious one, based on a plain reading of the statute, "nondisclosure" should not be equated with "willful nondisclosure." The Legislature's insertion of a specific *mens rea* element before the word "nondisclosure" in RCW 50.20.160(4)(c) should therefore inform the Court's interpretation of that subsection, and assist in distinguishing it from the preceding one.

Mr. Hughes argues the Commissioner erred in finding there was no "knowing withholding" of information while also finding Mr. Hughes actions *did* amount to "willful nondisclosure." Appellant's Brief at 4. Mr. Hughes challenges these legal conclusions as contradictory. Appellant's Brief at 9. But Mr. Hughes' argument completely disregards

the Legislative distinction in the redetermination provision. A plain reading of RCW 50.20.160(3) and (4) reveals that by using different terms, the Legislature intended to give the two provisions different meanings. The Legislature's use of different words indicates it is possible to have a set of facts that fails to meet the fraud-like standard of "misrepresentation," but that supports the conclusion that a claimant engaged in "willful nondisclosure." Moreover, the Legislature's distinction is also a sensible one, as it extends the amount of time within which the Department can redetermine an award of benefits under RCW 50.20.160(4)(c), based primarily on incremental degrees of intentionality; the more deliberate the act, the more time the Department has to make a redetermination.

As in the *Engbrecht* case, there is no case law precisely on point distinguishing between "misrepresentation" and "nondisclosure." *See Engbrecht*, 132 Wn. App. at 428. However, the Commissioner's precedential decisions are instructive. *See Martini*, 98 Wn. App. at 795; *see also Spain*, 185 P.3d at 1190.

In *In re Potts*, Empl. Sec. Comm'r Dec. 425 (1959),<sup>12</sup> the Commissioner had occasion to examine the difference between the

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<sup>12</sup> For the Court's convenience, the Commissioner's precedential decision in *In re Potts* is attached to this brief as "Appendix C."

provisions of RCW 50.20.160(3) and (4).<sup>13</sup> In that case, the ALJ determined that the Legislature had purposely included the term “willful” in RCW 50.20.160(4)(c), but had accidentally failed to include the same term in RCW 50.20.160(3). The Commissioner disagreed. In finding the Legislature’s insertion of the adjective “willful” to be intentional, the Commissioner noted that:

“Nondisclosure” is not a synonym for “fraud” or “misrepresentation,” but the term does imply and presuppose the possession of knowledge which is not imparted either through inadvertence or design. If one fails to disclose knowledge intentionally (i.e. design) when he has a duty or obligation to speak, his actions are fraudulent. *Because the provisions of [RCW 50.20.160(3)] specifically cover the situation of fraud, it is felt that the term “nondisclosure” (as it appears in the statute) must relate to circumstances wherein an individual possessing knowledge or information fails to disclose same through inadvertence or negligent oversight. To hold otherwise is to conclude that the legislature was unnecessarily duplicitous in its choice of wording.*

*In re Potts*, Empl. Sec. Comm’r Dec. 425 (emphasis added).

Thus, under the court’s decision in *Engbrecht* and the Commissioner’s decision in *In re Potts*, a finding of “no knowing misrepresentation” does

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<sup>13</sup> Although *In re Potts* was decided under a prior version of the Act, the provisions relevant to this case have remained virtually unchanged. The relevant provisions are Former §84(3) and § 87 of the Employment Security Act, re-enacted in its current form as RCW 50.20.160. Decisions, albeit non-binding ones, rendered while that statute was in effect should be given the same effect. See *Green Mountain School Dist. No. 103 v. Durkee*, 56 Wn.2d 154, 351 P.2d 525 (1960) (new legislation is presumed to be in line with prior judicial decisions absent an indication that the Legislature intended to completely overrule prior case law).

not preclude a finding of “willful nondisclosure,” as the two are not synonymous and are governed by different burdens of proof.

Indeed, proof of “nondisclosure,” as construed by prior decisions of the Commissioner, requires a lower degree of intentionality. Here, the Commissioner found that although there was insufficient proof of intent to defraud, fault still rested with Mr. Hughes, albeit a lesser degree of fault requiring a lower burden of proof; one more akin to negligent oversight or inadvertence rather than intent to defraud. While Mr. Hughes may not have intended to defraud the Department, his actions in failing to report material facts regarding his eligibility during the course of over one year constituted acts of “willful nondisclosure” for purposes of RCW 50.20.160(4)(c). The Legislature’s use of different terms in the redetermination statute indicates that a particular set of facts, as in this case, can support a finding of “willful nondisclosure” although they may not rise to the level of a knowing misrepresentation (or withholding) of information.

**B. Substantial Evidence Supports The Commissioner’s Finding That Mr. Hughes Willfully Failed To Disclose He Was Unavailable To Work And Concurrently Receiving Unemployment Benefits And Industrial Insurance**

Mr. Hughes argues that his actions in failing to disclose he was receiving dual benefits were not “willful” when one takes into account his

mental abilities during the periods in question. Appellant's Brief at 19. Indeed, Mr. Hughes testified that it was not his "intent" to "defraud" the Department. CR at 53. But under Washington law, "willfulness" is proven when an act is done "knowingly." *City of Spokane v. White*, 102 Wn. App. 955, 961-962, 10 P.3d 1095 (2000). "Knowledge" is a less serious form of mental culpability than "intent," which, according to *Engbrecht*, is one of the requisite elements for a finding of fraud or misrepresentation. *Id.* Thus, while Mr. Hughes may not have intended to defraud the Department by misrepresenting or failing to report material facts (given his mental condition at the time), his actions were nonetheless willful, as he acted with *knowledge* that he was receiving dual benefits.

Recently, Division III of the Court of Appeals had occasion to address the distinctions and similarities between the mental states "willfully" and "knowingly" in the context of a constitutional challenge to the City of Spokane's criminal assault ordinance. *White*, 102 Wn. App. at 995. In that case, the question presented was whether the City's criminal assault ordinance, SMC § 10.11.010(a), impermissibly conflicted with the State of Washington's assault statute in that it prohibited an act that the state statute allowed, in violation of constitutional pre-emption principles. *See* RCW 9A.36.011; *see also City of Bellingham v. Schampera*, 57 Wn.2d. 106, 111, 356 P.2d 292 (1960). The petitioner in

*White* argued that the City’s ordinance, which made it an offense to “willfully use or threaten . . . physical force against the person of another,” conflicted with its state counterpart, which required an “intent” *mens rea*. *White*, 102 Wn. App. at 961.

In rejecting the constitutional challenge, the court found that for purposes of the assault provisions at issue, the use of the terms “willfully” and “knowingly” were interchangeable. *Id.* However, the court acknowledged that both “willfully” and “knowingly” were less serious forms of mental culpability, than “intent,” *Id.* Thus, while “intent” is a component of the “misrepresentation” provision under RCW 50.20.160(4)(c), intent is irrelevant for purposes of establishing an act of “willful nondisclosure” under that same provision. In this case, Mr. Hughes would be liable for the overpayment if he acted with knowledge that he was receiving dual benefits, which is not disputed, regardless of whether he *intended* to defraud the Department. *See* RCW 50.20.160(4)(c); *White*, 102 Wn. App. at 961.

The *White* court’s *mens rea* analysis is consistent with Washington’s law on welfare fraud. In *State v. Delcambre*, our Supreme Court found that Washington’s welfare fraud statute, RCW 74.08.331, which includes a “willfulness” *mens rea*, does not require “intent” to

defraud, only knowledge.<sup>14</sup> *State v. Delcambre*, 116 Wn.2d 444, 448, 805 P.2d 233, 235 (1991). The court found that the state need only prove the defendant made a willfully false statement or material omission which resulted in overpayment. *Id.* Accordingly, the requisite mental state under the welfare fraud statute, which employs a *mens rea* identical to the redetermination statute, is knowledge, not intent. *See* RCW 50.20.160(4)(c). As long as Mr. Hughes had knowledge that he was “unable to work” and receiving industrial insurance, which cannot seriously be disputed, his actions in failing to disclose this information amounted to acts of willful nondisclosure under RCW 50.20.160(4)(c).

When asked by his attorney whether he deposited his unemployment checks in a bank, Mr. Hughes replied, “Yeah, I’m sure I did.” CR at 22, 264. On several occasions during the hearing, Mr. Hughes stated he could not remember factual information related to his case. *See* CR at 47-48. However, when asked about the deposits, he did not deny the fact, or have trouble remembering. Mr. Hughes remembered, albeit vaguely, that he had personally deposited his benefit checks into his account. CR at 22, 264. Based on this evidence and absent evidence to the contrary, a reasonable trier of fact could determine

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<sup>14</sup> RCW 74.08.331 makes it a criminal offense to obtain welfare benefits “by means . . . of a willful failure to reveal any material fact . . . affecting eligibility. RCW 74.08.331.

that Mr. Hughes personally deposited his benefit checks. CR at 264. The Commissioner's finding that Mr. Hughes personally deposited his benefit checks is therefore supported by substantial evidence.

Mr. Hughes acted with knowledge that he was receiving dual benefits, and knew that he was "unable to work" by virtue of not only his injury but also his receipt of industrial insurance. In response to the Department's overpayment assessment, Mr. Hughes admitted he had received dual benefits, and stated that the "overlap was confusing." CR at 82. Mr. Hughes also testified he understood that in order to be eligible for unemployment benefits, he was required to be actively looking for work. CR at 16. Indeed, Mr. Hughes testified that he was looking for work while he was receiving unemployment, despite the fact he was reporting to L&I that he was "unable to work." CR at 16. Mr. Hughes also testified he believed he personally "[went] down to the unemployment office" to initially apply for benefits. CR at 22. Although the Department does not deny Mr. Hughes suffers from severe memory issues as a result of the accident, there is no evidence in the record to support the conclusion that Mr. Hughes was completely and utterly incapacitated to the extent he would not understand or recall day-to-day activities.

Moreover, simply because Mr. Hughes had trouble remembering certain aspects of his case, this fact alone does not establish that he did not have knowledge of the relevant facts at the *time they occurred*; a failure to recall merely establishes that the speaker does not *presently* (or at the time of the hearing) have the ability to recollect. In this case, Mr. Hughes simply does not recall the details of his unemployment claim, which is not surprising, since the time period in which he claimed benefits encompassed a period of over one year. However, Mr. Hughes weekly filing, in which he systematically provided in correct answers to the Department's questions provide sufficient probative evidence that Mr. Hughes knew he was "able to work" and receiving industrial insurance. CR at 103-169. Accordingly, the Commissioner's decision that Mr. Hughes acted with knowledge is supported by substantial evidence and consistent with the law.

Mr. Hughes may not have known it was unlawful to receive dual benefits, and would therefore be, as the Commissioner correctly noted, unable to form the requisite intent for fraud. CR at 264-265. Taking into account Mr. Hughes mental condition, it was reasonable for the Commissioner to conclude Mr. Hughes lacked the requisite intent for a finding of misrepresentation. Mr. Hughes mental condition could have precluded him from forming the requisite "intent to defraud" *mens rea* for

purposes of the misrepresentation prong of RCW 50.20.160(4)(c). However, he was aware that he was receiving dual benefits, and was filing weekly benefit applications during the course of a sixty-two week period. This knowledge rendered his actions willful for purposes of RCW 50.20.160(4)(c). Because the legislature drew a distinction between “willful nondisclosure” and “misrepresentation,” which according to *Engbrecht* requires the element of intent, the Commissioner properly found that Mr. Hughes knew he was receiving both unemployment and worker’s compensation, and thus concluded that he was liable under the “willful nondisclosure” prong of RCW 50.20.160(4)(c). CR at 265.

Week after week for a period of over one year, Mr. Hughes failed to disclose to the Department he was receiving industrial insurance benefits concurrently with his unemployment benefits. CR at 103-168, 265. Week after week, Mr. Hughes remembered to call the Department’s claims center to file his weekly claim, informing the Department he was “able to work.” While Mr. Hughes may have been unable to form the requisite intent to defraud, since he did not have knowledge that receiving dual benefits was illegal, his systematic actions in failing to report relevant information constituted acts of “willful nondisclosure.” The Department’s redetermination was therefore valid and Mr. Hughes is required to reimburse the Department for all benefits wrongfully obtained.

**C. As Mr. Hughes Willfully Failed To Disclose Material Facts Regarding His Eligibility, He Is Ineligible For A Waiver As A Matter Of Law Under RCW 50.20.190**

In this case, the Commissioner correctly determined Mr. Hughes was ineligible for waiver, as the overpayment was the result of his willful failure to disclose information relevant to his benefit eligibility. CR at 265. Mr. Hughes argues the Commissioner erred in finding him “at fault” for the overpayment. Appellant’s Brief at 3-4. Specifically, Mr. Hughes argues that his mental abilities during the period at issue affected his ability to accurately report relevant facts to the Department. Appellant’s Brief at 4. But, as a matter of law, the Act prohibits waiver of an overpayment if benefits were procured through an act of “willful nondisclosure.” RCW 50.20.190(2).

An unemployment claimant who receives benefits to which he or she is not entitled is liable for the repayment of the overpaid benefits. RCW 50.20.190. The Commissioner may not waive an overpayment if the overpayment was the result of fraud, misrepresentation, or willful nondisclosure, *or* fault attributable to the claimant and recovery thereof would be against equity and good conscience. *Engbrecht*, 132 Wn. App. at 428; *see* RCW 50.20.190(2) (emphasis added).

In this case, the overpayment was caused by Mr. Hughes’ willful failure to disclose material information regarding his benefit eligibility

over the course of sixty-two weeks. CR at 265. As Mr. Hughes' actions were determined to be acts of "willful nondisclosure" by the Commissioner, and those findings are supported by substantial evidence, Mr. Hughes is, as a matter of law, ineligible for a waiver under RCW 50.20.190(2).

**D. The Act Does Not Provide For Attorney Fees Incurred At The Administrative Level**

The Act's attorney fees provision serves to: (1) regulate attorney fees and costs for the protection of unemployment benefit claimants (whether incurred in the administrative or court proceedings); and (2) provide that only those fees and costs incurred in court proceedings are payable out of the unemployment compensation administration fund.

RCW 50.32.100. Under the Act:

[r]easonable attorney fees incurred during judicial review may be recovered and paid from the unemployment administration fund "if the decision of the commissioner [is] reversed or modified." RCW 50.32.160. The statute requires that only "reasonable attorney fees" be awarded.

RCW 50.32.110; 50.32.160.

Thus, contrary to Mr. Hughes' assertion, attorney fees for costs incurred at the administrative level are not compensable from the unemployment administration fund. Appellant's Brief at 5. This question was resolved in *Gaines v. Dep't of Empl. Sec.*,

140 Wn. App. 791, 801-802, 166 P.3d 1257, 1263 (2007) and remains the controlling case law on the issue.

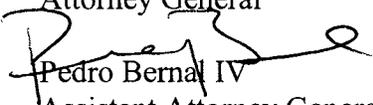
Thus, should Mr. Hughes prevail in this appeal, attorney fees for costs incurred at the administrative level are not compensable from the fund.

## VI. CONCLUSION

For the foregoing reasons, Mr. Hughes has failed to demonstrate the Commissioner misinterpreted or misapplied the law. Additionally, the Commissioner's decision is supported by substantial evidence. Accordingly, the Department respectfully requests this Court affirm the Commissioner's decision.

RESPECTFULLY SUBMITTED this 28 day of October, 2008.

ROBERT M. MCKENNA  
Attorney General

  
Pedro Bernal IV  
Assistant Attorney General  
WSBA # 394

## APPENDIX

Appendix A: *In re Larry L. Hughes, Jr.*, Review No. 2007-1298  
(June 8, 2007), Commissioner's Record pp. 264-265

Appendix B: *In the Matter of Larry L. Hughes, Jr.*, OAH Docket No.  
01-2007-06920 (April 26, 2007), Commissioner's  
Record pp. 239-243

Appendix C: *In re Potts*, Empl. Sec. Comm'r Dec. 425 (1959)

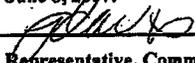
Appendix D: *In re Uhri*, Empl. Sec. Comm'r Dec.2d 624 (1980);  
*In re Psomos*, Empl. Sec. Comm'r Dec.2d 117 (1975);  
*In re Olson*, Empl. Sec. Comm'r Dec. 636 (1965)

**Appendix A**

*In re Larry L. Hughes, Jr.*, Review No. 2007-1298 (June 8, 2007),  
Commissioner's Record pp. 264-265

**CERTIFICATE OF SERVICE**

I certify that I mailed a copy of this decision to the within named interested parties at their respective addresses, postage prepaid, on June 8, 2007.

  
Representative, Commissioner's Review Office,  
Employment Security Department

UIO: 790  
BYE: 08/03/2002

**BEFORE THE COMMISSIONER OF  
THE EMPLOYMENT SECURITY DEPARTMENT  
OF THE STATE OF WASHINGTON**

Review No. 2007-1298

In re:

LARRY L. HUGHES, JR.  
SSA No. [REDACTED]

Docket No. 01-2007-06920

DECISION OF COMMISSIONER

On May 25, 2007, LARRY L. HUGHES, JR., by and through Unemployment Law Project, Vicky Daniels, Representative, petitioned the Commissioner for review of a decision issued by the Office of Administrative Hearings on April 26, 2007. Pursuant to chapter 192-04 WAC this matter has been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the entire record and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), the undersigned adopts the Office of Administrative Hearings' findings of fact, except the last sentence at finding No. 7.

We augment finding No. 5 to show that the Department of Labor and Industries paid claimant every two weeks, *see* Exhibit No. 7, and that the Employment Security Department ("the Department") paid him every week. Exhibit No. 11.

With reference to finding No. 7, claimant testified that he "[believed] somebody was helping [him] file those unemployment claims; [he did] not know if they answered the questions for [him]," that "[Ms. Coster] was a friend of [his], she was helping [him]," that "[he remembered] getting unemployment checks," and that "[he was] sure [he] deposited them in a bank." We find, then, that Ms. Coster assisted claimant in filing his claims for unemployment benefits and that he personally deposited his benefit warrants into his bank account. We have not adopted the last sentence at finding No. 7 because the evidence does not show that claimant appointed Ms. Coster his agent for the purpose of filing claims for unemployment compensation benefits.

We adopt the Office of Administrative Hearings' conclusions of law, except conclusion No. 13.

We point out initially that the Department made payments in satisfaction of the claims in question, the most recent payment having been processed on November 10, 2002. Exhibit No. 11, p. 1. Each such payment constituted a determination of allowance of benefits. In re

Bailey, Empl. Sec. Comm'r Dec.2d 599 (1980). No appeal was taken from any such determination and, consequently, each payment, or determination, became final. That being the case, the Department's June 29, 2006 "determination" was actually a redetermination. In re Rundell, Empl. Sec. Comm'r Dec.2d 327 (1977). A redetermination of an allowance of benefits is proper only if the requirements of either RCW 50.20.160(3) or (4) are met.

Instead of conclusion No. 13 we note that RCW 50.20.160(4)(c) permits the Department to make a redetermination in the event of wilful nondisclosure. Here, claimant filed weekly claims and received weekly unemployment benefit checks for fourteen months while simultaneously receiving workers' compensation benefits every two weeks. Either he alone or he and Ms. Coster together informed the Department each week that he was able to work while, at the same time, he was receiving biweekly benefits for being unable to work. He personally deposited the Department's payments into his bank account. On this evidence, we are satisfied that his failure to either question the Department about his conflicting reports or to inform it of the fact of the simultaneous claims and payments was wilful. In that circumstance, the Department's "determination" notice issued June 29, 2006 is a proper redetermination.

On the basis of the foregoing, we conclude that claimant is not entirely free from fault in the matter of his overpayment and that, accordingly, he is liable for refund of the overpayment. *See, e.g., In re Mumy*, Empl. Sec. Comm'r Dec.2d 839 (1993); *In re Wood*, Empl. Sec. Comm'r Dec. 349 (1957); *In re Powell*, Empl. Sec. Comm'r Dec. 202 (1955).

Now, therefore,

IT IS HEREBY ORDERED that the decision of the Office of Administrative Hearings issued on April 26, 2007, is AFFIRMED. Claimant's appeal was filed late with good cause. He is not disqualified pursuant to RCW 50.20.070, but is disqualified pursuant to RCW 50.20.085 for the weeks ending September 8, 2001 through November 9, 2002. Benefits paid for those weeks in the amount of \$22,630 constitute an overpayment pursuant to RCW 50.20.190(1). Claimant is not free from fault in the matter of this overpayment and is therefore liable for refund pursuant to RCW 50.20.190(1) and (2).

DATED at Olympia, Washington, June 8, 2007.\*

*Anthony J. Philippsen, Jr.*

Review Judge  
Commissioner's Review Office

\*Copies of this decision were mailed to all interested parties on this date.

**Appendix B**

*In the Matter of Larry L. Hughes, Jr.*, OAH Docket No. 01-2007-06920  
(April 26, 2007), Commissioner's Record pp. 239-243

STATE OF WASHINGTON  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE EMPLOYMENT SECURITY DEPARTMENT

IN THE MATTER OF:

Larry L. Hughes Jr

Claimant

DOCKET NO: 01-2007-06920

INITIAL ORDER

SSA: [REDACTED]

BYE: 08/03/2002

UIO: 790

**Hearing:** This matter came before Administrative Law Judge Todd Gay on April 26, 2007 at Olympia, Washington after due and proper notice to all interested parties.

**Persons Present:** The claimant-appellant, Larry L. Hughes Jr; claimant representative, Vicky Daniels and Unemployment Law Project; claimant witness, Marjorie Bamford; employment security department, represented by Bob Wohlers.

**STATEMENT OF THE CASE:**

The claimant filed an appeal on March 14, 2007 from a Decision of the Employment Security Department dated June 29, 2006. At issue in the appeal is whether the claimant is disqualified under RCW 50.20.085 due to receipt of industrial insurance benefits and is subject to the denial of unemployment benefits; whether the appellant has good cause for filing a late appeal (to be timely an appeal must be filed in writing within 30 days after the Determination Notice was mailed); whether the claimant 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 benefits and is subject to disqualification pursuant to RCW 50.20.070; and whether the claimant is liable for the refund of regular benefits pursuant to RCW 50.20.190 in the amount of \$22,630.00.

**Having fully considered the entire record, the undersigned Administrative Law Judge enters the following Findings of Fact, Conclusions of Law and Initial Order:**

**FINDINGS OF FACT:**

1. Claimant Larry Hughes was seriously injured in an auto accident in 2005. Claimant was in critical care for about a month at Harborview Hospital, then hospitalized for about a year thereafter. Brain injury has caused long-term problems for claimant's memory and mood. Claimant is under doctor's care and is medicated for anger control.

INITIAL ORDER - 1

2. Claimant is not able to comprehend to a substantial degree the writing in the exhibits admitted to the record in this case. Claimant has not been able to understand, without assistance, correspondence pertaining to this case.

3. Claimant has been living with his close friend Marjorie Bamford, who testified at hearing, since early 2005. They have known each other since the fall of 2004.

4. The department mailed two determinations on June 29, 2006 to claimant's PO box in Napavine. Claimant does not recall whether he received the determinations in 2006. In early 2007, claimant received correspondence from the department. Ms. Bamford helped claimant put together an appeal letter, which was faxed to the department on March 11, 2007. Ms Bamford and claimant do not share the same PO box.

5. Claimant received unemployment benefits for the relevant weeks, from the week ending September 8, 2001 through November 9, 2002—62 weeks—at his weekly benefit amount of \$365 for a total of \$22,630. For each and every week in the relevant period claimant also received benefits from the department of labor and industries (L&I). There is no evidence in the record to controvert the department's evidence with regard to benefits paid to and received by claimant from both the employment security department and L&I in the relevant weeks.

6. In all relevant weeks, claimant was not able to work. He was eligible and in fact did receive benefits paid through L&I.

7. Claimant has little if any recollection about the filing of his weekly claims for unemployment benefits in the relevant weeks. Claimant vaguely recalls this was done by telephone rather than by Internet. Claimant believes he was assisted in his weekly claim filing by Marlyn Coster. Claimant and Marlyn Coster lived together beginning in September 2001. We find, for purposes of adjudicating overpayment issues here, that Marlyn Coster acted as claimant's agent with his approval and assisted him in the filing of his claim for unemployment benefits.

8. Claimant was employed by Sonoco from August 1998 until July 26, 2001. Claimant was discharged, and started claiming unemployment benefits shortly thereafter. Claimant's job was to fashion cardboard cores for packaging for shipment of paper products from a paper mill in Longview.

#### **CONCLUSIONS OF LAW:**

1. The provisions of RCW 50.32.020, 50.32.025 and 50.32.075 and WAC 192-04-090 are applicable and will be found on the attachment.

2. Pursuant to RCW 50.32.075 the thirty (30) day time limitation on an appeal may be waived if good cause for the late-filed appeal is shown. A three prong test is applied in determining whether a claimant has established good cause for a late-filed appeal. The criteria considered are as follows: ". . . (1) the shortness of the delay; (2) the absence of

prejudice to the parties; and (3) the excusability of the error." *Wells v. Employment Security Dep't*, 61 Wn. App. 306, 809 P.2d 1386 (1991); *Devine v. Employment Security Dep't*, 26 Wn. App. 778, 614 P.2d 231 (1980). With regard to the shortness of the delay and the excusability of the error, the analysis is based upon a sliding scale in which a short delay requires a less compelling reason for the failure to file a timely appeal than does a longer delay. *Wells*, supra.

3. Considering claimant's significant memory deficit and his testimony of having no recollection with regard to the issuance in June 2006 of the determinations in question, and evidence as to claimant's inability to read and fully understand the determination, we find good cause to allow the late appeal. The merits should be heard.

4. The provisions of RCW 50.20.085 are applicable and are found on the attachment. An individual is disqualified from benefits with respect to any day or days for which he or she is receiving, has received, or will receive compensation under RCW 51.32.060 or 51.32.090.

5. The determination of the department that claimant was disqualified under RCW 50.20.085 should be affirmed.

6. Claimant was overpaid benefits in the amount of \$22,630.00. This is a legal debt. Claimant is obligated to repay the debt, absent a waiver under RCW 50.20.190.

7. We are concerned here with the provisions of RCW 50.20.070, a copy of which is attached.

8. To disqualify an individual for benefits for any week with respect to which he has knowingly misrepresented a material fact and has thereby obtained benefits, the Department must establish, by clear, cogent, and convincing evidence, five essential elements:

- a. The claimant has made a statement or implied a statement by his silence;
- b. The statement was false;
- c. The claimant was aware that the statement was false or was without knowledge with respect to its truth or falsity;
- d. The statement concerned a fact material to the claimant's rights and benefits; and
- e. The statement was made with the intent that the Department should act in reliance thereon.

See *In re Olson*, Empl. Sec. Comm'r Dec. 636 (1965); and *In re Psomos*, Empl. Sec. Comm'r Dec. 2d 117 (1975).

INITIAL ORDER - 3

2706920.TG

9. It is not established by clear, cogent and convincing evidence that claimant knowingly withheld information with the intent to obtain unemployment benefits improperly. Considering the totality of claimant's testimony, and claimant's mental status at the time in question, there is insufficient evidence to conclude there was knowing misrepresentation, by the high standard of proof of clear, cogent and convincing evidence. Therefore, the terms of RCW 50.20.070 should not be applied.

10. The provisions of RCW 50.20.190, WAC 192-220-010, WAC 192-220-020, and WAC 192-220-030 are applicable and will be found on the attachment.

11. Having given due consideration to each of the factors set forth in the above-cited regulations, it is our conclusion that the claimant was at fault and must remain liable for repayment of the regular overpayment of \$ 22,630.00.

12. With regard to the question of fault, we turn to WAC 192-220-020. A claimant who is at fault is not allowed waiver of overpayment based on equity under the overpayment statute—RCW 50.20.190. Fault may be found if claimant is paid benefits in an amount greater than he is entitled and accepts and retains those benefits and the payment of benefits is based on incorrect information or failure to furnish information which claimant should have provided, and claimant had notice the information should have been reported. Claimant may be considered at fault even if all relevant information is provided, if the overpayment is the result of payment claimant should reasonably have known was improper. In deciding whether or not a claimant is at fault, the department should consider education, mental abilities, emotional state, experience with claimant claiming unemployment benefits and other elements of claimant's personal situation which affect his knowledge and ability to comply with reporting all relevant information.

13. In this case, there is the argument to be made for claimant that given his mental disabilities and his personal situation, he reasonably could not have known payments were paid improperly. For purposes of the analysis here, however, we find claimant was assisted in the weekly claim filing process by his friend Marlyn Coster, with whom he was living at the time. Ms. Coster presumably was acting, in essence, as the agent of the claimant. Claimant is responsible for his agent's acts, authorized by him—the principal. The agent presumably had authority (claimant's approval) to transact business binding on the principal. We further presume the agent reasonably should have known that claimant was receiving L&I benefits. Therefore, the claimant's legal obligation, about which there is virtually no doubt, should be claimant's responsibility and should not be forgiven as a matter of equity. We conclude claimant was at fault and therefore not eligible for consideration of waiver.

**Now therefore it is ORDERED:**

The appellant has shown good cause for filing a late appeal.

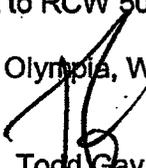
The Decision of the Employment Security Department under appeal is **MODIFIED**.

Benefits are denied on the basis that the claimant is disqualified under RCW 50.20.085 due to receipt of industrial insurance benefits for the period beginning with the week ending September 8, 2001 through November 9, 2002.

The claimant was at fault in causing the overpayment and is required to repay the regular overpayment pursuant to RCW 50.20.190 in the amount of \$22,630.00; and claimant is not eligible for consideration of waiver.

The claimant did not fraudulently obtain or attempt to obtain benefits and is not subject to disqualification, on that basis, pursuant to RCW 50.20.070.

**Dated and Mailed** on April 26, 2007 at Olympia, Washington.

  
Todd Gay  
Administrative Law Judge  
Office of Administrative Hearings  
2420 Bristol Court SW  
PO Box 9046  
Olympia, WA 98507-9046

#### **Certificate of Service**

I certify that I mailed a copy of this order to the within-named interested parties at their respective addresses postage prepaid on the date stated herein. \_\_\_\_\_

#### **PETITION FOR REVIEW RIGHTS**

This Order is final unless a written Petition for Review is addressed and mailed to:

**Agency Records Center  
Employment Security Department  
PO Box 9046  
Olympia, Washington 98507-9046**

and postmarked on or before **May 29, 2007**. All argument in support of the Petition for Review must be attached to and submitted with the Petition for Review. The Petition for Review, including attachments, may not exceed five (5) pages. Any pages in excess of five (5) pages will not be considered and will be returned to the petitioner. *The docket number from the Initial Order of the Office of Administrative Hearings must be included on the Petition for Review.* Do not file your Petition for Review by Facsimile (FAX). Do not mail your Petition to any location other than the Agency Records Center.

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Attachment A

**Mailed to the following:**

Larry L Hughes Jr  
PO Box 824  
Napavine, WA 98565-0824

Claimant-Appellant

Unemployment Law Project  
1904 Third Ave Suite 604  
Seattle, WA 98101

Claimant Representative

**Appendix C**  
*In re Potts*, Empl. Sec. Comm'r Dec. 425 (1959)

Westlaw

Empl. Sec. Comm'r Dec. 425, 1959 WL 67628 (WA)

Page 1

Empl. Sec. Comm'r Dec. 425, 1959 WL 67628 (WA)

Commissioner of the Employment Security Department  
State of Washington

**IN**  
**RE**  
BARBARA J.  
**POTTS**

December 22, 1959

Case No.  
425  
Review No.  
4992  
Docket No.  
A-38263

**DECISION OF COMMISSIONER**

On the 18th day of November, 1959, the undersigned Commissioner, acting pursuant to the provisions of Section 123 of the Act, took the above-entitled matter under advisement for the purpose of reviewing a Decision of an Appeal Tribunal published with respect thereto on the 13th day of November, 1959. Having now completed a thorough examination of the record and files herein, thereby being fully advised in the premises, the Commissioner hereby adopts the Findings of Fact of the Appeal Tribunal which, for purposes of clarity, will be set forth verbatim as a preface to the conclusions hereinafter following:

**FINDINGS OF FACT****I**

The appellant filed an application for an initial determination on July 6, 1959. On July 17, 1959, she was interviewed with respect to her availability for work. At that time, the appellant signed the following statement:

"I have 2 children - 2 yrs & 6 wks. I have child care with Mrs. Viola Hill, 15th Ave. S.W. I take my children to her. I have a car for this. I have looked for work with my former employer, San Juan Fishing Co., & Sears Roebuck & Co. I am told today I must make many new employer contacts, in person, each week & be able to name my contacts when asked. I can work any regular day shift & I am able to

work."

## II

The appellant was subsequently granted waiting period credit for the week ending July 11, 1959, and was paid benefits in the amount of \$33.00 each for the weeks ending July 18, 25, August 1, 8 and 15, 1959. She has claimed benefits for the weeks ending August 22 and 29, 1959, but payment for such weeks is being withheld pending decision on the appeal.

## III

On August 24, 1959, the appellant was offered a referral by the Employment Service to work in her usual occupation, but she did not apply for this work because of lack of child care. On August 28, 1959, she was interviewed with respect to her failure to apply for the work. At that time, she signed the following statement:

"I had been called on Thursday, Aug. 20th, but was out of town on Thursday, August 20th visiting my mother. I was just gone the one day. I did report here on Friday, August 21st, but had not gotten the message yet. I have no phone, so gave my mother-in-law's phone number. I did not see my mother-in-law until the week end. I called her Monday, August 24th, in the morning. That job had been filled, but she offered me another job as a packer to Crescent Mfg. Co. I could not apply that day as I had no car & no baby sitter. I suppose I could take the bus but I have no baby sitter. Now that I have 2 children, I would like to get someone to come in as it is too difficult to take 2 children out early in the morning. I do not have anyone now to care for my children.

"I didn't look for work last week as I didn't have the car. I haven't had anyone to look after my children. I did have a neighbor for a few days look after the children but she went care for them all the time. I did tell Mrs. Brown of the Employment Service that I would try to go to the job the next day, but I was unable to due to lack of child care & my husband needs the car. I did say on July 17th, that I would take my two children to Mrs. Violet Hill, but that is impossible. Mrs. Hill has a day nursery. I took the one baby to her, and that was satisfactory - but I can not take 2 children out - it is just impossible. When I signed the statement on July 17th I thought I could take the 2 out, but then I got to thinking, and my tiny baby is not 3 months old yet, and I decided I couldn't take him out. I haven't had child care since July 17th when I decided I couldn't take the 2 babies out.

"I have been asked why I didn't say I didn't have child care - my answer is - when I went to the window they didn't ask me question like they do at a desk. It has been pointed out to me that one of the questions at the window is 'are you able to work every day during the week.' I now see that is so."

## IV

The appellant agrees that she signed both of the statements dated July 17, 1959 and August 28, 1959, after having had an opportunity to read them, and made no objection to them. At the hearing, she testified that had she been able to find work she would have made arrangements for someone to care for her children. At the time of the hearing, the appellant was employed by Sears Roebuck and Company, and is presently having her two children cared for by a neighbor. The appellant admits that she did not talk with her neighbor about caring for her children until after she had obtained employment at Sears Roebuck and Company. The appellant contended that had she been able to find employment she could have taken her two children to her former baby sitter but, to have done so, she would have had to use the family car. Normally the appellant's husband takes the car to his work, and the car is not available to the appellant unless she knows in advance she is going to need it for a part of the day.

#### V

It is the Department's position that because the appellant had not had child care since filing her application on July 6, 1959, she was not available for work and therefore not entitled to the benefits which were paid to her. In the determination issued to the appellant, the statement is made, "It cannot be definitely established that you intentionally misrepresented your availability."

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

#### ISSUES

##### I

Was the appellant available for work commencing with the week ending July 11, 1959, through the week ending August 29, 1959, pursuant to the provisions of Section 68(3) of the Act?

##### II

Assuming that the appellant was not available for the period in question, can a redetermination of her eligibility for this period be effectuated, thereby permitting a recovery of any benefits paid for said weeks?

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

#### CONCLUSIONS

##### I

Without attempting to elaborate on the conclusions reached by the Appeal Tribunal, suffice it to say that we concur with the Tribunal to the effect that the appellant was not available for work within the meaning and intent of Section 68(3) of the Act, during the period in question, to-wit: commencing with the week ending

July 11, 1959, through the week ending August 29, 1959.

## II

In order to arrive at a conclusion with respect to the second issue presented, it is necessary to make reference to pertinent portions of Section 84(3) and 87 of the Act which are as follows:

"SEC. 84. Redetermination . . .

(3) A determination of allowance of benefits shall become final, in the absence of a timely appeal therefrom: Provided, That the commissioner may redetermine such allowance at any time within two years following the benefit year in which such allowance was made in order to recover any benefits improperly paid and for which recovery is provided under the provisions of Section 87: And Provided further, That in the absence of fraud, misrepresentation, or nondisclosure, this provision or the provisions of Section 87 shall not be construed so as to permit redetermination or recovery of an allowance of benefits which having been made after consideration of the provisions of Section 68(3), or the provisions of Sections 73, 74, 76 or 77 has become final."

"SEC. 87. Recovery of Benefit Payments. Any person who is paid any amount as benefits under this title to which he is not entitled shall become liable for such amount: Provided, That in the absence of fraud, misrepresentation or wilful nondisclosure, such person shall not be liable for an amount of overpayment received without fault on his part where the recovery thereof would be against equity and good conscience. The amount of the overpayment and the basis thereof shall be assessed to the liable person and following the overpayment assessment such amount, if not collected, shall be deducted from any future benefits payable to the individual: Provided, That in the absence of fraud, misrepresentation, or wilful nondisclosure, every determination of liability shall be mailed or personally served not later than two years after the close of the benefit year in which the purported overpayment was made . . ."

There appears to be little question but that the Commissioner may redetermine an allowance of benefits within two (2) years following the close of the benefit year in which the allowance was made, providing, that the original (and improper) allowance of benefits came about through fraud, misrepresentation or nondisclosure. Having once allowed benefits, any attempt to recover same presupposes the fact that we have changed our minds concerning the original allowance. The "changing of the mind" is the redetermination which must always precede the recovery of the benefits. From these observations, one must agree with the Appeal Tribunal that there is a natural and close affinity between the provisions of Section 84(3) of the Act (changing the mind) and the provisions of Section 87 of the Act (recovery).

It was the observation of the Appeal Tribunal that both the provisions of Section

84(3) of the Act and Section 87 thereof, contained similar, if not identical, language to the extent that each section referred to an allowance of benefits coming about through fraud or misrepresentation. However, Section 84(3) also provided that a redetermination could be made where there was evidence of "nondisclosure", whereas Section 87 of the Act indicated that "nondisclosure", to be utilized as a basis for recovery of benefits, must be "wilful nondisclosure". The question confronting the Appeal Tribunal was whether or not the legislature, through inadvertence, had failed to supply the adjective "wilful" in the provisions of Section 84(3) of the Act. It was the opinion of the Tribunal that such was the case. With this conclusion, we respectfully disagree.

"Nondisclosure" is not a synonym for "fraud" or "misrepresentation", but the term does imply and presuppose the possession of knowledge which is not imparted either through inadvertence or by design. If one fails to disclose knowledge intentionally (i.e. design) when he has a duty or obligation to speak, his actions are fraudulent. Because the provisions of Section 84(3) of the Act specifically cover the situation of fraud, it is felt that the term "nondisclosure" (as it appears in the statute) must relate to circumstances wherein an individual possessing knowledge or information fails to disclose same through inadvertence or negligent oversight. To hold otherwise is to conclude that the legislature was unnecessarily duplicitous in its choice of wording.

In further support of our reasoning, it is to be noted that Section 87 of the Act compels recovery of benefits wrongfully paid as a result of fraud, misrepresentation or wilful nondisclosure. In addition to this, recovery may also be had where the claimant was not without fault. Obviously, any claimant who (through fraud, misrepresentation or wilful nondisclosure) obtains benefits to which he is not entitled, is not without fault. Yet the statute indicates certain situations arising where benefits are improperly paid, but recovery of these benefits cannot be had if the claimant was without fault. If we were to supply the adjective "wilful" as a prefix to the term "nondisclosure" as the latter term appears in Section 84(3) of the Act, there would never be an occasion wherein we could adjudicate an overpayment solely on the issue of "fault". To state this another way: By interpreting the present wording of Section 84(3) of the Act literally, we will give full force and effect to the provisions of Section 87 of the Act. On the other hand, if we supply the adjective "wilful" in the provisions of Section 84(3) of the Act to the term "nondisclosure", we render useless a certain portion of Section 87 of the Act. This latter construction cannot be permitted to stand.

On the basis of the foregoing, we conclude that the appellant (though not wilfully) failed to disclose circumstances affecting her availability for work, to-wit: Her lack of immediate child care and transportation. As a result of this "nondisclosure" she was improperly granted waiting period credit and allowed benefits in the total amount of \$165.00. Because the allowance of benefits was originally predicated on the claimant's failure to fully disclose all circumstances relating to her eligibility for benefits, it was entirely proper for the local of-

fice to redetermine the allowance of benefits pursuant to the provisions of Section 84(3) of the Act. In addition to this, the overpayment of \$165.00 is properly recoverable pursuant to the provisions of Section 87 of the Act, as the appellant was not without fault in bringing the overpayment about. Accordingly,

IT IS HEREBY ORDERED that the Decision of the Appeal Tribunal entered in this matter on the 13th day of November, 1959, shall be SET ASIDE. The appellant is found unavailable for work commencing with the calendar week ending July 11, 1959, through the calendar week ending August 29, 1959, pursuant to the provisions of Section 68(3) of the Act. The allowance of waiting period credit and benefits for the weeks ending July 11, 18, 25 and August 1, 8 and 15, 1959, was properly redetermined pursuant to the provisions of Section 84(3) of the Act. The overpayment of \$165.00 was properly established pursuant to the provisions of Section 87 of the Act, and is recoverable by this department.

DATED at Olympia, Washington, December 22, 1959.

OTTO S. JOHNSON  
Acting Commissioner  
Employment Security Department

Empl. Sec. Comm'r Dec. 425, 1959 WL 67628 (WA)  
END OF DOCUMENT

**Appendix D**

*In re Uhri*, Empl. Sec. Comm'r Dec.2d 624 (1980);  
*In re Psomos*, Empl. Sec. Comm'r Dec.2d 117 (1975);  
*In re Olson*, Empl. Sec. Comm'r Dec. 636 (1965)

Westlaw

Empl. Sec. Comm'r Dec.2d 624, 1980 WL 344302 (WA)

Page 1

Empl. Sec. Comm'r Dec.2d 624, 1980 WL 344302 (WA)

Commissioner of the Employment Security Department  
State of Washington

**IN**  
**RE**  
JERRY W.  
**UHRI**

July 9, 1980

Case No.  
624  
Review No.  
36409  
Docket No.  
0-04390

**DECISION OF COMMISSIONER**

On June 16, 1980, the undersigned issued an Order taking this cause under advisement for the purpose of reviewing the record and proceedings to determine whether the decision of the Appeal Tribunal rendered on the 4th day of June, 1980, properly disposed of the issues involved therein, and to prevent said decision from becoming final before opportunity was had to review the record and proceedings. Having now carefully reviewed the entire record, thereby being fully advised in the premises, the undersigned does hereby enter the following:

**FINDINGS OF FACT****I**

The weeks in issue are those ending September 15, September 22, September 29, and October 6, 1979. The Appeal Tribunal Decision additionally covered the week ending October 13, 1979, but the Determination Notice did not purport to deny benefits for that week, and consequently that week is not in issue.

**II**

As to the weeks ending September 15 and 29, the Department found that claimant's weekly benefit amount of \$137 was subject to reduction because of remuneration that was payable to him with respect to those weeks. As to the weeks ending

September 22 and October 6, the Department found that claimant did not qualify as an "unemployed individual" because of remuneration that was payable to him with respect to those weeks. As to all four weeks the Department found that claimant had knowingly made false statements of material facts and had thereby attempted to obtain benefits. In view of this finding, the Department disqualified claimant under the provisions of RCW 50.20.070.

### III

Claimant worked as a mechanic at \$12.65 per hour for Coast Marine Construction in Portland, Oregon for approximately one year. He quit that employment on August 3, 1979, on the basis that the distance to work was too great (he lives in Castle Rock, Washington) and that the gas shortage hampered him in getting to and from work. See Exhibit #8.

### IV

on September 4, 1979, claimant began splitting cedar bolts under an arrangement with two friends whose operation was known as Bum Cedar. He had no set hours for performing the work, and he was to be paid at a piece work rate of \$100 per cord, if and when the split cedar was sold.

### V

On September 12, 1979, claimant initiated a claim for unemployment insurance. In this connection, he was required to complete a form entitled "Eligibility Review Form." See Exhibit #5, Pg. 2. Part 20 of the form asked claimant to "List Your Last Three Jobs (Last Job First)." He responded to this by listing Coast Marine Construction as his last job, and Columbia West and S. J. Groves & Sons as the jobs he held before that with Coast Marine. He reported that all three jobs had been secured through his union, Operating Engineers Local 701. He made no mention of his arrangement with Bum Cedar.

### VI

Part 15 of the "Eligibility Review Form" required claimant to "List any work which you are doing in self-employment, on a commission basis, in operating a farm, on a service or exchange basis, etc." To this he answered "none."

### VII

Claimant did not receive the Information for Claimant's pamphlet, nor did he receive the usual eligibility lecture.

### VIII

On September 20, claimant was interviewed concerning his separation from Coast Marine. During the course of this interview he was questioned concerning Part 15

of the "Eligibility Review Form" (see Finding VI), and he affirmed that he was not engaged in the activities described therein.

#### IX

Claimant filed claims for the weeks ending September 15 through October 6. On each of these claims he was asked "Did you work? (If yes, enter earnings before deductions and complete 1A on back)." On each of the claims he answered "no" to this question.

#### X

On October 13, claimant completed the work he was doing with Bum Cedar, and on October 15 he was paid \$823.25 which represented full compensation for the cedar he had split since September 4.

#### XI

On October 17, the Department mailed claimant a determination disqualifying him from benefits under RCW 50.20.050 for having quit his employment with Coast Marine.

#### XII

On October 18, claimant visited the Job Service Center for the purpose of reporting his Bum Cedar earnings. As best we can determine from the record, claimant was not aware at the time he came to the office that the October 17 disqualification had been issued. In this connection we have taken note of the Claim Record Card (Exhibit #7) which indicates that claimant telephoned on October 19 inquiring as to his appeal rights. This tends to suggest that it was not until October 19 that he received the Disqualification Notice.

#### XIII

On October 18, claimant disclosed his Bum Cedar earnings to the Department. He had not kept record of the exact hours he had spent in splitting the cedar. He provided a written estimate as to the weeks ending September 15 through October 13, which ranged from 18 hours per week to 36 hours per week. See Exhibit #5, Pg. 6. No estimate was given as to the week ending September 8. The Department allocated the earnings to the weeks ending September 15 through October 13.

#### XIV

Claimant maintains that at no time did he knowingly attempt to conceal his association with Bum Cedar from the Department. As to Part 15 of the "Eligibility Review Form" he asserts that he did not consider it a type of activity described therein. As to Part 20 of the "Eligibility Review Form" he asserts that he did not consider it a job within the scope of that inquiry. As to the claims he filed, he says that

it was his understanding that you didn't report the work until you had received earnings, and that the wording of the question on the claim card suggests just that. The Appeal Tribunal Decision makes no credibility findings with respect to these assertions.

#### XV

Claimant filed no appeal from the Determination denying him benefits for quitting his work with Coast Marine. Under that determination, claimant was disqualified from benefits until he obtained work and earned wages of not less than his weekly benefit amount in each of 5 calendar weeks.

#### XVI

Claimant was not paid benefits for the weeks at issue, except for one warrant in the amount of \$137 which the Job Service Center issued by error and which claimant promptly returned upon request.

#### ISSUES

##### I

What effect did claimant's Bum Cedar earnings have on his entitlement to benefits as to the weeks ending September 15 through October 6, 1979?

##### II

Did claimant knowingly make misrepresentations of material facts concerning his association with Bum Cedar?

##### III

Was claimant's association with Bum Cedar properly characterized as "self" employment?

#### CONCLUSIONS

##### I

The money claimant earned during each of the weeks in issue clearly represent remuneration payable to him with respect to such week(s) "within the meaning of RCW 50.04.310 (defining an unemployed individual) and RCW 50.20.130 (requiring a deduction from one's weekly benefit amount with respect to remuneration). As to some of the weeks the remuneration may have rendered him "not unemployed." At a minimum, the remuneration would serve to reduce his claim for each of the weeks.

The Department's method of allocating the remuneration to the respective weeks seems to be incorrect. According to the evidence, the remuneration was earned over a period of 6 weeks (week ending September 8 through week ending October 13),

whereas the Department allocated the remuneration to only 5 weeks (week ending September 15 through week ending October 13).

However, for purposes of our present decision it is unnecessary to make an exact allocation of the remuneration to the respective weeks. At a minimum the remuneration would serve to reduce claimant's entitlement for each of the weeks; and regardless of whether he was partially unemployed as distinguished from being "not unemployed," he could not be paid benefits for any of the weeks in issue because of his disqualification under RCW 50.20.050 (leaving work voluntarily without good cause).

## II

In material part RCW 50.20.070 provides:

"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 benefits under the provisions of this title, and for an additional twenty-six weeks . . ."

The Appeal Tribunal Decision correctly states that in order to disqualify an individual under RCW 50.20.070, the Department must establish by clear, cogent and convincing evidence five essential elements:

1. The claimant has made a statement or implied a statement by his silence;
2. The statement was false;
3. The claimant was aware that the statement was false or was without knowledge with respect to its truth or falsity;
4. The statement concerned a fact material to the claimant's rights and benefits; and
5. The statement was made with the intent that the Department should act in reliance thereon.

See *In re McSorley*, Comm. Dec. 129 (1954); *In re Childress*, Comm. Dec. 254 (1955); and *In re Psomos*, Comm. Dec. (2nd) 117 (1975).

The Appeal Tribunal concluded that claimant made statements which were false. We agree. Arguably, his answers to Parts 15 and 20 of the "Eligibility Review Form" were not false, i.e., "List any work which you are doing in self-employment, on commission basis, in operating a farm, on service or exchange basis, etc." and "List Your Last Three Jobs." Unless his association with Bum Cedar could be characterized as self employment, it does not appear to be akin to any of the activities described in Part 15. And at the time he initiated his claim, Bum Cedar would

be considered his "last" job only if the word "last" were read to include "current" jobs. But the "no" answers he gave on his weekly claim cards to the question "did you work" were clearly false.

The Appeal Tribunal concluded however that the false statements were not material. Its rationale was that "at that time, he was subject to an independent denial, and his failure to report his employment at that time was immaterial."

In our opinion the false statements were material. We have defined a material fact as "one which, if known, would result in the claimant being denied benefits. In re Altaras, Comm. Dec. (2nd) 414 (1978); and In re Fox, Comm. Dec. 589 (1964). And in the case of In re Noordeloos, Comm. Dec. 340 (1957) we said: "if the Department determines that the presence of this fact works to defeat the claimant's right to benefits, the fact is 'material'." The following situations help to illustrate the intended meaning of the term:

"1. A claimant knowingly withholds from the Department the fact that he is attending school, but his school attendance does not restrict his availability for work. His nondisclosure may be said to be "relevant" to his entitlement to benefits, but it is not considered "material" within the meaning of RCW 50.20.070. See In re Noordeloos, supra.

"2. A claimant lies about certain circumstances surrounding her quitting work, but the lies, even if true, would not cause the Department to find good cause for her quit. The lies are not "material." See In re Fox, supra.

"3. A claimant reports that she has no earnings during a given week, but in fact she has earned \$11. If the statute disregards the first \$12 in earnings in figuring the individual's weekly claim, the misrepresentation is not "material." See In re Vlahovich, Comm. Dec. 809 (1969).

"4. A claimant reports that he has quit work when in fact he has been discharged. If he has not been discharged for misconduct, the misrepresentation is not "material." See In re Altaras, supra."

In contrast to the above illustrations, the present claimant misrepresented circumstances that served, at a minimum, to reduce his claims for the weeks at issue; and viewed from that standpoint, his misrepresentations were material. We fail to see that the subsequent determination that he was subject to disqualification for the same weeks over quitting work at Coast Marine negates the materiality of his misrepresentations. Under the Act his earnings had as much legal effect in reducing his claims as did his voluntary quit in disqualifying his claims. In our opinion, where the misrepresented or undisclosed facts serve as an independent basis under the Act for reducing or denying the individual's claim they are "material." The present misrepresentations were material.

While we conclude that false representations were made, and that they were materi-

al, we are not satisfied that they were knowingly made, i.e., that claimant was aware that his statements were false or was without knowledge of their truth or falsity. Claimant maintains that he did not attempt to conceal his association with Bum Cedar, and that on his claim cards he understood that he was only to report work for which he had been paid. In the absence of a credibility finding rejecting his assertions, we are inclined to believe them. In doing so we have given weight to the facts that he did not receive instructions as to the details of the unemployment program, that the Bum Cedar work was not a typical activity in which he engaged, and that he apparently reported his earnings before he was aware that it was to his advantage to do so (the advantage would be to secure purge credit for his voluntary quit disqualification).

In view of the above, claimant is not subject to disqualification under RCW 50.20.070.

III

The Appeal Tribunal Decision characterizes claimant's relationship with Bum Cedar as self-employment (see Conclusion No. 6), yet allows purge credit as to certain of the weeks in which claimant was so engaged. Earnings from self-employment do not serve to purge a disqualification under RCW 50.20.050. See In re Lewis, Comm. Dec. (2nd) 563 (1979); and In re Davis, Comm. Dec. (2nd) 578 (1979). However, we find the evidence concerning claimant's relationship with Bum Cedar too meager to make a proper characterization. The Job Service Center should develop the evidence further in this respect, and issue a determination thereon.

And now, in view of all the foregoing,

IT IS HEREBY ORDERED that the Decision of the Appeal Tribunal Decision entered in this matter on the 4th day of June, 1980, shall be MODIFIED. Claimant is not subject to disqualification under RCW 50.20.070. The Job Service Center should issue a determination on the issue of whether claimant's relationship with Bum Cedar was that of self-employment, and whether his income from that source can be used to purge his disqualification under RCW 50.20.050.

DATED at Olympia, Washington, JUL 9 1980

David J. Freeman  
Commissioner's Delegate

Empl. Sec. Comm'r Dec.2d 624, 1980 WL 344302 (WA)  
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Empl. Sec. Comm'r Dec.2d 117, 1975 WL 175344 (WA)

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Empl. Sec. Comm'r Dec.2d 117, 1975 WL 175344 (WA)

Commissioner of the Employment Security Department  
State of Washington

**IN**  
**RE**  
FRANK  
**PSOMOS**

November 28, 1975

Case No.  
117  
Review No.  
24511  
Docket No.  
5-08610

**DECISION OF COMMISSIONER**

On the 3rd day of November, 1975, the undersigned Commissioner issued an Order taking the above-entitled matter under advisement on his own motion for the purpose of reviewing a Decision of an Appeal Tribunal entered with respect thereto on the 23rd day of October, 1975. Having now completed a thorough examination of the record and files herein, thereby being fully advised in the premises, the Commissioner does hereby adopt Finding of Fact No. 1 of the Appeal Tribunal Decision, as follows:

**FINDINGS OF FACT**

"1. During the calendar week ending August 24, 1974, the claimant worked for Lockheed Shipbuilding and earned \$276.48. When claiming benefits for that week, the claimant completed a continued claim card indicating that he performed no work and had no earnings during the week claimed. Subsequently, the claimant was allowed and paid his full weekly benefit amount of \$62 for that particular week."

The claimant states that at the time he reported to the local office and completed the claim card for the week in question, he told the claimstaker he "was getting a job over there at Lockheed" and was going back to work. She assured him that he could claim benefits for the week ending August 24, 1974, so after she checked the appropriate blocks, he signed the card. It is clear to us on the record that the claimant did not inform the claimstaker that he had already returned to work, and

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had in fact worked during the week for which he was claiming benefits.

The claimant has offered no reason for his failure to properly report his work and earnings for this week, but asserts that "I did not do it on purpose or anything" and "I never tried to take anything from the state" and "I wasn't trying to cheat anybody".

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

#### ISSUES

##### I

Was the claimant "unemployed" during the week ending August 24, 1974, within RCW 50.20.010?

##### II

Is the claimant subject to the disqualification of RCW 50.20.070?

##### III

Is the claimant liable to refund benefits of \$62 paid to him for the week ending August 24, 1974, within RCW 50.20.190?

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

#### CONCLUSIONS

We adopt the Conclusions of the Appeal Tribunal Decision to the following extent:

"1. The provisions of RCW 50.20.010 and RCW 50.04.310 are applicable and will be found on the attachment.

"2. It will be seen that there are actually two definitions of the term 'unemployed individual.' If an individual can meet the requirements of either of these two definitions, that person will then be considered 'unemployed.' The first of these definitions requires that no services be performed and no remuneration be payable with respect to each week in question. It should be noted that there are two requirements in this definition--no services and no remuneration. These requirements are in the conjunctive and both must be met. The second definition provides that in any week of less than full-time work, any remuneration payable must be in an amount less than one and one-third times the weekly benefit amount plus five dollars. These two requirements are also in the conjunctive and both of them must be met.

"3. The facts of this case indicate that during the week in question, the claimant met neither definition of unemployed individual.

"4. RCW 50.20.070 and RCW 50.20.190 apply, are attached hereto, and are incorporated herein.

"5. Five elements must be proven before disqualification pursuant to RCW 50.20.070 may be imposed. They are:

- a. A representation or statement;
- b. Its materiality;
- c. Its falsity;
- d. The speaker's knowledge of its falsity or ignorance of its truth;
- e. The speaker's intention that his representation shall be relied upon by the person to whom it is made.

"As to the first element, the claimant represented to the Department that he had neither worked nor earned remuneration during the week in question despite the above findings. As to the second, the statements were material inasmuch as they determined the amount of benefits he was entitled to receive. As to the third, these statements were false, the claimant does not deny either that he had worked or that he had earned the amount indicated above during the week in question. . . ."

As to the fourth element, the Tribunal concludes that, "the claimant signed the card in haste without ascertaining the truth of the matters contained therein." We find nothing in the record which would indicate that the claimant signed the card "in haste". However, we do agree that he signed it without attempting to ascertain the truth or falsity thereof.

With respect to the fifth element, that of intent, the Tribunal finds that the claimant "did not intend to deceive the Department" and should not be subject to the disqualification of RCW 50.20.070. We believe the Tribunal has failed to consider the case of *In re Olson*, 6 Comm. Dec. 636, from which we quote, in part, as follows:

"In the instant case we have established that the appellant knew his responsibility for accurately reporting work and/or earnings. We know he both worked and received earnings with respect to the week ending June 29, 1963, and that he failed to report his work and earnings for the week in question. We know that he received benefits based, in part, upon his assertion that he did not work or receive earnings with respect to the week ending June 29, 1963. We know that he has failed to explain or introduce testimony by way of attempting to explain his failure to correctly report his work and earnings. By operation of law, the foregoing established facts prove the existence of 'intent', as a matter of legal inference and presumption, through the medium of circumstantial evidence. Thus, an un rebutted prima facie case of fraud has been established."

Applied to the instant case, it is clear that a prima facie case of fraud is established on the facts shown. The claimant attempts to rebut this by asserting

that he did not fail to report his work and earnings during the week in question "on purpose or anything" or that he "never tried to take anything from the state" and that he "wasn't trying to cheat anybody". Such reasons do not offer anything in the way of a reasonable excuse for failing to properly report work and earnings, and do not operate to overcome the prima facie case of fraud. The claimant must therefore be held subject to the statutory disqualification. Accordingly,

IT IS HEREBY ORDERED that the Decision of the Appeal Tribunal entered in this matter on the 23rd day of October, 1975, shall be MODIFIED. Benefits shall be denied the petitioner for the calendar week ending August 24, 1974, pursuant to the provisions of RCW 50.20.010 and RCW 50.20.070. The claimant is also held subject to the disqualification provided by RCW 50.20.070. He is held liable to refund benefits of \$62 paid to him for the week ending August 24, 1974, pursuant to RCW 50.20.190.

DATED at Olympia, Washington, NOV 28 1975

Norward J. Brooks  
Commissioner

Empl. Sec. Comm'r Dec.2d 117, 1975 WL 175344 (WA)  
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Empl. Sec. Comm'r Dec. 636, 1965 WL 93759 (WA)

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Empl. Sec. Comm'r Dec. 636, 1965 WL 93759 (WA)

Commissioner of the Employment Security Department  
State of Washington

**IN**  
**RE**  
PAUL R.  
**OLSON**  
PETITIONER

September 1, 1965

Case No.  
636  
Review No.  
7238  
Docket No.  
A-55743

**DECISION OF COMMISSIONER**

On the 2nd day of August, 1965, the undersigned issued an Order taking the above-entitled matter under advisement on his own motion for the purpose of reviewing a Decision of an Appeal Tribunal published with respect thereto on the 22nd day of July, 1965. Having now completed a thorough examination of the record and files herein, thereby being fully advised in the premises, the Commissioner hereby enters the following:

**FINDINGS OF FACT****I**

On July 17, 1962, the appellant filed an application for benefits, stating that he was last employed by the Lucky Lager Brewing Company on July 13, 1962, at which time he was laid off for lack of work. (Hereinafter, we will refer to the brewery as Lucky.)

**II**

On July 23, 1962, the appellant certified on his claim for the week ending July 21, 1962, at which time he advised the Department that he had earned \$25.22 in the employ of Lucky during the week ending July 21, 1962. Waiting period credit was

granted for this week.

### III

On August 20, 1962, the appellant certified on his claim for the week ending August 18, 1962, stating that he had worked for Lucky in said week and had earned \$25.22 therefor. Benefits were allowed for the week ending August 18, 1962, in the adjusted amount of \$27.00.

### IV

On September 17, 1962, the appellant certified on his claim for the week ending September 15, 1962, stating that he had worked for Lucky in said week and had earned \$77.28 therefor. Because his earnings were in excess of his weekly benefit amount, no benefits were paid the appellant.

### V

On September 26, 1962, the appellant certified on his claim for the week ending September 22, 1962, stating that he had worked for Lucky in said week and had earned \$25.76 therefor. Adjusted benefits were paid to the appellant in the amount of \$27.00 for said week.

### VI

On October 12, 1962, the appellant certified on his claim for the week ending September 29, 1962, stating that he had worked for Lucky in said week and had earned \$25.76 therefor. Adjusted benefits were paid to the appellant in the amount of \$ 27.00 for said week.

### VII

The appellant next filed an additional claim on June 10, 1963, at which time he advised the Department that he had last worked for Air Reduction Pacific Company on June 8, 1963, at which time he voluntarily quit. He thereafter claimed benefits for the week ending June 15, 1963, on June 19, 1963, and for the week ending June 22, 1963, on June 26, 1963, stating that he had no work or earnings in either week. Benefits were paid for both weeks in the amount of \$40.00 each.

### VIII

On June 28, 1963, the appellant worked for Lucky, earning gross wages of \$27.62 therefor. On July 3, 1963, the appellant received a pay check from Lucky in the net amount of \$26.62 for his work on June 28, 1963. Also on July 3, 1963, the appellant appeared in his local office to claim benefits for the week ending June 29, 1963, at which time he advised that he had no earnings and had performed no work during said week. On the basis of his certification, benefits in the amount of \$40.00 were paid to the appellant for the week ending June 29, 1963.

**IX**

The appellant was fully aware of his responsibility to report all work done and wages earned with respect to each week for which he claimed benefits. The appellant does not recall why he failed to report work and earnings from Lucky when he certified on his claim for the week ending June 29, 1963. The appellant is certain that he did not withhold the fact of work and/or earnings in order to obtain benefits fraudulently.

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

**ISSUES****I**

Did the appellant knowingly withhold a material fact and thereby obtain benefits to which he was not entitled, subjecting himself to the disqualification provisions of Section 75 of the Act?

**II**

Is the appellant liable for an overpayment of \$40.00 pursuant to the provisions of Section 87 of the Act?

From the Issues as framed the Commissioner draws the following:

**CONCLUSIONS****I**

Section 75 of the Act is hereinafter set forth as a preface to our conclusions:

"SEC. 75. 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 a claim for waiting period 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. "

An examination of the foregoing Section of the Act, discloses the necessity for proving five essential elements of fraud before disqualification may be imposed;

i.e., (1) a representation or statement; (2) its materiality; (3) its falsity; (4) the speaker's knowledge of its falsity or ignorance of its truth; and (5) the speaker's intention that his representation shall be relied upon by the person to whom it is made. (See *In re McSorley*, Docket No. A-25911, Review No. 3419) Each of the se elements must be established by clear, cogent and convincing evidence; they must be proved, not presumed. It is unnecessary to establish each element by direct evidence. Circumstantial evidence, if clear, cogent and convincing, is sufficient to meet the burden of proof with respect to the particular element involved. (See *In re Childress*, Docket No. A-27929, Review No. 3767, and cases cited therein.)

#### **A Representation or Statement**

In our present case, it is admitted by the appellant that he stated, on July 3, 1963, he had performed no work and had no earnings with respect to the week ending June 29, 1963. Thus, by personal admission, the first element is established.

#### **Its Materiality**

The Employment Security Act contemplates payment of benefits to "unemployed individuals" only. Section 32 of the Act defines an "unemployed individual" as one who, with respect to a week for which he claims benefits, neither performed services or received remuneration. It is apparent that any statement made by a claimant which would establish the presence or absence of services or remuneration in a specific week, would be particularly material to the validity of his claim for that week. In advising this Department that he had neither worked or received wages with respect to the week ending June 29, 1963, the appellant made a material statement of fact with respect to his potential entitlement to benefits. Materiality is established to our satisfaction.

#### **Its Falsity**

The record in this case leaves no room for doubt concerning the fact that the appellant worked during the week of June 29, 1963, and received wages therefor. As pointed out above, the appellant stated that he had not worked or received wages with respect to the week ending June 29, 1963. The falsity of this statement is conclusively established.

#### **The Speaker's Knowledge of the Falsity of his Statement**

Inasmuch as the appellant was fully aware of his responsibility to correctly report work and earnings in any week with respect to which he claimed benefits, and because he in fact did work and received wages in and for the week ending June 29, 1963, he must be held to have been in possession of all knowledgeable information required by this Department. An individual is held to intend the natural and probable consequences of his act. Armed with the fact of working and the knowledge of his responsibility to report said fact, an assertion by the appellant that he did

not work, is held to have been made with full knowledge of its falsity. He alone possessed the requisite information, and he alone had the responsibility for imparting the information correctly.

**The Speaker's Intention that his Representation Shall be Relied Upon**

We now approach the crucial element of "intent" to which the Appeal Tribunal has devoted considerable attention in its Decision. That the element of "intent" must be established in each and every case of fraud cannot be argued. It is the manner in which this element is proved which has provoked the concern of the Appeal Tribunal to the extent of rejecting our principles previously set forth in the case of In re Tilden, Docket No. A-49443, Review No. 6399. We hasten to state that the principles of the Tilden case, supra, are uniquely applicable to the instant matter and, if applied, dispose of the question now before us. However, because the Appeal Tribunal has considered that the element of "intent" must be established by purely subjective "opinions" rather than by operation of law (in the absence of a rational explanation by the claimant for deviations from reporting requirements), we feel it necessary to comment further in attempted clarification of our previously announced position.

In Volume 24, American Jurisprudence, at page 97, we find the following statement:

"Ordinarily, intent to deceive is not susceptible of direct proof, but can be established only by circumstantial evidence. As heretofore stated, fraud may be inferred from circumstances. Accordingly, the existence of the elements of intent and knowledge may be inferred from circumstances. In fact, a legal inference and presumption of knowledge of falsity is recognized under substantive principles of the law of deceit in certain situations, as where a false representation is made as of personal knowledge recklessly disregarding a known lack of information on the subject, where the person making the representation is in possession of such means of knowledge or in such situation that it is incumbent upon him to know the truth, or where a false statement is made for an ulterior purpose. Likewise, it is recognized that an intent to defraud may be presumed from the fact that the person making the representation had knowledge of its falsity. The effect of a presumption of intent or knowledge is to cast upon the party charged with fraud the burden of producing evidence to disprove the existence of such an element. . . .

"It has been held that every intendment is made against a party who is guilty of suppression of a fact. An obstinate resistance to judicial inquiry by the party charged with fraud or his failure to appear and explain or to introduce testimony has been held sufficient to raise a presumption of fraudulent motive or intent on his part." (Emphasis mine.)

In the instant case we have established that the appellant knew his responsibility for accurately reporting work and/or earnings. We know he both worked and received earnings with respect to the week ending June 29, 1963, and that he failed to re-

port his work and earnings for the week in question. We know that he received benefits based, in part, upon his assertion that he did not work or receive earnings with respect to the week ending June 29, 1963. We know that he has failed to explain or introduce testimony by way of attempting to explain his failure to correctly report his work and earnings. By operation of law, the foregoing established facts prove the existence of "intent", as a matter of legal inference and presumption, through the medium of circumstantial evidence. Thus, an un rebutted prima facie case of fraud has been established. Recognition of the principles set forth in text form above was given by the Michigan Circuit Court for Wayne County in the case of Sanders v. ESC and Chrysler Corporation, Michigan Transfer Binder CCH-UI, par. 8608, 1957, wherein the court stated as follows:

"Plaintiff relies in part upon the general proposition that there is a presumption against the existence of fraud and in favor of innocence, the presumption against fraud approximating in strength the presumption of innocence of crime. 37 CJ 6 393."

"Reliance is also placed upon rulings of the appeals boards of both the States of Kansas and Washington. These two appeal boards have emphasized that there must be a wilful act and an intent to defraud before a disqualification may be assessed."

"Certainly the burden should be upon the Commission to establish that fraud was committed, and fraud should not be presumed but established by competent proof that persuades one that a proper inference may be drawn. For it must be conceded that the Commission could not be expected to secure an admission by a claimant that he had committed a fraud. So, to prove an intent to defraud an inference must be drawn from the facts themselves." (Emphasis mine.)

Once again we re-emphasize that the appellant was aware of his responsibility to correctly report work done and wages received with respect to any week for which he claimed benefits. We know that appellant did work during the week ending June 29, 1963, and that he was paid for this work on July 3, 1963. We know that on the same day he was paid for his work, the appellant reported to his local office, stating by way of certification on his claim, that he had not worked or received wages for the week ending June 29, 1963. Only the most naive of individuals could fail to observe that the evidence in this record clearly and cogently supports the element of fraudulent intent as a matter of legal inference. We conclude that the Appeal Tribunal erred, on a matter of law, in holding that fraud was not established upon the record. The appellant is held subject to the disqualification provisions of Section 75 of the Act.

## II

Section 87 of the Act provides, in part, as follows:

"SEC. 87. Recovery of Benefit Payments. Any person who is paid any amount as benefits under this title to which he is not entitled shall become liable for such

amount: Provided, That in the absence of fraud, **misrepresentation** or wilful nondis- closure, such person shall not be liable for an amount of overpayment received without fault on his part where the recovery thereof would be against equity and good conscience. The amount of the overpayment and the basis thereof shall be assessed to the liable person and following the overpayment assessment such amount, if not collected, shall be deducted from any future benefits payable to the individual; . . ."

The appellant received benefits in the sum of \$40.00 for the week ending June 29, 1963. Benefits were paid in the amount indicated solely upon the basis of appellant's assertions concerning his lack of work and earnings during the week in question. Because we have found that such assertions were fraudulent in their utterances, the appellant is liable for the repayment of \$40.00 without benefit of the waiver provisions of Section 87 of the Act. In accordance with the foregoing,

IT IS HEREBY ORDERED that the Decision of the Appeal Tribunal entered in this matter on the 22nd day of July, 1965, shall be SET ASIDE. Benefits shall be denied the appellant for the week ending June 29, 1963, and for an additional period of twenty-six weeks commencing with the first week for which he completes a claim for waiting period credit or benefits following the mailing date of the determination under appeal, to wit: June 11, 1965, pursuant to the provisions of Section 75 of the Act. An overpayment of \$40.00 is properly established and deemed recoverable pursuant to the provisions of Section 87 of the Act.

DATED at Olympia, Washington, September 1, 1965.

SIDNEY E. SMITH  
Commissioner  
Employment Security Department

Empl. Sec. Comm'r Dec. 636, 1965 WL 93759 (WA)  
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FILED  
COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

DEPUTY

NO. 38009-9

**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

LARRY HUGHES,  
Appellant,

vs.

EMPLOYMENT SECURITY  
DEPARTMENT,  
STATE OF WASHINGTON,  
Respondent.

DECLARATION  
OF SERVICE BY  
ABC LEGAL  
MESSENGER

I, JENNIFER PONICSAN, 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.

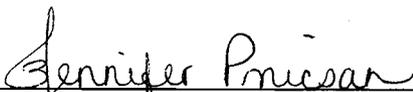
2. That on the 29 day of October, 2008, I caused to be served by ABC Legal Messenger a true and correct copy of Brief of Respondent to:

MARCUS LAMPSON  
UNEMPLOYMENT LAW PROJECT  
1904 THIRD AVE., SUITE 604  
SEATTLE, WA 98101

**ORIGINAL**

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

Dated this 29 day of October, 2008, in Seattle,  
Washington.

  
\_\_\_\_\_  
Jennifer Ponicsan, Legal Assistant