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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

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DEPUTY

NO. 39169-4-II

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

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PUGET SOUND MEDICAL SUPPLY,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND  
HEALTH SERVICES,

Respondent.

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**BRIEF OF RESPONDENT**

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*P.M. 9-14-2009*

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## I. INTRODUCTION

Puget Sound Medical Supply (Puget Sound) administratively appealed a Department of Social and Health Services determination that it had erroneously billed and received nearly \$2 million in Medicaid reimbursements. After a five-day hearing, the Administrative Law Judge (ALJ) agreed that the Department's assessed overpayment was substantially correct.

Puget Sound then sought review from the Department's Board of Appeals, but its petition for review was untimely. When asked for justification, Puget Sound said the failure was due to the holidays and personnel changes in its attorney's office, resulting in a failure to calendar the appeal deadline, and it asked the Board to find these factors justified the late appeal. Exercising its discretionary authority, the Board of Appeals rejected Puget Sound's request and further denied a subsequent motion for reconsideration. The Board concluded that, under either a "good reason" or "good cause" standard, the late filed appeal was not justified.

Puget Sound then sought judicial review of the Board's ruling refusing further review. The superior court, acting in its appellate capacity, reviewed the decision under the Administrative Procedure Act, and affirmed.

Puget Sound appeals, essentially arguing that the Board of Appeals abused its discretion (1) in distinguishing between good reason and good cause and in then refusing to apply a “good cause” standard or (2) in applying DSHS agency rules defining “good cause” rather than applying the statutory definition of good cause that governs appeals from fair hearings in Employment Security Department cases. As shown below, the Board acted within its sound discretion to reject the untimely petition for administrative review, and the order of the Board should be affirmed.

## **II. COUNTERSTATEMENT OF THE ISSUE**

Did the Board of Appeals abuse its discretion in applying the definition of “good cause” set forth in Department of Social and Health Services rules and refusing to hear an untimely petition for administrative review of an initial order, where the appellant was clearly informed of the deadline and argued that administrative mistakes should be considered good cause for accepting the untimely petition?

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

Puget Sound Medical Supply sells durable medical equipment and medical supplies. If the product is sold to a Medicaid-eligible client, Puget Sound bills the Department of Social and Health Services for the product and the Department pays for the product directly to Puget

Sound. The Department conducts periodic audits of Medicaid payments made to Puget Sound and other Medicaid providers.

After an audit of a sample of Puget Sound's Medicaid billings and supporting documentation, the Department found overpayments and, based on extrapolation, assessed Puget Sound an overpayment of more than \$1.8 million.<sup>1</sup> Administrative Record (AR) at 55. After five days of testimony, and after reviewing more than 750 exhibits, the ALJ modified the Department's decision and upheld the overpayment. AR at 54-75.

The ALJ's initial order, which was mailed December 24, 2007, AR at 54, explained Puget Sound's right to appeal and the procedure for doing so:

**NOTICE TO PARTIES:** THIS ORDER BECOMES FINAL ON THE DATE OF MAILING UNLESS WITHIN 21 DAYS OF MAILING OF THIS ORDER A PETITION FOR REVIEW IS RECEIVED BY THE DSHS BOARD OF APPEALS, PO BOX 45803, OLYMPIA, WA 98504-5803. A PETITION FORM AND INSTRUCTIONS ARE ENCLOSED.

AR at 73.

The enclosed petition form stated, "**Deadline: Received on or before 21 days from mail date of Initial Decision**" in large, bold print.

AR at 74. The enclosed instructions stated:

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<sup>1</sup> Extrapolation is a standard and well-known statistical technique used to generalize data from a sample to a known universe. AR at 67.

**DEADLINE for Appeal:** The Board of Appeals **must receive** your appeal within twenty-one (21) calendar days from the date stamped on the enclosed hearing decision. **If you miss the deadline, you may lose all right to appeal the decision.**

AR at 75 (emphasis in original).

Puget Sound's appeal request was received by the Board of Appeals on January 15, 2008, one day after the 21-day deadline. AR at 51. Puget Sound did not file a statement claiming good cause for the late filing until January 29, 2008, 15 days after the deadline. AR at 42-49. The Board of Appeals entered an order denying review, finding Puget Sound failed to provide a good reason for its late filing of the Petition for Review of the Initial Decision. AR at 19-32 (attached as Appendix A-1 through A-14). The Board of Appeals also denied a subsequent motion for reconsideration because Puget Sound did not have a good reason for late filing, and the reasons given did not satisfy the good cause standard under Department rule. AR at 1-7 (attached as Appendix A-15 through A-22).

Puget Sound argued that the late filing should be excused because administrative office issues resulted in the failure to calendar the appeal deadline. To support its argument, Puget Sound argued that the Board should apply the statute and case law governing administrative appeals in employment security cases to determine whether good cause for the late

appeal existed in this case. The Board of Appeals explicitly rejected this position and applied DSHS rules instead of those of a different state agency. *See* AR at 1-7, 29-30.

Puget Sound sought judicial review of the Order Denying Review and Decision on Reconsideration in superior court. Puget Sound argued that the Board's refusal to accept review was an error of law and was arbitrary and capricious.<sup>2</sup> The superior court affirmed the Board of Appeals, holding that Puget Sound did not meet any of the criteria under the Administrative Procedure Act to overturn the agency decision denying review. CP at 59-61.

Puget Sound now appeals to this Court. The sole claim of error raised by Puget Sound is that the Board of Appeals erred in denying Puget Sound's request to file its appeal after the deadline for filing had passed.<sup>3</sup>

#### IV. ARGUMENT

##### A. Standard of Review

The court applies the Administrative Procedure Act standards directly to the record before the agency. *Tapper v. Empl. Sec. Dep't*, 122

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<sup>2</sup> Puget Sound has abandoned the claim that the agency action was arbitrary and capricious on appeal.

<sup>3</sup> In a separate case brought after the ALJ decision became final, Puget Sound asked for judicial review of the initial substantive ALJ decision. That judicial review was dismissed for failure to exhaust administrative remedies. *Puget Sound Med. Supply v. Dep't of Soc. & Health Servs.*, No. 08-2-00311-3 (Thurston Cy. Super. Ct., order to dismiss entered on Sept. 4, 2009). In any event, Puget Sound's opening brief raised only its claims from below, that the Board erred by not considering its late petition for administrative review.

Wn.2d 397, 402, 858 P.2d 494 (1993). A reviewing court may reverse an agency order if the order was based on an error of law. *See* RCW 34.05.570(3)(d). However, the burden of demonstrating the invalidity of the agency action is on the party asserting the invalidity. RCW 34.05.570(1)(a). The court should only grant relief if “it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.” RCW 34.05.570(1)(d).

Under Department of Social and Health Services rules, the Board of Appeals has discretion to accept a late appeal if the appellant demonstrates a good reason for the failure to timely appeal. WAC 388-02-0580(3). A judicial entity abuses its discretion “if its ruling is manifestly unreasonable, or is exercised on untenable grounds, or for untenable reasons.” *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003).

A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard . . . or the facts do not meet the requirements of the correct standard.

*In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

Puget Sound’s argument is that the Board of Appeals abused its discretion by applying the wrong legal standard. The argument is without merit.

**B. The Board Of Appeals Correctly Relied On The Definition Of Good Cause Specific To The Department's Administrative Hearings Process**

Puget Sound argues the Board of Appeals erred in distinguishing between “good reason” and “good cause,” and in failing to apply a good cause standard. Br. of Appellant at 9-13. Although the Board’s order makes a distinction between good reason and good cause – based on the language of the Department’s rules – the Board ultimately determined that Puget Sound did not meet the Department’s good cause standard. Thus, the distinction argued by Puget Sound does not show error by the Board.<sup>4</sup>

The Board of Appeals recognized that the Department has a definition of “good cause” in rule, specific to the administrative hearings process. AR at 5-7. WAC 388-02-0020(1) states:

Good cause is a substantial reason or legal justification for failing to appear, to act, or respond to an action. To show good cause, the ALJ must find that a party had a good reason for what they did or did not do, using the provisions of Superior Court Civil Rule 60 as a guideline.

The rule also provides examples of circumstances that would rise to the level of good cause; these include the appellant ignoring a notice because the appellant was in the hospital or if the appellant did not

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<sup>4</sup> Solely for purposes of this appeal, the Department agrees there is little, if any, distinction between a “good reason” and “good cause” for excusing a failure to timely file an appeal.

understand the notice because it was written in a language the appellant did not understand. WAC 388-02-0020(2). Both examples imply a fundamental inability of the appellant to respond to the notice. It is uncontested that none of the reasons in Puget Sound's statement of good cause are consistent with these examples, because none of the offered reasons show a fundamental inability to file the appeal before the deadline. Instead, the reasons proffered are the inadvertence and inattention of Puget Sound and its counsel to the appeal and the rules governing the time frame for filing an appeal.

Consistent with the Department's rule, the Board of Appeals looked to case law interpreting CR 60 for guidance in evaluating Puget Sound's request to file a late appeal. The Board determined that the primary reason for the untimely filing – the failure of Puget Sound's attorney's office staff to properly calendar the deadline – would not constitute good cause under CR 60 and case law interpreting that rule. AR at 5-7.

CR 60 requires, in part, that a party who misses a deadline must demonstrate that any neglect was "excusable." Judicial decisions have repeatedly held that a failure to meet judicial deadlines based on a breakdown of internal office procedure does not constitute excusable neglect. *TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140

Wn. App. 191, 212, 165 P.3d 1271 (2007). *See also Johnson v. Cash Store*, 116 Wn. App. 833, 848, 68 P.3d 1099 (2003) (neglect is not excusable when a litigant fails to respond to a complaint because someone other than general counsel accepted service and neglected to forward the complaint to the appropriate person); *Prest v. Am. Bankers Life Assur. Co.*, 79 Wn. App. 93, 100, 900 P.2d 595 (1995) (neglect is inexcusable when summons and complaint were “mislaidd” while general counsel was out of town).

Notably, Puget Sound does not contend that the request for a late appeal meets the requirements of good cause in the Department’s rule or under CR 60, which should end its case. Puget Sound, however, contends that the Board of Appeals should rely on case law interpreting part of the Employment Security Act, rather than on the law governing DSHS appeals, to interpret the term “good cause.” Br. of Appellant at 13. As discussed below, Part C, the Board of Appeals properly rejected Puget Sound’s argument that Employment Security law should be looked to for guidance on the meaning of “good cause” because the Department has its own definition which uses CR 60 as a guideline. AR at 5-7, 29-30.

The Court should therefore hold that the Board did not err when it applied the definition of “good cause,” as set forth in DSHS rule, to determine that Puget Sound’s reason for missing the appeal deadline did

not constitute a “substantial reason or justification” for failing to timely act and, therefore, did not constitute “good cause” under WAC 388-02-0020(1). The Board properly exercised its discretion in denying Puget Sound’s request for permission to file a late appeal.

**C. The Department’s Definition Of Good Cause Does Not Require The Application Of Case Law Interpreting The Employment Security Act**

Puget Sound argues that the Board of Appeals should have applied the good cause standard of RCW 50.32.075, a standard applicable to litigants in Employment Security Department administrative appeals. Puget Sound does not support its argument with any authority and this Court should reject it.

RCW 50.32.075 is part of the Employment Security Act, designed to address administrative challenges and appeals in unemployment compensation cases. The statutory scheme under chapter 50.32 RCW controls the Employment Security Department (ESD), a separate state agency from the Department of Social and Health Services. The legislature has not included a provision similar to RCW 50.32.075 in either the Administrative Procedure Act or in statutes governing DSHS administrative appeals.

Moreover, no appellate decision involving RCW 50.32.075 has extended its reach beyond the ESD context, and none has found it to apply

by analogy to any other state agency. Nor has Puget Sound provided any authority to support its suggestion that a state agency must look to the statutes and case law governing ESD when the agency is interpreting its own rules and requirements. There is nothing in the Administrative Procedure Act which would compel the Department to apply the case law and statutory scheme of a different state agency in the Department's administrative hearing process.

As even Puget Sound acknowledges, the case law interpreting good cause in the ESD context reaches different outcomes than the case law interpreting CR 60. Br. of Appellant at 18. A different outcome in the ESD context makes sense. The preamble to the Employment Security Act states that "(t)he legislature . . . declares . . . that this title shall be liberally construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to the minimum." RCW 50.01.010. This language regarding a liberal construction has often been interpreted to support allowing some unemployment claimants to appeal, even though they missed a deadline. *See, e.g., Devine v. Empl. Sec. Dep't*, 26 Wn. App. 778, 782, 614 P.2d 231 (1980).

Puget Sound advocates that this same rationale and case law should apply when an administrative tribunal is evaluating the late appeal of a business challenging an overpayment assessment in a Medicaid audit.

This position ignores that Puget Sound is a medical supply company that has 11 employees and earns \$2.3 million in gross annual sales, AR at 56, not an unemployed individual the statutory scheme in the Employment Security Act was designed to protect. A construction similar to the liberal construction required under RCW Title 50 is not required or supported in the present case. This is particularly so because DSHS has defined “good cause” for purposes of its administrative appeals. There is no need to look to other agencies’ laws or rules to determine what constitutes good cause in DSHS cases.

The Board of Appeals properly exercised its discretion by applying the definition and standards set forth in DSHS rules, rather than looking to a different state agency, governed by different statutes, for a definition.

**D. Any Error In Applying The Good Reason/Good Cause Standard Is Harmless**

Puget Sound also contends that it was error to use a good reason, rather than a good cause, standard to review a request that the Board accept the untimely appeal. Br. of Appellant at 10.

Assuming, solely for the sake of argument, that the Board of Appeals erred in discussing and applying a “good reason” standard to evaluate Puget Sound’s request for a late appeal, Puget Sound is unable to show the Board’s reliance on the term “good reason” caused it any

harm. Error without prejudice is not a ground for reversal, and error is not prejudicial unless it affects the case outcome. *Qwest Corp. v. Wash. Utils. & Transp. Comm'n*, 140 Wn. App. 255, 260, 166 P.3d 732 (2007) (citing *Brown v. Spokane Cy. Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 668 P.2d 571 (1983)). See also RCW 34.05.570(1)(d) (stating, “The court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.”). Here, any error in discussing the good reason standard is harmless in light of the Board’s ruling.

After the Board of Appeals rejected the interchangeable nature of the phrases “good cause” and “good reason,” AR at 5, 29-30, it still evaluated Puget Sound’s reasons for missing the appeal deadline under the Department’s definition of “good cause.” It determined that Puget Sound did not have either a good reason or good cause for failing to timely file its appeal. AR at 5-7. Therefore, because the Board of Appeals evaluated Puget Sound’s request to file a late appeal under the good cause standard, and determined that the appeal would still be dismissed, there is no prejudice from the Board of Appeals having examined the reasons for the late appeal under the “good reason” standard.

Any error in using two separate standards is harmless. The Board of Appeals, in substance, applied the good cause standard, which is the standard requested by Puget Sound, and determined that standard had not been met.

#### V. CONCLUSION

Puget Sound's explanation for missing the appeal deadline does not meet the standard of a good reason or good cause. Because the Board of Appeals' decision was in accordance with the law governing DSHS administrative appeals and within the sound exercise of the Board's discretion, the Board's orders should be affirmed.

RESPECTFULLY SUBMITTED this 14th day of September, 2009.

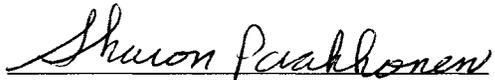
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Attorney General

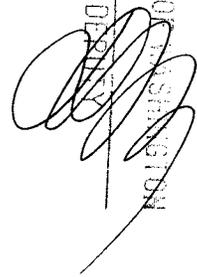
  
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**CERTIFICATE OF SERVICE**

I certify that I mailed a copy of the foregoing Brief of Respondent to Thomas L. Dickson, Attorney for Appellant, at Dickson Steinacker LLP, 1201 Pacific Avenue, Ste. 1401, Tacoma, WA 98402, postage prepaid, on September 14, 2009.

  
Sharon Paakkonen, Legal Assistant

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STATE OF WASHINGTON  
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## **APPENDIX**

**A-1 Order Denying Review (mailed March 7, 2008)**

**A-15 Decision on Reconsideration (mailed April 7, 2008)**

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

|                                   |   |                              |                |
|-----------------------------------|---|------------------------------|----------------|
| In Re:                            | ) | Docket No.                   | 08-2006-A-0851 |
|                                   | ) |                              |                |
| <b>PUGET SOUND MEDICAL SUPPLY</b> | ) | <b>ORDER DENYING REVIEW</b>  |                |
|                                   | ) |                              |                |
| Appellant                         | ) | Medical Provider Overpayment |                |

**MAILED**  
**MAR 07 2008**  
 DSMS  
 BOARD OF APPEALS

**I. NATURE OF ACTION**

1. The Department assessed an overpayment against the Appellant provider. The Appellant requested a hearing to contest the Department's assessment of an overpayment. Administrative Law Judge Robert C. Krabill held a hearing on November 13, 14, 15, 19, and 20, 2007, in response to the Appellant's request. The Administrative Law Judge (ALJ) issued the Initial Decision on December 24, 2007, modifying the overpayment assessed by the Department.

2. The Appellant filed a Petition for Review of the Initial Decision on January 15, 2008. The Board of Appeals issued a Notice of Late Request for Review and Deadline to Give Explanation. In response to this Notice, the Appellant filed a Memorandum Re: Good Cause for Late Petition on January 29, 2008. The Appellant's Memorandum stated:

COMES NOW Appellant Puget Sound Medical Supply ("PSM"), by and through its attorney undersigned, and submits this memorandum stating good cause why the Board of Appeals should accept the Petition for Review of the Initial Decision in this matter, dated December 24, 2007.

**FACTUAL SUMMARY**

The administrative law judge's initial order in this matter was mailed December 24, 2007. The order was received by PSM's counsel on December 26, 2007. The receptionist, who receives and docket incoming mailings and pleadings, and the legal assistant for the attorneys working on the appeal were both on vacation for the holidays. Due to the holidays and the timing of the decision, PSM only had 10 business days after receipt before expiration of the 21-day deadline from the date of mailing. The hearing consisted of five days of testimony and over 750 exhibits. PSM's argument was largely based on the

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analysis of an expert witness, Dr. Intriligator, who lives in California. The shortened time made it difficult to contact the client and the expert witness to evaluate whether to seek further relief.

Furthermore, the initial order allowed either party to request that the record be reopened within one week of the date of the decision. The ALJ had also stated during the hearing that his decision would be mailed after the holidays. Thus, counsel did not believe that the 21-day deadline passed as early as January 14. However, upon confirmation of the deadline, PSM's petition for review of the initial order was faxed to the Board of Appeals and to counsel for the Department before noon on January 15, 2008. A copy was also mailed that day.

### AUTHORITY AND ARGUMENT

The time for the petition for review is governed by WAC 388-02-0580:

A review judge may accept a review request after the twenty-one calendar day deadline only if:

- (a) The BOA receives the review request on or before the thirtieth calendar day after the deadline; and
- (b) A party shows good reason for missing the deadline.

WAC 388-02-0580(3). The petition for review was received twenty-two days after the initial order was mailed. Thus, PSM must only establish a "good reason" for missing the 21-day deadline. Significantly, there can be no question whether the Board of Appeals has *jurisdiction* to hear the petition, because the WAC provision explicitly states that petitions may be accepted up to thirty days after mailing.

No reported decisions discuss the "good reason" requirement of WAC 388-02-0580, and this phrase is not defined in WAC 388-02. However, the statutes governing review of unemployment compensation decisions contain an almost identical provision. Despite the statutory time limits for appeal, "[f]or good cause shown the appeal tribunal or the commissioner may waive the time limitations for administrative appeals or petitions set forth in the provisions of this title." RCW 50.32.075. A three-part test is used to determine whether good cause justifies extension of the deadline: (1) the shortness of the delay, (2) the absence of prejudice to the parties, and (3) the excusability of the error. *E.g. Devine v. Employment Sec. Dept.*, 26 Wn. App. 778, 782, 614 P.2d 231 (1980) (citing *Gibson v. Unemployment Insurance Appeals Board*, 9 Cal.3d 494, 108 Cal. Rptr. 1, 509 P.2d 945 (1973)). "The evaluation of the three factors in the good cause analysis is based on a sliding scale in which a short delay requires a less compelling reason for the failure to timely file than does a longer delay." *Wells v. Employment Sec. Dept.*, 61 Wn. App. 306, 314, 809 P.2d 1386 (1991).

In *Devine*, the party was one day late in filing her petition for review. 26 Wn. App. at 780. She claimed that she had not seen the language in the decision giving notice of the deadline. *Id.* Because there was no prejudice to the other

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party, the court concluded that she had shown good cause for the delay. *Id.* at 782.

In *Wells*, the appellant was also only one day late and there was no showing of prejudice. 61 Wn. App. at 314. The appellant excused his delay by stating that he "lost his determination notice and thought he had a few more days in which to file." *Id.* This was sufficient to show good cause justifying the delay. *Id.* at 315.

In *Gibson*, the California decision that originated the 3-part test, the party's attorney filed the notice of appeal three days late due to inadvertent failure to calendar the deadline and to a large caseload. 509 P.2d 945. Again, there was no prejudice, and the court determined that the party had shown sufficient good cause justifying the deadline.

The petition for review in this matter was received by the Board of Appeals only a matter of hours after expiration of the 21-day deadline, and well within the 30-day deadline. There can be no argument that this short delay has resulted in any prejudice to the Department. In light of the lack of prejudice and the extreme shortness of the delay, the reason for the delay does not require extensive scrutiny under the rule in *Wells*.

The initial order was mailed on Christmas Eve and was not received by PSM's attorney until December 26, 2007. Due to the holiday season, critical office staff, including the receptionist who receives and processes incoming mail and pleadings and the legal assistant to the two attorneys familiar with the appeal, was out of the office on vacation on the day of receipt and subsequent days. The response deadline was therefore not calendared. However, counsel did act diligently to communicate the effect of the order to the client.

Also due to the holidays and the timing of the order, there were fewer business days in which to consider the order and decide whether to appeal. The 21-day deadline expired only 10 business days after receipt of the order. Every bit of the 21 days was necessary to decide whether to appeal and prepare the notice of appeal. The hearing involved over 750 exhibits and five days of testimony. Chris Marston was the attorney who did most of the preparation for the hearing, was also lead attorney for most of the hearing, and was therefore most familiar with the matter. However, he moved on to a different law firm one day after the conclusion of the hearing.

In addition, PSM's argument was primarily based upon the testimony and analysis of an expert witness, Dr. Intriligator, a UCLA professor living in Los Angeles. PSM's counsel needed to confer with the client and with Dr. Intriligator before filing a notice of appeal. Communication with Dr. Intriligator already involved inherent delays due to his location and schedule. The holidays made it difficult to contact the client and Dr. Intriligator and delayed the decision to file an appeal.

As further justification for the delay, the initial order allowed either party to request supplementation of the record within one week after the date of the

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decision. The Department could have requested that the record be supplemented in order to recalculate the extrapolated overpayment based on the ALJ's findings. Ms. Coats, attorney for the Department, had filed a notice of unavailability, indicating that she would be out of the office from December 24, 2007, until January 7, 2008. Thus, there was some possibility that she would seek supplementation of the record even beyond the week one deadline.

The ALJ requested written closing arguments to be filed December 4, 2007. Due to personal reasons on Ms. Coats, we extended the courtesy to allow continuance of filing the written closing arguments until December 7, 2007. At the conclusion of the hearing, the ALJ stated he did not anticipate that his written decision would be mailed until after the holidays on or about January 4, 2008. Thus, counsel did not anticipate and had not planned for service of the order during the holidays.

Considering the extreme shortness of the delay, the lack of prejudice to the Department, and the communication and other difficulties presented due to the holiday season, the Board of Appeals should accept the good reason offered by PSM and allow hearing of the petition for review.

3. The Department filed a Response to the Appellant's Explanation on February 11, 2008. The Department's Response stated:

#### I. INTRODUCTION

The Department of Social and Health Services ("Department") responds to Puget Sounds Medical Supply's ("Puget Sound") statement regarding good cause for late filing. Because the Appellant failed to timely file an appeal, his appeal should be dismissed for lack of subject matter jurisdiction.

#### II. FACTS

A hearing was held in the above matter on November 13, 14, 15, 19, and 20, 2007, before Administrative Law Judge Robert C. Krabill. Puget Sound is appealing the initial order from this hearing which upheld the Department's assessment of a monetary overpayment.

The Office of Administrative Hearing's ("OAH") initial order was mailed on December 24, 2007. The hearing decision explained Appellant's right to appeal and the procedure for doing so:

**NOTICE TO PARTIES: THIS ORDER BECOMES FINAL ON THE DATE OF MAILING UNLESS WITHIN 21 DAYS OF MAILING OF THIS ORDER A PETITION FOR REVIEW IS RECEIVED BY THE BOARD OF APPEALS, PO BOX 45803, OLYMPIA, WA 98504-5803. A PETITION FORM AND INSTRUCTIONS ARE ENCLOSED.**

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(Emphasis added.)

Appellant's appeal request was received by the DSHS Board of Appeals ("BOA") on January 15, 2008- one day after the deadline. The Appellant filed a statement regarding good cause for late filing on January 29, 2008- 15 days after the deadline.

### III. LEGAL AUTHORITY

BOA must receive the written review request on or before the twenty-first calendar day after the initial order was mailed. WAC 388-02-0580(1). A review judge may only accept a review request after the twenty-one calendar day deadline if the BOA receives the review request on or before the thirtieth calendar day after the deadline and a party shows good reason for missing the deadline. WAC 388-02-0580(3). Failure to timely appeal results in automatic dismissal due to lack of jurisdiction. See *Clark v. Selah School Dist.*, 53 Wn. App. 832, 836-37, 770 p.2d 1062, *review denied*, 113 Wn.2d 1103 (1989). Strict adherence to time limits is also applied in administrative settings where the time limits have been found to be jurisdictional. *Rutcosky v. Bd. of Trustees*, 14 Wn. App. 786, 789, 545 P.2d 567, *review denied*, 87 Wn. 2d 1003 (1976); *Rust v. Western Washington State College*, 11 Wn. App. 410, 415, 523 P.2d 204, *review denied*, 84 Wn.2d 1008 (1974). Further, the Administrative Procedure Act (APA) provides that an agency shall only commence an adjudicative proceeding upon a *timely* application. RCW 34.05.413 (2).

In this case, Appellant was required to file any appeal within 21 days of mailing of the OAH decision. OAH mailed the decision on December 24, 2007. Twenty-one days following the mailing of the decision was January 14, 2008. Appellant failed to file its request with the DSHS Board of Appeals until January 15, 2008- 22 days following the mailing of the OAH decision. Because of Appellant's failure to timely file its appeal request, this matter should be dismissed for lack of subject matter jurisdiction.

The regulations do not specifically define the term "good reason." However, the regulations do define the term "good cause," which is instructive regarding the definition of a "good reason" for late filing.<sup>1</sup> WAC 388-02-0020(1) states, "Good cause is a substantial reason or legal justification for failing to appear, to act, or respond to an action." Examples of good cause include the appellant ignoring a notice because the appellant was in the hospital or it was written in a language that the appellant did not understand. WAC 388-02-0020(2). Both of these examples imply a fundamental inability of the appellant to respond to the notice. None of the reasons in Puget Sound's statement of good cause meet this definition of good cause because none of them show a fundamental inability to respond to the notice.

Puget Sound did not request a timely appeal or follow the process to request a continuance of the appeal deadline, which must be requested in 21 days. See

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<sup>1</sup> Even Puget Sound uses the terms "good cause" and "good reason" interchangeably through out its Statement. Furthermore, Puget Sound's filing is entitled "Statement re Good Cause for Late Petition."

WAC 388-02-0580. Much of Puget Sound's Statement of Good Cause has no connection to missing the appeal deadline because the events that are referenced did not take place during the time to appeal, from December 24 to January 14. For example, the fact that there was an agreed continuance for filing written closing arguments in this case in early December, when the Department representative had to attend to a family matter out of state, is completely unrelated to the present discussion. That agreed continuance was sought and obtained from opposing counsel and the court before the expiration of any deadline and had no bearing on either party's actions once a decision was issued at the end of December. Likewise, Puget Sound's contention that this appeal was affected by one of Puget Sound's attorneys transferring to another law firm is equally unavailing because he left the law firm one day after the hearing, which occurred in mid-November. The remaining members of the law firm have known since November that any appeal would need to be prepared without the transferred attorney present. These events, that occurred before the hearing record was even closed, cannot justify missing an appeal deadline in mid-January.

The portion of Puget Sound's Statement Regarding Good Cause that deals with the proper time period, between December 24 and January 14, basically states that there was difficulty deciding whether to appeal and there was a delay in getting started on the appeal because of the holiday season.<sup>2</sup> Nothing prevented Puget Sound from filing a timely appeal or requesting a continuance within the specified deadline. In fact, the statement implies that once Puget Sound knew of the result of the hearing, the legal team began reviewing the initial decision and determining whether to appeal. Declaration of Kevin Steinacker in Support of Memorandum re Good Cause for Late Petition, Section 2. Furthermore, once the date for appeal was "confirmed", presumably after the deadline on January 15, the appeal was filed "immediately." Declaration of Kevin Steinacker in Support of Memorandum re Good Cause for Late Petition, Section 5. Apparently, Puget Sound could have filed any response "immediately" had it paid attention to the January 14, 2008, deadline.

Appellant has failed to demonstrate a good reason for filing a late appeal. As such, the BOA lacks subject matter jurisdiction of this appeal.

#### IV. CONCLUSION

Appellant was informed in writing of the deadline for appeal. Appellant filed its appeal 22 days after the OAH decision was mailed – one day later than required. Appellant's explanation for missing the deadline does not meet the standard of a good reason. Because of Appellant's untimely appeal, the court lacks subject

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<sup>2</sup> Puget Sound also tries to justify missing the appeal deadline because the attorney for the Department had filed a notice of unavailability during part of the time and "there was some possibility that she would seek supplementation of the record beyond the one week deadline." *Memorandum re: Good Cause* pg. 5. This argument is perplexing considering the Department's representatives sent a letter in early January to OAH and the Appellant explicitly stating that it was the Department's understanding that neither side had filed a request for the record to be reopened. *See Attachment A.*

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matter jurisdiction and the Department respectfully requests that this matter be dismissed.

## II. FINDINGS OF FACT

The undersigned has entered the following Findings of Fact solely for the purpose of this Order Denying Review.

1. The Appellant provider requested a hearing to challenge an overpayment assessed by the Department. The Office of Administrative Hearings held a hearing on November 13, 14, 15, 19, and 20, 2007, in response to the Appellant's request.
2. On December 24, 2007, the Office of Administrative Hearings issued the Initial Decision, modifying the overpayment assessed by the Department.
3. On January 15, 2008, the Appellant filed a Petition for Review with the Board of Appeals, requesting review of the December 24, 2007, Initial Decision.
4. The Appellant provided the following six reasons for its late filed Petition for Review: (1) response date not calendared because office staff was out of the office for the holidays; (2) short deadline (10 working days) to decide whether to appeal after receipt of the Initial Decision; (3) lead attorney left the firm; (4) difficulty contacting an expert witness; (5) possibility that the Department would seek to supplement hearing record; (6) Initial Decision arrived earlier than expected.

## III. CONCLUSIONS OF LAW

1. **Findings of Fact-** The undersigned has entered four Findings of Fact. These Findings of Fact have been entered solely for the purpose of this Order Denying Review.
2. **Late Petition for Review-** The Department's rule regarding the deadline for filing a Petition for Review states:

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**WAC 388-02-0580 What is the deadline for requesting review of cases listed in WAC 388-02-0215(4)?**

- (1) BOA must receive the written review request on or before the twenty-first calendar day after the initial order was mailed.
- (2) A review judge may extend the deadline if a party:
  - (a) Asks for more time before the deadline expires; and
  - (b) Gives a good reason for more time.
- (3) A review judge may accept a review request after the twenty-one calendar day deadline only if:
  - (a) The BOA receives the review request on or before the thirtieth calendar day after the deadline; and
  - (b) A party shows good reason for missing the deadline.

In this case, the ALJ issued the Initial Decision on December 24, 2007. The deadline to file a Petition for Review was January 14, 2008, the 21<sup>st</sup> calendar day after the hearing decision was mailed. The Board of Appeals received the Department's Petition for Review on January 15, 2008. Therefore, the Department's Petition for Review was one day late.

3. The Appellant provided the following six possible explanations for the late filed Petition for Review: (1) response date not calendared because office staff was out of the office for the holidays; (2) short deadline (10 working days) to decide whether to appeal after receipt of the Initial Decision; (3) lead attorney left the firm; (4) difficulty contacting an expert witness; (5) possibility that the Department would seek to supplement hearing record; (6) Initial Decision arrived earlier than expected. The undersigned addresses each of the explanations separately below.

4. The Appellant provider first argued that it had a good reason for the late filed Petition for Review because the response date was not calendared. This argument is not persuasive. All participants in the administrative process are expected to keep track of relevant hearing dates and deadlines. The undersigned would not accept a late Petition for Review from a pro se appellant who received the Initial Decision and didn't bother to look at the filing deadline until after the deadline passed. The Appellant provider and its representative must be held to the same standard. Mere inattention is not sufficient to

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support a finding of good reason. The term "good reason" is not defined in chapter 388-02 WAC. However, the use of the modifier "good" indicates that not every reason is sufficient to permit the late filing of a Petition for Review. If the undersigned were to conclude that ordinary carelessness is a good reason for late filing, this would completely undermine the 21-day deadline in WAC 388-02-0580. If the undersigned were to conclude that ordinary carelessness is a good reason for late filing, then the word "good" would be rendered meaningless.

5. The Appellant provider argued that it had a good reason for the late filed Petition for Review because it had a "short" deadline to request review. This argument is not correct. The Appellant's representative received the Initial Decision on December 26, 2007. There was only one holiday day (New Year's Day) between December 26, 2007, and the deadline of January 14, 2008. Thus, the Appellant's appeal period was not appreciably shorter than the standard appeal period. The Appellant still had 11 business days to prepare a Petition for Review.<sup>3</sup> If the Appellant needed additional time, the Appellant could have contacted the Board of Appeals at any time during this 11-day period. In addition, the holiday occurred at the beginning of the Appellant's appeal period. The week immediately preceding the deadline did not contain a holiday and was a standard work week. The fact that there was one holiday at the beginning of the Appellant's appeal period is not a good reason for a late Petition for Review.

6. The Appellant provider argued that it had good reason for the late filed Petition for Review because the lead attorney on the case left the firm. This fact is irrelevant to the late filed Petition because the lead attorney left the firm 55 days before the deadline to file a Petition for Review. The firm had almost two months to recover from the loss of the lead

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<sup>3</sup> Assuming two days for mail delivery of an Initial Decision, an appellant will never have more than 13 business days to file a Petition for Review because there are three weekends in every 21-day appeal period.

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attorney. The firm had almost two months to reassign the duties of the lead attorney. The Appellant failed to explain how the loss of the lead attorney in November 2007 impacted the filing of a Petition for Review in January 2008.

7. The Appellant provider argued that it had good reason for the late filed Petition for Review because of difficulty contacting an expert witness. The difficulty contacting the expert witness was not the reason for the Appellant's late filed Petition for Review. The Appellant already asserted that the Petition was late because the deadline was not calendared. However, even if the difficulty contacting the expert witness was the reason for the late filed Petition for Review, this is not a good reason for the late filing. In his declaration, the Appellant's representative stated that he began attempting to contact the expert witness after he received the Initial Decision. Thus, the Appellant's representative knew at the beginning of the appeal period that his communication with the expert witness would be delayed. If the Appellant was having difficulty contacting an expert witness, then the appropriate response was to request additional time. The Appellant had ample opportunity to request additional time and the Appellant did not do so. A late filed Petition for Review is not an adequate substitute for a request for additional time.

8. The Appellant provider argued that it had good reason for the late filed Petition for Review because of the possibility that the Department might seek to supplement the record. However, there was no ambiguity on this issue. The Appellant knew that the Department was not seeking to reopen the record. The Department sent a letter to the ALJ and the parties on January 3, 2008, clearly stating that it was not requesting a reopening of the record. The Appellant presumably received the Department's letter at the beginning of the week of January 7, 2008, one week before the filing deadline. It is not clear why the Appellant is now claiming that there was some ambiguity on this issue.

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9. Finally, the Appellant provider argued that it had good reason for the late filed Petition for Review because the Initial Decision arrived earlier than expected. The Appellant's expectations are not relevant because the Appellant actually received the Initial Decision on December 26, 2007. Even if the ALJ said that he did not anticipate mailing his decision before January 2008, the Appellant knew that this statement was not correct when it received the Initial Decision on December 26, 2007. The Appellant should have been able to adapt to this new information instead of relying on its prior expectations. Once the Appellant received the Initial Decision, the Appellant still had 11 business days and 19 calendar days to recover from receiving the Initial Decision early and to prepare a timely Petition for Review.

10. In sum, the undersigned is unable to determine that a "good reason" existed for the late filing of the Appellant provider's Petition for Review. While the Appellant has provided six reasons for the late filing, the Appellant has not provided a good reason for the late filing. No outside force or event prevented the Appellant from filing a timely Petition for Review. The Appellant could have requested an extension of the deadline at any time. The Appellant had ample information to determine the precise deadline for review. If the undersigned were to conclude that a simple failure to note the deadline constituted a good reason, then every reason would be a good reason and the phrase "good reason" would be rendered meaningless. Therefore, the Appellant has not provided a good reason for its late filed Petition and the request for review must be denied.

11. The Appellant cited several Employment Security Department (ESD) decisions and argued that the reasoning in these decisions should be followed in this case. This argument is not persuasive for two reasons. First, the Appellant's argument is not persuasive because the cited ESD statute (RCW 50.32.075) refers to good cause, while the rule at issue in this case (WAC 388-02-0580(2)) refers to good reason. Although several 000029 other rules in chapter 388-02 WAC refer to "good cause," the drafters of

WAC 388-02-0580(2) chose to use the "good reason" standard instead of the "good cause" standard. Therefore, the undersigned cannot presume that "good cause" is synonymous with "good reason." Second, the Appellant's argument is not persuasive because the cases interpreting RCW 50.32.075 have not been extended beyond the ESD context. Absent some authority, the undersigned declines to adopt an interpretation that expressly applies to another state agency.

The procedures and time limits for seeking reconsideration or judicial review of this decision are in the attached statement.

#### IV. DECISION AND ORDER

Review is denied because the Appellant provider failed to provide a good reason for its late filed Petition for Review of the Initial Decision. The Initial Decision remains the final agency decision.

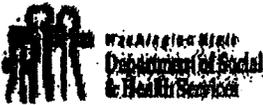
*Mailed on March 7, 2008.*

  
S. ANDREW GRACE  
Review Judge

Attached: Reconsideration/Judicial Review Information

Copies have been sent to: Puget Sound Medical Supply, Appellant  
c/o Dickinson Steinacker LLP  
Thomas Dickson, Appellant's Representative  
Angela Coats, Department's Representative, MS: 40124  
Clayton King, Program Manager, MS: 45504  
Medical Provider Overpayments, Program Admin, MS: 45504  
Robert C. Krabill, ALJ, Olympia OAH

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STATE OF WASHINGTON  
 DEPARTMENT OF SOCIAL AND HEALTH SERVICES  
 BOARD OF APPEALS  
**PETITION FOR RECONSIDERATION OF  
 REVIEW DECISION**

See information on back.

Print or type detailed answers.

|                                |               |                         |
|--------------------------------|---------------|-------------------------|
| NAME(S) (PLEASE PRINT)         | DOCKET NUMBER | CLIENT ID OR "D" NUMBER |
| MAILING ADDRESS                | CITY          | STATE                   |
| TELEPHONE AREA CODE AND NUMBER |               |                         |
| ZIP CODE                       |               |                         |

Please explain why you want a reconsideration of the Review Decision. Try to be specific. For example, explain:

- Why you think that the decision is wrong (why you disagree with it).
- How the decision should be changed.
- The importance of certain facts which the Review Judge should consider.

I want the Review Judge to reconsider the Review Decision because...

|                 |           |      |
|-----------------|-----------|------|
| PRINT YOUR NAME | SIGNATURE | DATE |
|-----------------|-----------|------|

|   |   |
|---|---|
| <p style="text-align: center;"><u>MAILING ADDRESS</u></p> BOARD OF APPEALS<br>PO BOX 45803<br>OLYMPIA WA 98504-5803 | <p style="text-align: center;"><u>PERSONAL SERVICE LOCATION</u></p> Board of Appeals, DSHS<br>Blake Office East Bldg 2nd Floor, W<br>4500 10th Ave SE, Lacey Washington |
| <p style="text-align: center;"><u>FAX</u></p> 1-(360) 664-6187  | <p style="text-align: center;"><u>TELEPHONE (for more information)</u></p> 1-(360) 664-6100 or 1-877-351-0002   |

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CONSIDERATION REQUEST

Page \_\_\_\_\_ of \_\_\_\_\_

**If You Disagree with the Judge's Review Decision or Order and Want It Changed,  
You Have the Right to:**

- (1) Ask the Review Judge to reconsider (rethink) the decision or order (**10 day deadline**);
- (2) File a Petition for Judicial Review (start a Superior Court case) and ask the Superior Court Judge to review the decision (**30 day deadline**).

**DEADLINE for Reconsideration Request - 10 DAYS:** The Board of Appeals must **RECEIVE** your request within ten (10) calendar days from the date stamped on the enclosed Review Decision or Order. The deadline is 5:00 p.m. **If you do not meet this deadline, you will lose your right to request a reconsideration.**

**If you need more time:** A Review Judge can extend (postpone, delay) the deadline, but you must ask within the same ten (10) day time limit.

**HOW to Request:** Use the enclosed form or make your own. Add more paper if necessary. You must send or deliver your request for reconsideration or for more time to the **Board of Appeals** on or before the 10-day deadline (see addresses on enclosed form).

**COPIES to Other Parties:** You must send or deliver copies of your request and attachments to every other party in this matter. For example, a client must send a copy to the DSHS office that opposed him or her in the hearing.

**Translations and Visual Challenges:** If you do not read and write English, you may submit and receive papers in your own language. If you are visually challenged, you have the right to submit and receive papers in an alternate format such as Braille or large print. Let the Board of Appeals know your needs. Call 1-(360)-664-6100 or TTY 1-(360) 664-6178.

**DEADLINE for Superior Court Cases - 30 DAYS:** The Superior Court, the Board of Appeals, and the state Attorney General's Office must all **RECEIVE** copies of your Petition for Judicial Review within thirty (30) days from the date stamped on the enclosed Review Decision or Order. **There are rules for filing and service that you must follow.**

**EXCEPTION:** IF (and only if) you file a timely reconsideration request (see above), you will have thirty days from the date of the Reconsideration Decision.

Refer to the Revised Code of Washington (RCW), including chapter 34.05, the Washington Administrative Code (WAC), and to the Washington Rules of Court (civil) for guidance. These materials are available in all law libraries and in most community libraries.

**If You Need Help:** Ask friends or relatives for a reference to an attorney, or contact your county's bar association or referral services (usually listed at the end of the "attorney" section in the telephone book advertising section). Columbia Legal Services, Northwest Justice Project, the Northwest Women's Law Center, some law schools, and other non-profit legal organizations may be able to provide assistance. **You are not guaranteed an attorney free of charge.**

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STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND HEALTH SERVICES

BOARD OF APPEALS

MAILED  
APR 07 2008  
DSHS  
BOARD OF APPEALS

In Re: ) Docket No. 08-2006-A-0851  
)  
PUGET SOUND MEDICAL SUPPLY ) DECISION ON RECONSIDERATION  
)  
Appellant ) Medical Provider Overpayment

I. NATURE OF ACTION

- 1. The undersigned issued an Order Denying Review on March 7, 2008, denying the Appellant's request for review of the Initial Decision.
- 2. The Appellant filed a Petition for Reconsideration of the Review Decision on March 17, 2008. The Petition for Reconsideration stated:

COMES NOW Appellant Puget Sound Medical Supply ("PSM"), by and through its attorneys undersigned, and moves the Board of Appeals ("BOA") to reconsider its Order Denying Review, entered in this matter on March 7, 2008.

FACTUAL SUMMARY

The Order Denying Review, a copy of which is attached hereto, reprinted the parties' previous statements of fact and legal argument. PSM incorporates herein the statement of facts provided its prior memorandum. PSM does not dispute the findings of fact in the Order Denying Review.

AUTHORITY AND ARGUMENT

PSM asks the BOA to reconsider its decision that it has not provided adequate reason to allow review of the Petition for Review filed 22 days after the date of the Initial Decision. As acknowledged in the decision, the time for the petition for review is governed by WAC 388-02-0580:

A review judge may accept a review request after the twenty-one calendar day deadline only if:

- (a) The BOA receives the review request on or before the thirtieth calendar day after the deadline; and
- (b) A party shows good reason for missing the deadline.

WAC 388-02-0580(3).

The BOA decision concluded that "good reason" and "good cause" are not synonymous, and therefore the employment security decision cited by PSM were unpersuasive. Conclusion of Law 11. However, the two terms are sufficiently similar to allow an analogy to the case law cited in PSM's prior memorandum. For

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example, in the provision defining whether sufficient justification exists for a delay by DSHS in processing an application for cash or medical assistance, "good reason" and "good cause" are synonymous:

If your application for cash or medical assistance is not processed within the time limits under WAC 388-406-0035, the department must decide if there is a good reason for the delay. This good reason is also called 'good cause.'

WAC 388-406-0045. Thus, the reason for writing "good reason" instead of "good cause" in WAC 388-02-0580 is not necessarily because there was an explicit decision to avoid the term good cause and its legal ramifications, but possibly simply because the drafter understood that good reason might be more readily understood by a layperson than good cause. The standard applied to determine whether PSM established sufficient good cause should be the same standard applied to all appellants under this provision.

Thus, because the term used in WAC 388-02-0580 is virtually synonymous with the term used in RCW 50.32.075, the case law applying good cause as used in that statute is appropriately applied here. As argued in PSM's prior memorandum, courts have applied the language of RCW 50.32.075 to allow a late-filed petition to be heard where the delay was short and the prejudice was minimal, even absent a showing of compelling good cause. *Wells v. Employment Sec. Dep. t.*, 61 Wn. App. 306, 314, 809 P.2d 1386 (1991); *Devine V. Employment Sec. Dept.*, 26 Wn. App. 778, 782, 614 P.2 231 (1980); see also *Gibson v. Unemployment Insurance Appeals Board*, 9 Cal.3d 494, 108 Cal. Rptr. 1, 509 P.2d 945 (1973). Under these decisions, compelling justification for a delay is not required where the delay is minimal and there is no prejudice to the other parties, despite the "good cause" requirement in the statute.

The decision also implies that for a good reason to exist there must be some outside force or event. Conclusion of Law 10. However, nothing in WAC 388-02-0580 indicates that this is a factor for determining the sufficiency of a party's reason for a late filing. There is no compelling justification to adopt a requirement for an external force, as opposed to the criteria developed for the courts for determining good cause under RCW 50.32.075.

The statutory language and the context of RCW 50.32.075 is very similar to the wording of WAC 388-02-0580. Both apply to the time period for an appeal of an agency decision within the agency. Both apply to a waiver of the time limit for filing an appeal. Both allow an extension of the time period if sufficient justification is shown. Given the similarities, the case law cited in PSM's prior memorandum should be applied to this decision.

As argued previously, considering the extreme shortness of the delay and the lack of prejudice to the Department, it is inappropriate to require a compelling justification for the delay. PSM has sufficiently provided good reason for the delay, 0000021 and the BOA should accept the petition for review.

3. The Department filed a Response to the Appellant's Petition for Reconsideration on March 26, 2008. The Department's Response stated:

The Department of Social and Health Services ("Department") responds to Puget Sound Medical Supply's ("Puget Sound") motion for reconsideration.

### I. FACTS

A hearing was held in the above matter on November 13, 14, 15, 19, and 20, 2007, before Administrative Law Judge Robert C. Krabill. Puget Sound is appealing the initial order from this hearing which upheld the Department's assessment of a monetary overpayment.

The office of Administrative Hearings (OAH) initial order was mailed on December 24, 2007. The hearing decision explained Appellant's right to appeal and the procedure for doing so:

**NOTICE TO PARTIES:** THIS ORDER BECOMES FINAL ON THE DATE OF MAILING UNLESS WITHIN 21 DAYS OF MAILING OF THIS ORDER A PETITION FOR REVIEW IS RECEIVED BY THE DSHS BOARD OF APPEALS, PO BOX 45803, OLYMPIA, WA 98504-5803. A PETITION FORM AND INSTRUCTIONS ARE ENCLOSED.

(Emphasis added.)

Appellant's appeal request was received by the DSHS Board of Appeals (BOA) on January 15, 2008, one day after the deadline. Puget Sound filed a statement regarding good cause for late filing on January 29, 2008, 15 days after the deadline. The BOA entered an order denying review because Puget Sound failed to provide a good reason for its late filed Petition for Review of the Initial Decision.

### II. RESPONSE TO MOTION FOR RECONSIDERATION

The BOA's Order Denying Review in this case relies on the term "good reason" to deny review. This decision is consistent with the Department's regulations. See WAC 388-02-0580(2). Puget Sound has filed a motion for reconsideration advocating that (1) the phrase "good cause" and "good reason" are the same and (2) the BOA should rely on case law from the Employment Securities Department (ESD), another state agency, in interpreting the term "good cause". Puget Sound's position is, if this case law is used, it justifies the late filing in this case. This is the same position that Puget Sound advocated in the original Statement Regarding Good Cause for Late Filing. This Position was explicitly rejected in the BOA's Order Denying Review. See Order Denying Review, pg. 11-10.

As the Order Denying Review points out, the drafters of the rules used the phrase "good cause" in other places, but chose to use the phrase "good reason" here. As such, there cannot be a presumption that the two terms are

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synonymous. Order Denying Review, Conclusion of Law 11, pg. 12. Secondly, the ESD case law interpreting RCW 50.32.075 has not been extended beyond the ESD context. *Id.*

Even if the BOA does as Puget Sound requests and decides this case under the good cause standard, that standard does not mean that cases from other agencies apply to this decision. Department rules specifically define the term "good cause." See WAC 388-02-0020(1). When Department rules apply to an issue on administrative appeal, Review Judges are first required to apply those rules. WAC 388-02-0220(1). Since there are specific Department rules regarding the definition of "good cause," this tribunal would need to decide this case under those rules and has no authority to look outside the rule for the definition of good cause.

Under the Department's rules, the good cause standard does not dictate that review should be granted in this case. WAC 388-02-0220(1) states, "good cause is a substantial reason or legal justification for failing to appear, to act, or to respond to an action." Examples of good cause include the appellant ignoring a notice because the appellant was in the hospital or it was written in a language that the appellant did not understand. WAC 388-02-0220(2). Both of the examples of good cause in the Department's regulation imply a fundamental inability of the appellant to respond to the notice. None of the reasons in Puget Sound's original statement of good cause meet this definition of good cause because none of them show a fundamental inability to respond to the notice. As such, even under the standard advocated by Puget Sound, review of the initial decision must still be denied.

### III. CONCLUSION

Appellant was informed in writing of the deadline for appeal. Appellant filed its appeal 22 days after the OAH decision was mailed, one day later than required. Appellant's explanation for missing the deadline does not meet either the standard of good reason or the standard of good cause. The Department respectfully requests that Order Denying Review be upheld and the Appellant's Motion for Reconsideration be denied.

### II. FINDINGS OF FACT

The Findings of Fact in the Review Decision are adopted as findings in this decision under RCW 34.05.464(8).

### III. CONCLUSIONS OF LAW

1. The Petition for Reconsideration was timely filed and is otherwise proper. WAC 388-02-0620. Jurisdiction exists for the undersigned Review Judge to reconsider the Review Decision. RCW 34.05.470.

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2. In its Petition for Reconsideration, the Appellant provider continued to argue that the terms "good reason" and "good cause" are sufficiently similar to allow an analogy to the cited case law from the Employment Security Department (ESD). As noted in the Review Decision, this argument is not persuasive because the Department's procedural rules (chapter 388-02 WAC) do not use the terms "good reason" and "good cause" interchangeably. The drafters of chapter 388-02 WAC chose to use the phrase "good reason" in some rules and the phrase "good cause" in other rules. If the drafters of chapter 388-02 WAC believed that "good reason" was synonymous with "good cause", then the drafters would not have used different terms in different rules. If the drafters of chapter 388-02 WAC intended to adopt a single standard, then the drafters would have used a consistent phrase throughout the chapter.

3. Even if the undersigned were to agree that the terms "good reason" and "good cause" are synonymous in chapter 388-02 WAC, this does not mean that the undersigned would rely on the cited ESD case law to interpret "good reason". Instead, WAC 388-02-0020 contains the following definition of good cause:

**WAC 388-02-0020 What does good cause mean?**

(1) Good cause is a substantial reason or legal justification for failing to appear, to act, or respond to an action. To show good cause, the ALJ must find that a party had a good reason for what they did or did not do, using the provisions of Superior Court Civil Rule 60 as a guideline.

(2) Good cause may include, but is not limited to, the following examples.

(a) You ignored a notice because you were in the hospital or were otherwise prevented from responding; or

(b) You could not respond to the notice because it was written in a language that you did not understand.

(Emphasis added). If the undersigned were to conclude that "good reason" was synonymous with "good cause", then the undersigned would use Civil Rule 60 (CR 60) as a guideline to interpret "good cause". The undersigned would not use the ESD case law as a guideline because this would conflict with the instruction in WAC 388-02-0020(1).

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4. The CR 60 case law does not support the Appellant's position in this case. The Appellant's primary reason for the late-filed Petition for Review was the failure of office staff to

add the petition deadline to the calendar. Washington courts have held that errors by office staff do not provide a valid excuse for late filing under CR 60:

Judicial decisions have repeatedly held that if a company's failure to respond to a properly served summons and complaint was due to a break-down of internal office procedure, the failure was not excusable.

If a company fails to respond to a complaint because someone other than general counsel accepted service of process and then neglected to forward the complaint, the company's failure to respond is deemed due to inexcusable neglect.

*Cash Store*, 116 Wn. App. at 848. See also *Beckman v. Dep't of Soc. & Health Servs.*, 102 Wn. App. 687, 11 P.3d 313 (2000) (neglect in failing to institute office management procedures to "catch" administrative errors was inexcusable); *Prest v. Am. Bankers Life Assurance Co.*, 79 Wn. App. 93, 900 P.2d 595 (1995) (neglect inexcusable when summons and complaint were "mislaidd" while general counsel was out of town).

In this case, PETCO failed to ensure that the legal assistant responsible for entering the deadline into the calendaring system did so before she left on an extended vacation, subsequently failed to ensure that employees hired to replace that assistant were trained on the calendaring system and competent in operating it, and failed to institute any other procedures necessary to ensure that PETCO's general counsel received notice of the dispute. PETCO's neglect was due to a break-down in internal office management and procedure and was, therefore, inexcusable.

*TMT Bear Creek Shopping Ctr., Inc. v. PETCO Animal Supplies, Inc.*, 140 Wn. App. 191, 212, 165 P.3d 1271 (2007).

[Respondent's] excuse for failing to answer is that the individual who, according to the records of the Washington Insurance Commissioner, carried the designation of General Counsel had been reassigned to other duties and was out of town at the time the summons and complaint was received at Bankers's offices. This, Bankers indicated, resulted in the file being "mislaidd" and a consequent failure to "forward it to the proper personnel in time." Br. of Resp't at 23. While certainly Bankers's failure to answer was neglect, it is not excusable. It is an important part of the business of an insurance company to respond to legal process that is served upon it. If Bankers had designated another individual to receive legal process of this nature, it had a responsibility to notify the state insurance commissioner of the change or make arrangements to have that person's duties assumed by someone else at the company. The failure of Bankers to do either of those things is inexcusable. See *B&J Roofing, Inc. v. Board of Indus. Ins. Appeals*, 66 Wn. App. 871, 832 P.2d 1386 (1992) (error by an employee or corporation in misdirecting a petition for review of administrative decision not excusable neglect).

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*Prest v. American Bankers Life*, 79 Wn. App. 93, 100, 900 P.2d 595 (1995). Even if the undersigned were to agree that "good reason" is synonymous with "good cause", the CR 60 case law indicates that ordinary errors by office staff do not provide good cause for late filing.

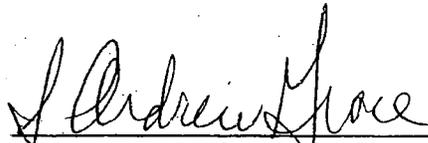
5. Nothing the Appellant has said or argued in its Petition for Reconsideration has convinced the undersigned that the Review Decision was incorrect and should be changed. The Appellant's Petition for Reconsideration is denied. The Conclusions of Law in the Review Decision are adopted. RCW 34.05.464(8). The procedures and time limits for judicial review are described in the attached statement.

#### IV. DECISION

The Appellant's Petition for Reconsideration is denied. The Review Decision is the final administrative order.

**NOTICE:** The deadline for filing a Petition for Judicial Review in Superior Court is thirty (30) days from the date of mailing of this Decision on Reconsideration.

*Mailed on April 7, 2008.*

  
S. ANDREW GRACE  
Review Judge

Encl. (Judicial Review Information)

Copies have been sent to: Puget Sound Medical Supply, Appellant  
c/o Dickinson Steinacker LLP  
Thomas Dickson, Appellant's Representative  
Angela Coats, Department's Representative, MS: 40124  
Clayton King, Program Manager, MS: 45504  
Medical Provider Overpayments, Program Admin, MS: 45504  
Robert C. Krabill, ALJ, Olympia OAH

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**IF YOU DISAGREE**  
**YOU HAVE THE RIGHT TO APPEAL TO SUPERIOR COURT**

**DEADLINE for Superior Court Cases - 30 DAYS:** The Superior Court, the Board of Appeals, and the state Attorney General's Office **must all RECEIVE** copies of your Petition for Judicial Review within thirty (30) days from the date stamped on the enclosed Reconsideration Decision.

Refer to the Revised Code of Washington (RCW), including chapter 34.05, the Washington Administrative Code (WAC), and to the Washington Rules of Court (civil) for guidance. These materials are available in all law libraries and in most community libraries.

**If You Need Help:** Ask friends or relatives for a reference to an attorney, or contact your county's bar association or referral services (usually listed at the end of the "attorney" section in the telephone book advertising section). Columbia Legal Services, Northwest Justice Project, the Northwest Women's Law Center, some law schools, and other non-profit legal organizations may be able to provide assistance. **You are not guaranteed an attorney free of charge.**

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