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STATE OF WASHINGTON

BY *[Signature]*

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

COSSETTA STROUD,

Appellant,

v.

STATE OF WASHINGTON, DEPARTMENT OF SOCIAL AND
HEALTH SERVICES,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The fundamental question in this appeal is whether the Department of Social and Health Services' (DSHS) Board of Appeals appropriately followed the superior court's instructions on remand when it upheld a DSHS determination that Appellant Cossetta Stroud had neglected her severely disabled father.

Ms. Stroud had a contract with DSHS to provide care to her father and also had accepted her father into her home for the purpose of being his caregiver. DSHS received numerous reports that Ms. Stroud left her father, John Stroud, alone on multiple occasions, – despite knowing that he was at risk of injuring himself through a fall or by choking. The DSHS Adult Protective Services (APS) determined that Ms. Stroud neglected her father. Her contract to provide in-home care to him was terminated. After a complex series of proceedings at the administrative and superior court levels, Thurston County Superior Court upheld DSHS's finding of neglect against Ms. Stroud and denied her request for attorney's fees.¹

Ms. Stroud appeals, claiming the APS finding of neglect should be overturned because it is not supported by substantial evidence and

¹ There have been 13 orders in administrative and superior court proceedings.

there are procedural deficiencies in the final agency order that determined she neglected her father. Ms. Stroud is also asking this Court for contractual back pay and attorney's fees relative to the neglect finding.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the DSHS Board of Appeals properly amend findings of fact to reflect the rationale for its decision on new issues raised by the Superior Court on remand?
2. Did the DSHS Board of Appeals correctly interpret and apply the law when it used a technical amendment to clarify an ambiguous statute?
3. Is the finding that Ms. Stroud neglected her father by failing to provide the necessary 24 hour care supported by substantial evidence?
4. Is the Board of Appeals required to solely rely on the testimony of the same witness as the ALJ to determine the ultimate issue of whether neglect occurred?
5. Did the Superior Court properly permit DSHS to supplement the record on judicial review?
6. Are damages for breach of contract allowed in a judicial review where the amount of damages is not proven and no legal authority supports the award?
7. Did the Superior Court properly deny the Appellant's motion for attorney's fees on the basis she was not a prevailing party and the agency's actions were justified?

III. COUNTERSTATEMENT OF THE CASE

A. Substantive Facts

Appellant's father, John Stroud, suffered from Huntington's disease, an inherited disorder that causes progressive degeneration of a person's movement and cognition. Administrative Record (AR) 613, Findings of Fact (FF) 1. A person suffering from Huntington's disease typically experiences movement characterized by chorea: random, jerky, spasmodic movements of the body and its limbs. This chorea causes difficulties with walking, balance, and general coordination. In addition, the person's ability to chew and swallow food is affected. AR 613, FF2. Mr. Stroud expended a great deal of energy due to the muscle spasms caused by the Huntington's chorea and liked to have food available to him throughout the day for small meals and snacks. AR 614, FF9. Mr. Stroud also woke up multiple times during the night and needed medication assistance and incontinent care. AR 615, FF8.

Before his death, Mr. Stroud was eligible to receive Medicaid personal care services. The services for which he was eligible were provided in his home by a qualified paid caregiver referred to as an "individual provider" through a Medicaid home and community based waiver program, the "COPES" program. AR 613, FF 1. John Stroud resided in Olympia, Washington with his daughter, Appellant Cossetta Stroud. Ms. Stroud had a contract with DSHS as an individual provider

to provide COPES in-home care for her father. AR 613-616, FF 3, 4, 9, 10, 11. She was also her father's power of attorney. *Id.* Because her father lived with her, Ms. Stroud provided care to her father whenever it was needed; DSHS paid her to provide care for her father for 184 hours per month. AR 614, FF4.

On December 16, 2002, Mr. Stroud's DSHS case manager conducted an annual, comprehensive assessment of his need for COPES services. During the course of the assessment, Mr. Stroud deferred to his daughter to answer most of the questions. AR 614, FF6. Ms. Stroud informed the case manager that, although her father could walk, he had experienced a significant increase in the number of times he had fallen in the past year, along with increased confusion. He did not yet have a wheelchair, but used a wheeled walker to assist him. AR 614, FF 7. In addition to his difficulties walking, transferring, and positioning, Mr. Stroud was also having fairly frequent coughing spells and remained a high risk for aspirating on liquids and food. *Id.* Mr. Stroud choked daily and there were times when he was unable to clear his airway and Ms. Stroud had to perform the Heimlich maneuver. AR 620, FF 24.

After the assessment, the case manager concluded that it was not safe or appropriate for Mr. Stroud to be left alone because of multiple health and safety risks. AR 615, FF 10. Based on Mr. Stroud's need for

extensive assistance with all activities of daily living, and to assure his safety, the case manager sought extra paid hours of caregiving for him so that Mr. Stroud could receive 24 hour care. In addition to the hours that Ms. Stroud would be caring for her father, additional hours were authorized so that other individual providers could also be employed to provide care. AR 615, FF 9. The assessment noted that Ms. Stroud understood that her father was “not to be left alone, even for brief periods” and that Ms. Stroud’s oversight and care of her father were required whenever other COPES individual providers were not scheduled to provide care. In light of the requirement for round-the-clock care, the case manager did not reauthorize payment for Mr. Stroud’s “Lifeline” emergency response device.² *Id.*

Following the assessment, DSHS developed a Service Plan to identify ways to meet Mr. Stroud’s needs and to guide his caregivers. The Plan reiterates the requirement that Mr. Stroud was not to be left alone, even for brief periods of time. AR 615-616, FF11. Ms. Stroud signed the Service Plan on her father’s behalf, but disagreed with parts of it. She requested the requirement that her father was “not to be left alone, even for brief periods” be deleted. DSHS declined this request,

² Although DSHS payment was authorized for a Lifeline device, there is no evidence that Mr. Stroud ever had such a device, or was capable of using it, in late 2002 and early 2003. AR 619, FF 23.

stating:

John Stroud, is not to be left alone even for brief periods due to the significant safety risks this would impose on [him] including high risk of falls and high risk of choking and aspiration, which could seriously and adversely affect Mr. Stroud's health and potentially adversely affect his survivability-especially in an emergency situation.

AR 617, FF 15.

During this same time period, in mid-December 2002, Adult Protective Services (APS) received two referrals from separate sources expressing concern about the care that Mr. Stroud was receiving from his daughter. He was reportedly being left without any caregiver in the home. AR 617-618, FF 16, 21. DSHS interviewed one individual provider for Mr. Stroud who stated that Ms. Stroud was not at home about 50 percent of the time when the provider arrived to care for Mr. Stroud, and Mr. Stroud was without a caregiver when the provider arrived. AR 627, FF 51.

On the afternoon of December 17, 2002, an APS investigator went to the Stroud home and discovered Mr. Stroud home alone. AR 617, FF 16-17. The investigator attempted to contact Ms. Stroud and other family friends who were listed as emergency contacts because she was concerned for Mr. Stroud's health and safety and was not comfortable leaving him alone. AR 618, FF 18. After several attempts,

the investigator contacted an emergency contact person. *Id.* A few minutes later, Ms. Stroud returned the investigator's phone call and demanded that the investigator leave. AR 618, FF 19. The investigator was alone with Mr. Stroud for 45 minutes before one of the emergency contacts arrived. AR 618, FF 20. During that time, the investigator did not observe any food or water in Mr. Stroud's bedroom and he was not wearing his Lifeline device. *Id.*

Multiple caregivers providing care for Mr. Stroud refused to continue working in the Stroud household. Three individual providers quit based on their concerns about leaving Mr. Stroud alone – per Ms. Stroud's instructions – when no one else was in the home. These individual providers reported their concerns to DSHS. AR 620, FF 25 and AR 627, FF 51.

During the course of the APS investigation into Ms. Stroud's alleged neglect of her father for leaving him without a caregiver, the investigator spoke with Mr. Stroud's primary physician, Dr. Edstam, three registered nurses, three social workers, and three of Mr. Stroud's individual providers. AR 618-619, FF 22. Dr. Edstam expressed his opinion that Mr. Stroud could be left alone so long as he had access to, and could use, his Lifeline device. The three registered nurses expressed concerns over leaving the Appellant on his own for any period of time.

Id. The three social workers had mixed opinions. All three of the individual providers who cared for him were concerned about leaving Mr. Stroud by himself. *Id.*

One of the social workers, Ms. Catherine Kendall, stated that she believes it is acceptable to leave a Huntington's patient on his own for periods of time. Ms. Kendall indicated that for patients in the advanced stages of Huntington's disease, "death is inevitable and occurs in the most structured care environments of adult family homes, assisted living, skilled nursing facilities and hospitals." AR 619, FF 23. According to Ms. Kendall, the risks of falling or aspirating food or drink is unavoidable in patients suffering from this disease and the leading causes of death for Huntington's patients are aspiration, pneumonia and choking. AR 619-620, FF 24. Ms. Kendall stated that Mr. Stroud could safely be left alone *if* he had a functional wheelchair and if he was able to use his Lifeline emergency device. AR 619, FF 23.

The premises for Ms. Kendall's opinion did not exist. The Lifeline device authorized by DSHS was discontinued once Mr. Stroud's Service Plan was for 24 hour care. AR 615, FF 10. There is no evidence in the record that Mr. Stroud had a fully functional wheelchair or a functional Lifeline emergency device in late 2002 or early 2003, nor is there any evidence in the record to indicate that

Mr. Stroud was ever able to demonstrate an ability to use a Lifeline emergency device. AR 619, FF 23. At least two people testified at hearing that they did not observe Mr. Stroud wearing a Lifeline device when they visited the home. AR 618, FF 20 and AR 627, FF 49.

On March 13, 2003, the APS investigator completed her investigation report by stating, “APS believes, as do other medical professionals that being left alone in the home, puts Mr. Stroud at great risk of injury.” In support of this conclusion, she noted that at least three individual providers had quit and refused to continue providing care for Mr. Stroud so long as they were being asked by Ms. Stroud to leave her father alone in the residence. She concluded that Mr. Stroud being left alone in Ms. Stroud’s home for any period of time greater than a few minutes met the legal definition of neglect. AR 620, FF 25.

DSHS terminated Ms. Stroud’s contract to provide care to John Stroud because there was an APS finding of neglect against her and she was not providing appropriate care in accordance with her contract and Mr. Stroud’s plan of care. AR 625, FF 46.

B. Procedural Facts

1. John Stroud’s Administrative Hearing Contesting The Termination Of Cossetta Stroud’s Contract

John Stroud had a right under former RCW 74.39A.095 (2002) and WAC 388-71-0560 to contest DSHS’s decision to terminate

Ms. Stroud's contract. Individuals who receive COPES services may select any qualified caregiver to provide those services and they have a right of appeal if DSHS refuses to contract with their selected provider. Here, Ms. Stroud, acting under a power of attorney for her father, exercised John Stroud's right to an administrative hearing to contest the termination of her own contract.

Following a hearing, Administrative Law Judge (ALJ) Adam Torem issued a stay of the termination of the contract, and reversed DSHS's proposed termination of Ms. Stroud's contract. The ALJ relied heavily on the testimony of Ms. Kendall, who stated that there were certain conditions when Mr. Stroud could be left alone. AR 740-769, 799-816. The DSHS Board of Appeals, which issues the final agency decision, ruled that, while John Stroud had a right to contest the termination of Cossetta Stroud's contract, "the ALJ had no authority to evaluate or discount the APS neglect finding and could only evaluate DSHS's decision to terminate the individual provider contract." AR 701-713. The July 16, 2003, Review Decision modified the Initial Decision and affirmed DSHS's termination of Ms. Stroud's contract. This decision did not determine whether Cossetta Stroud's conduct amounted to neglect, or whether the contract was properly terminated for the alternative reasons that DSHS originally alleged. *Id.*

Mr. Stroud sought judicial review. The superior court reversed the Board of Appeals Decision and remanded the matter for further proceedings. The court ruled that an APS finding is evidence that an ALJ may take into account when reviewing the termination of a care provider's contract. The court remanded to the Board of Appeals to consider (1) whether Cossetta Stroud's conduct amounted to neglect, and (2) whether her contract was properly terminated on one, or more, of the alternative grounds alleged by DSHS. AR 687-690.

Before the Board of Appeals could act on remand, John Stroud died. After his death, and consistent with the superior court's order, the Board of Appeals considered the issue of whether Cossetta Stroud's conduct toward her father constituted neglect.³

The Board found that her conduct constituted neglect and, on December 30, 2004, the Board of Appeals issued a Final Agency Order upholding DSHS's decision to terminate Cossetta Stroud's contract. AR 598-655. Cossetta Stroud appealed. The superior court dismissed her appeal on the ground that the case was moot because of the death of John Stroud. The court also determined that Ms. Stroud lacked standing to pursue her father's appeal of the case. AR 546-547.

³ The alternative grounds were rejected or not addressed because the finding of neglect was ultimately upheld. AR 651-654, FF 60-64.

2. Cossetta Stroud's Administrative Hearing Challenging The APS Finding And The Termination Of Contract

In a separate administrative proceeding in her own name, Cossetta Stroud attempted to challenge the termination of her individualized provider contract, and the APS determination that her conduct amounted to neglect. DSHS asked the ALJ to dismiss because Ms. Stroud lacked the standing needed to pursue an administrative appeal. She had no standing to pursue the contractual issue, and, at that time, there were no administrative appeal rights for challenging APS findings since those findings were not documented on any type of registry. *See* AR 66-67. The ALJ dismissed the case. AR 50-58. The Board of Appeals affirmed. AR 1-22. Ms. Stroud petitioned for judicial review.

The superior court asked DSHS to file a motion to dismiss. After a hearing on that motion, the court entered two orders: one denying the motion to dismiss, and the other consolidating the administrative record from Cossetta Stroud's case with the administrative record from John Stroud's earlier case so that the final order upholding the finding of neglect in John Stroud's case could be reviewed. Clerk's Papers (CP) 263.

3. Judicial Review Of The Consolidated Administrative Records

In the proceeding to review the consolidated record, DSHS moved to dismiss for failure to state a claim for which relief may be granted. In support of its motion, DSHS submitted the Declaration of Carol Sloan, which contained information about a separate APS finding of abuse based on Ms. Stroud's actions after her individual provider contract had been terminated. That finding of abuse had been sustained after a full administrative hearing. CP 121-122. Attached to the declaration was the administrative hearing decision regarding the abuse finding. CP 123-158. The declaration was offered to support the DSHS's position in the motion to dismiss that no relief could be granted to Ms. Stroud based on the present appeal; she was ineligible to have a DSHS contract based on the finding of abuse, and her name was already placed on a registry of findings.

Cossetta Stroud moved to strike both the declaration and its attachment. The superior court partially granted Ms. Stroud's motion, permitting it to be considered solely for the purpose of the motion to dismiss and striking the attached decision from the record. CP 174-175. The Court eventually denied DSHS's motion to dismiss. CP 166-173.

The superior court reviewed the December 30, 2004, Board of Appeals' decision in the John Stroud case to determine whether the finding of neglect was proper. In a letter opinion, the superior court affirmed the finding of neglect against Ms. Stroud, finding the actions of DSHS were not arbitrary and capricious, and the agency decision was supported by substantial evidence. The petition for judicial review was denied. CP 176-183. Ms. Stroud sought reconsideration on the issue of attorney fees. The superior court had ruled that it did not need to address attorney fees, because the petition for judicial review was denied and, therefore, Ms. Stroud was not a prevailing party; additionally DSHS's actions were substantially justified. CP 264, 184-185.

IV. ARGUMENT

A. Standard Of Review

Ms. Stroud asks this Court to reinstate the decision of the Administrative Law Judge. Brief of Appellant at 5. This matter is before the Court on appeal from a final agency order in an adjudicative proceeding under the Administrative Procedure Act (APA), RCW 34.05. This Court's review is limited to a review of the Board of Review's Final Order, not the ALJ's Initial Decision, or of the superior court proceedings. *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 403-404, 858 P.2d 494 (1993) (commissioner's decision, not that of the administrative

law judge, is the one that the court reviews); *Northwest Steelhead & Salmon Council of Trout Unlimited v. Dep't of Fisheries*, 78 Wn. App. 778, 896 P.2d 1292 (1995) (agency head's findings, not ALJ's, are reviewed). The order for this Court to review is the December 30, 2004, Review Decision and Final Order from the John Stroud case, AR 598-657.

This Court applies the APA standards of review directly to the record made before the administrative agency. RCW 34.05.558; *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 601, 903 P.2d 433 (1995), *cert. denied*, 518 U.S. 1006 (1996). With certain exceptions not applicable here, review is confined to the record made before the administrative agency, and the Court may not consider new evidence. RCW 34.05.558-.562.

The Court may grant relief from an agency order in an adjudicative proceeding only on the grounds provided under RCW 34.05.570(3).⁴ *Tapper v. Empl. Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). The Court reviews *de novo* both the agency's

⁴ Relief may be granted only if (a) the order or rule on which it is based is unconstitutional; (b) the order exceeds the agency's statutory authority; (c) the decision-making process was unlawful; (d) the agency erroneously interpreted or applied the law; (e) the order is not supported by substantial evidence in light of the whole record before the court; (f) the agency has not decided all issues requiring resolution by the agency; (g) a motion for disqualification should have been granted; (h) the order is inconsistent with the agency's rules; or (i) the order is arbitrary or capricious.

conclusions of law and its application of the law to the facts. *Id* at 402 03. The Court can modify conclusions of law if the agency's review judge "erroneously interpreted or applied the law." RCW 34.05.570(3)(d); *Heinmiller*, 127 Wn.2d at 601. The Court may substitute its judgment for that of the reviewing officer, but it accords "substantial weight" to the agency's interpretations of the law within its area of expertise. *Macey v. Empl. Sec. Dep't*, 110 Wn.2d 308, 313, 752 P.2d 372 (1988).

Ms. Stroud has the burden of showing the invalidity of the Final Order. RCW 34.05.570(1)(a); *Hillis v. Dep't of Ecology*, 131 Wn.2d 373, 381, 932 P.2d 139 (1997). The Court may grant relief only if it determines that Ms. Stroud has been "substantially prejudiced" by the agency's actions. RCW 34.05.570(1)(d); *Peacock v. Public Disclosure Comm'n*, 84 Wn. App. 282, 286, 928 P.2d 427 (1996).

B. The Board Of Appeals Correctly Followed The Superior Court's Remand Instructions; Amendment And Addition Of Essential Findings Of Fact Was Therefore Proper

Ms. Stroud contends that the December 30, 2004, Review Decision and Final Order is in error because the Board of Appeals Review Judge added and amended essential findings of fact. *See* AR 627-631, Conclusion of Law (CL) 1-16. Ms. Stroud mischaracterizes the remand order as constraining the Board of Appeals

review so that no new or amended findings of fact could be made. Brief of Appellant at 19. This is not the case. The changes were made consistent with and in response to the remand order of the superior court.

The earlier Board of Appeals decision, dated July 16, 2003 ruled that an appeal of an APS finding of neglect was not available in John Stroud's appeal of the contract action and, therefore, contract termination was mandatory. The only evidence the Board of Appeals needed to make this determination was that an APS finding of neglect existed against Ms. Stroud, but it did not independently consider whether Cossetta Stroud's conduct amounted to neglect, or whether the contract was properly terminated for the alternative reasons alleged. The superior court reversed this decision, ruled that "the agency has not decided all issues requiring resolution by the agency" and remanded the case to the Board of Appeals to resolve the issue of whether the neglect finding was warranted and whether the alternative reasons suggested by DSHS justified termination of the contract. AR 687-690, *citing* RCW 34.05.570(3)(f).

The superior court's order does not impose limitations on the remand. This is confirmed because the remand was for the purpose of making essential findings necessary to resolve the issues referenced in the remand order.

A review judge “has the power to make his or her own findings of fact and in the process set aside or modify the findings of the ALJ.” *Kabbae v. Dep’t of Soc. & Servs.*, 144 Wn. App. 432, 442-443, 192 P.3d 903, 908 (2008). Here, the Board of Appeals judge exercised his authority properly pursuant to former WAC 388-02-0600(2)(2002)⁵ and made additional findings of fact supported by substantial evidence in view of the entire record, consistent with the ALJ’s findings that are supported by substantial evidence based on the entire record. Former WAC 388-02-0600(2)(e)(2002).

Notably, Ms. Stroud does not contend that the amendments or revisions to the findings are not essential or that they are unsupported by the record. She argues that the Board of Appeals should not have revised the decision at all, which is an incorrect reading of the remand order and the Board’s authority. Then, having not assigned error to any of the findings entered, the findings are verities. *Kitsap Cy. v. Cent.*

⁵ In pertinent part, former WAC 388-02-0600(2)(2002) states: A Review Judge may only change the hearing decision if: (a) There are irregularities, including misconduct of a party or misconduct of the ALJ or abuse of discretion by the ALJ that affected the fairness of the hearing; (b) The findings of fact are not supported by substantial evidence based on the entire record; (c) The decision includes errors of law; (d) The decision needs to be clarified before the parties can implement it; or (e) Findings of fact must be added because the ALJ failed to make an essential factual finding. The additional findings must be supported by substantial evidence in view of the entire record and must be consistent with the ALJ’s findings that are supported by substantial evidence based on the entire record.

Puget Sound Growth Mgmt. Hearings Bd., 138 Wn. App. 863, 872, 158 P.3d 638, (2007).

The Court should conclude that the Review Judge acted properly on remand and, consistent with the remand order and the authority in RCW 34.05.570(3)(f) and former WAC 388-02-0600(2)(2002), amended the findings of fact based on the new issues remanded from the superior court. There is no basis for reversal of the agency decision because of these amended findings.

C. A Finding Of Neglect Does Not Require Proof Of Actual Harm To The Vulnerable Adult

Ms. Stroud argues that the December 30, 2004, Board of Appeals' Review Judge relied on incorrect law because the review judge referred to a technical and clarifying amendment to the definition of neglect. Brief of Appellant at 23. There is no error in the Board's reliance on the amendment in the context of this case.

Former RCW 74.34.020(9), which was in effect in 2002, when the neglect finding was originally made, defines "neglect" as:

"Neglect" means (a) a pattern of conduct or inaction by a person or entity with a duty of care that provide the goods and services that maintain physical or mental health of a vulnerable adult, or that avoids or prevents physical or mental harm or pain to a vulnerable adult; or (b) an act or omission that demonstrates a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare,

or safety, including but not limited to conduct prohibited under RCW 9A.42.100.⁶

The ALJ's order that would have reversed the finding of neglect concluded that, under part (a) of this definition, when there is a pattern of conduct or inaction by a person with a duty of care that provides the goods and services that maintains the physical or mental health of a vulnerable adult, there must be actual harm to a vulnerable adult before DSHS may make a finding of neglect. He reasoned that Mr. Stroud had not suffered actual harm when he was left alone. AR 763, CL 15.

The Board of Appeals corrected the ALJ's erroneous view of the law. A demonstration of actual harm is not required to support a finding of neglect. AR 634, CL 24. The Board of Appeals Review Judge found that the definition of neglect was ambiguous and, in interpreting the statute, he considered a 2003 technical amendment to the statute to inform his analysis of what the legislative intent was in enacting the 2002 statute. AR 634-635, CL 25-31. *See* Attachment 1, page 4 (cited in CL 27, footnote 1, stating that the 2003 amendment to the definition of neglect was a technical amendment). The technical amendment changed the neglect definition to read:

“Neglect” means (a) a pattern of conduct or inaction by a person or entity with a duty of care that fails to provide the

⁶ Ms. Stroud concedes that Mr. Stroud was a vulnerable adult and that Ms. Stroud was a person with a duty of care.

goods and services that maintain physical or mental health of a vulnerable adult, or that fails to avoid or prevent physical or mental harm or pain to a vulnerable adult; or (b) an act or omission that demonstrates a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, or safety, including but not limited to conduct prohibited under RCW 9A.42.100.

Former RCW 74.34.020(9) (emphasis added).⁷

The Review Judge, relying in part on this amendment, concluded that neglect under the first portion of part (a) of the definition does not require a showing of actual harm. It merely requires that a person or entity with a duty of care fails to provide the goods and services that maintain physical or mental health of a vulnerable adult. AR 637, CL 30. Because Ms. Stroud was a person with a duty to of care to Mr. Stroud who failed to provide 24 hour care to her father and placed him at risk for harm, this omission was enough to support a finding of neglect. AR 649, CL 56.

Ms. Stroud argues that the Review Judge's use of the statutory amendment when interpreting the definition of neglect constituted an unjustified retroactive application of the law. Brief of Appellant at 23. But the Review Judge's use of the clearer definition, was appropriate under law: "[W]here an original enactment was ambiguous and a

⁷ This is still the current definition of neglect. It has been recodified as RCW 74.34.020(11).

clarifying amendment or technical correction contravenes no construction placed on the original statute, the amendment may be deemed curative, remedial, and retroactive.” *State v. Jones*, 110 Wn.2d 74, 82, 750 P.2d 620, 624 (1988). Since this change was merely a technical amendment, the changes made did not impact the substantive meaning of the statute, and the meaning of the statute was the same in both 2002 and 2003. This is not a situation where substantive law is being applied retroactively.

Moreover, the Review Judge’s interpretation is not error because, even without considering the 2003 amendment, the view of neglect is consistent with *Bond v. Dep’t of Soc. & Health Servs.*, 111 Wn. App. 566, 45 P.3d 1087 (2002). In *Bond*, an adult family home provider left vulnerable adults home alone with an unqualified caregiver, but there was no actual harm. DSHS took action against the adult family home license merely based on the fact that harm could have occurred. This Court upheld the DSHS’s action because the potential for harm was there, even though actual harm did not occur:

One of our government’s most sacred duties is to protect those unable to care for themselves. When balancing the needs of vulnerable adults entrusted to state care and the interests of even well-meaning caregivers who fail to provide necessary and adequate supervision over their charges, DSHS must give priority to the safety of these vulnerable adults.

Bond, 111 Wn. App. at 576.

Appellant Ms. Stroud also argues that the law applicable to technical amendments does not apply here because DSHS's determination of neglect is a "quasi-criminal action" that is penal in nature. Brief of Appellant at 24. This assertion is untrue on several levels. DSHS findings under RCW 74.34 are not quasi-criminal or penal in nature. See *Kraft v. Dep't of Soc. & Health Servs*, 145 Wn. App. at 715 (upholding DSHS's use of the preponderance of the evidence standard of proof for findings under RCW 74.34 and stating that such findings were not quasi-criminal). The purpose of the neglect finding is to regulate and protect the public.⁸ Regardless, technical and curative amendments have been retroactively applied in the criminal context as well. See *State v. Jones*, 110 Wn.2d at 82 (applying a technical amendment to criminal sentencing guidelines).

D. The Administrative Record Contains Substantial Evidence To Support The Finding That Ms. Stroud Neglected John Stroud

Substantial evidence supports that Ms. Stroud engaged in a pattern of leaving Mr. Stroud unattended, even though she had a duty of care to provide the services that maintain his physical health and prevent physical harm. Multiple caregivers reported that Ms. Stroud told them

⁸ While a few courts use the term quasi criminal, it is not a term that aids the analysis because it obscures the actual interests, which are regulatory and protective in nature.

to leave Mr. Stroud alone and DSHS staff also observed Mr. Stroud at home without a caregiver. *See* AR 617-620, 627, FF 16-21, 25, 51. Ms. Stroud cannot meet her burden on appeal of demonstrating that the findings are unsupported by substantial evidence. *See Donahue v. Cent. Wash. Univ.*, 140 Wn. App. 17, 23, 163 P.3d 801 (2007) (findings are upheld if supported by substantial evidence).

Substantial evidence is evidence sufficient to persuade a fair-minded person of the truth of the matter. *Heinmiller*, 127 Wn.2d at 607. If enough evidence supports the finding, it does not matter that there are conflicting facts in the record or other interpretations of the facts. The Court determines only if the evidence most favorable to the prevailing party reasonably supports the challenged finding. *Dep't of Rev. v. Sec. Pacific Bank*, 109 Wn. App. 795, 803, 38 P.3d 354 (2002); *Sherrel v. Selfors*, 73 Wn. App. 596, 600-01, 871 P.2d 168 *review denied*, 125 Wn.2d 1002 (1994).

E. The Board Of Appeals Was Not Required To Rely On The Testimony Of One Witness To Determine The Ultimate Issue

Ms. Stroud argues that the Board of Appeals erred when it did not rely on the testimony of a witness, Catherine Kendall, to determine whether Ms. Stroud neglected her father. Brief of Appellant at 21. The ALJ had relied solely on Ms. Kendall's testimony to determine the

ultimate issue of neglect and found that she was credible. *Id.* The Appellant cites *Costanich v. Dept. of Soc. & Health Servs.*, 138 Wn. App. 547, 156 P.3d 232 (2007), *reversed on other grounds*, 164 Wn.2d 925, 194 P.3d 988 (2008), to support the position that the review judge did not give “due regard to the presiding officer’s ability to observe the witness” under RCW 34.05.464(4). Appellant’s reliance on *Costanich* is misplaced.

RCW 34.05.464(4) governs a review judge’s power to review an initial order in an administrative hearing, providing in relevant part:

The reviewing officer shall exercise all the decision-making power that the reviewing officer would have had to decide and enter the final order had the reviewing officer presided over the hearing, except to the extent that the issues subject to review are limited by a provision of law or by the reviewing officer upon notice to all the parties. In reviewing findings of fact by presiding officers, the reviewing officers shall give due regard to the presiding officer’s opportunity to observe the witnesses.

Giving “due regard to the presiding officer’s ability to observe the witness” under RCW 34.05.464(4), does not mean that a review judge is unable to review and evaluate the evidence.

This case is different than *Costanich*, where a review judge based additional factual findings and contradicted the ALJ’s credibility determination, solely on hearsay evidence that the ALJ had already rejected as lacking credibility. *Costanich*, 138 Wn. App. at 559.

Unlike in *Costanich*, the Review Judge in this case did not overturn a credibility determination regarding truthfulness, or rely on hearsay evidence that the ALJ found not credible to make a determination. Rather, the review judge evaluated Ms. Kendall's testimony to see if it was determinative on the ultimate issue of neglect. Under a proper view of the legal issue regarding neglect, Ms. Kendall's opinion was insufficient.

The Board of Appeals gave five distinct reasons to support its decision that Ms. Kendall's testimony is not determinative on the ultimate issue of neglect. Those reasons are: (1) Ms. Kendall did not offer a precise standard for how long Mr. Stroud could be left alone; (2) Ms. Kendall gave numerous qualifications and conditions for determining how long Mr. Stroud could be left alone (such as the Lifeline and wheelchair), but there is no evidence in the record that those qualifications and conditions were ever met; (3) Ms. Kendall's statements are inconsistent with the plan, developed for Mr. Stroud by the University of Washington Medical Center, that is included in the record; (4) Ms. Kendall's conclusions and testimony strain logic because her testimony was based on the theory that that Mr. Stroud was going to die anyway so care giving did not need to be 24 hours a day; and (5) Ms. Kendall never challenged the assertion that the appellant was at risk

without 24 hour care giving. AR 643-646. Ms. Stroud does not dispute the validity of any of the five reasons that the Review Judge gave for not finding Ms. Kendall's testimony controlling on the ultimate issue of neglect.

The Review Judge's analysis is also consistent with *Kabbae*, 144 Wn. App. at 442-443, which states that a review judge has "the power to make his or her own findings of fact and in the process set aside or modify the findings of the ALJ." *Costanich* does not apply here, because the Review Judge gave the ALJ the "due regard" required under RCW 34.05.464(4), but declined to rely solely on the testimony of one witness where the issue of neglect depended on a proper view of the legal standard as well as the evidence.

The Review Judge acted within his authority under RCW 34.05.464(4). He evaluated the evidence before him and explained why his legal conclusion was different from the ALJ. The December 30, 2004, Board of Appeals' decision should not be overturned on this basis.

F. Damages For Breach Of Contract Are Not Recoverable

Ms. Stroud requests "back pay" for the time period after July 16, 2003, when her individualized provider contract was terminated until her father's death. Brief of Appellant at 26. Assuming that this Court had

any basis to reverse the termination of Ms. Stroud's individualized provider contract, a reviewing court may not award damages, compensation, or ancillary relief, including reasonable attorney's fees and witness fees, unless such an award is expressly authorized by another provision of law. RCW 34.05.574(3). The only authority the Appellant cites for the proposition of "back pay" in this administrative proceeding regarding a COPES contract and an APS finding of neglect is *Boeing Co. v. Gelman*, 102 Wn. App. 862, 10 P.3d 475 (2000). That case concerns the general authority for a court to craft a remedy under the APA. That case does not overcome the specific language of RCW 34.05.574, which requires express statutory authority or some other separate legal basis for seeking monetary relief in connection with judicial review under the APA. Ms. Stroud cites no express authority allowing her to collect contractual damages in this judicial review. She did not plead a separate cause of action for breach of contract, and such a claim cannot be added to this appeal. RAP 2.5.

Moreover, nothing in the record supports the Appellant's contention of "back pay" for the time period after July 16, 2003. Ms. Stroud's contract is not in the record, nor is there any information regarding Mr. Stroud's eligibility for the services or the care that he was provided by other DSHS paid care providers during the time period of

July 16, 2003 to October 2004, when he died. There is no evidence regarding this information for a very good reason; the time period for which the Petitioner is now requesting payment was months after the substantive administrative hearing record was made in this matter.

The Court applies the APA standards of review directly to the record made before the administrative agency. RCW 34.05.558; *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 601, 903 P.2d 433 (1995), *cert. denied*, 518 U.S. 1006 (1996). What the record does show is that, while a stay was requested and granted of the termination of her contract by the ALJ, AR 799-817, no similar stay was granted for any other level of review and Ms. Stroud's contract was terminated. She should not receive payment on the terminated contract in this proceeding, and there is no authority for such a proposition.

G. The Administrative Record Was Not Supplemented On Review

The Appellant requests that the declaration attached to DSHS's Motion to Dismiss be stricken from the administrative record, and should not be used in this judicial review. This objection is misplaced.

The superior court only admitted the Declaration of Carol Sloan for purposes of supporting DSHS's motion to dismiss. It was not accepted as part of the judicial review. CP 174-175. The superior court did not allow the declaration into the administrative record.

The motion to dismiss, for which the declaration was allowed, was also not granted. CP 166-173. Assuming, solely for the sake of argument, that the Appellant's motion in limine should have been granted in full, and both the declaration and the attachments should have been excluded from consideration in the motion to dismiss, the error is harmless because the motion to dismiss was denied. 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)).

H. Ms. Stroud Is Not Entitled To Attorney's Fees

Ms. Stroud requested attorney's fees from the superior court and cited to two bases for receiving attorney's fees. The first is RCW 74.08.080, which only applies to applicants and recipients of public assistance and their disputes about that assistance. This case has never been about Ms. Stroud as an applicant or recipient of public assistance;

she is a contractor who was working for a recipient of public assistance.

As such, RCW 74.08.080 does not apply to her.

Ms. Stroud also requested attorney's fees under RCW 4.84.350, which provides that:

a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust. A qualified party shall be considered to have prevailed if the qualified party obtained relief on a significant issue that achieves some benefit that the qualified party sought.

RCW 4.84.350 (emphasis added).

The superior court correctly denied Ms. Stroud her request for attorney's fees because she was not a prevailing party in the judicial review, and, for the separate reason that the state was substantially justified in its actions. CP 264, 184-185. The appellate courts review fee decisions for an abuse of discretion. *See Constr. Indus. Training Council v. Apprenticeship & Training Council*, 96 Wn. App. 59, 65, 977 P.2d 655 (1999); *Alpine Lakes Prot. Soc'y v. Dep't of Natural Res.*, 102 Wn. App. 1, 19, 979 P.2d 929 (1999).

This Court should affirm the denial of fees because Ms. Stroud should not prevail in this judicial review. A qualified party "prevails" if the party obtains "relief on a significant issue that achieves some

benefit” that the party sought in the judicial review proceeding. RCW 4.84.350(1). The statute also expressly limits the payment of attorney’s fees and other expenses to those incurred as a result of prevailing in “a judicial review of an agency action.” RCW 4.84.350(1). Simply because a party prevailed on an issue in the litigation, does not mean that a party is a “prevailing party.” *See e.g., Densley v. Dep’t of Ret. Sys.*, 162 Wn.2d 210, 173 P.3d 885 (2007). The “prevailing party” requirement is a significant issue in the present case because Ms. Stroud did not obtain the relief that she sought: The reversal of DSHS’s finding of neglect. There is not a single order overturning or reversing an agency action after the December 30, 2004, Board of Appeals’ Decision upholding the neglect finding.

Ms. Stroud argues that, even though the petition for judicial review failed, she prevailed when the two administrative records were combined and the DSHS’s first motion to dismiss was denied. Brief of Appellant at 28. Ms. Stroud points to the order of consolidation. CP 263. The consolidation order is not an order reversing an agency action; it is a procedural determination of the superior court regarding its own jurisdiction and its ability to proceed by consolidating the administrative records of two separate agency actions. It provided no

substantive relief and does not meet the statutory standard of “prevailing.”

In the alternative, attorneys fees may be denied because the “agency action” is “substantially justified.” RCW 4.84.350(1). Here, DSHS’s actions are substantially justified as shown by substantial evidence and the nature of the legal issues. The substantive agency action of the neglect finding was upheld. The superior court below agreed that the agency’s actions were justified in this proceeding. There is no basis for attorney fees to be awarded.

III. CONCLUSION

The Appellant has not met her burden of showing the invalidity of the Final Order. The Review Judge acted properly on remand and used the correct law. The decision that Ms. Stroud neglected her father is supported by substantial evidence. Therefore, this Court should affirm the Final Order and DSHS’s action.

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The Appellant has not provided authority for how she qualifies for attorney's fees or contract damages. None should be awarded.

RESPECTFULLY SUBMITTED this 20th day of August, 2010.

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CERTIFICATE OF SERVICE

I certify that I mailed a copy of the foregoing Respondent's Response Brief to Paul Neal, Attorney for Appellant, 112 East 4th Avenue, Suite 200, Olympia, WA 98501, postage prepaid, on August 20, 2010.

Angela Coats McCarthy

Angela Coats McCarthy
Attorney for State of Washington,
Department of Social and Health Services

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{+ SHB 1904 +} - H AMD 0168 WITHDRAWN 3-18-03
By Representative Kagi

Strike everything after the enacting clause and insert the following:

"Sec. 1. RCW 74.34.020 and 1999 c 176 s 3 are each amended to read as follows:

Unless the context clearly requires otherwise, the definitions in this section apply throughout this chapter.

(1) "Abandonment" means action or inaction by a person or entity with a duty of care for a vulnerable adult that leaves the vulnerable person without the means or ability to obtain necessary food, clothing, shelter, or health care.

(2) "Abuse" means the willful action or inaction that inflicts injury, unreasonable confinement, intimidation, or punishment on a vulnerable adult. In instances of abuse of a vulnerable adult who is unable to express or demonstrate physical harm, pain, or mental anguish, the abuse is presumed to cause physical harm, pain, or mental anguish. Abuse includes sexual abuse, mental abuse, physical abuse, and exploitation of a vulnerable adult, which have the following meanings:

(a) "Sexual abuse" means any form of nonconsensual sexual contact, including but not limited to unwanted or inappropriate touching, rape, sodomy, sexual coercion, sexually explicit photographing, and sexual harassment. Sexual abuse includes any sexual contact between a staff person, who is not also a resident or client, of a facility or a staff person of a program authorized under chapter 71A.12 RCW, and a vulnerable adult living in that facility or receiving service from a program authorized under chapter 71A.12 RCW, whether or not it is consensual.

(b) "Physical abuse" means the willful action of inflicting bodily injury or physical mistreatment. Physical abuse includes, but is not limited to, striking with or without an object, slapping, pinching, choking, kicking, shoving, prodding, or the use of chemical restraints or physical restraints unless the restraints are consistent with licensing requirements, and includes restraints that are otherwise being used inappropriately.

(c) "Mental abuse" means any willful action or inaction of mental or verbal abuse. Mental abuse includes, but is not limited to, coercion, harassment, inappropriately isolating a vulnerable adult from family, friends, or regular activity, and verbal assault that includes ridiculing, intimidating, yelling, or swearing.

(d) "Exploitation" means an act of forcing, compelling, or exerting undue influence over a vulnerable adult causing the vulnerable adult to act in a way that is inconsistent with relevant past behavior, or causing the vulnerable adult to perform services for the benefit of another.

(3) "Consent" means express written consent granted after the vulnerable adult or his or her legal representative has been fully informed of the nature of the services to be offered and that the receipt of services is voluntary.

(4) "Department" means the department of social and health services.

(5) "Facility" means a residence licensed or required to be licensed under chapter 18.20 RCW, boarding homes; chapter 18.51 RCW, nursing homes; chapter 70.128 RCW, adult family homes; chapter 2.36 RCW, soldiers' homes; or chapter 71A.20 RCW, residential habilitation centers; or any other facility licensed by the department.

(6) "Financial exploitation" means the illegal or improper use of the property, income, resources, or trust funds of the vulnerable adult by any person for any person's profit or advantage.

(7) "Individual provider" means a person under contract with the department to provide services in the home under chapter 74.09 or 74.39A RCW.

(8) "Mandated reporter" is an employee of the department; law enforcement officer; social worker; professional school personnel; individual provider; an employee of a facility; an operator of a facility; an employee of a social service, welfare, mental health, adult day health, adult day care, home health, home care, or hospice agency; county coroner or medical examiner; Christian Science practitioner; or health care provider subject to chapter 18.130 RCW.

(9) "Neglect" means (a) a pattern of conduct or inaction by a person or entity with a duty of care (+ that fails +) to provide the goods and services that maintain physical or mental health of a vulnerable adult, or that (+ fails to +) avoid((- s -)) or prevent((- s -)) physical or mental harm or pain to a vulnerable adult; or (b) an act or omission that demonstrates a serious disregard of consequences of such a magnitude as to constitute a clear and present danger to the vulnerable adult's health, welfare, safety.

(10) "Permissive reporter" means any person, employee of a financial institution, attorney, or volunteer in a facility or program providing services for vulnerable adults.

(11) "Protective services" means any services provided by the department to a vulnerable adult with the consent of the vulnerable adult, or the legal representative of the vulnerable adult, who has been abandoned, abused, financially exploited, neglected, or in a state of self-neglect. These services may include, but are not limited to case management, social casework, home care, placement, arranging for medical evaluations, psychological evaluations, day care, or referral for legal assistance.

(12) "Self-neglect" means the failure of a vulnerable adult, not living in a facility, to provide for himself or herself the goods and services necessary for the vulnerable adult's physical or mental health, and the absence of which impairs or threatens the vulnerable adult's well-being. This definition may include a vulnerable adult who is receiving services through home health, hospice, or a home care agency, or an individual provider when the neglect is not a result of inaction by that agency or individual provider.

(13) "Vulnerable adult" includes a person:

(a) Sixty years of age or older who has the functional, mental, or physical inability to care for himself or herself; or

(b) Found incapacitated under chapter 11.88 RCW; or

(c) Who has a developmental disability as defined under RCW 71A.10.020; or

(d) Admitted to any facility; or

(e) Receiving services from home health, hospice, or home care agencies licensed or required to be licensed under chapter 70.127 RCW; or

(f) Receiving services from an individual provider.

Sec. 2. RCW 74.34.035 and 1999 c 176 s 5 are each amended to read as follows:

(1) {+ (a) +} When there is reasonable cause to believe that abandonment, abuse, financial exploitation, or neglect of a vulnerable adult has occurred, mandated reporters shall immediately report to the department. {{{- If -}}}

{+ (b) When +} there is reason to suspect that sexual {{{- or physical -}}} assault has occurred, mandated reporters shall immediately report to the appropriate law enforcement agency and to the department.

{+ (c) When there is reason to suspect that physical assault has occurred:

(i) Mandated reporters shall immediately report to the department; and

(ii) Mandated reporters shall immediately report to the appropriate law enforcement agency, except as provided in subsection (1)(d) of this section.

(d) A mandated reporter is not required to report to a law enforcement agency an incident of physical assault between vulnerable adults that causes minor bodily injury limited to transient physical pain or minor temporary marks, such as, but not limited to, small abrasions, lacerations, or contusions limited to the surface of the skin that do not require more than first aid, unless the incident involves: (i) A pattern of repeated assault either between the same vulnerable adults or involving the same vulnerable adult that results in minor bodily injury; (ii) an attempt to choke another person; or (iii) an act that results in the fear of imminent harm; or the injured vulnerable adult or his/her legal representative or family member requests that a report be made. +}

(2) Permissive reporters may report to the department or a law enforcement agency when there is reasonable cause to believe that a vulnerable adult is being or has been abandoned, abused, financially exploited, or neglected.

(3) No facility, as defined by this chapter, agency licensed or required to be licensed under chapter 70.127 RCW, or facility or agency under contract with the department to provide care for vulnerable adults may develop policies or procedures that interfere with the reporting requirements of this chapter.

(4) Each report, oral or written, must contain as much as possible of the following information:

(a) The name and address of the person making the report;

(b) The name and address of the vulnerable adult and the name of the facility or agency providing care for the vulnerable adult;

(c) The name and address of the legal guardian or alternate decision maker;

(d) The nature and extent of the abandonment, abuse, financial exploitation, neglect, or self-neglect;

(e) Any history of previous abandonment, abuse, financial exploitation, neglect, or self-neglect;

(f) The identity of the alleged perpetrator, if known; and

(g) Other information that may be helpful in establishing the extent of abandonment, abuse, financial exploitation, neglect, or the cause of death of the deceased vulnerable adult.

(5) Unless there is a judicial proceeding or the person consents, the identity of the person making the report under this section is confidential.

{+ NEW SECTION. +} Sec. 3. This act is necessary for the immediate preservation of the public peace, health, or safety, or support of the state government and its existing public institutions, and takes effect immediately."

{+ EFFECT: +} Changes the limitation provided in the bill on the reporting requirements for mandated reporters of incidents involving vulnerable adults to specify that the incidents exempted from the reporting requirements are limited to an incident of physical assault that causes minor bodily injury limited to transient physical pain or minor temporary marks, such as, but not limited to, small abrasions, lacerations, or contusions limited to the surface of the skin that do not require more than first aid, unless the incident involves: a pattern of repeated assault either between the same vulnerable adults or involving the same vulnerable adult that results in minor bodily injury; an attempt to choke another person; or an act that results in the fear of imminent harm. Removes the definition of "harm" provided in the bill, in making the changes to the limitation on the reporting requirements. Makes a technical change to the definition of "neglect" provided in current statute.