

NO. 43156-4

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

BASIL YAUGER,

Appellant,

v.

STATE OF WASHINGTON,
DEPARTMENT OF EMPLOYMENT SECURITY,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

When an individual receives a notice from the Employment Security Department denying him unemployment benefits and he admittedly chooses not to read the portion of the notice informing him of his appeal rights, he does not have good cause for filing an appeal 11 months late.

The Respondent, Employment Security Department, dismissed Appellant Basil Yauger's appeal of the Department's decision denying him unemployment benefits because he filed his appeal 11 months after the 30-day appeal deadline. Mr. Yauger argued below that the depression from which he was suffering at the time prevented him from reading and comprehending the notice. But he admitted that he chose to read, and did in fact comprehend, the portion of the decision denying him benefits. He was also able to file weekly benefit claims with the Department and continued to be able to, available for, and actively seeking work, which included making and keeping a record of at least three job contacts per week. Under the Employment Security Act and the regulations promulgated thereunder, the Commissioner properly concluded that Mr. Yauger did not have good cause for filing his appeal after the applicable deadline. The Department respectfully asks this Court to affirm the Commissioner's decision.

II. COUNTERSTATEMENT OF THE ISSUES

1. Did the Commissioner properly conclude that Mr. Yauger did not have good cause to appeal the Department's decision denying him unemployment benefits 11 months late when Mr. Yauger failed to read the portion of the Determination Notice informing of his appeal rights and the appeal deadline but was able to file weekly benefits claims, made at least three job contacts per week, and was able for and willing to accept full time work?

III. COUNTERSTATEMENT OF THE CASE¹

After quitting his job, Mr. Yauger applied for unemployment benefits with the Employment Security Department. AR at 90-96.² The Department issued a determination notice denying him benefits on the ground that he voluntarily quit his job without good cause. AR at 76-77, 110, 125; Finding of Fact (FF) 1. This determination notice was dated and mailed to Mr. Yauger on June 5, 2010, and he received it shortly thereafter. AR at 62, 76, 110, 125; FF 1, 3. The following was printed on the first page of the notice:

YOUR RIGHTS/SUS DERECHOS: If you disagree with this decision, you have the right to appeal. Your appeal must be received or postmarked by 07/06/2010. See "YOUR RIGHT TO APPEAL" at the end of this decision.

¹ Mr. Yauger's statement of the case includes numerous factual assertions that are not supported by the Commissioner's findings of fact and are not a part of the record created at the administrative hearing. See Appellant's Br. at 5-6. Also, Mr. Yauger provides no references to the record to support his factual statements in violation of Rule of Appellate Procedure (RAP) 10.3(a)(5). The Department provides this statement of the case to present the facts as found by the Commissioner, which are the basis for this Court's review.

² The superior court transmitted the Administrative Record in this matter as a stand-alone document. The Administrative Record is separately paginated from the Clerk's Papers and, therefore, will be cited in this brief as "AR."

AR at 76, 110, 125; FF 2. The third page of the notice stated the following:

YOUR RIGHT TO APPEAL:

If you disagree with this decision, you have the right to appeal. An appeal is a written statement that you disagree with this decision. Your appeal must be received or postmarked by 07/06/2010. An appeal is a request for a hearing with an Administrative Law Judge (ALJ) from the Office of Administrative Hearings (OAH). If you miss the deadline to appeal, tell us why the appeal is late. The ALJ will decide if you have "good cause"—for a late appeal. . . .

AR at 78.

Mr. Yauger did not file his appeal until June 7, 2011—11 months after the July 6, 2010 appeal deadline. AR at 83–84. He testified at an administrative hearing that he chose not to read the entire determination notice, only turning to and reading the portion informing him that he was not eligible for benefits. AR at 62, 64, 126.³ When he received the notice, Mr. Yauger was suffering from severe depression over the loss of his sister but, despite this difficulty, he had been able to, available for, and

³ In his brief, Mr. Yauger states that "[t]he Department denied my case, but at that time I was not in a mental or physical state of awareness to read the letter completely – I had my girlfriend read me the decision only." Appellant's Br. at 6. Mr. Yauger did not assert during the administrative hearing below that he did not read the decision himself, and such a statement directly contradicts Mr. Yauger's sworn testimony on the subject. Mr. Yauger testified: "To be honest with you, when I received the rejection letter, I did not read the portion stating that there was a statute of limitations or a deadline. I just flipped to the page that said you have been denied benefits, closed the envelope and went back into my state of depression accepting that I resigned even though I had other options." AR at 62–63. The Commissioner's finding is based directly on this testimony. The Court should disregard this newly-offered evidence.

actively seeking work, including making at least three job contacts per week, and had been filing weekly benefits claims. AR at 59, 61, 110–11, 126; FF 5, 8.

After a series of hearings at the Office of Administrative Hearings, the Administrative Law Judge (ALJ) entered an initial order of dismissal on the ground that Mr. Yauger filed his appeal late and without good cause for the delay. AR at 110–13. Mr. Yauger filed a timely Petition for Review with the Commissioner, in which he asserted, for the first time, that complications from post-traumatic stress disorder (PTSD) caused him to file his appeal late. AR at 115–22. The Commissioner affirmed the ALJ's order of dismissal, adopting the ALJ's findings of fact and conclusions of law and supplementing them with additional findings and conclusions. AR at 125–27. Mr. Yauger then filed a Petition for Reconsideration, which the Commissioner denied. AR at 131–39. A Petition for Review to Thurston County Superior Court followed, and the court affirmed the Commissioner.

IV. STANDARD OF REVIEW

The standard of review is of particular importance here because Mr. Yauger references alleged facts that are not found in the record and, therefore, are not subject to review. Washington's Administrative Procedure Act (APA) governs judicial review of the Commissioner's

decisions concerning eligibility for unemployment benefits. RCW 34.05.510; RCW 50.32.120. This Court sits in the same position as the superior court on review of the agency action under the APA and applies the APA standards directly to the administrative record. *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.2d 263 (2010).

The Court undertakes the limited task of reviewing the Commissioner's findings to determine, based solely on the evidence in the administrative record, whether substantial evidence supports those findings. RCW 34.05.558; *Wm. Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). Unchallenged factual findings are verities on appeal. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993). Evidence is substantial if it is "sufficient to persuade a rational, fair-minded person of the truth of the finding." *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). The reviewing court is to "view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed" at the administrative proceeding below and may not re-weigh evidence, witness credibility, or demeanor. *Wm. Dickson Co.*, 81 Wn. App. at 411; *W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 449, 41 P.3d 510 (2002).

The Court then determines *de novo* whether the Commissioner correctly applied the law to those factual findings. *Tapper*, 122 Wn.2d at 407. However, because the Department has expertise in interpreting and applying unemployment benefits law, the Court should accord substantial weight to the agency's decision. *Markam Group, Inc. v. Emp't Sec. Dep't*, 148 Wn. App. 555, 561, 200 P.3d 748 (2009); *Wm. Dickson Co.*, 81 Wn. App. at 407.

This Court must consider the Commissioner's decision to be *prima facie* correct, and the party asserting the invalidity of an agency action—here, Mr. Yauger—bears the burden of demonstrating such invalidity. RCW 34.05.570(1)(a); *Anderson v. Emp't Sec. Dep't*, 135 Wn. App. 887, 893, 146 P.3d 475 (2006). The Court may grant relief only if “it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.” RCW 34.05.570(1)(d).

V. ARGUMENT

This Court should affirm the Commissioner's decision because substantial evidence supports the findings of fact, and there are no errors of law. The Commissioner may waive the 30-day deadline for an appeal of an unemployment benefits decision only upon a showing of good cause. RCW 50.32.020, .075. The Commissioner properly concluded that Mr. Yauger did not establish good cause to appeal the denial of his

unemployment benefits application 11 months late. Although Mr. Yauger was suffering from depression at the time, as he testified under oath, he remained fully able to comprehend the portion of the Department's notice of denial of benefits that he chose to read, file benefits claims according to the Department's procedures, and maintain an active job search of at least three job contacts per week. The Commissioner correctly determined that Mr. Yauger was able to read the portion of the notice detailing his appeal rights and file an appeal within 30 days but that he negligently chose not to.

A. Substantial Evidence Supports the Commissioner's Findings that Mr. Yauger Filed His Appeal over 11 Months Late Because He Neglected to Read the Notice of His Appeal Rights

As noted above, the Court must uphold the Commissioner's findings of fact if they are supported by substantial evidence in the administrative record. Here, the central findings are that while Mr. Yauger was suffering from severe depression over the death of his sister at the time he received the Department's determination notice, this difficulty did not prevent him from fully reading the notice. AR at 59, 61, 110-11, 126; FF 5, 8. Mr. Yauger made a deliberate choice to read only the portion of the notice declaring him ineligible for benefits and ignore the remainder, which included an explanation of his right to appeal. AR at 62, 64, 126.

As Mr. Yauger testified, depression did not prevent him from being able to, available for, and actively seeking work. AR at 61, 111, 126; FF 8. For three months—from the day he quit to the day he was denied benefits—Mr. Yauger made at least three job contacts per week, kept a log of those contacts, and reported them to the Department, as required by RCW 50.20.010 and WAC 192-180-010. AR at 17–18, 61. He also filed weekly claims for benefits during that period. AR at 61–62. He testified that he suffered from no injuries or illnesses that would have prevented him from working and that he actively pursued and was physically able to perform any job. AR at 19, 22. Mr. Yauger’s negligence in not reading the entire notice is what caused him to file his appeal 11 months late, not his depression. AR at 126.

As noted, these findings are drawn directly from Mr. Yauger’s own sworn testimony at the administrative hearing. Mr. Yauger challenges the Commissioner’s interpretation of these statements, but this Court is to “view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed” at the administrative proceeding below. *Wm. Dickson Co.*, 81 Wn. App. at 411. Mr. Yauger testified that he chose not to read the entire notice. AR at 26, 62–63. The ALJ asked him, “So if you were able to work and looking for work, Mr. Yauger, how come you were not able to file an appeal of the decision that

denied you benefits so that you could at least receive some income?" AR

at 62. Mr. Yauger replied:

To be honest with you, when I received the rejection letter, I did not read the portion stating that there was a statute of limitations or a deadline. I just flipped to the page that said you have been denied benefits, closed the envelope and went back into my state of depression accepting that I resigned even though I had other options.

AR at 62.

He testified that he maintained an active job search and job search log and was able and available to work. AR 17–18, 61. He was able to comprehend the Department's forms in order to file weekly claims for unemployment benefits and he understood the portion of the determination notice that he did read. AR at 61–63. The Commissioner concluded that Mr. Yauger was able to, but negligently chose not to, read and comprehend the appeal section of the determination notice. AR at 126. This negligence caused him to file his appeal 11 months late. AR at 126. This is a reasonable inference supported by substantial evidence in the record, and the Court should uphold it and its supporting findings.

On appeal, Mr. Yauger seeks to introduce evidence that is not in the record. He asserts that he suffers from PTSD and that complications from this disorder made him unable to read the determination notice and file his appeal on time. Appellant's Br. at 6. Mr. Yauger did not raise his

PTSD diagnosis until he filed his Petition for Review to the Commissioner of the Department. AR at 117-22.

He did not present evidence of the diagnosis to the Department when he filed his initial claim for benefits, nor did he present any such evidence to the ALJ at the administrative hearing, either in written form or in his testimony. If Mr. Yauger wished for evidence of a PTSD diagnosis to be considered, he was obligated to present it during the administrative hearing; the Commissioner cannot consider new evidence. RCW 34.05.449; RCW 50.32.080.

Mr. Yauger includes a general citation in his brief to the federal Americans with Disabilities Act (ADA) but provides no explanation of how the ADA requires the Commissioner to set aside Washington law and consider evidence that was not properly offered below. Presumably Mr. Yauger is implying that the Department somehow discriminated against him by following Washington law and not considering evidence of a PTSD diagnosis that was not offered at the administrative hearing. But the federal Americans with Disabilities Act (ADA), Washington's Employment Security Act, and its Administrative Procedure Act are not in conflict here.

In no way did the Commissioner, following the Employment Security Act, discriminate against Mr. Yauger on the basis of his PTSD

diagnosis. Under Washington law, the Department must afford an appellant a reasonable opportunity for fair hearing. RCW 50.32.040. Mr. Yauger received a fair hearing here. He had every opportunity to present evidence of his PTSD diagnosis and to explain why he believed the symptoms of the disorder caused him to file his appeal late. Instead, he testified that, because he was not thinking clearly, he simply stopped reading the notice after learning his claim for benefits had been denied, but that he understood the portion of the notice he did read. AR at 62–63.

Furthermore, he did in fact testify to the symptoms of depression that he was experiencing, and the ALJ and Commissioner considered this testimony. And despite his PTSD symptoms, Mr. Yauger was able to file weekly claims for benefits and was available for, able to, and actively seeking work. Accordingly, substantial evidence supports the Commissioner's finding that it was Mr. Yauger's own negligence in failing to read the entire Determination Notice, which included an explanation of his appeal rights, and not his depression, that caused him to miss his appeal deadline. AR at 126.

B. The Commissioner Correctly Concluded that Mr. Yauger Did Not Have Good Cause for Filing His Appeal 11 Months Late

The Employment Security Act, Title 50 RCW, provides a claimant a comprehensive administrative process for challenging a decision

denying him unemployment benefits. *See* RCW 50.32. After receiving an initial determination from the Department, a claimant has 30 days within which to file an appeal with the Department. RCW 50.32.020.

The Commissioner of the Department may waive this 30-day appeal deadline only if the appellant shows that he had “good cause” for filing his appeal late. RCW 50.32.075. In determining whether “good cause” is shown, the Commissioner considers (a) the length of the delay, (b) the excusability of the delay, and (c) whether acceptance of the late-filed petition for review will result in prejudice to other interested parties, including the Department. WAC 192-04-090(1); *Wells v. Emp’t Sec. Dep’t*, 61 Wn. App. 306, 311, 809 P.2d 1386 (1991).

The evaluation of these factors—the length and excusability of the delay and prejudice to other interested parties—is based on a sliding scale: the longer the delay in filing, the more compelling the reason for the delay must be. *Wells*, 61 Wn. App. 306. Division III of this Court noted, “In contrast to a delay of 1, 8, 13 or even 17 days, the delay here was almost 9 months. . . . Even if we measure the delay [from a later period resulting in a six week delay], six weeks is too lengthy a delay absent a compelling reason.” *Hanratty v. Emp’t Sec. Dep’t*, 85 Wn. App. 503, 507, 933 P.2d 428 (1997). The 11 month delay in this case is much longer than the six

week delay addressed in *Hanratty*, so Mr. Yauger was obligated to prove an exceptionally compelling reason for his late filing. He has not done so.

Mr. Yauger admits that when he received the determination notice, he turned to and read only the section indicating that he was denied benefits and chose not to read the section on the first page that expressly informed him of his July 6, 2010 appeal deadline. AR at 62, 126. The Commissioner did find that Mr. Yauger was suffering from severe depression at the time, but Mr. Yauger was capable of reading the determination notice. AR at 62–63, 126. He simply chose not to do so. AR at 62, 126. Because Mr. Yauger was able to maintain an active job search and was willing and able to work, there is no evidence that his depression prevented him from reading and understanding the explanation of his appeal rights and obligations. AR at 61, 126. Mr. Yauger also had the ability to understand and comply with other Department requirements, which included filing weekly claims for benefits with the Department and locating and understanding the information in the determination notice indicating that he had been denied benefits. AR at 62. While the Department does not doubt the difficulties presented to Mr. Yauger by his depression, he has failed to show a compelling reason why he could not read the appeal information on the front page of the notice and file his

appeal within 30 days. Without a compelling reason, the 11 month delay in filing is without good cause.

When deciding whether the Department is prejudiced by a late-filed appeal, courts have taken into consideration the length of the delay in filing and the administrative resources required to re-adjudicate the claim. *See Wells*, 61 Wn. App. at 312; *Rasmussen v. Emp't Sec. Dep't*, 98 Wn.2d 846, 850, 658 P.2d 1240 (1983) (noting Department not prejudiced by short delays of 1 and 13 days respectively); *Scully v. Emp't Sec. Dep't*, 42 Wn. App. 596, 712 P.2d 870 (1986) (finding no prejudicial effect on Department's limited resources where ALJ heard testimony on issue of timeliness of appeal at same time as evidence on merits of case).

Here, the Department will be prejudiced if Mr. Yauger's untimely appeal is waived for good cause. First, the length of the delay in this case, 11 months, is significantly longer than the one and 13 day delays considered in *Wells* and *Rasmussen*. Second, the merits of Mr. Yauger's claim—whether he had good cause for voluntarily quitting his job—were not addressed in any lower tribunal. Thus, the Department would be prejudiced by the administrative costs and time involved in being required to reexamine a determination made roughly two-and-a-half years ago because of Mr. Yauger's own error in failing to file a timely appeal. Mr.

Yauger's former employer, as an interested party entitled to participate in these proceedings, would likewise be prejudiced by the delay here.

In Mr. Yauger's case, the delay is longer, the reason is less compelling, and the likely prejudice is greater than in cases in which courts have found good cause for late filings. In *Devine v. Emp't Sec. Dep't*, 26 Wn. App. 778, 782, 614 P.2d 231 (1980), the court found good cause for a one day delay caused by the claimant waiting for advice from a union representative—a person with a legal relationship to her employment—that she had requested before the deadline expired. No prejudice was shown or asserted. *Devine*, 26 Wn. App. 778. Here, the delay was much longer and was not caused by a delayed response from someone who had a legal relationship to Mr. Yauger's employment.

In *Scully*, the court found good cause for a late filing because the claimant had received misleading communications from the Department leading him to believe that he had not been denied benefits. *Scully*, 42 Wn. App. at 604. Here, Mr. Yauger did not receive misleading communications from the Department. He simply chose not to read the first page of the determination notice.

Finally, in *Wells*, the claimant lost his determination notice and thought that he had more time in which to file his appeal. The court found good cause because he filed only one day late, and the Department was not

prejudiced. *Wells*, 61 Wn. App. at 314. The delay here was nearly a year longer, requiring Mr. Yauger to present a much more compelling reason, which he failed to do. He did not misplace the Department's notice; he simply chose not to read it.

The Commissioner properly concluded that Mr. Yauger did not have good cause for filing his appeal after the applicable deadline. The length of the delay was excessive, and the reasons offered were not compelling in light of the magnitude of the delay. Further, the resources and difficulty in addressing the merits of Mr. Yauger's appeal of a two-and-a-half year old benefits determination would unduly prejudice the Department and Mr. Yauger's former employer. The Commissioner's decision to dismiss Mr. Yauger's appeal is correct and the Court should affirm it.

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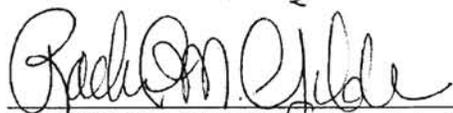
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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 4th day of December, 2012, at Olympia, WA.



RACHEL M. GIBBONS, Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

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