

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Dec 22, 2014, 11:48 am
BY RONALD R. CARPENTER
CLERK

RECEIVED BY E-MAIL

NO. 90544-4

SUPREME COURT
OF THE STATE OF WASHINGTON
DIVISION II

LINDA DARKENWALD,

Petitioner,

and

STATE OF WASHINGTON,
EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

Edward Earl Younglove III, WSBA #5873
of Younglove & Coker, P.L.L.C.
Attorney for Respondent

YOUNGLOVE & COKER, P.L.L.C.
1800 Cooper Point Road SW, Bldg. 16
PO Box 7846
Olympia, WA 98507-7846
Tel: 360/357-7791
Fax: 360/754-9268



ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION	1
II. STATEMENT OF THE ISSUES ON REVIEW	2
III. STATEMENT OF THE CASE.....	2
IV. ARGUMENT	6
A. As a “part-time worker” Mrs. Darkenwald was entitled to refuse employment of more than 17 hours per week without effecting her eligibility for unemployment benefits.	6
B. Mrs. Darkenwald sufficiently demonstrated that her physical disability prevented her from increasing her days of work qualifying her to receive unemployment benefits.....	15
V. MRS. DARKENWALD IS ENTITLED TO AN AWARD OF REASONABLE ATTORNEY FEES.....	20

TABLE OF AUTHORITIES

Washington Cases

Bauer v. Employment Security Department,
126 Wn. App 468, 101 P.3d 1240 (2005) 11

Beckman v. Wilcox,
96 Wn. App. 355, 979 P.2d 890 (1999)..... 12

Hallauer v. Spectrum Properties, Inc.,
143 Wn.2d 126, 18 P.3d 540 (2001) 12

In re Yim,
139 Wn.2d 581, 989 P.2d 512 (1999) 12

Pearce v. G.R. Kirk Co.,
22 Wash.App. 323, 589 P.2d 302 (1979) 12

State v. Houck,
32 Wash.2d 681 –85, 203 P.2d 693 (1949) 12

State v. Wright,
84 Wash.2d 645, 529 P.2d 453 (1974) 12

Tunstall v. Bergeson,
141 Wash.2d 201, 5 P.3d 691 (2000) 12

Wark v. Nat'l Guard,
87 Wash.2d 864, 557 P.2d 844 (1976) 12

Statutes

RCW 50.20.010(1)(c) 5, 9

RCW 50.20.050(2)..... 5

RCW 50.20.050(2)(b) 11

RCW 50.20.050(2)(b)(ii) 15

RCW 50.20.066 13
RCW 50.32.160 20
RCW 51.50.020(2)(b)(vi) 8

State Regulations

WAC 192-150-055(4)(c) 15
WAC 192-150-060(2)..... 16
WAC 192-170-070 9

I. INTRODUCTION

Linda Darkenwald was employed as a Dental Hygienist in Dr. Gordon Yamaguchi's office for twenty-five (25) years. During the last four years of her employment, by agreement with her employer, Mrs. Darkenwald had been a "part-time worker," working only two days (between 14 to 17 hours) per week. RCW 50.20.119. This was because she had a serious neck and back disability related to a work injury, rated as a permanent impairment of the dorsal spine by the Department of Labor and Industries, for which she was still being treated. The physical consequences from working more than two days a week were severe. If she worked more than that, she couldn't work at all because of the constant pain related to her condition.

On July 28, 2010, she was told by Dr. Yamaguchi that because he had added a dentist she had to work three days a week. She was surprised, and because she understood that he knew she couldn't work three days a week, she told him she understood she was being fired. She was denied unemployment benefits.

Mrs. Darkenwald contends that she was eligible for benefits because as a "part-time worker" she could refuse a job of more hours, and that even if her termination is characterized as a "quit" that her disability was sufficiently established as a "good cause."

II. STATEMENT OF THE ISSUES ON REVIEW

1. Is a part-time worker whose job terminates because she refuses to lose her part-time worker status under RCW 50.20.119 disqualified from receiving unemployment benefits?

2. Where an employee has received a permanent disability rating from the Department of Labor and Industries, and while working more than two days a week exacerbates the injury causing the employer to allow her to work only two days a week, is medical testimony of her disability restrictions necessary to qualify her for unemployment benefits when she becomes unemployed for refusing to increase her days of work?

III. STATEMENT OF THE CASE

Linda Darkenwald was employed as a Dental Hygienist in Dr. Yamaguchi's office for twenty-five (25) years.¹ In 1998, Mrs. Darkenwald was injured at work and received "a permanent impairment rating of category 2 of the dorsal spine" from the Department of Labor and Industries.² After that, she worked a limited number of hours because of "a serious neck and back problem" for which she continued to receive medical attention.³

¹ R. 15:14-15. (Department Record at 15 of 139 pages.)

² R. 137.

³ R. 19:7-20:3.

She described the medical consequences from working more than two days a week as “quite severe” and that “if I work more than that it becomes very chronic to the point of then I actually can’t work.”⁴ Due to this chronic condition, she had not been able to work more than two days a week for the last four years of her employment because of the constant pain it caused.⁵ It didn’t matter to her which two days of the week she worked,⁶ including Fridays.⁷ None of this testimony was challenged.

Dr. Yamaguchi claimed that despite her L&I permanent impairment rating, Mrs. Darkenwald had no physical disability because she had run a marathon more than twenty-five years earlier in 1982.⁸ Mrs. Darkenwald hadn’t run a marathon since 1984, well before her injury.⁹ No credible evidence refutes her testimony concerning the nature and limitations from her 1998 back injury and the Department of Labor and Industries disability determination.

On July 28, 2010 Dr. Yamaguchi told her he had to have someone who could work three (3) days a week. She was surprised because she knew that the

⁴ R. 14:7-25.

⁵ R. 15:2-6.

⁶ R. 16:24.

⁷ R. 18:24-25.

⁸ R. 28:22-23.

⁹ R. 33:25-34:3.

dentist knew she couldn't work three (3) days a week. She immediately responded, "I hear you saying that I am fired."¹⁰

The parties disagreed whether she quit or was fired, but not that the Dentist insisted that to continue working she work three days per week. The dental office records reflected "*Discharge*" as the reason for separation and that "she [Mrs. Darkenwald] refused to work three days. *She could not do three days a week.*"¹¹ [Emphasis added.]

Letters exchanged between the parties are consistent with their different understanding of whether Mrs. Darkenwald quit or was fired. Mrs. Darkenwald begins her letter by referring to "being summarily fired."¹² The employer's response says he hadn't "considered you fired," but also says, "[t]he bottom line is I need a three day a week hygienist for the practice."¹³

Dr. Yamaguchi testified: "If Linda could have worked more days *I would have never let her go*. She had a long outstanding history. She had seen a lot of my patients a long time."¹⁴ [Emphasis added.] Dr. Yamaguchi may

¹⁰ Q. How did the job end for you?

A. On July the 28th...Wed. Dr. Yamaguchi asked me if I would talk to him and Lynn (his wife and office mgr.)...he said he would like somebody who could work three days a week...And so I asked him if I could repeat back what I had heard. I said I hear you saying that I am fired. You need somebody three days a week...When will I know when is my last day? ...'Lynn will tell you'. So I went up front and I asked Lynn, I said, 'I've been fired. When is my last day?'... Record p. 22 of 139 lines 4-18.

¹¹ R. 131.

¹² R. 45.

¹³ R. 46.

¹⁴ R. 26:17-19.

have wanted her to stay in the position, but he was also firm in his decision that she had to work three days a week. He testified, “I wanted to re-state that. *We need more days. I need to go ahead.* My practice has grown. And that’s what the meeting was about.”¹⁵ [Emphasis added.]

Mrs. Darkenwald’s application for unemployment benefits¹⁶ was denied and the reason provided stated “Your employer states that you quit on 8/2/10 because you were offered three days per week. You refused to work three days....”¹⁷ Mrs. Darkenwald appealed, stating “I did not quit my job—rather, I was fired.”¹⁸

Following a hearing, the Department denied Mrs. Darkenwald benefits on two grounds: (1) because she wasn’t actively looking for work [RCW 50.20.010(1)(c)] and (2) because she voluntarily quit without good cause [RCW 50.20.050(2)].¹⁹

On appeal the Department stipulated that the evidence did not support the denial based on Mrs. Darkenwald’s not actively looking for work because

¹⁵ R. 26:22-27:2.

¹⁶ R. 53.

¹⁷ R. 49.

¹⁸ R.70.

¹⁹ 10-14-10; Initial orders in Docket No. 31264 R. 88 and Docket No. 31265 R. 94 [erroneously holding she wasn’t available for work because she wouldn’t work Fridays]. On the second ground, even though the employer initiated the change in her required days of work, the Department concluded that “claimant [Mrs. Darkenwald] was the moving party in the job separation, did not have statutory good cause for leaving, and that benefits must therefore be denied.” R. 114, Decision of Commissioner. Mrs. Darkenwald’s petition for review to the Commission was denied [R. 118] as were her Petitions for Reconsideration [R. 128]

she allegedly wasn't available to work on Fridays. The Superior Court reversed that determination in a stipulated order.²⁰ The court also found that Mrs. Darkenwald had good cause to quit because she was physically unable to work more than the two days a week and reversed the Department,²¹ which then appealed.²²

The Court of Appeals held both that Mrs. Darkenwald had not produced sufficient "medical evidence" that she couldn't work more than 2 days a week and that [although she was clearly a "part-time worker as defined by RCW 50.20.119] she did not have the right to continue limiting her work to 17 hours per week and remain eligible to receive benefits.²³ This Court granted Review.

IV. ARGUMENT²⁴

A. As a "part-time worker" Mrs. Darkenwald was entitled to refuse employment of more than 17 hours per week without effecting her eligibility for unemployment benefits.

RCW 50.20.119 declares that "... an otherwise eligible individual may not be denied benefits for a week because the individual is a part-time worker and is available for, seeks, applies for, *or accepts only work of seventeen or*

²⁰ CP 19-20. Docket No. 04-2010-31265.

²¹ CP 75-78.

²² CP 79-80.both

²³ *Darkenwald v. Employment Sec. Dep't.*, 182 Wn. App. 157, 328 P.3d 977 (2014).

²⁴ The Court's *de novo* review is directly to the administrative record under the authority set forth in Petitioner's Opening Brief to the Court of Appeals, at 13-16.

fewer hours per week...” WAC 192-170-070(1) permits a part time worker to “*refuse any job of 18 or more hours per week.*”

The Department argues that these provisions only apply to *unemployed* individuals required to look for work to be eligible for unemployment compensation. This appeal asks the question, if Mrs. Darkenwald could refuse new employment of more than 17 hours and receive benefits, why would refusing more than 17 hours with her current employer disqualify her from benefits?

For at least the past four years Mrs. Darkenwald had not worked more than seventeen hours per week in Dr. Yamaguchi’s dental office. She was unquestionably a “part-time worker.” RCW 50.20.119(2). The Department itself recognized Mrs. Darkenwald’s part-time status.²⁵ Dr. Yamaguchi required Mrs. Darkenwald to immediately increase her hours to more than seventeen hours per week. Regardless of whether it is construed that she quit or was fired, it is not disputed that her employment terminated because she was unwilling to work more than seventeen hours per week.

Under the Department’s strained interpretation of RCW 50.20.119, Mrs. Darkenwald would face a “Catch 22:” if she accepted her employer’s

²⁵“A claimant who has worked 17 hours or less per week during her benefit payment year is required to seek only part time work. RCW 50.20.119, WAC 192-170-070.” R. 118. The Department found Mrs. Darkenwald worked 14-17 hours per week for at least the past 4 years, Finding of Fact 3. R. 89.

demand, she would immediately lose her “part-time worker” status until she returned to working less than 17 hours for at least a year, but if she refused in order to preserve her part-time worker status, the “quit” would not be for statutory good cause rendering her ineligible for unemployment benefits.²⁶

The alternative option of waiting to be fired for preserving her rights as a part-time worker would subject her to all the social stigmas and potential economic consequences that come with a job separation being characterized as a “firing,” when the job separation is in fact through no fault of their own. Public policy, and the very purpose of the Employment Security Act [RCW 50.20] is to protect such employees. RCW 50.20.010.

Protecting her “part-time worker” status was a legitimate basis for Mrs. Darkenwald to refuse her employer’s demand that she work more days (hours). In this case, the fact that her part-time status is a direct consequence of her job related disability makes it even more compelling.

The Court of Appeals described the question presented by Mrs. Darkenwald’s situation as a question of first impression for the court. It agreed

²⁶ The Department suggests that continuing as a substitute employee would have been a reasonable alternative for Mrs. Darkenwald rather than “quitting.” The record reflected that even before hiring the three day a week hygienist to replace Mrs. Darkenwald, Dr. Yamaguchi only used his four substitute (on call) employees a total of 53 days a year. (For the past four years Mrs. Darkenwald had been working approximately 100 days a year.) Even if she got all those days (unlikely) she would have had substantially more than a twenty-five percent (25%) reduction in her compensation, a specified reason for good cause to quit. RCW 50.50.020(2)(b)(vi).

that by permitting a part-time worker to refuse any job of eighteen or more hours per week (citing WAC 192-170-070), RCW 50.20.119 creates an exception to the general requirement in RCW 50.20.010(1)(c) that a claimant for unemployment benefits must be “willing to work full-time, part-time, and accept temporary work during all of the usual hours and days of the week customary for your occupation.” However, it held that these provisions pertained only to an “unemployed part-time worker seeking benefits from being disqualified,” as opposed to an “employed part-time worker.” Decision at 17-18.

Under that analysis, had Mrs. Darkenwald lost her job under circumstances qualifying her to receive unemployment benefits, she could continue to receive benefits even while refusing any and all job offers for employment of eighteen or more hours per week. The Department contends, however, that she is disqualified from receiving benefits by choosing to protect her part-time worker status acquired over the past four years by refusing to increase her hours in her current job to eighteen or more per week.

The Department’s analysis is contrary to the policy clearly articulated in the preamble to the Employment Security Act. The purpose of the unemployment compensation fund is “to be used for the benefit of persons unemployed through no fault of their own, and that this title shall be liberally

construed for the purpose of reducing involuntary unemployment and the suffering caused thereby to a minimum.” RCW 50.01.010. The Act requires that wherever possible it must be construed in favor of the unemployed worker.²⁷ The Department’s argument, however, *disfavors* the employee.

By accepting this argument, the Court of Appeals decision is in stark contrast with the intent of the Employment Security Act and its liberal construction mandate. It denied Mrs. Darkenwald unemployment benefits solely because she was still working and not already receiving unemployment benefits when she rejected her employer’s insistence that she increase her work hours to eighteen or more per week and lose her statutorily protected part-time worker status.

There is no dispute that had Mrs. Darkenwald been unemployed and receiving unemployment benefits, she would have had every right to reject an offer of employment from Dr. Yamaguchi to work eighteen or more hours per week and still retain her eligibility for benefits.²⁸ Yet as far as her employer

²⁷ See e.g. *Western Ports Transportation, Inc. v. Employment Sec. Dep’t*, 110 Wn. App. 440, 450, 41 P.3d 510 (2002). “The mandate of liberal construction requires that courts view with caution any construction that would narrow the coverage of the unemployment compensation laws.” *Shoreline Community College District No. 7 v. Employment Sec. Dep’t*, 120 Wn. 2d 394, 406, 842 P.2d 938 (1992). “[T]he statutory mandate of liberal construction within the Employment Security Act requires the courts to view with caution any construction that would narrow the Act’s coverage.” *W. Ports Transp., Inc. v. Employment Sec. Dep’t*, 110 Wn. App. 440, 450 (2002).

²⁸ Under this analysis, an unemployed part-time worker desiring to preserve their part-time status could accept only part-time work of 17 or less hours per week (and receive unemployment while they looked), but once employed (the next day?) could have their hours

was concerned her seventeen or less hour per week job was no more, it was now one requiring at least 18 hours or more per week.

In limiting “part-time worker” status to already unemployed individuals, the Court of Appeals relied on *Bauer v. Employment Security Department*, 126 Wn. App 468, 101 P.3d 1240 (2005). *Bauer* held that a part-time employee’s rejection of full-time employment constituted a voluntary quit disqualifying him from unemployment benefits. RCW 50.20.119, adopted in 2006 and in response to *Bauer*, is consistent with the Act’s purpose, and reflects the Legislative intent that a part-time worker may reject employment of eighteen or more hours per week and qualify for unemployment benefits.

This Court should hold that workers may preserve their part-time worker status under RCW 50.20.119 by refusing employment of eighteen or more hours per week *whether the part-timer worker is currently employed or unemployed* without jeopardizing their eligibility to receive unemployment compensation benefits.

The Department counters this argument by citing *Campbell v. State of Washington*, 174 Wn. App 210, 297 P.3d 757 (2013) wherein the Court of Appeals held that “[w]hen the legislature amended RCW 50.20.050(2)(b) in

adjusted upward and lose eligibility for unemployment if they lost the job for refusing to work the increased hours.

2009, it made clear that good cause to quit was limited to the listed statutory reasons. RCW 50.20.050(2)(a).”²⁹

However, *Campbell* did not involve the application of another provision in RCW Ch. 50.20 and the requirement that statutes in *pari materia* must be construed together. *Hallauer v. Spectrum Properties, Inc.*, 143 Wn.2d 126, 18 P.3d 540 (2001); *In re Yim*, 139 Wn.2d 581, 989 P.2d 512 (1999).

The principle of reading statutes in *pari materia* applies where statutes relate to the same subject matter. *In re Personal Restraint Petition of Yim*, 139 Wn.2d 581, 592, 989 P.2d 512 (1999). Such statutes “‘must be construed together.’ ” *Id.* (quoting *State v. Houck*, 32 Wn.2d 681, 684–85, 203 P.2d 693 (1949)). “In ascertaining legislative purpose, statutes which stand in *pari materia* are to be read together as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.” *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974). If the statutes irreconcilably conflict, the more specific statute will prevail, unless there is legislative intent that the more general statute controls. *Wark v. Nat'l Guard*, 87 Wn.2d 864, 867, 557 P.2d 844 (1976); *Pearce v. G.R. Kirk Co.*, 22 Wn.App. 323, 327, 589 P.2d 302 (1979). Courts also consider the sequence of all statutes relating to the same subject matter. *Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (2000), *pet. for cert. filed* (Wash. Jan. 4, 2001).

Hallauer v. Spectrum Properties, Inc., 143 Wn.2d 126, 146, 18 P.3d 540 (2001). Also see *Beckman v. Wilcox*, 96 Wn. App. 355, 364, 979 P.2d 890 (1999).

²⁹ Response Brief at 12.

Application of this rule of construction requires that the provisions of RCW 50.20.050 be construed in light of the Legislature's *later* creation of part-time worker status in RCW 50.20.119. The Department's interpretation that a part-time worker must accept full-time work would defeat the essential purpose of RCW 50.20.119, and its implementing regulation WAC 192170-070, creating the "part-time worker" status and allowing "part-time workers" to remain eligible for benefits while refusing to accept any job of 18 or more hours per week.

The purpose of both RCW 50.20.020 and .119 can be easily reconciled by construing RCW 50.20.119 as deeming a part-time worker's refusal to accept full time work in order to preserve her part-time worker status as a "quit for good cause." Similarly, the new statute (RCW 50.20.119) can be reconciled with RCW 50.20.066 [discharge disqualification] by construing the employer's demand that a "part-time worker" convert to "full time" status as a non-disqualifying discharge should she refuse. These constructions preserve the intended effects of all three provisions while serving the statutes' general purpose of providing benefits for those rendered unemployed through no fault of their own.

RCW 50.20.119 represents a significant change in Washington employment law. It is notable that the termination of Mrs. Darkenwald's

employment was neither a “quit” nor a “discharge” as those terms are employed in common usage, defined in English dictionaries, or understood by the parties themselves. Dr. Yamaguchi did not want his highly valued hygienist of 25 years to leave. He didn’t want to “let her go.” He didn’t want to “fire” her and he didn’t think that he had. Mrs. Darkenwald didn’t want to leave her job of 25 years. She simply couldn’t accommodate his demand that she convert to full time status.³⁰ She didn’t want to “quit” her job and didn’t think that she had.

A more accurate view would be to see the employer’s demand as being that the “part-time worker” abandon her part-time status as a condition of continued employment, and her refusal as the exercise of an employee’s right to preserve her “part-time worker” status.

Dr. Yamaguchi’s demand of his at-will employee that she work three days a week rather than two was the same as terminating her old job and offering her a new job. RCW 50.20.119 permitted Mrs. Darkenwald to protect her part-time worker status by rejecting such an offer without jeopardizing her unemployment compensation eligibility.

³⁰ RCW 50.20.119 recognizes the reality of a large part-time workforce comprised not only of those with work hour limitations due not only to medical reasons but circumstances such as child or other family care, etc.

B. Mrs. Darkenwald sufficiently demonstrated that her physical disability prevented her from increasing her days of work thereby qualifying her to receive unemployment benefits.

There is no dispute that Mrs. Darkenwald suffered a serious industrial injury during her employment with Dr. Yamaguchi. The Court of Appeals decision recognized that her category 2 permanent impairment rating from the Department of Labor and Industries sufficiently established her physical disability. Decision at 13.

The record establishes that the limitations on the hours that she was able to work increased over time due to her disability, despite her continued medical treatments. Eventually, and for the last four years of her employment, she could work no more than two days a week. That was the reason she rejected her employer's requirement that she increase her work days to three days a week. The Court of Appeals construed this to mean she "left her job."

Whether her termination is described as a quit or a firing there is no dispute it was due to the fact that she refused to increase her days of work because of her disability. An employee who quits work is not disqualified from receiving benefits if it was necessary because of a physical disability. RCW 50.20.050(2)(b)(ii). WAC 192-150-055(4)(c) permits an employee to quit work and remain eligible for benefits if the quit is medically necessary in that it is "of such degree or severity in relation to [the claimant's] particular circumstances

that it would cause a reasonably prudent person acting under similar circumstances to quit work.” Mrs. Darkenwald’s testimony coupled with her L&I permanent disability finding establish these criteria.

The only issue in this case concerns the proper application of WAC 192-150-060(2) requiring that restrictions because of a worker’s disability “be supported by a physician’s statement.”

The Court of Appeals held that Mrs. Darkenwald was disqualified from benefits because she presented “no medical testimony at all [of her disability].” Decision at 14-15. However, the regulation does not require a claimant to present medical testimony.

The regulation concerns “Notice to Employer” and concerns the requirement that the employee provide the employer with prior notice substantiating the disability. The Department of Labor and Industries permanent disability finding and the other evidence of Mrs. Darkenwald’s medical disability was not seriously disputed.³¹

Mrs. Darkenwald testified to her ongoing treatments. Her employer even admitted knowledge of her receiving treatments.³² Mrs. Darkenwald testified her disability became more painful if she worked too much, causing

³¹ Dr. Yamaguchi’s claim that she was healthy because she had run a marathon some sixteen years prior to her back injury does nothing to refute this evidence.

³² R.25:2-12.

her to limit her work days to no more than two per week. Dr. Yamaguchi permitted her to work that reduced schedule for the last four years.

WAC 192-150-060(2) concerns notice to the employer of the existence of an employee's disability. It contemplates the situation in which the employee intends to quit work because of a physical disability. In such a situation, advance notice to the employer supported by documentation in the form of a physician's statement is a reasonable requirement. Those are not the facts of this situation, as Mrs. Darkenwald only wanted to continue her limited work schedule, not to quit work.

The regulation is not concerned with the evidence required in an administrative hearing. In any event, Dr. Yamaguchi was well aware of Mrs. Darkenwald's disability. The Department never contested that she had a limiting physical disability, the root cause being an L&I back injury at work. (Response at 2-3) In fact, it found that Mrs. Darkenwald "has a serious back and neck problem which becomes more painful if she works too much. [She] [k]eeps her neck and back problems under control by seeing a chiropractor and a massage therapist on a regular basis."³³ She takes regular medication to control her condition.³⁴

³³ Findings 6. R. 89.

³⁴ R. 24:14-17.

The Department apparently contends only that her employer did not, after 25 years of working together, understand that her disability limited her to working two days or less a week. However, the record clearly establishes that her employer knew of her serious L&I injury, a permanent disability. He also admitted that he knew that her back was “a complaint,”³⁵ and that she was getting treatments. In fact, he permitted her to reduce her hours per week so that for the last four years of employment she only worked two days per week. He claimed, in his words, however, only that her back had not been a “loud,” everyday occurrence.³⁶

It is not contested that Mrs. Darkenwald’s work days had been decreasing ever since her injury. She testified that eventually, if she tried to work more than two days a week, she couldn’t work at all.³⁷ Some weeks she

³⁵ R. 32:22-23.

³⁶ R. 25:5-12.

³⁷ R. 19:7-20:3; Q So, then, Ms. Darkenwald, I guess I will ask why is it that you’re limited to working 14, 16 hours a week?

A Well, I have quite a serious neck and back problem. And if I work more than that it becomes very chronic to the point of then I actually can’t work.

Q And what medical attention have you sought for your neck and back problems?

A I’ve gone to physicians. I’ve done physical therapy. I’ve done a session of (unintelligible). I’ve had injections in my back of cortisone. I do massage therapy. I see a chiropractor. Do you want more? I sought acupuncture.

Q I guess I would like whatever medical attention you’ve sought.

A Yeah, okay. I’ve really – when I was working more days a week and it was probably quite severe, I had to file an L&I claim. That was back in 1998. And they said I had a permanent impairment rating of category 2 of the dorsal spine. And I had been encouraged to file that claim by my physician, Dr. Ellen Parker was her name at the time. She remarried and was Dr. Ellen Martin.

Q And so what’s category 2 mean, to the best of your knowledge?

A Well, it’s a permanent impairment. I can’t make it go away. But if I work two days a week

only worked one day. She hadn't worked more than two days a week since 2006 because of her physical limitations.

The Department itself correctly found that Mrs. Darkenwald "has a serious back and neck problem which becomes more painful if she works too much."³⁸ It found that for the last four years Mrs. Darkenwald had been working 14-17 hours (two days) per week.³⁹

The Court of Appeals decision holding that Mrs. Darkenwald should be denied benefits because she "presented no medical testimony" or "any evidence from a physician stating that the number of hours she could work was restricted due to her disability" misconstrues the purpose of the requirement in WAC 192-150-060(2) which is merely to provide advance notice to the employer of a disability before an employee quits for that reason. In this case, Dr. Yamaguchi was well aware of Mrs. Darkenwald's disability.

Requiring an employee to provide medical testimony imposes a considerable and unreasonable burden upon a claimant in an informal administrative proceeding, in this case a brief telephone hearing, particularly where there is no dispute that the employee has a longstanding, well-established

I do just fine.

Q And so --

A I'm sorry, you know, it doesn't -- I can work two days a week. I feel good. If I work more than that it really actually becomes constant pain.

³⁸ Finding of Fact 6. R. 89.

³⁹ Finding of Fact 3. R. 89.

serious medical condition which the employer has accommodated and is currently accommodating.

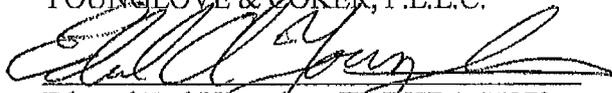
Mrs. Darkenwald had a right to refuse to aggravate her disability in a job with more hours without losing her eligibility for unemployment benefits.

V. MRS. DARKENWALD IS ENTITLED TO AN AWARD OF REASONABLE ATTORNEY FEES

Pursuant to RAP 18.1 Mrs. Darkenwald requests an award of her reasonable attorney fees. She is entitled to her costs and reasonable attorney fees, including those on appeal, if this court reverses or modifies the Department's decision. RCW 50.32.160.

RESPECTFULLY SUBMITTED this 22nd day of December, 2014.

YOUNGLOVE & COKER, P.L.L.C.



Edward Earl Younglove III, WSBA #5873
Attorney for Petitioner

PROOF OF SERVICE

I, Christa Biasi, certify that I caused a copy of this document, **SUPPLEMENTAL BRIEF OF PETITIONER** to be served on all parties by the US Postal Service and as follows on the date below to:

Eric A. Sonju
Office of the Attorney General
1125 Washington St SE
PO Box 40110
Olympia, WA 98504-0100

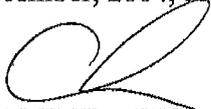
Noah Guzzo Purcell,
Solicitor General
Office of the Solicitor General
PO Box 40100
Olympia, WA 98504-0100

Original filed electronically with:

Supreme Court
Supreme@courts.wa.gov

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

DATED this 22nd day of December, 2004, at Olympia, Washington.



Christa Biasi, Paralegal
Younglove & Coker, P.L.L.C.

OFFICE RECEPTIONIST, CLERK

To: Christa Biasi
Cc: Ed Younglove
Subject: RE: Linda Darkenwald v. State of Washington Employment Security Department/Case No. 90544-4

Received 12-22-2014

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Christa Biasi [mailto:Christa@ylclaw.com]
Sent: Monday, December 22, 2014 11:43 AM
To: OFFICE RECEPTIONIST, CLERK
Cc: Ed Younglove
Subject: Linda Darkenwald v. State of Washington Employment Security Department/Case No. 90544-4

Dear Clerk,

Please find the attached Supplemental Brief of Petitioner, Linda Darkenwald for the above referenced case. Please also note the attorney of record is Edward Earl Younglove III, WSBA # 5873, and his business phone number is (360) 357-7791. Please let me know should you have any issues opening the aforementioned attached document. Thank you.

Christa Biasi, Paralegal
YOUNGLOVE & COKER, PLLC
1800 Cooper Point Road SW, Bldg. 16
PO Box 7846
Olympia WA 98507-7846
christa@ylclaw.com
360.357.7791 Ext. 107
360.754.9268 (fax)

CONFIDENTIALITY NOTICE: *The information contained in this ELECTRONIC MAIL transmission is confidential. It may also be subject to the attorney-client privilege or be privileged work product or proprietary information. This information is intended for the exclusive use of the addressee(s). If you are not the intended recipient, you are hereby notified that any use, disclosure, dissemination, distribution (other than to the addressee(s)), copying or taking of any action because of this information is strictly prohibited.*