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NO. 67703-9

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

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GEORGE O. TAMBLYN, IV,

Appellant,

v.

EMPLOYMENT SECURITY DEPARTMENT,

Respondent.

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**BRIEF OF RESPONDENT**

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ROBERT M. MCKENNA  
Attorney General

JENNIFER STEELE,  
WSBA # 36751  
Assistant Attorney General  
Attorneys for Respondent  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
Phone: (206) 464-7676  
Fax: (206) 389-2800  
E-mail: LALSeaEF@atg.wa.gov

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## I. INTRODUCTION

George O. Tamblyn IV failed to timely appeal the Employment Security Department's determination denying him unemployment benefits. Tamblyn waited over three months before filing his appeal of the Department's determination. An appeal from a Department determination must be filed within thirty days after the date of mailing pursuant to RCW 50.32.020. However, the thirty day time limitation to file an appeal may be waived for good cause as articulated in RCW 50.32.075. Therefore, an administrative law judge (ALJ) convened a hearing to determine whether Tamblyn had good cause to file his appeal late. Tamblyn testified that he did not read the determination letter thoroughly and decided to appeal once he realized that he was required to repay money he had received from the Department. The ALJ determined that this was not good cause that would justify a three-month late appeal and dismissed Tamblyn's untimely appeal. The Commissioner affirmed.

The sole issue before this Court is whether the Commissioner's dismissal of Tamblyn's untimely appeal was proper. Tamblyn filed his appeal over three months late because he did not thoroughly review the Department's determination. This does not constitute good cause. Accordingly, this Court should affirm the Commissioner's decision.

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

Did the Commissioner properly determine that Tamblyn did not have good cause justifying a late appeal when Tamblyn filed his appeal over three months after the appeal deadline because he did not read the determination notice thoroughly?

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

On April 28, 2010, the Employment Security Department issued a determination denying Tamblyn unemployment benefits pursuant to RCW 50.04.310 and 50.20.070. Commissioner's Record (Comm'r's Rec) 27-34. Included in the letter mailed to Tamblyn in the "Your Right to Appeal" section, were instructions to appeal the determination, by mail or fax number. Comm'r's Rec 30. The letter provided that the appeal "must be received or postmarked by 5/28/2010." Comm'r's Rec 30. On September 10, Tamblyn mailed a letter to the Employment Security Department appealing the initial determination. Comm'r's Rec 37.

On October 25, 2010, an ALJ convened a hearing to determine whether Tamblyn had good cause to file a late appeal. Comm'r's Rec 2, 8. Tamblyn appeared and testified about his reasons for filing his appeal over three months after the deadline. Comm'r's Rec 7-22. Tamblyn testified: "I - I can't say I read it thoroughly." Comm'r's Rec 12. Tamblyn explained that he understood that he had been denied benefits

but did nothing about it because he had just found a new job. Comm'r's Rec 11. Several months later, when Tamblyn received a certified letter informing him of a wage garnishment, Tamblyn realized that he was liable for an overpayment from the Department. Comm'r's Rec 13–14. Tamblyn testified that the reason he decided to appeal the determination was because he did not want to repay the overpayment. Comm'r's Rec 13.

The ALJ dismissed Tamblyn's appeal finding that Tamblyn had not shown good cause justifying his late appeal. Comm'r's Rec 16–17, 83–85. On December 30, 2010, the Commissioner affirmed the ALJ's decision. Comm'r's Rec 89. Tamblyn now seeks review from this Court.

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

The sole question presented in this appeal is whether Tamblyn had good cause excusing his untimely appeal. Whether good cause exists to excuse the untimely filing of a petition for review is a mixed question of law and fact. *Hanratty v. Emp't. Sec. Dep't*, 85 Wn. App. 503, 505, 933 P.2d 428 (1997) (citing *Rasmussen v. Emp't. Sec. Dep't*, 98 Wn.2d 846, 850, 658 P.2d 1240 (1983)). A court sitting in its appellate capacity affirms findings of fact that are supported by substantial evidence. “Substantial evidence is evidence that 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) (citation omitted). Once the facts of the delay are established, the court's review is de novo. *Hanratty*, 85 Wn. App. at 505. Here, none of the facts are reasonably in dispute, so the issue is purely legal. *See id.*

Courts have consistently accorded a "heightened degree of deference" to the Commissioner's interpretation of employment security law in view of the Department's expertise in administering the law. *W. Ports Transp., Inc. v. Emp't. Sec. Dep't*, 110 Wn. App. 440, 449-450, 41 P.3d 510 (2002); *Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 391, 687 P.2d 195 (1984).

## V. ARGUMENT

The Department properly dismisses an appeal of a determination notice if it is untimely and the party fails to demonstrate good cause for the late appeal. Here, Tamblyn filed his appeal over 3 months late because he did not carefully read the Department's determination letter. The Commissioner properly held that this explanation for Tamblyn's untimeliness did not amount to good cause under RCW 50.32.075. Accordingly, the Court should affirm the Commissioner's decision dismissing Tamblyn's appeal.

**A. To determine whether good cause exists to justify a late appeal of a determination notice, the court weighs (1) the length of the delay, (2) the prejudice to the parties, and (3) the excusability of the error.**

A claimant must file an appeal of an OAH decision within thirty days of the date of notification or mailing of that decision, whichever is earlier. RCW 50.32.020, .070. "Filing" is deemed complete when the petitioning party mails the petition, as evidenced by postmark. RCW 50.32.025. In the event of an untimely filing to the Commissioner, the 30-day time limit can be waived if there is "good cause shown" for the tardiness. RCW 50.32.075.

In determining whether the claimant had good cause, the court considers "(1) the length of the delay, (2) the prejudice to the parties, and (3) the excusability of the error." *Hanratty*, 85 Wn. App. at 505. *See also* WAC 192-04-090. The court employs a "sliding scale" analysis whereby a short delay requires a less compelling reason than does a longer delay. *Hanratty*, 85 Wn. App. at 507 (citing *Wells v. Emp't. Sec. Dep't*, 61 Wn. App. 306, 809 P.2d 1386 (1991)).

A court must consider each case on its own facts. *Wells*, 61 Wn. App. at 314. However, previous cases are instructive in applying the law to the particular facts presented in a given case. *See Hanratty*, 85 Wn. App. at 505-08. Cases where good cause has been found include: *Scully*

*v. Dep't of Emp't. Sec.*, 42 Wn. App. 596, 712 P.2d 870 (1986) (misleading advice from the Department can justify a late appeal); *Wells*, 61 Wn. App. 306 (filing appeal one day late could be justified by less compelling reason of claimant losing notice with deadline); *Devine v. Emp't. Sec. Dep't*, 26 Wn. App. 778, 614 P.2d 231 (1980) (good cause found where claimant delayed filing until one day past the time limit because she was waiting on advice from a person upon whom she could legally rely).

Cases where good cause has not been established include: *Hanratty*, 85 Wn. App. at 507 (six week delay was not justified by employer's failure to contact its own representative to ensure timely appeal); *Rasmussen*, 98 Wn.2d at 851-52 (three days late inexcusable where the claimant was under the mistaken impression that she had ten working days to file (as opposed to calendar days)).

**B. The Commissioner properly dismissed Tamblyn's appeal because failing to read a determination notice in its entirety does not amount to good cause.**

Tamblyn fails to establish the three prongs of the good cause test, which allow for late appeals. The length of the delay—over three months—was not minimal. The Department is prejudiced by an appeal filed over three months late because it has an interest in finality. Moreover, Tamblyn offered no excusable explanation for the late filing.

Tamblyn testified: “I – I can’t say I read [the determination notice] thoroughly. Comm’r’s Rec 12, 13. He further testified that he understood that he was denied unemployment benefits. Comm’r’s Rec 11. However, he did not read the letter thoroughly enough to understand that he was required to repay the Department the money he had received from it. Once he realized this, he decided to appeal. Comm’r’s Rec 13. He tried to justify why he did not thoroughly read the determination by explaining that his business had failed (Comm’r’s Rec 12–16), and that he had a medical problem, which he described as depression (Comm’r’s Rec 12–20).

However, the ultimate reason that Tamblyn did not file an appeal for over three months was that he did not read the Department’s determination letter in its entirety. *See* Comm’r’s Rec 12. The Department’s letter explicitly informed Tamblyn of the appeal timelines, that he was required to repay the Department the money he had received, and that he could appeal the determination that he was required to repay the Department the money he had received.

The first page of the determination letter mailed to Tamblyn informed him: “If you disagree with this decision, you have the right to appeal. Your appeal must be received or postmarked by **05/28/2010**.” Comm’r’s Rec 27. The determination also includes an entire page

dedicated to filing an appeal. The appeal section informs the claimant of the precise deadline for filing an appeal and exactly how to do it:

**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 **05/28/2010**. 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. You can fax or mail your written appeal to the fax number or return address listed at the beginning of this decision. We will not accept appeals by e-mail or telephone.

An appeal must include:

- Your name
- Your social security number (claimant’s)
- Your current address
- Your telephone number
- The decision you want to appeal
- The reason(s) you want to appeal
- Your signature (we will return it if is not signed)

...

Comm’r’s Rec 30. Lastly, the determination closes with the instruction that “You have 30 days to appeal this decision.” Comm’r’s Rec 33.

The determination also informed Tamblyn that he was required to repay the benefits he had received: “The accompanying determination denies your benefits for the weeks that you have been paid.” Comm’r’s Rec 32. The determination also informed him of the amount that he must repay: “\$4,158.00... You must repay this amount under RCW 50.20.190.” Comm’r’s Rec 32.

The determination even informed Tamblyn that he had a right to appeal the overpayment determination. Comm'r's Rec 32.

Tamblyn was given due notice of the fact that he was required to repay money he had received from the Department. He was also given due notice of the appeal deadline. The reason Tamblyn did not file his appeal on time was that he did not read the Department's determination in its entirety, which, as evidenced above, carefully informed him of all the information he might possibly need.

Tamblyn's reasons for filing his appeal late are not compelling and do not excuse a three-month delay. Moreover, the length of the delay was excessive. Therefore, the Commissioner properly held that Tamblyn failed to establish good cause. This Court should therefore affirm the Commissioner's order dismissing Tamblyn's appeal.

**VI. CONCLUSION**

Based on the foregoing, the Department respectfully requests this Court affirm the Commissioner's decision dismissing Tamblyn's untimely appeal because Tamblyn did not have good cause to file a late appeal.

RESPECTFULLY SUBMITTED this 11<sup>th</sup> day of January, 2012.

ROBERT M. MCKENNA  
Attorney General



JENNIFER STEELE,  
WSBA # 36751  
Assistant Attorney General  
Attorneys for Respondent

**TABLE OF CONTENTS**

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE ISSUE .....2

III. COUNTERSTATEMENT OF THE CASE .....2

IV. STANDARD OF REVIEW.....3

V. ARGUMENT .....4

    A. To determine whether good cause exists to justify a late appeal of a determination notice, the court weighs (1) the length of the delay, (2) the prejudice to the parties, and (3) the excusability of the error.....5

    B. The Commissioner properly dismissed Tamblyn’s appeal because failing to read a determination notice in its entirety does not amount to good cause.....6

VI. CONCLUSION .....10

## TABLE OF AUTHORITIES

### Cases

<i>Devine v. Emp't. Sec. Dep't</i> , 26 Wn. App. 778, 614 P.2d 231 (1980).....	6
<i>Hanratty v. Emp't. Sec. Dep't</i> , 85 Wn. App. 503, 933 P.2d 428 (1997).....	3, 4, 5, 6
<i>In re Estate of Jones</i> , 152 Wn.2d 1, 93 P.3d 147 (2004).....	4
<i>Rasmussen v. Emp't. Sec. Dep't</i> , 98 Wn.2d 846, 658 P.2d 1240 (1983).....	3, 6
<i>Safeco Ins. Co. v. Meyering</i> , 102 Wn.2d 385, 687 P.2d 195 (1984).....	4
<i>Scully v. Dep't of Emp't. Sec.</i> , 42 Wn. App. 596, 712 P.2d 870 (1986).....	5
<i>W. Ports Transp., Inc. v. Emp't. Sec. Dep't</i> , 110 Wn. App. 440, 41 P.3d 510 (2002).....	4
<i>Wells v. Emp't. Sec. Dep't</i> , 61 Wn. App. 306, 809 P.2d 1386 (1991).....	5, 6

### Statutes

RCW 50.04.310 .....	2
RCW 50.20.070 .....	2, 5
RCW 50.20.190 .....	8
RCW 50.32.020 .....	1, 5
RCW 50.32.025 .....	5
RCW 50.32.075 .....	1, 4, 5

**Rules**

WAC 192-04-090..... 5