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COURT OF APPEALS NO. 71038-9-1

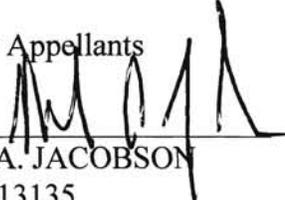
WASHINGTON STATE COURT OF APPEALS
DIVISION ONE AT SEATTLE

MICHAEL AND MELODY GIBSON, APPELLANTS
V
STATE OF WASHINGTON, EMPLOYMENT SECURITY DIVISION,
RESPONDENT

APPELLANTS' OPENING BRIEF

Respectfully submitted this 24 day of January 2014

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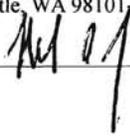
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IIIa. ASSIGNMENTS OF ERROR

1. Did the Trial Court err in adjudicating the Commissioner’s fact findings to be supported by substantial evidence?
2. Did the Trial Court err in adjudicating the Commissioner’s conclusions to be in accordance with law?

IIIb. ISSUES RELATING TO ASSIGNMENTS OF ERROR

- A. WHAT IS THE SCOPE OF REVIEW?
- B. MISTAKING AN EXCHANGE ANTECEDENT SERVICE FOR

PAY TO BE STATUTORY WORK AND EARNINGS, DID THE COMMISSIONER MISAPPLY THE GOVERNING LEGAL STANDARDS?

C. DID THE COMMISSIONER MISAPPLY THE GOVERNING LEGAL STANDARD FOR CLEAR AND COGENT AND CONVINCING RCW 50.20.070 KNOWING FALSITY OR KNOWING OMISSION OF MATERIAL FACT?

D. MUST THE COURT ORDER ADDITIONAL FACT FINDING WHERE MATERIAL COMPONENTS OF WAC 192-190-040 BACK PAY FOR ANTECEDENT SERVICES WHICH NEGATE THE FINDING OF CURRENT WORK HAVE BEEN COMPLETELY OVERLOOKED WITHOUT COMMENT BY THE COMMISSIONER?

E. DID THE COMMISSIONER FIND FACTS WHICH ARE IRRECONCILABLE WITH THE EVIDENTIARY RECORD AS A WHOLE, ASSERTING EACH GIBSON PERFORMED CURRENT FULL TIME EMPLOYMENT, 40 HOURS PER WEEK OF WORK, AND RECEIVED PAY FOR CURRENT SERVICES RENDERED?

F. ARE THE GIBSONS ENTITLED TO AN AWARD OF PREVAILING PARTY COUNSEL FEES?

IV. Statement of the Case.

a. Action by Washington Employment Security Department (“ESD”) and the Office of Administrative Hearings (“OAH”)

ESD issued Orders dated July 6, 2012 adjudicating **Michael** Gibson [“Michael”] to be disqualified from unemployment benefits because of (1) employment and (2) misrepresentation; to owe an overpayment debt and to be subject to penalties [CP 1114] during the intervals October 20, 2008 to March 12, 2012. (CP 1114) ESD adjudicated Melody Gibson [“Melody”] to be disqualified and indebted for the same reasons [CP 1099] during the intervals October 27, 2008 to October 12, 2009 and November 22, 2011 to February 20 , 2012. (CP 1099) The Office of Administrative Hearings

(“OAH”) appointed Administrative Law Judge (“ALJ”) Fager to determine the Gibsons’ appeals. The cases were consolidated for one hearing. (CP 62)¹ The ALJ affirmed all ESD orders. (CP 1104, 1119)

b. Commissioner’s Decision on Appeal.

With two exceptions, the Commissioner of Employment Security (“Commissioner”) adopted each and every material ALJ Finding of Fact (“FF”) which pertained to Michael. (CP 1129) The ALJ found that Michael’s benefit claims spanned the entire 20-month interval February 2010 to October 2011 (CP 1115; FF#8) resulting in a \$63,318 overpayment. However, the ESD records in fact showed a 9-month gap during which Michael made no benefit claim from July, 2010 to March, 2011. (CP 981) The Commissioner modified and reduced the OAH overpayment award from \$63,318 (CP 1121 FF#8) to \$41,135 (CP 1125 ¶ I). The Commissioner also reversed the ALJ award of a “second fraud” penalty; holding that ESD had put on no evidence of a “second fraud.” (CP 1125 ¶ III) As to Melody, the Commissioner reversed her “second fraud” penalty. (CP 1108 ¶II) Also, the Commissioner adopted each and every ALJ Finding of Fact without material² alteration (CP 1107) The Trial Court affirmed all Commissioner Findings and Conclusion. (CP 3-4)

1

The trial court likewise consolidated Michael and Melody’s case in one trial. (CP 8)

2

The Commissioner’s modifications to findings 15 and 18 fixed sense and syntax errors made by the ALJ. Modifications to finding 8 fixed a typographical error.

c. Parties. Michael and Melody were founders of Operation Lookout, (“the Foundation”) a 501c3 charitable foundation serving the interests of missing or abducted children and their families. (CP 1115, FF#2, CP 1100 FF#2) Michael handled operational duties as Executive Head of Case Management; Melody as Executive Director. (CP 1115 FF#1; CP 1099, FF-1) Each was appointed a Director. (Id.) Foundation Directors volunteered their Board service, without compensation. (CP 732; 1092; 1056 ¶VII.A; 694)

d. Commissioner’s Key Findings.

The Commissioner’s key fraud findings rested upon a three-legged foundation. First, the Commissioner found that the Foundation reported and paid ESD tax for Michael and Melody for wages and hours itemized during the claims period, which reports contradicted claims of unemployment. (CP 1116, FF#18)(CP 1101, FF#20) Second, the Commissioner’s Data Mining division discovered the Foundation’s annual corporate IRS Form 990 tax reports listing Michael and Melody to be corporate officers or key employees, working a 40 hour-per-week schedule and receiving an annual wage for services rendered (CP 1116, FF#10 and FF#17) (CP 1100, FF#10; 1101 FF#18); which contradicted the Appeals filed by Michael and Melody asserting that the Foundation paid them deferred wages earned and accrued during cyclical slowdowns in the past. (CP 1116, FF#18) (CP 1101 FF#20) Also, the Commissioner

found that the Gibsons' continuing service to the Foundation Board after layoff constituted work for pay. (Id) Third, the Commissioner found that the Gibsons checked the boxes on online ESD certification forms, relied upon by ESD, which asserted each week "no work" and "no earnings" and which omitted to report deferred compensation. (CP 1100, FF#7 FF#15; CP 1115, FF#7)

e. Procedural Irregularities

At the 11th hour, one day prior to the Gibsons' scheduled September 19 evidentiary hearing, ESD faxed to Court and counsel their Data Mining record of Form 990 tax reports, (CP 66-67) which had not been identified or disclosed by September 14 as ordered by the ALJ. (CP 45) These late-filed documents were targeted for rejection by Gibsons' written motion to strike; filed in advance of hearing. (CP 66-67) The OAH accepted the Form 990 records over objection. (CP 157) The Commissioner later identified snippets from the tax forms to be the centerpiece of ESD's case against the Gibsons (CP 1116 FF#10; 1100 FF #10) But the Commissioner did not preserve for review a record of the motion to strike.

Nor were the late-filed copies shared with the Foundation representative, tax preparer Martin Eller, who, testifying by cell phone at the 11th hour from a remote location, was forced to testify about the content and meaning of the evidence without a copy to review. (CP 101)

Because Eller's need to explain the evidence emerged after the 11th hour, he described his preparation, his access to the Gibsons and counsel, and his potential testimony as "inadequate." (CP 80)

Melody had filed in writing in advance of the consolidated hearing a motion for continuance, asserting that her son-in-law's September 19 emergency cancer tumor surgery had been announced by doctors on September 18. (CP 67) The ALJ denied the continuance. (CP 68) But the Commissioner did not preserve for review the record of it--no letter from the doctor, no affidavit of Gibson, no moving papers. Melody Gibson was listed in Foundation papers as the uncompensated Board Treasurer, while Michael Gibson's operational oversight made him Board President. (CP 1056) So with the continuance denied, no testimony could be furnished by the Board treasurer. (CP 68) The ALJ issued findings that Michael was unresponsive about pay issues (CP 1115, FF#1) and that Melody did not attend the hearing. (CP 1099, FF#4)

In overseeing the conduct and order of examination the ALJ conducted the following interrogation:

Q (Judge Fager) So I recognize in this case that there is quite a bit of- there is going to be a little bit of confusion here because, if I understand, Michael Gibson and Melody Gibson and Operation Lookout are **essentially all one in the same**. We have two claimants and the Employer, but those two claimants, in fact, have this business, Operation Lookout; is that correct?

(Jacobson) Object. Argumentative. Leading.

(Judge Fager) Okay. I'm going to ask for clarification on any identification between the Employer and the claimant.

Q (Judge Fager) Ms. Gibb, do you know any distinction between

them?

A: (Gibb)There is **not a clear distinction** between that, no. (CP 110) (emp added)

On this basis, the ALJ found the facts to be that Melody “never gave the Department the full story and received benefits as a result” (CP 1101, FF#19) having **involved herself in the businesses of Operation Lookout, Caring for Our Children and NXT2NU without ever notifying the Department or reporting** work or earnings. (CP 1101, FF#19) (emp added) However, Melody made no claim for benefits during the 21-month interval ending fourth quarter 2011, (CP 1099) which included her 18-month stint working with NXT2NU starting in 2010 (CP 785-789) and her 6-month interval returning to Operation Lookout in 2010. (CP 770)

f. Material Facts Ignored by the Commissioner

i. Layoff and Economic Necessity The Commissioner found that the Gibsons’ work duties and schedule never changed; the only thing that changed was that sometimes the Foundation shorted them pay. (CP 1101, FF#16)(CP 1116 FF#16) But the Gibsons presented to the Commissioner layoff and economic necessity³ data. The Board voted to layoff its executives at the end of 2008 due to economic necessity. [CP 729] Further,

3

The court may take judicial notice of ascertainable and irrebutable facts—including that beginning with the \$32 billion Indy Mac bank failure in July 2008 and \$307 billion Washington Mutual Bank failure in October 2008, the US economy was plunged into a Great Recession which spanned the claims period at issue in this case from 2008 (fourth quarter) to 2012.

the Foundation's five-year history of Profit and Loss (CP 719-721) comparing gross profit, executive compensation, staff compensation, and net income was produced, to wit:

<i>Year</i>	<i>Gross Profit</i>	<i>Exec. comp. #6001 /</i>	<i>staff salary #6003 /</i>	<i>Net income</i>
2007	\$.473 Mil	\$118,326	\$77,678	\$26,241
2008	\$.771 Mil	\$ 80,562	\$54,106	\$39,742
2009	\$.256 Mil	\$ 22,229	\$49,189	\$(11,296)
2010	\$.200 Mil	\$ 30,790	\$31,543	\$(28,374)
2011	\$.189 Mil	\$ 35,372	\$18,804	\$ 12,013

(CP 675; 719-721) Pre-recession Executive Compensation of Executive Director Melody and Head of Case Management Michael averaged \$99,000. Post-recession executive compensation was a third of that. [CP 675.] Pre-recession gross profits averaged \$.6M. Post-recession gross profits were a third of that. [CP 675] Staff salaries were maintained at half their pre-recession levels. [Id.] The Foundation ran an operating loss [Id.] Michael and Melody continued their uncompensated service as volunteer board members. (CP 732; 694; 1092; 1056—"not compensated") The Commissioner ignored this third-party, objective, historical evidence without comment, as if such evidence did not exist.

ii. Tax Records—"No hours worked" A 2009 ESD advisory was addressed to the Foundation asserting that ESD tax reports identifying employee wage and hours were routinely compared against employee claims for unemployment benefits. (CP 258) The Commissioner found that Foundation wage and tax reports spotlighted the Gibsons' 40 hour

week while they received benefits. (CP 1116, FF#18)(CP 1101, FF#20)
 To the contrary, Operation Lookout’s ESD quarterly tax forms asserted
 that, every three months, Michael’s **work hours** were “no hours worked”
 [CP 767, 768, 765] or “1 hour” [CP 771, 772, 770, 769, 767,] or “ ___ ”
 (blank) (CP 766). A summary of the Foundation’s ESD tax filings shows
 Michael did not furnish services for pay during the claims period.

	2009	2010	2011
Hours Q1	“Zero hours”	1	1 (note: no hours) ⁴
Hours Q2	___	1	1
Hours Q3	1	1 ⁵	1
Hours Q4	1	1 (note: no hours)	1

(Re-2009: CP 765, 766, 771, 772) (Re-2010: CP 770, 769, 960, 767) (Re-
 2011: CP 768, 961–2011). A summary of the Foundation’s ESD tax filings
 shows that Melody did not furnish services for pay during the claims
 period.

4

ESD’s 2011 Printout (CP 961) of Michael’s wages and hours reported 468 hours of work
 by Michael in quarter one of 2011. Quarter one was amended by Company Bookkeeper
 Bennett, due to a computerized payroll coding error (CP 768). There were actually “no
 hours worked” for the first quarter of 2011. (CP768) Nor was there any claim for benefits
 during that period. (CP 981)

5

ESD’s 2010 printout (CP 960) reports one hour of Michaels work in each quarter, but 142
 in quarter 4. Quarter 4 was amended by Company Bookkeeper Bennett, due to a
 computerized payroll coding error. (CP 767) There were “no hours worked” for the fourth
 quarter. (CP 767) Nor was there any claim filed in quarter four of 2010. (CP 981)

	2009	2010 ⁶	2011	2012
Hours Q1	“Zero hours”	n.a.	n.a. ⁷	No record
Hours Q2	—	n.a.	n.a.	
Hours Q3	1	n.a.	n.a.	
Hours Q4	1	n.a.	1	

(Re-2009: CP 765, 766, 771, 772–)(Re-2010: CP 1099; (Re 2011: CP

968, 935) ESD spokesman Gibb further admitted the implication of these reports

Q: ...do you have any reason to doubt the implication here that the company was paying Mr. And Mrs. Gibson without them performing current work?

A: I believe they may have been providing **one hour of work**⁸ in that quarter. (CP 238)

But the ESD did not assess and the Commissioner did not adjudicate overpayment against Michael and Melody during one hour of service time during one week of the 13 weekly claim periods each quarter. The Commissioner’s repayment order demanded repayment from Michael for

6

No claim for benefits was filed during calendar 2010. (CP 1099) Melody performed work for Nxt2Nu Thrift Store in that interval, which paid taxes for her wages and hours. (CP 934; See CP 767 for amended 4th quarter data)

7

ESD’s 2011 Printout (CP 935) of Melody’s wages and hours reported 240 hours of work by Melody in quarter one of 2011. The quarter one Operation Lookout wage and hour report was amended by Company Bookkeeper Bennett, due to a computerized payroll coding error (CP 768). There were actually “no hours worked” for the first quarter of 2011. (CP768) Nor was there any claim for benefits during that period. (CP 1099) Melody was employed by Nxt2Nu Thrift Store in that interval.

8

ESD’s spokesperson, auditor. Gibb, could not say whether the “webtax” online tax reporting program had a built in computerized “default” which invalidated a report of wages earned unless the value of hours worked was greater than zero. (CP 240) The Court may take judicial notice of irrebuttable facts, including that online tax payments to the UI Webtax site are pre-programmed to decline tax payments upon a report of “zero” hours worked. So, in order to make quarterly deposits, the corporate bookkeeper must report a figure greater than zero in the “work hours” column, which defaults to “1 hr”.

each of the 13 weeks of benefits during every quarter from 2008 to 2012 (CP 1115, FF#8)⁹ where his service time was one hour of work. The same for Melody—the Commissioner’s repayment order demanded repayment from Melody for each of the 13 weeks of benefits paid during every quarter recording one hour of Melody’s service time to the Foundation from October, 2008 to October, 2009 and November, 2011 to February, 2012. (CP 1099; 1100, FF#8) The Commissioner ignored without comment the admissions of the ESD auditor and the objective historical evidence from third party providers,¹⁰ as if such evidence did not exist.

iii. Form 990 Tax Records

The Commissioner’s basis for disbelieving that the Gibsons were paid for **antecedent services** while receiving unemployment benefits (CP 1116, FF#18) (CP 1101 FF#20) boiled down to one record—IRS Form 990 tax reports. The Commissioner asserted that the Foundation’s IRS Form 990 tax reports identified Michael and Melody to each be (i) a full time employee (ii) working 40 hours-per-week and (iii) receiving an annual wage for services rendered. (CP 1116, FF#10 and FF#17) (CP 1100, FF#10; 1101 FF#18). However, the 2010 IRS Form 990 Section VII.A. on its face contradicts the Commissioner. Form 990 Part VII.A checked the

9

Excluding July, 2010 to March, 2011 (CP 981; 1129)

10

The ESD auditor never contacted the third party bookkeeping services to clarify. (CP 249, 269) But the corporate ESD tax forms were signed by independent bookkeeping service providers. (eg. CP 765-66, 772)

box identifying Michael and Melody to be “Neither...compensated
...**current officer**... nor director..” (CP 1056)

VII. A...

XX Check this box if neither the organization nor any related organization **compensated** any **current officer, director** or trustee. (CP 1056)(emp added)

The Foundation’s audited financial statements incorporated within Form 990 made this point explicitly—

Michael Gibson is President, Chairman of the Board, and volunteers as Head of Case Management....Melody Gibson is an active volunteer¹¹Any compensation received ...in 2010 is based on unpaid past due wages from previous years that was approved by the Board of Directors.(CP 1092)

Foundation tax preparer Martin Eller (CP 1049) explained the context and meaning of the terms used in Form 990. The “officers” and “40 hour-per-week” schedule and “W-2 earnings” and administrative titles (CP 1056) associated with Michael and Melody Gibson appeared on every tax form because IRS regulations mandated a five-year lookback period listing current **and former** officers and directors during the lookback interval. (CR 211-213) The regulations also directed the preparer to “list W-2 wages” paid to officers and directors, whether their status was current or former. The IRS regulations instructed preparers to identify “highest

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Melody's work hours and earnings during 2010 were not material to any decided issue; she made no 2010 claim for benefits. (CP 1049) The disclosure could have been material to charitable givers, which is why it appears in the financial statement.

compensated employee”¹² by listing the W-2 report with the highest amount, regardless of current or prior service. (CP 1056)

Foundation tax preparer Eller also testified about surrounding circumstances bearing on the preparation of tax forms. First, under standard procedure, he circulated each year a computer generated “pro forma” tax report, which updated the current year tax forms by importing all the data inputted into the prior year’s tax form. (CP 186) From there, the management team and Eller made the necessary updates. (CP 186) The atypical system breakdown which struck at the end of 2009 was Eller’s major heart attack and subsequent hospitalizations nine or ten times in the following year, which ensnared him in year-end management meetings with the Foundation management time while situated in a critical care unit at the hospital. (CP 185) Eller said he was unable to manage the collaboration and consult process required to update and check the prior year data on the tax forms. (CP 185) The information source for Section VII.A information was often just the pro forma tax form, without updates. (CP 185-186)

Foundation Director Roger Ward recorded in 2010 corporate minutes that Michael had retired, continued to serve in the capacity of a volunteer Director, and would need to remain on layoff status in 2010 until

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The “key employee” designation turned out to be a tax preparer error; the regulations required a \$150,000 or greater salary to meet this criteria and nobody should have been so identified. (CP 1057)

the budget expanded, though authorized to receive past due wages as cash flow permitted (CP 732) ¹³ Likewise, Melody was identified as a volunteer Executive Director, (CP 734) eligible to receive her accrued past due wages as cash flow would permit during 2010. (CP 732) Payments to Michael on the accrued debt during 2009 consisted of irregular weekly payments, most commonly zero, with otherwise intermittent payments ranging from \$200 per week up to a one-time top end equal to \$1200 (CP 433) "as cash flow permitted." (CP 732)

In addition, the 2010 Form 990 listed Melody Gibson as an officer with "average hours per week...40" with W-2 reportable compensation \$23,094. (CP 1056) However, Next2Nu Thrift store itemized and paid taxes to ESD for 611 hours of Melody's Thrift Store management services throughout four quarterly periods in 2010 (CP 785-788); while Operation Lookout itemized 1 hour of service time per quarter for the Foundation in that interval (CP 770, 769, 768)—not 40 hours per week.

During the layoff, Michael's uncompensated Board oversight services (CP 353) continued at a rate of two to three hours in a day (CP 289) Form 990 itemized Michael's 10 donated hours per week in this interval as "neither...compensated officer...or director." (CP 1056) When

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Ward mis-identified Michael's layoff date as 2009 (CP 732); but Director Kohagen recorded in 2008 that 2008 layoffs were implemented for both executives Michael and Melody as a cost reduction measure.(CP 729)

layoff ended in the spring of 2012, Michael's executive work schedule reverted to M-F 10:30-5 and full case management duties. (CP 277)

Ignoring adjacent sections of the tax form, the incorporated financial audit notes, the regulatory definitions of terms, explanatory conditions, and surrounding circumstances without comment, as if such evidence did not exist, the Commissioner drained the context and meaning from the Form 990 tax report.

iv. Deferred Payment of Prior Accrued Wages

The Commissioner absurdly characterized the Gibsons' "deferred wage" as an ersatz condition when "...he was not paid his full wages because the organization could not afford to pay..." and "claimant argues he and his wife volunteered their time when paid deferred wages...(although) well aware of the fact he was working 40 hours per week and he expected to be paid and was paid." (CP 1116, FF#16,17) The Commissioner gave credence to the ESD auditor who claimed "the department does not view this as past due wages...there was no record provided to the department to show that those were past due wages." (CP-253, 120) But the Commissioner ignored without comment the objective, third-party evidence that the Gibsons had accrued unpaid wages **for work performed** during 2003 to 2008 and were approved by the independent Directors to be paid installments against that accrual when cash flow permitted.

Foundation accountants furnished a contemporaneous 2003-2011 “past due wage reconciliation” report (CP 736) which calculated “allowed salary” minus “actually paid” to carry forward “balance due.” The balance due was increasing 2003 through 2006 during which time each Gibson was accruing more salary than paid. (CP 236) The balance due was decreasing 2008 to 2011 during which interval each Gibson was receiving payments for his or her prior service. (Id.) The Foundation furnished a separate Quickbooks daily reconciliation which recorded every weekly installment paid on this past due obligation from 2009 to 2011. (CP 737-754) The daily reconciliation ties into the past due reconciliation report. (Id.) The Commissioner ignored this objective, third-party, historic evidence without comment, as if such evidence did not exist.

Further, the past due wage reconciliation was debated and approved by disinterested directors in the corporate minutes (CP 729, 732) The charitable public was informed of this recurring related-party financial transaction in the auditor’s financial notes. (CP 1092) The corporation bookkeepers reported the condition to ESD throughout 2009, 2010 (CP 765, 767, 768) Michael Gibson testified that he and his wife did not receive pay for services in 2009-2011, but for wages accrued during a prior interval when each had deferred compensation. (CP 282) ESD’s spokesmen circulated advisories asserting that “ Under Washington State

Law, wages are considered earned wages the week the work is performed ...” (CP 258, 858) that “volunteer hours are not reportable.” (CP 137-39) The definitions which ESD circulated gave examples of “other earnings” which did not include deferred pay from a different week.

8. Did you have or receive any other income/earnings during the weeks claimed? (Include **part-time work** or earnings from **self-employment**) (CP 362)

Michael’s volunteer service was limited to his **uncompensated** Board duties (CP 1092; 1056¶VII.A; 732) formulating procedures, policy, hiring, and 501c3 IRS spokesman (CP 284) ¹⁴ Melody was likewise an uncompensated volunteer director. (CP 1092; 1056¶VII.A; 732) The Commissioner disregarded this third-party, objective, historical evidence without comment, as if such evidence did not exist.

v. Checking the online box for “no work, no earnings”

The commissioner found that Michael and Melody completed weekly online claim forms and accepted benefits while checking the box “no earnings”. (CP 1115, FF#7, 1116, FF#15)(CP 1100, FF#8, 1101 FF#15) and concluded that the certification “no work and no earnings was clearly false.” (CP 1117 ¶2; CP 11108 ¶ 2) However, the question posed by ESD’s click-a-choice online form was materially different:

for the (current) week: other earnings (yes or no)

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If on site and somebody asked, he’d occasionally pitch in to to fix a computer. (CP 285)

(See CP 469-591) (emp added) (proposed RAP 9.10; Certified Commissioner's Administrative Record for Melody Gibson, p 549-640) Reading from an ESD reference book she herself uses when advising claimant, ESD spokesperson Gibb accepted as definitive that "Hours spent doing volunteer work are not reportable." (CP 137-39)

Q: Are wages **earned** when the check is delivered...or when the service is given?

A (Ms Gibb):When the service is...

Q: ...Lets say we are talking about 2012 now. The service was provided in 2011. My employer or former employer then paid an amount that was withheld in 2011 when the service was performed and they pay it to me in 2012. There is **no current earnings** to me then, is there?

A(Ms Gibb) : If there is no work being done, correct, there wouldn't be.

...

Q: The wages are received during the period where there is **no service** performed, that's **not work**?

A (Ms. Gibb): If there is no services, no (work).

...(CP 139, 140, 141)

Asked to choose between "yes" or "no" accrued wage earnings from prior service "for the (current) week," Michael and Melody correctly chose "no." ¹⁵ But the commissioner ignored the admissions of the ESD

¹⁵ When asked different questions, the Gibsons answered differently. When **engaged to converse** about about his work situation, Michael asserted "**when I spoke** to the person, I was clear with them that I had past due wages and that I had no current earnings." (CP 282) The question "why" unemployed or request for a "reason" to claim no earnings elicited from Michael the information disseminated by ESD:

I did not earn any wages and I did not work any hours or provide any services....Under Washington State law, wages are considered earned wages the week the work is performed...(CP 339, 258)

When asked "why" no earnings, Melody responded "I have been told I can receive deferred payment from my previous employer." (CP 269; 132-33) The question "explain...no...reportable earnings" elicited the information disseminated by ESD to Melody

spokesman Gibb and the question which prompted Gibsons' response without comment, as if such admissions did not exist.

V. ARGUMENT AND AUTHORITIES

A. Scope of Review.

A reviewing court must grant relief where the agency has erroneously interpreted or applied the law. (RCW 34.05.570(3)(d)) There is no discretion to misapply the law. Schneider v. Seattle, 24 Wn. App. 251 256 (1979) ("... (A)n issue of law.... we review for error only, as no discretion inures in the trial court's decision.")

A reviewing court further is authorized to grant discretionary relief against agency orders arbitrary and capricious or not supported by evidence that is substantial when viewed in light of the whole record or where all issues requiring resolution have not been addressed. RCW 34.05.570(3)(e,f,i); See, Va. Mason Hosp. Ass'n v. Larson, 9 Wn.2d 284, 307 (1941);(findings... incomplete.... only **partial** and biased... regardless of the character of the evidence in the record to the contrary") Bach v. Sarich, 74 Wn.2d 575, 583 (findings "irreconcilable with the total evidentiary composition viewed in a favorable light"); State Ex. Rel.

I was told by your representative that deferred compensation was not current or reportable. (proposed RAP 9.10; Certified Commissioner's Administrative Record for Melody Gibson, p 430)

Asked a "reason" for appeal, Melody reported the information disseminated by ESD I performed no service and there were no earnings for the weeks at issue. Under Washington State law wages are considered earned during the week the work is performed. (proposed RAP 9.10; Certified Commissioner's Administrative Record for Melody Gibson, p 392)

Carrol v. Junker, 79 Wn.2d 12, 25-26 (1971) (“conclusions must be drawn from objective criteria.”) See, also, Hillis v. State, DOE, 131 Wn.2d 373 (1997) (“choices among the evidence taken without regard to the attending facts or circumstances”)

B MISTAKING AN EXCHANGE OF PAY FOR ANTECEDENT SERVICE TO BE STATUTORY WORK AND EARNINGS, THE COMMISSIONER MUST BE REVERSED

“Employment” and “wage” and “remuneration” and “work” under the Act all require the same three elements: (1) current personal services (2) exchanged (3) for compensation. RCW 50.04.310, 50.04.100, 50.04.320(4) ¹⁶ Without the designated **employer** relationship and a **current exchange**, there is no wage and there is no employment. W. Transp. Inc. v. Emp Sec Dept., 110 Wn. App. 440, 451 (2002) (“(E)mployment exists if (1) **the worker performs** personal services for the alleged employer and (2) if the **employer pays wages for those services**”)(emp. added) Where the quid pro quo exchange is broken, there is no “service...**for wages**” and no “remuneration...for service” and no “service **with respect to which** ...remuneration is payable. RCW

¹⁶ RCW 50.04.100 provides;
(100)Employment.....means (i)personal service...(ii) **performed for** (iii)wages
(320)(2) Wages for the purpose of payment of benefits.....means **remuneration paid** by employer (iv) **for employment** (320)(4)(a) Remuneration means all compensation **paid for** personal services (emphasis added.) Similarly “unemployment” under the act, **negates** 3 elements: (1) performing no services (2) **with respect to which** (3) no remuneration is payable.

50.04.310 (emp added).¹⁷ In contrast, W.A.C. 192-190-040 “back pay means wages paid to a worker for a prior pay period.”¹⁸ Asserting that “neither claimant reported...**deferred wages** (with) their weekly certification for benefits” (CP 1116, 1101, FF#15) and inferring that a “no work and no earnings...report is clearly false” (CP 1117) the Commissioner misstated, misapplied, and interchanged the governing legal standards. The Commissioner mixed apples and oranges, adjudicating that an undisclosed WAC 192-190-040 payment in exchange for antecedent service (“back pay”) rendered “clearly false” the reported lack of RCW 50.04.100 current service exchanged for pay (“employment”work) and RCW 50.04.320(4a) exchange of pay for current service (“remunerative” earnings). There is no discretion afforded to misapply the governing law. The Commissioner’s error of law must be reversed. The RCW 50.20.190 and WAC 192-220-017 remedies awarded to ESD must be reversed and held for naught.

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(1) An individual shall be deemed to be unemployed in any week during which the individual (i) performs no services and (ii) **with respect to which** (iii) no remuneration is payable RCW 50.04.310. Without the designated “by employer” relationship, there is no wage and there is no employment. Okamoto v. ESD, 107 Wn. App. 490, 497 (2001) (“this definition contemplates a relationship between the parties where one pays remuneration to the other. It does not state that self-employment constitutes work”)

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RCW 50.04.320(4B) provides:
(320)(4B) Previously accrued compensation...when assigned to specific period of time by virtue of a...request of the individual compensated, shall be considered remuneration **for the period to which it is assigned.**
See also WAC 192-190-040 (1);

C. ABSENT CLEAR AND COGENT AND CONVINCING KNOWING FALSITY OR KNOWING OMISSION OF MATERIAL FACT, THERE IS NO RCW 50.20.070 MISREPRESENTATION

RCW 50.20.070 misrepresentation requires clear and cogent evidence of a knowingly false or knowingly “ignorant” material fact asserted on a claim benefit form for the purpose of receiving benefits See, WAC 192.100.050 (¶1c--“knew the statement was false or did not know whether it was true or false (which) ¶ 2... must be shown by clear, cogent, and convincing evidence”); See. Engbrecht v. Emp Sec Dept. 132 Wn. App. 423, 429 (2006) (“the speaker must have '**knowledge** of.. falsity or **ignorance...**”) (emp. added). Clear and convincing evidence that back pay or earnings in another period or accrued wage was material to the online check-the-box form (CP 1117, 1101, FF#15) cannot be inferred from this record. The **purported** trigger to signal to Michael and Melody Gibson the materiality of back pay or earnings from a different period, or previously accrued compensation from a prior year, was the check-the-box question

for the (current) week ... other earnings (yes/no)(CP 471 et seq)

The question is restricted to the specified week. Last year is not material to this week.¹⁹ The Commissioner misapplied the governing standard for clear and convincing misrepresentation and must be reversed. The RCW

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Yogi Berra’s oft-quoted answer to the question Q: “what time is it”; A: “do you mean now?” is notorious for defying logic, not because of its common sense.

50.20.190 and WAC 192-220-017 remedies awarded to ESD must be reversed.

A strong social policy favoring benefits in uncertain circumstances supports an order reversing the Commissioner's ruling.

The purpose of unemployment compensation is to reduce involuntary unemployment and ease the suffering caused thereby. RCW 50.01.010. The Employment Security Act must be liberally construed in favor of the unemployed worker. RCW 50.04.010. Liberal construction of a statute implies that any exceptions to the statute be narrowly confined. Miller v. City of Tacoma, 138 Wn.2d 318, 324, 979 P.2d 429 (1999). Thus, the 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., 110 Wn. App. at 449-50. A finding of clear and convincing omission of material **antecedent** data when the question asks "this week" would effectively strip from the statute protections which guard against disqualification from benefits. The Commissioner's order should be reversed for this added reason.

Furthermore, RCW 34.05.570(3e) discretionary choices from the evidence must be "drawn from objective criteria." Junker, 79 Wn.2d at 25-26. Here, there is nothing objective. The Commissioner cannot support finding #15 (CP 1116, 1100) with objective criteria from its check-the-box online form asking "for the (current) week---earnings [yes or no]" or "other earnings [yes or no]" because back pay earnings or prior interval earnings or deferred pay earnings are not one of the pre-printed choices. Also, "why not" or "when" or "explain... earnings" are not the question

posed. The Commissioner presumed, without evidence in support, that **deferred** earnings inhered in a yes/no question about the **current** week. Deciding the facts without an objective anchor in the evidence is an abuse of discretion which must be reversed.

The Commissioner's contradictory finding in the face of Michael and Melody's answer is also "irreconcilable with the total evidentiary composition..." Bach, 74 Wn.2d at 583. When asked to **explain** or answer "**why not**" earnings or "when...earnings" or give reasons, the Gibsons accurately reported (quoting verbatim at times from) what ESD spokesmen told them about earnings occurring when the service is given. The Gibsons' reported truthfully when asked to elaborate and reported truthfully when asked to choose yes or no about earning in the current week. Their conduct does not support "clearly false" and knowing material omissions. For these added reasons, the commissioner's RCW 34.05.570 abuses of discretion should be reversed.

D. PAY FOR ANTECEDENT SERVICES AND CURRENT UNCOMPENSATED SERVICE FOR BOARD DUTIES ARE MATERIAL YET OVERLOOKED COMPONENTS OF WAC 192-190-040 BACK PAY, REQUIRING ADDITIONAL FACT FINDING

Where all RCW 49.05.570(3)(i) material issues for resolution have not been addressed by the Commissioner, the reviewing court may make "original findings of fact...which are necessary and material to a complete disclosure." Virginia Mason, 9 Wn.2d at 308. The Commissioner mischaracterized the Gibsons' "deferred wage" as a sham and euphemism:

17....claimant argues he...volunteered ...time when paid deferred wages...

16....sometimes he was not paid his full wage because the organization could not afford to pay his wage or his wife's wage (CP 1116 FF#16, FF#17)

But absurdly reducing “deferred” wage and “volunteer” service to the gap created when pay was delayed ignores the material evidence which concerns WAC 192-190-040 back pay for antecedent service. The evidentiary record shows that “deferred pay” was the check delivered years after the service was given, not just the gap created during the waiting period. The Commissioner ignored without comment, as if non-existent, the corporation’s reconciliation record of Michael and Melody’s accrued salary account, with weekly deductions taken from the accrued totals, and its correlation to 2009 and 2010 disbursed funds and 2009 and 2010 ESD taxes paid upon the disbursements. The objective records of an obligation, board approvals to pay it, bookkeeping entries of its payment, tax payments on account of fulfillment, and accounting audit contrasted with continuing, long term, **uncompensated** volunteer service on the Foundation Board were all a necessary and material component of the link between antecedent service and current pay. The Commissioner ignored all this evidence of a material issue in dispute, as if such evidence did not exist.²⁰

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The ESD Spokesman asserted that ESD gave no consideration to the distinction between wage and back pay:

Q: -do you have any reason in your mind to doubt the implication of this chart

Virginia Mason, 9 Wn.2d at 307-08 is instructive. In that case the hearings officer failed to consider or report material evidence of Virginia Mason's not-for-profit status, in spite of a governing legal standard which exempted not-for-profit organizations from granting the disputed benefit.

The court held:

This rule does not bind the court to the administrative findings of fact... Nor is the court precluded from looking to the commissioner's record for the purpose of, in effect, making additional material findings of fact, where the administrative findings are incomplete, and where such additional findings do not controvert those conclusive findings of fact made by the administrative agency. Were the rule otherwise, then, by making only partial and biased findings of fact, the administrative tribunal could compel the court to sustain [308] the administrative conclusions and decision, regardless of the character of the evidence in the record to the contrary.

...

In addition, we have, in effect, made certain original findings of fact, which are unconverted by the testimony or by the facts found by the appeal examiner, and which are necessary and material to a complete disclosure of appellant's character of organization and methods of operation....(to wit) that none of the net earnings of appellant inure ~~to~~ the benefit of any private individual ...which refute the conclusion reached by the administrative tribunal.

Virginia Mason, 9 Wn.2d at 307-08. Our facts are like the facts in

Virginia Mason. Here, the Commissioner simply ignored, without

comment, as if non-existent, the Foundation's record of an obligation to

pay for antecedent services, record of payment for it, record of tax paid on

account of discharge of the obligation, and Gibsons' delivery of antecedent

that when the Gibsons were paid in 2009 and '10 and '11 by Operation Lookout, they were being paid for debt that accumulated in 2004 and '05 and '06 and services that were provided in 2004 and '05 and '06? A: Well...but yes, that's -I know that's why. That's why we are here because the Department views this as ...as wages and not deferred. (CP 156)

service under the back pay regulation, WAC 192-190-040. The Commissioner likewise failed to consider that in describing “volunteer” service setting policies, procedures, hiring, and fulfilling 501c3 requirements, (CP 284) Michael Gibson was meeting the Foundation’s stipulation that board member volunteer to serve without compensation. (CP 693; 1056 ¶VII.A). In keeping with Virginia Mason, the court should issue findings that (1) each Gibson received back pay for antecedent services throughout the claims period; (2) each gave their continuing Board service without compensation throughout the claims period; (3) each Gibson furnished no “employment” services; and (4) there existed no RCW 50.20.070 knowing misrepresentation. The Court should reverse the Commissioner and hold for naught its decision. At the very least, the Court should invalidate the Commissioner’s decision and remand with instructions to elicit evidence and decide the issue whether the Gibsons received WAC 192-190-040 back pay during the claims period.

E. CURRENT FULL TIME EMPLOYMENT, 40 HOURS PER WEEK OF WORK, AND PAY FOR CURRENT SERVICES RENDERED ARE FINDINGS IRRECONCILABLE WITH THE EVIDENTIARY RECORD AS A WHOLE AND MUST BE REVERSED.

The Court is empowered to reverse arbitrary findings “irreconcilable with the total evidentiary composition viewed in a favorable light,” Bach v. Sarich, 74 Wn.2d at 583. The Commissioner’s sole record of an exchange of current service for pay at 40 hours per week (CP 1116,

FF#10, FF#17; 1100, FF-#10,#18) is a snippet divorced from its context taken from Section VII.A of the Form 990 tax report. Taking a snippet of the tax report for the whole, the Commissioner drained the context and meaning from the immediately adjacent sentence in Form 990 that the corporation reported wages for “neither... compensated... current officers” nor “compensated... directors.” (CP 1056) The Commissioner drained from Form 990 the context and meaning provided by note 6 to its audited financial statements. (CP 1092) Relying on the out-of-context and **fully contradicted** snippet for its entire proof of current full-time service, pay for current service, and undisclosed current service, the Commissioner engaged in arbitrary decision making and should be reversed.

The out-of-context snippet is rendered more irreconcilable with the total evidentiary composition in light of tax preparer Eller’s testimony about regulatory definitions attached to the form, methodology in preparing the form, and surrounding circumstances. The 5-year lookback period and comparative W-2 formula—each mandated by IRS regulations—both operate regardless of current service to the corporation. This is why **uncompensated** officers Michael and Melody were listed as officers and directors working 40 hours with reportable W-2 income on the form. Inferring that wages were paid for current services, the Commissioner further disregarded without comment, as if non-existent, important, qualifying data impeaching the administrative finding. Finally,

Eller's report of the surrounding context was disregarded without comment as if non-existent— Eller's nine recurrent hospitalizations starting at the end of 2009, his memory of emergency Foundation board meetings while situated in critical care, his inability to comprehensively handle business, and his standard procedure to circulate in "year 2" a pro-forma tax form that copied the data printed from the "year 1" form. These material considerations, too, were irreconcilable with Commissioner reliance upon the snippet taken out of its context in the tax form. For this added reason, the Commissioner's findings are arbitrary and the Court should reverse. The very least the Court should do is remand for rehearing to determine the definitions, methods, and surrounding circumstances that led to the creation of the Form 990 Tax reports. In either case, the RCW 50.20.190 and WAC 192-220-017 remedies awarded to ESD must be reversed.

F. Reasonable attorneys' Fees

RCW 50.32.160 provides in relevant part:

ATTORNEYS' FEES. ... if the decision of the commissioner shall be reversed or modified, such fee and the costs shall be payable out of the unemployment compensation administration fund.

Compensation for Gibsons' legal expense in proceeding should be awarded.

VI. Conclusion Based on the foregoing, the Commissioner's findings or conclusion must be either reversed or modified. The RCW 50.20.190

and WAC 192-220-017 remedies awarded to ESD must be reversed. The Gibsons are entitled to an award of reasonable attorneys' fees.

VII. Appendices. The Commissioner's Order of 23 January 2014 authorized the parties to incorporate in the appellate record the Commissioners' file in Melody Gibson OAH No. 04-2012-18385. The opening brief requires the court to review and cites to excerpts from the indicated Commissioner's file its pages ## 430, 392, 549. A copy of these excerpts will be filed for the appellate record as ordered, but are unavailable at time of this submission. A copy of the Notation Ruling and the parties' stipulated motion is attached in the appendix as a placeholder, until a copy of the indicated record items can be forwarded to the court.

Appendices 1, 2, 3

*The Court of Appeals
of the
State of Washington*

RICHARD D. JOHNSON,
Court Administrator/Clerk

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January 23, 2014

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CASE #: 71038-9-1

Michael & Melody Gibson, Appellant v. State of Washington Employment Security Division,
Respondent

Counsel:

The following notation ruling by Richard D. Johnson, Court Administrator/Clerk of the Court was entered on January 23, 2014, regarding Parties' Motion for RAP 9.10 Relief:

The parties must make any missing record part of the record on review in the trial court. Once accepted by the trial court, a supplemental designation of clerk's papers should be filed making the record(s) part of the record on appeal.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

lls

Please Rule upon receipt,
without oral argument

WASHINGTON STATE COURT OF APPEALS,
DIVISION ONE AT SEATTLE

Michael and Melody Gibson, appellants)	NO 71038-9-I
v)	
State of Washington, Employment)	Stipulated Motion for RAP
Security Division respondent)	9.10 Relief
_____)	

1. MOVING PARTIES. The appellants and respondent join together as moving parties.
2. RELIEF SOUGHT. The parties seek an Order pursuant to RAP 9.10 authorizing petitioner's counsel
 - a. transmit to the court of appeals clerk and designate as a supplemental record on review
 - b. the Certified Administrative Board Record ("CABR") pertaining to appellant Melody Gibson ("Melody")
 - c. in a PDF or CD or paper format
3. RELEVANT SECTIONS OF THE RECORD. The appellants are husband and wife who appeal the final decisions by the Employment Security Department's ("Department") Commissioner. (Declaration of Jacobson, ¶1) These matters were consolidated in a single administrative

hearing to promote efficiency, and the trial court consolidated for disposition the petitions for review. (Declaration of Jacobson, ¶2)

The exigent circumstance which makes relief necessary is that, while the Department served upon each party in the trial court a true copy of the CABR pertaining to Michael Gibson (“Michael”) and the CABR pertaining to Melody, the clerk of the trial court did not preserve the CABR pertaining to Melody. (Declaration of Jacobson, ¶3) A complete CABR pertaining to Michael has already been designated for review (Declaration of Jacobson, ¶3) But the record on appeal at this juncture remains insufficient to determine all the issues presented for appeal which pertain to Melody.

The due date for filing an opening brief is January 27th (Declaration of Jacobson, ¶4) Expediting transmission of the record directly to the appeals court clerk and using an existing certified copy in the possession of counsel serves the interest of expediting disposition of the appeal and conserving costs. (Declaration of Jacobson, ¶4)

Counsel seek authorization to

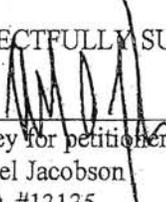
- a. transmit to the court of appeals clerk and designate as a supplemental record on review
- b. the complete CABR pertaining to Melody
- c. in a PDF or CD or paper format

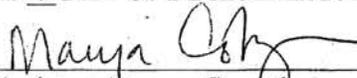
4. GROUNDS FOR RELIEF. RAP 9.10 anticipates such an exigency and provides in material part:

9.10....If the record is not sufficiently complete to permit a decision on the merits of the issues presented for review, the appellate court may, on its own initiative or on the motion of a party (1) direct the transmittal of additional...administrative records and exhibits certified by the administrative agency....

The parties stipulate that this is an appropriate circumstance, encompassed within the rule, to grant the indicated relief.

RESPECTFULLY SUBMITTED THIS 26th DAY OF DECEMBER 2013.


attorney for petitioners
Michael Jacobson
WSBA #13135
(copy received)


Assistant Attorney General
Attorney for Respondent
Marya Colignon
WSBA# 42225
(copy received)

Please Rule upon receipt, without oral argument

Michael and Melody Gibson, appellants) NO 71038-9-I
v) Declaration of Jacobson Re:
State of Washington, Employment) Stipulated Motion for RAP
Security Division respondent) 9.10 Relief
_____)

COMES NOW MICHAEL JACOBSON, ATTORNEY FOR

APPELLANTS, who makes this declaration based upon personal knowledge.

1. The appellants are husband and wife who were executives of a non-profit charity and whose unemployment benefits were contested by the Commissioner of Employment Security, each for the same basic reasons and who have appealed that determination.
2. After the matters were consolidated in a single administrative hearing to promote efficiency, the trial court consolidated for disposition the petitions for review. (Declaration of Jacobson, ¶2)
3. The exigent circumstance which makes relief necessary is that, while the Commissioner of Employment Security served upon each party in the trial court a true copy of the CABR pertaining to Michael Gibson ("Michael") and the CABR pertaining to Melody, the clerk of the trial court did not preserve the CABR pertaining to Melody. A complete transcript of the CABR pertaining to Michael has already been designated

for review But the record on appeal at this juncture remains insufficient to determine all the issues presented for appeal which pertain to Melody.

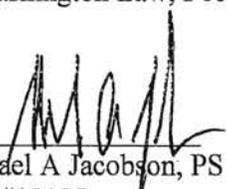
4. The due date for filing an opening brief is January 27th Expediting transmission of the record directly to the appeals court clerk and using an existing certified copy in the possession of counsel serves the interest of expediting disposition of the appeal.

5. The parties seek authorization to

- a. transmit to the court of appeals clerk and designate as a supplemental record on review
- b. an agreed excerpt of CABR constituting the CABR
- c. in a PDF or CD or paper format

Under pain of penalty for perjury under Washington Law, I certify the foregoing is true and complete

DATED: 22 December 2013


Michael A. Jacobson, PS Inc
WSB#13135

CERTIFICATION OF SERVICE

I certify that I delivered a true copy of this motion and declaration to counsel for respondents Colignon this 26 day of December 2013 via ordinary mail, postage prepaid.

