

NO. 73619-1

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

JUSTIN M. ROBINSON

Appellant,

vs.

EMPLOYMENT SECURITY DEPARTMENT OF THE STATE OF
WASHINGTON

Respondent/Cross-Appellant.

BRIEF OF RESPONDENT / CROSS-APPELLANT

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I. INTRODUCTION

The King County Superior Court remanded Justin Robinson's unemployment benefits appeal for additional fact-finding and denied his request for attorney fees. Robinson's appeal to this Court requests reversal of these orders and of the Employment Security Department's order denying benefits. The Department cross-appeals, asserting this Court, sitting in the same position as the superior court, should vacate the superior court's remand order and instead affirm the Department's order denying benefits because substantial evidence in the record supports the determination that Robinson quit his job effectively immediately.

In the alternative, if the Court reviews the superior court's remand order, it should hold the superior court validly exercised its authority under Administrative Procedure Act (APA) to remand matters when the record on review is inadequate. Further, because the superior court only remanded the case—and did not modify or reverse the Commissioner's decision—Robinson is not entitled to attorney fees and costs under the attorney fee provision of the Employment Security Act, RCW 50.32.160.

II. COUNTERSTATEMENT OF THE CASE

Justin Robinson worked as a protections specialist for Target from June 19, 2012, until he submitted his resignation on May 18, 2014. Administrative Record (AR) 87; Finding of Fact (FF) 3. Robinson applied

for unemployment benefits, and the Department denied his claim, finding that he was ineligible for benefits because he quit his job without good cause. AR 19-21, 32, 53-57; FF 3. Robinson requested a hearing before the Office of Administrative Hearings (OAH) to contest the denial. AR 60. The parties disputed how the job separation occurred. Robinson claimed that although he quit, he had given the employer two weeks' notice, but the employer accelerated the job separation. AR 31; FF 4. If that were true, the job separation would be adjudicated as a discharge without misconduct, and he would be eligible for unemployment benefits under RCW 50.20.066. In contrast, the employer asserted that Robinson quit effective immediately and without statutory good cause, and he therefore he should be ineligible for benefits under RCW 50.20.050. AR 24-25, 72; FF 7.

The hearing established that on May 17, 2014, Robinson texted his immediate supervisors, Julia Robison and John Randall, to inform them that he would be resigning because of a personal conflict at work. CR 18; 21, 72; FF 5-6. Randall texted back, "Worried about you. Don't job abandon. If you're going to quit, put in your two weeks instead of leaving on bad terms and leaving us high and dry." AR 49, 88; FF 6. The claimant then responded, "hey John, you and or whoever can end my employment." CR 32, 48; FF 6.

The employer's representative testified that Robinson then called human resources executive team manager Emily Hughes the following day and quit effective immediately. AR 24-25, 72; FF 7. But at the time of the hearing, Hughes was no longer working for the employer. However, new human resources manager Annie Kroshus testified that, based on her review of e-mails Hughes sent to the employer's unemployment hearing consultants, Robinson had resigned effective immediately. AR 25, 72; FF 9. Kroshus testified that the employer considered Robinson eligible for rehire if he wished to return to work in the future. AR 26. Kroshus also testified that human resources keys into the computer the exact date the employee indicates is the last day they want to work; they do not override an employee's requested quit date to make a quit effective immediately. AR 26. And in this case, the date keyed into the system was the day Robinson contacted the human resources office—May 18. AR 26. Finally, Kroshus testified that when an employee intends to work for a period of time after giving notice, the employee completes a voluntary resignation form; however, Robinson did not complete one when he quit. AR 25-26; FF 8.

Robinson testified that he intended to work two weeks after giving notice, but claimed the employer accelerated the job separation. AR 31; FF 4. Robinson acknowledged that during his conversation with human resources, the employer attempted to see if he would prefer to take a leave

of absence rather than quit, but he refused. AR 35-36. Robinson alleged that he went to work on May 19, the day after talking with Hughes, and was unable to clock in. He said he was told to talk to Randall or to his ETO¹ regarding the schedule if he thought there was a mistake. AR 19; FF 4. At the hearing, Robinson could not recall the specific ETO he allegedly talked with and stated that he did not speak with Randall. AR 40-43. Robinson claimed that he did not speak with Randall because Randall had not clocked in and that he did not want to call Randall's personal phone if he was not working. AR 41-43. Robinson further asserted that in the following days, he twice attempted to call human resources asking why he was not on the schedule, but the employer never gave him an explanation. AR 20; FF 4.

But Robinson's supervisor, John Randall, refuted Robinson's testimony. Randall testified that he was working at the time Robinson allegedly attempted to clock in and that Robinson knew how to reach him if an urgent situation arose, but he never saw or spoke with Robinson on the day Robinson claimed he came into work. AR 29-31; FF 4. Randall further testified that he was also available to speak by phone and that Robinson had corresponded with him by phone just two days earlier. AR 31-32.

¹ The record does not indicate what the ETO position is or what the abbreviation stands for, but it is clear from the record that the position has some authority over scheduling within the employer's workplace. *See* AR 18-19.

The Administrative Law Judge (ALJ) and the Commissioner considered the conflicting testimony, and both explicitly rejected Robinson's version of the job separation, finding the "claimant's testimony was not credible":

The testimony of the employer's witnesses was logical and consistent. It does not make logical sense that the employer would have accelerated the job separation, but still considered claimant to be eligible for re-hire. Nor does it make logical sense that claimant would have been able to correspond with supervisors and human resources over the phone and through text message on May 17-18, 2014, yet after May 19, 2014 claimant was not able to speak or correspond with a supervisor or human resources.

AR 88; FF 4; *see also* AR 103-04 ("Additionally, our thorough review of the record convinces us that the claimant is not a credible witness."). Accordingly, the ALJ, and subsequently the Commissioner, determined that Robinson quit effective immediately and without good cause. AR 86-96.

Robinson then sought judicial review in the superior court. After briefing and oral argument, the superior court remanded the case to OAH for "additional fact finding to the issue of whether the claimant resigned giving two-weeks' notice or resigned effective immediately when talking with the human resources employee Emily Hughes." CP 14. The court concluded the Commissioner had depended "on unreliable hearsay evidence," and, therefore, additional fact finding was necessary. CP 14.

Robinson filed a motion for attorney fees and a motion for reconsideration, which were denied. CP 15, 19.

Robinson filed a motion for discretionary review with this Court, arguing that the superior court's remand order was not authorized under RCW 34.05.562(2) and that he was entitled to attorney fees under RCW 50.32.160, even though the superior court did not reverse or modify the Commissioner's decision. The Department subsequently filed a notice of conditional cross-appeal, arguing in the event this Court accepted review, the Court should affirm the Commissioner's decision denying benefits because substantial evidence in the record supports the determination that Robinson voluntarily quit effectively immediately and without good cause. CP 21. The Court's Commissioner initially denied Robinson's motion, but this Court granted Robinson's motion to modify and accepted review.

III. COUNTERSTATEMENT OF THE ISSUES

1. Under the Washington Administrative Procedure Act, this Court sits in the same position as the superior court and reviews the underlying Commissioner's decision. Should the Court affirm the Commissioner's decision and vacate the superior court remand because substantial evidence in the record supports the finding that Robinson quit effective immediately?
2. Under RCW 34.05.562(2)(a), a reviewing court may remand a matter for additional fact-finding if the agency failed to prepare a record suitable for judicial

review. If the Commissioner's order is not affirmed pursuant to issue 1, did the superior court err by remanding Robinson's case based on a ruling that the evidentiary record surrounding Robinson's employment separation was inadequate due to the Commissioner's dependence on hearsay evidence?

3. Under RCW 50.32.160, a claimant is entitled to attorney fees only when the Commissioner's decision is "reversed or modified." Did the superior court correctly deny attorney fees because the decision was remanded for additional fact-finding, not reversed or modified?
4. Should this Court deny attorney fees under RCW 50.32.160 because there is no basis to reverse or modify the Commissioner's decision?

IV. STANDARD OF REVIEW

The APA, chapter 34.05 RCW, governs judicial review of a final decision by the Department's Commissioner. RCW 50.32.120; RCW 34.05.510; *Verizon Nw., Inc. v. Emp't Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). The standard of review is of particular importance in this case because Robinson's briefing bypassed the findings of facts and relies on his self-serving testimony, which was explicitly rejected by the Commissioner. Moreover, this Court sits in the same position as the superior court and should review the underlying Commissioner's decision, not the superior court's remand order. *See e.g.* Br. of App. at 4-8; *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993).

The Commissioner's decision is considered prima facie correct, and the burden of proving otherwise rests on the party challenging the decision. RCW 34.05.570(1)(a); *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010). In this case, that burden falls on Robinson.

Judicial review is limited to the agency record. RCW 34.05.558. The court must uphold the Commissioner's findings of fact if they are supported by substantial evidence. *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750, 755 (1996). 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). Evidence may be substantial enough to support a factual finding even if the evidence is conflicting and could lead to other reasonable interpretations. *Fred Hutchinson Cancer Research Ctr. v. Holman*, 107 Wn.2d 693, 713, 732 P.2d 974 (1987).

The reviewing court is to "view the evidence and the reasonable inferences therefrom in the light most favorable to the party that prevailed" at the administrative proceeding below. *Tapper*, 122 Wn.2d at 407. The court may not substitute its judgment for the agency's on the credibility of witnesses or the weight to be given to conflicting evidence. *Smith*, 155 Wn. App. at 35.

Questions of law are subject to de novo review. *Tapper*, 122 Wn.2d at 403. The issue of how to characterize a job separation presents a mixed question of law and fact. *Safeco Ins. Co. v. Meyering*, 102 Wn.2d 385, 390, 687 P.2d 195 (1984). The manner in which an individual's employment is terminated is a matter of fact. *Id.* A determination that the facts show a quit or discharge is a question of law. *Id.*

As discussed next, the Department agrees that if Robinson gave two-weeks' notice, but the employer accelerated the job separation, that would amount to a discharge as a matter of law. And Robinson agrees that if he quit effective immediately, that amounted to a voluntary quit without good cause as a matter of law. Therefore, the threshold issue in this appeal is whether substantial evidence supports the Commissioner's findings that this job separation occurred when Robinson quit effective immediately. The issue regarding the remand arises only if Robinson demonstrates that substantial evidence does not support the findings.

V. ARGUMENT

This Court sits in the same position as the superior court and reviews the Commissioner's decision, not the superior court's orders, by applying the APA standards directly to the administrative record. *Smith*, 155 Wn. App. at 32. Having accepted review of this case, this Court does not need to determine the validity of the superior court's remand order.

Instead, the Court should vacate the superior court's remand order and affirm the Commissioner's decision denying benefits because there is substantial evidence in the existing record to support the Commissioner's finding that Robinson quit effective immediately.

Alternatively, if the Court reviews the superior court's remand order, the Court should find it was a valid exercise of the reviewing court's remand authority. Under the APA, the superior court may remand a matter to an administrative agency for additional fact-finding if the administrative record is not suitable for judicial review. RCW 34.05.562(2)(a). Here, the court found the agency failed to prepare an adequate evidentiary record to determine the nature of Robinson's job separation, so it was authorized to remand for further evidence.

Regardless of whether this Court affirms the Commissioner's decision or alternatively affirms the superior court's remand order, Robinson is also not entitled to attorney fees. RCW 50.32.160 authorizes an award of attorney fees only if the Commissioner's decision is reversed or modified. Because the superior court remanded for additional fact-finding, and case law is clear that a remand does not entitle a claimant to fees because it is a form of relief that is distinct from a reversal or modification, the Court should deny attorney fees. *Hamel v. Emp't Sec. Dep't*, 93 Wn. App. 140, 148, 966 P.2d 1282 (1998).

A. The Court Should Affirm the Commissioner’s Determination That Robinson Quit Effective Immediately and Without Good Cause Because It Is Supported by Substantial Evidence

The Employment Security Act was enacted to provide compensation to individuals who are “involuntarily” unemployed “through no fault of their own.” RCW 50.01.010; *Tapper*, 122 Wn.2d at 408. The Act requires that the reason for the unemployment be external and apart from the claimant. *Cowles Publ’g Co. v. Emp’t Sec. Dep’t*, 15 Wn. App. 590, 593, 550 P.2d 712 (1976). Thus, a claimant who voluntarily quits employment is not eligible for unemployment benefits unless he proves he quit with good cause.

How a job separation is initially characterized, either as a voluntary quit or a discharge, will trigger which statutory section, and which analytical inquiry, will apply to the facts at issue. *Safeco*, 102 Wn.2d at 389. Whether RCW 50.20.050 (voluntary quit) or RCW 50.20.066 (discharge for misconduct) applies to a claim depends upon the event that causes the unemployment; both sections will not apply to the same set of facts. *Id.* When an employee intentionally terminates his own employment, the separation is properly adjudicated as a quit. *Id.* at 392-393. If the employee gives notice of his resignation, but the employer accelerates the date of the job separation without paying the employee through the notice period, that amounts to a discharge. *In re Kenneth A.*

Moa, Empl. Sec. Comm'r Dec. 1132 (1974);² *see also Safeco*, 102 Wn.2d at 393-94 (employee who quit with two weeks' notice, but was paid through the notice period and told not to work, was deemed to have quit work).

Robinson challenges the nature of his separation from employment, claiming he was discharged because he gave two-week's notice of his resignation, but the employer accelerated his last day of employment. Br. of App. at 4-6. But the Commissioner found his testimony was not credible and determined that he quit effective immediately, making the job separation a quit without good cause. AR 88, 103-04; FF 4. Therefore, the crux of this case is whether substantial evidence supports the Commissioner's resolution of the conflicting facts.

Here, substantial non-hearsay evidence in the record supports the Commissioner's credibility determinations and findings that Robinson resigned effective immediately. Accordingly, the Court should vacate the superior court's remand order and affirm the Commissioner's determination.

² Under RCW 50.32.095, the Commissioner may designate certain Commissioners' decisions as precedent, which serve as persuasive authority for this Court. *Martini v. State, Emp't Sec. Dep't*, 98 Wn. App. 791, 795, 990 P.2d 981, 984 (2000). A copy of the *In re Kenneth A. Moa* is attached.

1. Substantial evidence supports the Commissioner's determination that Robinson quit effective immediately

Substantial evidence supports the Commissioner's determination that Robinson quit effective immediately, and thus the matter was properly determined to be a voluntary quit.

On May 17, 2014, Robinson texted his immediate supervisors Julia Robison and John Randall, notifying them that he would be resigning because of a personal conflict at work. CR 18, 21, 72; FF 5-6. At that time, Randall advised the claimant to follow the employer's resignation policy by "put[ting] in your two weeks instead of leaving on bad terms and leaving us high and dry." AR 49, 88. But the claimant responded, "hey John, you and or whoever can end my employment." CR 32, 48.

The employer testified that Robinson subsequently called human resources executive team manager Emily Hughes and quit effective immediately. AR 24-25, 72; FF 7. Although Hughes was no longer working for the employer at the time of the hearing, new human resources manager Annie Kroshus testified that, based on her review of e-mails Hughes sent to the employer's unemployment hearing consultants, Robinson had resigned effective immediately. AR 25, 72; FF 9. Kroshus testified that the employer considered Robinson eligible for rehire if he wished to return to work in the future. AR 26. Kroshus also testified that Target's human

resources' standard business practice is to key into the schedule the exact date the employee indicates is the last day they want to work. AR 26. In this case, the date keyed into the system was the day Robinson contacted the human resources office—May 18. *Id.* Kroshus further testified that when an employee intends to work for a period of time after giving notice, human resources will have that employee fill out a voluntary resignation form. AR 25-26; FF 8. Robinson did not complete the form. *Id.*

The testimony of Robinsons' supervisor, John Randall, further supports the Commissioner's determination that Robinson quit effective immediately. Robinson claimed he came to work after speaking with human resources and spoke with his "ETO," but he could not recall the specific ETO he spoke with. AR 39-40. He also stated he did not speak with Randall because he thought he was not there. AR 41-43. But Randall testified he was working at the time Robinson allegedly attempted to clock in and that Robinson knew how to reach him if an urgent situation arose; in fact, Robinson had successfully corresponded with him by phone just two days earlier. AR 31-32; FF 4.

Robinson's briefing relies solely on his own testimony in an attempt to undermine this evidence. This argument is insufficient to show a lack of substantial evidence because "the existence of contrary evidence does not show the absence of substantial evidence to support [the]

challenged finding.” *Cummings v. Dep’t of Licensing*, 189 Wn. App. 1, 14, 355 P.3d 1155 (2015); *See e.g.* Br. of App. at 4-8. Robinson’s reliance on his testimony is also without merit here because the Commissioner explicitly rejected Robinson’s version of the job separation, finding his “testimony was not credible.” AR 88; FF 4. The Commissioner found it did “not make logical sense that the employer would have accelerated the job separation, but still considered claimant to be eligible for re-hire.” *Id.* Nor did it “make logical sense that claimant would have been able to correspond with supervisors and human resources over the phone and through text message on May 17-18, 2014, yet after May 19, 2014 claimant was not able to speak or correspond with a supervisor or human resources.” *Id.* The Commissioner also noted Robinson’s inability to remember whom he spoke to when he claimed to have reported to work after resigning, compared with Randall’s testimony that he did not see Robinson at the store on that day. *Id.*; *see also* CR 103-04 (“Additionally, our thorough review of the record convinces us the claimant is not a credible witness.”). This considered credibility determination cannot be disturbed on appeal. *Scheeler v. Dep’t of Emp’t Sec.*, 122 Wn. App. 484, 490-91, 93 P.3d 965 (2004) (“It is the ALJ’s role to weigh the evidence and assess credibility, and we will not disturb his credibility determinations on appeal.”); *W. Ports Transp., Inc. v. Emp’t Sec. Dep’t*,

110 Wn. App. 440, 449, 41 P.3d 510 (2002) (“The court will not substitute its judgment on witnesses’ credibility or the weight to be given conflicting evidence.”).

In short, ample evidence in the record supports the Commissioner’s credibility determination and resolution of how the job separation occurred. The superior court erred in ruling otherwise.

2. There is sufficient, non-hearsay evidence in the record to support the findings

Robinson’s assertion that the Commissioner’s finding regarding the nature of the job separation is invalid because it was “based entirely on hearsay evidence” is incorrect. Br. of App. at 1. The superior court improperly accepted this reasoning and remanded for additional proceedings.

First, the fact that there is hearsay does not demonstrate a lack of substantial evidence. Under the APA, hearsay evidence “is admissible if in the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs.” RCW 34.05.542(1). The only limit is that while hearsay evidence is admissible, factual findings may not be based exclusively on hearsay. RCW 34.05.461(4).

The Commissioner here did not base the finding that Robinson quit effectively immediately solely on Kroshus' hearsay testimony regarding her review of e-mails sent by Hughes to the employer's unemployment hearing consultants. To the contrary, the employer also provided the following non-hearsay evidence through testimony. First, there was evidence that this employer does not accelerate an employee's job separation and instead keys the separation date requested by the employee directly into the work schedule, and the date keyed into the system was May 18. AR 26. Second, the record showed that Robinson did not submit the employer's standard business form to continue working after giving notice. AR 25-26; FF 8. Third, the record showed that Robinson never spoke with his supervisor on the day he allegedly attempted to clock in. AR 29-31; FF 4. Fourth, the employer considered Robinson eligible for rehire which was inconsistent with a discharge. AR 26; FF 4. The Commissioner's finding was therefore not based exclusively on hearsay evidence, the superior court reached an erroneous conclusion, and the Commissioner's order was properly based on findings supported by substantial evidence. RCW 34.05.461(4).

In dismissing this non-hearsay evidence, Robinson and the superior court erroneously give no weight and evidentiary value to circumstantial evidence. "Circumstantial evidence is evidence of facts or

circumstances from which the existence or nonexistence of other facts may be reasonably inferred from common experience.” *State v. Jackson*, 145 Wn. App. 814, 818, 187 P.3d 321 (2008). “Circumstantial evidence is as reliable as direct evidence” and consequently a “trier of fact may rely exclusively upon circumstantial evidence to support its decision.” *Id.* Thus, because the Commissioner’s determination that Robinson quit effective immediately is supported by substantial evidence and not based solely on hearsay testimony, the finding should be upheld.

Robinson additionally argues that considering hearsay evidence was impermissible because it “unduly abridged [his] due process right to confront witnesses.” Br. of App. at 1. However, that same argument was already explicitly rejected in *Nationscapital Mortgage Corporation v. State Department of Financial Institutions*, 133 Wn. App. 723, 137 P.3d 78 (2006). The court held this argument “lacks merit” and that whether “a party’s opportunity to confront witnesses has been unduly abridged becomes an issue only when the presiding officer relies ‘exclusively’ on evidence that would be inadmissible in a civil trial.” *Id.* at 751. As in *Nationscapital*, the hearsay evidence here was “but one part of the documentary evidence to demonstrate” the allegations alleged. *Id.* Robinson’s due process rights were not abridged. The Court should vacate

the superior court's remand order and reinstate the amply supported Commissioner's decision.

3. The Commissioner properly concluded Robinson quit without good cause.

Robinson failed to establish that he had good cause to quit, and he does not argue on appeal that he had good cause. A person is generally ineligible to receive unemployment benefits when he leaves employment voluntarily, unless he had good cause to quit. The voluntary quit statute, RCW 50.20.050(2), set forth exclusive criteria for establishing good cause. The statute places the burden on claimants to establish that they meet the specific criteria in the statute. *Campbell v. Emp't Sec. Dep't*, 180 Wn.2d 566, 571-72, 326 P.3d 713 (2014). Here, it is uncontested that Robinson quit because he was unsatisfied with his relationship with his supervisor. CR 90; FF 11. This reason does not satisfy any of the reasons enumerated in RCW 50.20.050(2)(b). Accordingly, Robinson quit without good cause, and the Commissioner's decision should be affirmed.

B. Alternatively, the Superior Court Was Authorized To Remand for Additional Fact-Finding

This Court does not need to reach any additional issues if it affirms the Commissioner based on the substantial evidence. But if the Court does not affirm the Commissioner's decision, it should nevertheless uphold the superior court's remand order because the court acted within its statutory

authority when it remanded for additional fact-finding. Under RCW 34.05.562(2), a court can remand a matter if the agency failed to prepare a record suitable for judicial review. RCW 34.05.562(2)(a). The superior court in this case found the existing record was inadequate because it believed the record was composed of unreliable hearsay evidence, and it exercised the remand authority granted by RCW 34.05.562. The superior court's exercise of its remand authority was not an abuse of discretion.

Prior to making a final determination on a petition for review under the APA, a "court may remand" the matter to the agency "with directions that the agency conduct fact-finding and other proceedings the court considers necessary" if "the agency was required by this chapter or any other provision of law to base its action exclusively on a record of a type reasonably suited for judicial review, but the agency failed to prepare or preserve an adequate record." RCW 34.05.562(2)(a). Meaningful review requires an adequate evidentiary and factual record. *See Loveless v. Yantis*, 82 Wn.2d 754, 763, 513 P.2d 1023 (1973); *Pierce Cnty Sheriff v. Civil Serv. Comm'n of Pierce Cnty.*, 98 Wn.2d 690, 697-98, 658 P.2d 648 (1983). Accordingly, a remand in these circumstances serves "as a safety valve, permitting the reviewing court to require a second look at situations and conditions which might not warrant a reversal, but which, to the court

reviewing the record, would indicate to it that the [Department] may have acted on incomplete or inadequate information.” *Gunstone, State ex. Rel. v. Washington State Highway Comm’n*, 72 Wn.2d 673, 674-75, 434 P.2d 734 (1967).

For example, the court held a remand was appropriate in *McDaniel v. Department of Social and Health Services*, 51 Wn. App. 893, 894-98, 756 P.2d 143 (1988), where the superior court expressed concern about the agency’s reliance on hearsay evidence to find that an aid recipient’s husband lived at home. In that case, the only evidence presented to the administrative agency were hearsay documents containing speculation about the husband’s living situation, and direct evidence likely could have been presented. Given that showing, the court determined the decision was based on an incomplete or inaccurate record, and a superior court’s remand for additional fact-finding was not reversible error. *Id.* at 897.

This Court’s opinion in *Hong v. Department of Social and Health Services*, 146 Wn. App. 698, 192 P.3d 21 (2008), is also instructive and undermines Robinson’s assertion that the court abused its discretion. In *Hong*, the Department of Social and Health Services revoked a person’s adult residential facility license. *Id.* at 710. On judicial review, the superior court ordered a remand after expressing concerns that there was “insufficient evidence or testimony admitted into the administrative

record, to address the credibility of” an agency witness. *Id.* at 711. This Court held the superior court’s order fit “squarely within the interlocutory remand procedure authorized in RCW 34.05.562(2)” since the superior court had found there was insufficient evidence or testimony admitted into the administrative record. *Id.*

As in *McDaniel* and *Hong*, the superior court here determined the record was inadequate, and the court clearly stated that it felt a remand for further fact-finding was necessary because it was unable to determine whether the Commissioner’s findings were “supported by substantial evidence due to its dependence on unreliable hearsay evidence.” CP 14.³ Since this evidence specifically related to who initiated the job separation, the employer or the employee, and is a threshold issue that determines which party bears the burden of proof and which statutory framework applies, the court determined that meaningful review could not take place. The superior court did not abuse its discretion in exercising its statutory authority to remand for further fact-finding. RCW 34.05.562(2)(a).

Robinson also argues that remand frustrates procedural fairness by serving “only to provide the Department and the employer a second opportunity to litigate this case.” Br. of App. at 14. He is mistaken. As previously outlined, whether Robinson quit or was discharged was a

³ Robinson is incorrect that the court did not make findings regarding the need to reopen the record. Br. of App. at 13.

threshold issue that determined which party had the burden of proof. Here, the Commissioner determined that Robinson quit, and therefore he bore the burden of proving that he quit with good cause. The Commissioner determined that Robinson failed to carry his burden and therefore denied him benefits. As a result, a remand for additional fact-finding gives both parties a second opportunity to adjudicate this matter.

In support of his procedural fairness argument, Robinson incorrectly relies on *Darkenwald v. Employment Security Department*, 183 Wn.2d 237, 350 P.3d 647 (2015). That case did not address the superior court's authority to remand a case for additional fact-finding pursuant to RCW 34.05.562. Rather, it discussed the APA's bar on litigants raising new issues for the first time on judicial review because claimants should not have the opportunity to retry their case on appeal. *Id.* at 245. Review of whether Robinson quit or was discharged is a threshold issue that the reviewing court must address to decide if the agency erred. The court could reasonably decide that it could not engage in meaningful judicial review if the facts surrounding Robinson's job separation are not appropriately developed. The fact that the court exercised its statutory authority to remand a matter and request additional evidence be taken on a specific issue does not run counter to *Darkenwald*.

C. Robinson Is Not Entitled to Attorney Fees

1. A remand for additional factual-finding is not a reversal or modification

A claimant is entitled to attorney fees under the Employment Security Act only when the Commissioner's decision is "reversed or modified." RCW 50.32.160. Here, the superior court remanded Robinson's case for additional fact-finding; it did not reverse or modify the Commissioner's decision. CP 15.

Robinson incorrectly asserts that any order entered by a court that does not affirm the Commissioner's decision must be deemed a reversal or modification that entitles him to attorney fees. Br. of App. at 16-19. But the plain language of the APA and case law interpreting RCW 50.32.160 make clear that a remand for additional fact-finding does not constitute a reversal or modification. *Hamel*, 93 Wn. App. at 148. Thus, whether the Court affirms the Commissioner's decision or affirms the superior court's remand order, Robinson is not entitled to attorney fees.

This view of the meaning of reversed or modified is supported by the Employment Security Act read as a whole. The Act requires the superior court to determine whether the Department committed an error of law, which allows it to "reverse or modify":

If the court shall determine that the commissioner has acted within his or her power and has correctly construed the law,

the decision of the commissioner shall be confirmed; otherwise, it shall be reversed or modified. In case of a modification or reversal the superior court shall refer the same to the commissioner with an order directing him or her to proceed in accordance with the finding of the court.

RCW 50.32.150. That has not happened here.

Similarly, the claimant is entitled to the reasonable attorney fees and costs only if the benefit determination is “reversed or modified”:

It shall be unlawful for any attorney engaged in any appeal to the courts on behalf of an individual involving the individual’s . . . claim for benefits . . . to charge or receive any fee therein in excess of a reasonable fee to be fixed by the Superior Court . . . and *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.*

RCW 50.32.160 (emphasis added). This plain language has not been met in this case.

Finally, a statute awarding attorney fees against the state, such as RCW 50.32.160, must be strictly construed because it constitutes a waiver of sovereign immunity and an abrogation of the parties’ normal obligation to pay their own attorney fees. *Rettkowski v. Dep’t of Ecology*, 76 Wn. App. 384, 389, 885 P.2d 852 (1994), *aff’d in part, rev’d on other grounds in part* 128 Wn.2d 508, 910 P.2d 462 (1996). Given this rule of construction, the Act is clear: reasonable attorney fees are allowed only if

the decision of the Commissioner is reversed or modified on appeal to the courts.

Consistent with this statutory plain language, the Court of Appeals has held that a remand for additional fact-finding does not entitle a claimant to attorney fees under RCW 50.32.160. *Hamel*, 93 Wn. App. at 144. The claimant in *Hamel* was denied unemployment benefits after he was discharged for disqualifying misconduct. *Id.* On appeal, the superior court remanded the case for additional fact finding because the court was concerned the Commissioner did not sufficiently analyze a portion of the misconduct statute. *Id.* Based on the remand, Hamel requested attorney fees. *Id.* The Court denied the request for fees because “the superior court did not reverse or modify the decision of the Commissioner when it remanded the decision for additional fact findings.” *Id.* at 148.

As in *Hamel*, the superior court here did not modify or reverse the Commissioner’s decision; it solely remanded the matter to OAH for additional fact-finding. CP 14. Thus, the superior court appropriately denied attorney fees and costs because they were not awardable under RCW 50.32.160.

Robinson, however, argues the Employment Security Act does not explicitly authorize the court to issue a remand. He reasons that if RCW 50.32.150 and .160 are read in conjunction, a “remand” must be

included within the definition of a “modification.” Br. of App. at 16-19. However, the Employment Security Act explicitly provides that judicial review of unemployment benefits decisions are governed by the APA. RCW 50.32.120. And the plain language of the APA provides that a remand for additional fact-finding is both authorized under RCW 34.05.562(2) and distinct from other forms of judicial relief, including reversals or modifications: “If the courts sets aside *or* modifies agency action *or* remands the matter to the agency for further proceedings, the court may make any interlocutory order it finds necessary” RCW 34.05.574(4) (emphasis added); RCW 34.05.510; *see Lake v. Woodcreek Homeowners Ass’n*, 169 Wn.2d 516, 528, 243 P.3d 1283 (2010) (“[O]r” is a “‘function word’ indicating ‘an *alternative* between different or unlike things.’”).

2. The general-specific maxim of statutory construction is not applicable to the present case

While acknowledging the APA controls review of the Commissioner’s decision, Robinson nevertheless additionally argues that a “remand” must be considered a “modification” because the Employment Security Act’s judicial review provisions prevail over those of the APA under the general-specific maxim of statutory construction. Br. of App. at 20-21. However, the general-specific maxim “applies only if, after

attempting to read statutes governing the subject matter in pari material, [the court] concludes that the statutes conflict to the extent they cannot be harmonized.” *O.S.T. ex rel. G.T. v. Regence Blueshield*, 181 Wn.2d 691,701, 335 P.3d 416 (2014). Because the Employment Security Act and APA are not in conflict, the rule does not apply to the present circumstances.

When reviewing two statutes, the court “assumes the legislature does not intend to create inconsistent statutes. Statutes are to be read together, whenever possible, to achieve a harmonious total statutory scheme which maintains the integrity of the respective statutes.” *Am. Legion Post No. 149 v. Dep’t of Health*, 164 Wn.2d 570, 588, 192 P.3d 306 (2008). Here, RCW 50.32.150 of the Employment Security Act provides:

If the court shall determine that the commissioner has acted within his power and has correctly construed the law, the decision of the commissioner shall be confirmed; otherwise, it shall be reversed or modified.

(emphasis added). By its plain terms, RCW 50.32.150 only addresses what courts must do when the Department’s decision is determined to be either correct or incorrect. RCW 50.32.150 does not address what a court must do when it determines it needs additional information. The APA fills in this gap by providing for remands in situations, such as this one, where the

court determines it needs more information before concluding whether to affirm, reverse, or modify the Department's decision. *See* RCW 34.05.562(2). Since the APA's "remand" provision simply fills in a gap not addressed by the Employment Security Act, the two statutes do not conflict, and the general-specific maxim of statutory construction does not apply.

Because the superior court's remand under 34.05.562(2) was not a reversal or modification of the Commissioner's decision, the court properly denied attorney fees under RCW 50.32.160. The Court should affirm the denial of fees.

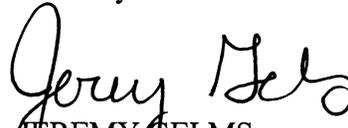
VI. CONCLUSION

The Court should vacate the superior court's remand order and affirm the Commissioner's decision because there is substantial non-hearsay evidence in the record to support the Commissioner's determination that Robinson quit effective immediately. Alternatively, the superior court did not abuse its discretion in remanding Robinson's case for additional fact-finding. Further, because the superior court only remanded the case—and did not modify or reverse the Commissioner's decision—Robinson is not entitled to attorney fees and costs under the Employment Security Act, RCW 50.32.160.

RESPECTFULLY SUBMITTED this 23RD day of September,

2016.

ROBERT W. FERGUSON
Attorney General

A handwritten signature in black ink, appearing to read "Jeremy Gelms". The signature is written in a cursive style with a large initial "J".

JEREMY GELMS,
WSBA # 45646

Assistant Attorney General
Attorneys for Respondent / Cross-
Appellant

PROOF OF SERVICE

I, Roxanne Immel, hereby state and declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 23rd day of September 2016, I caused to be served a copy of **Respondent’s Brief of Respondent / Cross Appellant** on the Appellant’s attorney of record on the below stated date as follows:

ABC Legal messenger and e-mail

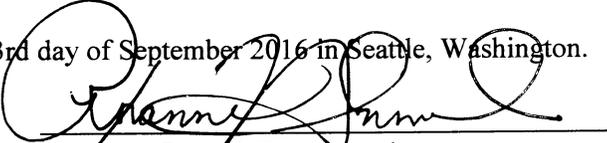
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SEATTLE, WA 98101-1176

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

Dated this 23rd day of September 2016 in Seattle, Washington.


Roxanne Immel, Legal Assistantt

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Washington State Employment Security Department Precedential Decisions of Commissioner

IN RE KENNETH A. MOA PETITIONER

Commissioner of the Employment Security Department

July 8, 1974

Empl. Sec. Comm'r Dec. 1132 (WA), 1974 WL 177500

Commissioner of the Employment Security Department

State of Washington

***1 IN RE KENNETH A. MOA PETITIONER**

***1 July 8, 1974**

***1**

Case No.

***1**

1132

***1**

Review No.

***1**

20966

***1**

Docket No.

***1**

4-02446

DECISION OF COMMISSIONER

***1** KENNETH A. MOA duly petitioned the undersigned Commissioner to review a Decision of an Appeal Tribunal entered in this matter on the 11th day of April, 1974. Having now completed a thorough examination of the record and files herein, thereby being fully advised in the premises, the Commissioner hereby enters the following:

FINDINGS OF FACT

I

***1** The petitioner, age 29, worked for the interested employer about a year as a truck driver hauling export logs to Japanese ships at Port Angeles at \$5 per hour. As with much logging, the work had its ups and downs due to weather and demand. His gross monthly wages for the year of 1973 and January, 1974, varied from \$840 to \$133, averaging out to about \$615 per month. He received \$505 for all of November, but had worked little since Thanksgiving. In December, he made \$133 and worked a little in January, 1974. An extra factor developed in January due to curtailment of ships because of the Japanese fuel shortage. The employer gave the petitioner all the work available at the time.

II

***1** He last worked January 12, 1974. He was terminated on either January 15 or 16, 1974. He testified, "I went over and talked to [employer] and told him I'm going to have to look for a steadier job. I would stick around until he found another driver if he wanted me to, or I would keep working for him until I found something else. He replied, 'there was no sense in coming back at all. That was it.' [He figured my pay and that was the end of it]. . . . I did not go over with the idea of quitting that day. . . . I wanted to notify him that I was planning on leaving so that he would have plenty of time to pick up another driver. I told him I would keep working for him until he found another driver. My employer had a health problem and did not want to drive steadily." There was other testimony by the petitioner to the same effect. The Appeal Examiner inquired if things were so slow, why did he feel it necessary to inform the employer that he was leaving. He replied, "Maybe people don't feel like they used to. I was taught by my folks and other employers that when you work for a company, you owe it some obligations, one of which is to let him know if you are going to leave." The Appeal Examiner inquired of the length of notice the petitioner felt was reasonable, and the petitioner replied, "Two weeks".

III

***1** On the S.F. Form 5361, Notice to Employer, the petitioner stated, "Discharge - was not putting in enough time." On the Employer's Report of Applicant's Separation, the employer apparently confirmed this, since he replied, "He wasn't putting in enough time." The employer replied "yes" to the following question on that form, "If discharged, was claimant so advised when he was given his separation notice?" In his appeal, the petitioner stated, "I didn't quit, I was fired." He maintained this at the hearing and in his petition.

***2** From the foregoing Findings of Fact, the Commissioner frames the following:

ISSUE

*2 Did the petitioner voluntarily quit without good cause, thereby incurring disqualification under RCW 50.20.050 of the Act, or was he discharged for misconduct connected with his work under RCW 50.20.060, or was he terminated otherwise?

*2 From the Issue as framed, the Commissioner draws the following:

CONCLUSION

*2 A voluntary quit is decided under the suitability or the valid personal compelling reasons provisions of RCW 50.20.050 of the Act when the facts of the particular case apply thereto. A discharge for misconduct connected with the work is decided under RCW 50.20.060 when the facts are such.

*2 However, there are situations other than the above when a termination results. This is the case here. It is one where an employee gives notice to his employer of his intention to quit on a future date, but prior to that date the employee is terminated by the employer as a consequence of the employee's notice. In such cases it has been held,

"... we are bound by the Superior Court's decision in the case of In re William E. F. Powell, King County Cause No. 470877, decided February 14, 1955. In the Powell case, supra, as is true in the instant matter, the claimant advised his employer on December 26, 1953, that he was resigning effective January 20, 1954. On December 30, 1953, the employer paid the claimant off in full, terminating the employer employee relationship. The Court held,

"that as a matter of law, the claimant-appellant did not leave his employment voluntarily at the time in issue, but was discharged by the employer, and the court is therefore of the view that the claimant-appellant is not subject to disqualification . . ."

"We conclude that the appellant in the instant case was discharged as a result of unilateral action taken by the employer. We find no evidence of misconduct in the present case which, if such were found to exist, would require disqualification. . . ."

"In re Nicoll, 5 Com. Dec. 595. Likewise, as was stated in another case, DPA2". . . Under such circumstances, it is seen that the employer accelerated the date of departure on his own motion, contrary to the willingness and availability of the appellant to continue working through the scheduled shift of July 19, 1964. . . ." In re Taggart, 6 Com. Dec. 602.

*2 Thus it can be seen that such cases are adjudicated as a "discharge" rather than a "quit", since it is the immediate cause of separation which is the relevant cause. When we consider the instant case under the above decisions and criteria, we find that it is a termination, but not for misconduct connected with the work.

*2 We point out the other side of the coin in a variation on the above situation; namely, one where the employee is directly informed or hears a rumor that he will be laid off in another few days or a week or so due to lack of work. In such a case the employee may decide to quit at once for reasons which appear sound to him. However, the fact remains that he had at least one or more days' or weeks' employment yet remaining at the time of his quit. In such unadorned cases, in the absence of other reasons, the Commissioner will hold ordinarily that the immediate cause of the termination was that of the employee, and that the voluntary quit was without good cause. In this latter type of case, it was the employee who accelerated the date of departure on his own motion contrary to the willingness of the employer and the availability of work; whereas, in the instant case, it was the employer who accelerated the date of departure, as has been pointed out earlier.

*3 We also point out that, but for the fact that the employer accelerated the termination, we would concur with the Appeal Tribunal and the Determination Notice that the petitioner voluntarily left work without good cause for the reasons stated in the Determination Notice. Now, therefore,

*3 IT IS HEREBY ORDERED that the Decision of the Appeal Tribunal entered in this matter on the 11th day of April, 1974, shall be SET ASIDE. The petitioner is not subject to disqualification under either RCW 50.20.050 or RCW 50.20.060, and benefits are accordingly allowed, provided he is otherwise qualified and eligible therefor.

*3 DATED at Olympia, Washington, JUL 8 1974

*3 Norward J. Brooks
*3 Commissioner

Empl. Sec. Comm'r Dec. 1132 (WA), 1974 WL 177500

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