

NO. 44714-2

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

Jon C. James,

Appellant,

v.

Employment Security Department,

Respondent.

RESPONDENT'S BRIEF

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I. INTRODUCTION

After working for Ace Landscaping for three weeks, Jon James walked off his jobsite without saying a word to his supervisor or employer. He claims that he quit due to illegal activities and unsafe working conditions, but he did not report any such concerns to his superiors.

The Commissioner of the Employment Security Department denied Mr. James unemployment benefits, properly concluding that he did not have good cause to quit because he did not report illegal conduct or safety hazards to his employer before quitting, as required to qualify for benefits under the Employment Security Act. Because substantial evidence supports the Commissioner's findings of fact, and the Commissioner's conclusions of law are free from error, the Department respectfully requests that the Court affirm the Commissioner's decision.

II. STATEMENT OF THE ISSUES

1. To qualify for unemployment benefits, an individual who quit his job must have done so with good cause. RCW 50.20.050(2)(a). To have good cause to quit due to illegal workplace activities, a claimant must have reported the illegal activities to his employer before he quit. Did the Commissioner properly conclude that Mr. James was ineligible for unemployment benefits because, while he believed that his employer illegally did not allow scheduled rest periods, he said nothing to his employer before walking off his worksite?

2. To have good cause to quit due to worksite safety deterioration, an individual must have reported such deterioration to his employer before he quit, and the employer must have failed to correct the hazards within a reasonable period of time. Did the Commissioner properly conclude that Mr. James was ineligible for unemployment benefits when he did not notify his employer of any safety concerns before he quit, and when the incidents that he later cited during an administrative hearing were resolved before he quit?

III. STATEMENT OF THE CASE

After working as a general laborer for Ace Landscaping for three weeks, Jon James walked off his worksite during his lunch break. Commissioner's Record (CR) at 38-39, 135; Finding of Fact (FF) 6. He quit because he believed that his employer had violated the law by not allowing him scheduled rest periods. CR at 43, 47-48, 73, 135; FF 7. Mr. James's job duties did not require continuous labor; his work required frequent changing of tasks and tools. CR at 51-52, 62-63, 148. In a 10-hour workday, he had five 10- to 15-minute periods of downtime. *Id.*

Before he quit, Mr. James did not notify his supervisor or employer of his concern over the employer's allegedly illegal practice of not providing scheduled breaks. CR at 43-44, 52, 55, 63-64, 66-67, 135, 150; FF 8. He told some of his coworkers that he was quitting because he "wasn't going to take anymore," but said nothing to his supervisor or employer and made no effort to find an alternative to quitting. *Id.*

Mr. James also claims that he quit because of certain safety issues on the worksite. CR at 41-42, 45- 48, 73, 135; FF 7. Two of Mr. James's coworkers rode in the bucket of a front loader on the worksite, and the crew installed an incorrect valve in an irrigation system. CR at 45-46, 56-57, 135; FF 7. The job superintendent reprimanded the employees who rode in the front loader, and the employer installed the correct valve when it learned of its error upon inspection. CR at 56-57, 84, 135, 148; FF 9. Mr. James never reported these issues to his employer, and the issues were resolved before he quit. *Id.*

After he quit, Mr. James filed a claim for unemployment benefits, which the Employment Security Department denied on the grounds that Mr. James quit without good cause. CR at 116-19. Mr. James appealed, and, after a hearing in the Office of Administrative Hearings, an Administrative Law Judge (ALJ) issued an initial order affirming the Department's decision. CR at 134-38. Mr. James then filed a petition for review with the Department's Commissioner, who issued a decision adopting and augmenting the ALJ's findings of fact and conclusions of law.

The ALJ and the Commissioner made express findings that the employer's testimony was more credible than that of Mr. James and resolved conflicting testimony in the employer's favor. CR at 135, 149;

FF 5. The Commissioner concluded that Mr. James did not have good cause to quit his job because he failed to notify his employer of alleged illegal activity before he quit, provide his employer a reasonable period of time to address the activity before he quit, or prove that illegal activities in fact took place. CR at 150. The Commissioner also determined that Mr. James did not notify his employer of unsafe working conditions and that the conditions cited by Mr. James were remedied before he quit.

The Commissioner denied Mr. James's subsequent petition for reconsideration. CR at 154-159, 161. Mr. James appealed to Thurston County Superior Court, which affirmed the Commissioner's decision. He now appeals to this Court.

IV. STANDARD OF REVIEW

Washington's Administrative Procedure Act (APA) governs judicial review of a decision of the Employment Security Department's Commissioner concerning eligibility for unemployment benefits. RCW 34.05.510; RCW 50.32.120. When reviewing the Commissioner's decision here, this Court sits in the same position as the superior court and applies the APA standards directly to the administrative record. *Courtney v. Emp't Sec. Dep't*, 171 Wn. App. 655, 660, 287 P.3d 596 (2012). The Commissioner's decision is prima facie correct. RCW 34.05.570(1)(a); *Anderson v. Emp't Sec. Dep't*, 135 Wn. App. 887, 893, 146 P.3d 475

(2006). Mr. James has the burden of demonstrating the invalidity of the Department's decision. RCW 34.05.570(1)(a). The Court may grant relief only if "it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d).

The Court undertakes the limited task of reviewing the Commissioner's findings to determine, based solely on the evidence in the administrative record, whether substantial evidence supports those findings. RCW 34.05.558; *Wm. Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). Unchallenged factual findings are verities on appeal. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 407, 858 P.2d 494 (1993).

Evidence is substantial if it is "sufficient to persuade a rational, fair-minded person of the truth of the finding." *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004). The reviewing court is to "view the evidence and the reasonable inferences therefrom in the light most favorable to the party who prevailed" at the administrative proceeding below and may not re-weigh evidence, witness credibility, or demeanor. *Affordable Cabs, Inc. v. Dep't of Emp't Sec.*, 124 Wn. App. 361, 367, 101 P.3d 440 (2004); *Wm. Dickson Co.*, 81 Wn. App. at 411; *W. Ports Transp., Inc. v. Emp't Sec. Dep't*, 110 Wn. App. 440, 449, 41 P.3d 510 (2002).

The Court then determines de novo whether the Commissioner correctly applied the law to those factual findings. *Tapper*, 122 Wn.2d at 407. However, because the Department has expertise in interpreting and applying unemployment benefits law, the Court should afford substantial weight to the agency's decision. *Courtney*, 171 Wn. App. at 660. The appellant generally may not raise issues on appeal that he did not raise below before the agency.¹ RCW 34.05.554(1).

V. ARGUMENT

The Court should affirm the Commissioner's decision denying Mr. James benefits because substantial evidence supports its finding of fact, and its conclusions of law are free from error. The Commissioner properly concluded that Mr. James did not have good cause to quit his job because he failed to satisfy the requirements of either the "illegal activities" provision or the "worksite safety" provision of the good cause statute.

The legislature enacted the Employment Security Act to provide compensation to individuals who are involuntarily unemployed "through

¹ Mr. James raises issues for the first time on appeal in his brief that he did not raise below. He argues that the Department should have paid him "conditional benefits" under WAC 192-120-050. He also asserts without explanation that several statutory and regulatory provisions are "unconstitutionally overbroad." Per RCW 34.05.554(1), Mr. James cannot raise these issues on appeal to this Court. The Court also should not consider these issues because Mr. James presents them with "[p]assing treatment . . . or lack of reasoned argument [that] is insufficient to merit judicial consideration." *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998) (internal citation omitted).

no fault of their own.” RCW 50.01.010; *Courtney*, 171 Wn. App. at 660. As such, a person is ineligible to receive unemployment benefits if he “left work voluntarily without good cause.” RCW 50.20.050(2)(a).

An individual may establish good cause only by proving that he quit for one of the 11 reasons provided by RCW 50.20.050(2)(b). The burden of establishing good cause to quit is on the benefits claimant; this burden never shifts during the course of proceedings. *Townsend v. Emp’t Sec. Dep’t*, 54 Wn.2d 532, 534, 341 P.2d 877 (1959); *In re Anderson*, 39 Wn.2d 356, 365, 235 P.2d 303 (1951).

Mr. James argued below that he had good cause to quit his job under the “illegal activities” and “worksite safety” provisions of the good cause statute.² He failed to prove that he satisfied the requirements of either provision.

² In his sixth assignment of error and elsewhere in his brief, Mr. James argues that the Department wrongfully did not disclose certain evidence. This was the subject of a Motion for Temporary Stay, Remand and Sanctions that Mr. James filed in the superior court proceeding below. Clerk’s Papers (CP) 38-58. The Department’s response to this motion may be found at CP 61-69. Mr. James objected to the inclusion in the certified record filed with the superior court of certain Department records that were not admitted as exhibits or considered by the ALJ. His motion focused on an account of a telephone interview with Mr. James’s former employer titled “Expert Fact Finding.” CR at 169-71. Department staff conducted this interview to gather information before it issued an initial determination of benefit eligibility. The ALJ did not admit or consider this document. Department records staff included the “Expert Fact Finding” and other records not admitted by the ALJ in the certified record filed with the superior court as “[e]vidence received” by the Department, per RCW 34.05.476(2)(d). The superior court judge denied Mr. James’s motion, explaining that these documents properly were included in the record but that the Court would not consider them because they were not admitted during the hearing below. CP 86-87. The “Expert Fact Finding” also was irrelevant because the

A. Mr. James Did Not Have Good Cause to Quit Due to Illegal Activities in His Worksite Because He Did Not Report Such Alleged Illegal Activities to His Employer Before He Quit

One circumstance under which an individual may have good cause to quit his job is where “[t]he individual left work because of illegal activities in the individual's worksite, the individual reported such activities to the employer, and the employer failed to end such activities within a reasonable period of time.” RCW 50.20.050(2)(b)(ix); *see also* WAC 192-150-135(2). An individual is not required to notify his employer before quitting when the employer “is conducting the illegal activity and notifying [his] employer could jeopardize [his] safety or is contrary to other federal and state laws (for example, whistleblower protection laws).” WAC 192-150-135(2). Illegal activity may include violations of either civil or criminal law. WAC 192-150-132(1).

An individual’s “employer” is his “supervisor, manager, or other individual who could reasonably be expected to have authority to correct the illegal activity at issue” WAC 192-150-135(3). And “[a] ‘reasonable period’ of time is the period a reasonably prudent person would be expected to continue working in the presence of the activity at issue.”

employer testified at the hearing to everything contained therein. This decision was proper, and Mr. James offers no argument to show otherwise.

Mr. James has not shown good cause for quitting under this provision because he did not report alleged illegal activities to his employer as required. The employer testified, and the Commissioner found, that Mr. James walked off the jobsite during his lunch break without providing any notification or explanation to his supervisor or employer of why he had chosen to quit. CR at 52, 55, 63-64, 66-67, 135, 150; FF 8. He said nothing to his supervisor or employer about their allegedly illegal failure to provide scheduled rest periods and had said nothing about it previously. *Id.*

These findings are supported by substantial evidence as they are drawn directly from the testimony of Mr. James's former supervisor, Eric Meade, and his former employer, Mark Dringle. *Id.* The Administrative Law Judge asked both individuals directly about whether Mr. James had discussed breaks with them, and both testified unequivocally that he had not. *Id.* Their testimony constitutes substantial evidence in that it is "sufficient to persuade a rational, fair-minded person of the truth of the finding[s]" that it supports. *In re Estate of Jones*, 152 Wn.2d at 8.

In his brief, Mr. James does not appear to assert that he did report alleged illegal activity to his employer. Even if he did make such an assertion, the Commissioner made an express determination that the testimony of Mr. Meade and Mr. Dringle was more credible than that of

Mr. James. CR at 135, 149; FF 5. As noted above, this Court has stated that it “will not substitute [its] judgment for that of the agency regarding witness credibility or the weight of evidence.” *Smith v. Emp’t Sec. Dep’t*, 155 Wn. App. 24, 35, 226 P.3d 263, 268 (2010) (internal citations omitted).

The Commissioner properly found that Mr. James did not report alleged illegal activity to his employer before he quit. Mr. James has made no showing that doing so would have jeopardized his safety or been contrary to federal or state laws. WAC 192-150-135(2). Accordingly, Mr. James has failed to establish that he had good cause to quit under the “illegal activities” provision, RCW 50.20.050(2)(b)(ix).

The Court has no need to reach the question of whether illegal activity in fact occurred in the worksite. The law requires an individual to report the activity to his employer before quitting. Without doing so, Mr. James cannot show good cause even if he proves that illegal activity in fact took place.³

B. Mr. James Did Not Have Good Cause to Quit Due to Deterioration of the Safety of His Worksite Because He Did Not Report Such Deterioration to His Employer and the Cited Safety Concerns Were Resolved Before He Quit

³ Mr. James argues throughout his brief that the Employment Security Department is not authorized to determine whether his employer allowed him the proper rest periods. Because Mr. James did not provide the required notice of illegal activity to his employer, the Court likewise has no need to reach this question.

An individual has good cause to quit his job if his “worksite safety deteriorated, the individual reported such safety deterioration to the employer, and the employer failed to correct the hazards within a reasonable period of time.” RCW 50.20.050(2)(b)(viii). Mr. James argued below that he had good cause to quit because some of his coworkers rode in the bucket of a front loader, and the crew installed an incorrect valve in an irrigation system. CR at 45-46, 56-57, 135; FF 7.

Mr. James failed to establish good cause under this provision as well. The Commissioner found that he never reported these safety concerns to his employer, and the issues were resolved before Mr. James quit. CR at 56-57, 84, 135, 148; FF 9. The job superintendent reprimanded the coworkers who rode in the bucket of the front loader, and the employer installed the correct valve when it learned of its error upon inspection. *Id.*

As above, these findings are supported by substantial evidence in that they are based directly on the sworn testimony of Mr. James’s former employer. *Id.* The Commissioner determined that this testimony was credible, a finding that cannot be disturbed on appeal.

Mr. James did not report deterioration in worksite safety to his employer before he quit, and the safety issues with which he was concerned were in fact resolved before he quit. Accordingly, he did not

have good cause to quit under the “worksite safety” provision of the good cause statute, RCW 50.20.050(2)(b)(viii). The Commissioner correctly concluded that, without good cause, Mr. James was not entitled to receive unemployment benefits.

VI. CONCLUSION

Because Mr. James failed to establish that he had good cause for quitting his job, the Department respectfully requests that this Court affirm the Commissioner’s decision finding Mr. James ineligible for unemployment benefits.

RESPECTFULLY SUBMITTED this 12th day of November,
2013.

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PROOF OF SERVICE

I, Rachel M. Gibbons, certify that I caused a copy of this document, **Respondent's Brief**, to be served on all parties or their counsel of record by US Mail Postage Prepaid via Consolidated Mail Service on the date below and as follows to:

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

DATED this 2nd day of November, 2013, at Olympia, Washington.



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WASHINGTON STATE ATTORNEY GENERAL

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