IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JAMES E. WATKINS, Appellant, v. STATE OF WASHINGTON, EMPLOYMENT SECURITY DEPARTMENT, Respondent.	No. 42023-6-II UNPUBLISHED OPINION

Worswick, C.J. — James Watkins appeals a decision by the Commissioner[1] of the Washington Employment Security Department (Department) denying him unemployment benefits. He argues that the Commissioner erred by concluding that he voluntarily quit. He requests attorney fees on appeal. We reverse the Commissioner's denial of Watkins's benefits and remand for further proceedings. We also grant Watkins reasonable attorney fees on appeal.

FACTS

Northwest Protective Service (NPS) employed Watkins as a security guard. Watkins was injured on the job on May 26, 2009. He was not released for work until June 2, when his doctor released him for light duty. NPS had no light duty available until August 6, at which point administrative assistant Bonnie Roberts called Watkins to offer him work. Watkins told Roberts that he was unable to work in spite of his physician's release.

---

[1] The decision on review was made by a "review judge" of the Employment Security Department's Commissioner's Review Office. For simplicity, the parties refer to the review judge as the Commissioner. We do the same.

NPS also sent Watkins a letter dated August 6 that informed him of the available work. The letter asked Watkins to sign and return it, indicating whether he accepted the work. Watkins did not return the letter.

On August 17, branch manager Tom Curry called Watkins and informed him that his doctor had again released him for light duty. Watkins told Curry that he was still unable to work.[2]

NPS consequently sent Watkins a termination letter stating,

> This letter is written to serve notice of your termination with NW Protective Service Inc., effective immediately. Your termination is due to your violation of Company policy, Section V, Subsection B. which states:
> . . . .
> It will be assumed that you have abandoned your job and quit voluntarily if:
> - For 3 consecutive weeks, you do not contact Operations and obtain and work a minimum of 16 hours per week.

Administrative Record (AR) at 71.

After separation from employment, Watkins applied to the Department for unemployment benefits. The Department determined that Watkins was eligible for benefits because he was terminated without proof of misconduct. The Department based its decision that Watkins was terminated on the finding that Watkins did not have the intention to quit his employment.

---

[2] The record does not show that Watkins contacted his doctor to change the terms of his release for light-duty work in light of Watkins's claimed disability.

NPS appealed the Department's determination. The appeal proceeded to a hearing before an administrative law judge (ALJ). In closing argument before the ALJ, NPS argued that Watkins was terminated for violating the company's job abandonment policy. The ALJ issued findings of fact and conclusions of law, ruling that NPS terminated Watkins without proving misconduct. The ALJ thus affirmed the Department's award of benefits.

NPS appealed the ALJ's decision to the Commissioner. The Commissioner adopted the ALJ's findings of fact but not the ALJ's pertinent conclusions of law. Despite NPS's argument below that it had fired Watkins for misconduct, the Commissioner instead concluded that Watkins had quit without good cause. The Commissioner ruled that Watkins was the "moving party" in the termination because NPS offered him work that fell within his physician's restrictions. The Commissioner thus ruled that Watkins "failed to respond or show up to work" and that "he abandoned his job." AR at 140. The Commissioner accordingly denied Watkins unemployment benefits without ruling on the issue of Watkins's alleged misconduct.

Watkins appealed the Commissioner's decision to the superior court. The superior court affirmed. Watkins now appeals to us.

ANALYSIS

I. Standard of Review

In reviewing a final decision by the Department's Commissioner, we sit in the same position as the superior court, applying the standards of the Washington Administrative Procedure Act[3] directly to the administrative record. *Smith v. Employment Sec. Dep't*, 155 Wn. App. 24,

[3] Ch. 34.05 RCW.

32, 226 P.3d 263 (2010). We consider the Commissioner's decision to be prima facie correct; Watkins, the party challenging the decision, bears the burden of showing its invalidity. RCW 34.05.570; *Smith*, 155 Wn. App. at 32. While the Administrative Procedure Act provides nine bases for overturning agency orders in adjudicative proceedings, Watkins argues only that the agency has erroneously interpreted or applied the law. RCW 34.05.570(3)(d).

We review questions of law de novo and we may substitute our own view of the law for the Commissioner's. *Verizon Nw., Inc. v. Employment Sec. Dep't*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). But we afford substantial weight to an agency's interpretation of a statute within its expertise. *Verizon Nw.*, 164 Wn.2d at 915. Because Watkins assigns error to only the Commissioner's conclusions of law, we treat the findings of fact as verities on appeal.[4] *Smith*, 155 Wn. App. at 33.

II. Voluntary Termination

Watkins argues that the Commissioner erroneously concluded that Watkins voluntarily quit his job. We agree and reverse the Commissioner's decision.

A. *Intent Required for Voluntary Termination*

Watkins first argues that the Commissioner erred by ruling that an employee who causes his or her own termination has voluntarily quit per se. He further argues that the Commissioner

[4] Watkins calls the Commissioner's conclusion of law 2, in which Watkins was the "moving party," a finding of fact, and then assigns error to it. But Watkins's characterization of this conclusion of law as a finding of fact is incorrect. The Commissioner uses the term "moving party" as a legal term—if the employee is the moving party, then the employee voluntarily quit. *See Woodruff v. McClellan*, 95 Wn.2d 394, 396, 622 P.2d 1268 (1980) (finding of fact was actually a conclusion of law when it addressed rescission, a term with legal implications). The actual findings of fact are unchallenged in this appeal.

erroneously relied on the doctrine of "constructive quit." We agree on both points.

The Employment Security Act[5] was enacted to provide compensation to those who become involuntarily unemployed through no fault of their own. RCW 50.01.010; *Nordlund v. Employment Sec. Dep't*, 135 Wn. App. 515, 524, 144 P.3d 1208 (2006). Courts have held that the legislature also intended to compensate those who become voluntarily unemployed for good cause. *Nordlund*, 135 Wn. App. at 524. But a claimant who has "left work voluntarily without good cause" is not eligible for benefits under the Act. RCW 50.20.050(1)(a), 2(a).

The Commissioner stated in conclusion of law 1:

> We must first determine whether the separation resulted from a quit or a discharge. In deciding whether a separation is a quit or a discharge, it must be determined what actually caused the separation. *Safeco Ins. Cos. v. Meyering*, 102 Wn.2d 385, 687 P.2d 195 (1984). The issue is decided by identifying which [sic] was the "moving party" initiating the separation. *In re Hensley*, Empl. Sec. Comm'r Dec.2d 636 (1984).

AR at 140. Washington courts have not adopted the term "moving party" in this context; but the Commissioner used the term as a legal term of art, meaning simply "the party that caused the termination." *See, e.g.*, *In re Millholland*, No. 5-00800, 1975 WL 175296 (Wash. Dep't Emp't Sec. Comm'r No. 1272, June 26, 1975).[6] If the employee is the moving party, the Commissioner deems the employee to have voluntarily quit. *See, e.g.*, *In re Henning*, No. 3-03572, 1983 WL 492324 (Wash. Dep't Emp't. Sec. Comm'r No. 737, 2d Series July 29, 1983).

---

[5] Title 50 RCW.

[6] The Commissioner has the authority to designate decisions as precedential; such decisions are persuasive authority before this court. RCW 50.32.095; *Graves v. Employment Sec. Dep't*, 144 Wn. App. 302, 308-09, 182 P.3d 1004 (2008).

Conclusion of law 1 leaves out an important holding from *Safeco*. The *Safeco* court held, "The act requires that the Department analyze the facts of each case to determine what actually caused the employee's separation. *A voluntary termination requires a showing that an employee intentionally terminated her own employment*." 102 Wn.2d at 392-93 (emphasis added). Thus, under *Safeco*, the analysis on this point is not limited (as the Commissioner concluded) to whether the employee "caused" the termination; the employee's intent is also at issue.[7]

As Division One of this court recognized in *Vergeyle v. Department of Employment Security*, to show a voluntary termination, "[T]he evidence must establish that the claimant, by *his or her own choice, intentionally, of his or her own free will*, terminated the employment." 28 Wn. App. 399, 402, 623 P.2d 736 (1981) (emphasis added) (quoting *Allen v. CORE Target City Youth Program*, 275 Md. 69, 79, 338 A.2d 237 (1975)) *overruled on other grounds by Davis v. Dep't of Emp't Sec.*, 108 Wn.2d 272, 737 P.2d 1262 (1987). Thus, in *Bauer v. Employment Security Department*, Division Three of this court held that Bauer's traffic violations that resulted in suspension of his commercial driver's license and subsequent termination did not amount to a voluntary termination, despite the fact that Bauer's conduct caused his own termination. 126 Wn. App. 468, 471, 475-76, 108 P.3d 1240 (2005).

Watkins also argues that the Commissioner's conclusion of law 1 is erroneously based on

[7] In addition to *Safeco*, the Commissioner relied on *In re Hensley*, No. 0-05854, 1980 WL 344313 (Wash. Dep't Emp't Sec. Comm'r No. 636, 2d Series Sept. 12, 1980). *Hensley* held that the "immediate cause" of a termination determines whether it was a voluntary termination. But *Hensley* does not support the Commissioner's conclusion. There, the Commissioner found that Hensley did not voluntarily quit because the employer, not Hensley, was the immediate cause of Hensley's separation. The Commissioner did not hold in *Hensley* that an employee who merely causes a termination without the intent to do so establishes voluntary termination. *Hensley* is accordingly unpersuasive here.

the "constructive quit" doctrine. We agree and hold that the "constructive quit" doctrine does

not apply in Washington.[8]

The "constructive quit" doctrine provides, "if an employee acts in a manner that might result in his discharge, and the employee is in fact discharged, the employee is deemed to have constructively quit or left his employment without good cause, and is not entitled to unemployment benefits." *Bauer*, 126 Wn. App. at 478-79. Here, the Commissioner ruled that Watkins voluntarily quit because he failed to return to work after being offered light-duty work; this reasoning describes a "constructive quit."

Division Three of this court has held the "constructive quit" doctrine inapplicable under the Employment Security Act. *Bauer*, 126 Wn. App. at 479-80.[9] It is well settled in Washington that an employee voluntarily quits only by intentionally terminating employment, not merely by causing termination. *Vergeyle*, 28 Wn. App. at 402. The "constructive quit" doctrine is incompatible with this Washington rule, and we agree with Division Three on this point.[10]

The mere fact that an employee's actions "caused" the employee's termination does not

---

[8] The Department does not contend that the "constructive quit" doctrine applies in Washington. Instead it argues that the Commissioner did not rely on the "constructive quit" doctrine.

[9] *Bauer* relied on former WAC 192-16-009, which codified the analysis for determining whether voluntary termination was based on good cause. Although our analysis is now based on the factors set forth in RCW 50.20.050, the new statute changes neither the analysis nor the result.

[10] Although we recognize that Washington has not adopted the "constructive quit" doctrine here, we note that RCW 50.20.066 provides for denial of benefits based on employee misconduct. RCW 50.04.294(1)(b) defines "misconduct" as "[d]eliberate violations or disregard of standards of behavior which the employer has the right to expect of an employee." Because the Commissioner did not address the issue of Watkins's alleged misconduct, that issue is not before us in this appeal.

establish voluntary termination. Nor may the Commissioner construct a voluntary termination based on the employee acting in a manner likely to cause termination. Rather, the evidence must show that the employee intentionally terminated his or her own employment. To the extent that the Commissioner's first conclusion of law holds to the contrary, it is an erroneous interpretation of the law.

B. *No Evidence of Intent To Terminate Employment*

Watkins next argues that because there was no evidence that he intended to terminate his employment, the Commissioner's conclusion that he voluntarily quit is erroneous. We agree.

The Commissioner stated in conclusion of law 2:

> We conclude that the claimant was the moving party; he was offered a job assignment which fell within the restrictions his doctor had ordered, but failed to respond or show up for work. Rather, he abandoned his job. Consequently, we conclude that he voluntarily quit employment.

AR at 140.

The Department argues that Watkins's failure to accept the offered work constituted voluntary termination under *Nordlund*, 135 Wn. App. 515. Nordlund left her job when her mother became ill and subsequently died. 135 Wn. App. at 517. Nordlund neither contacted her employer about returning to work nor responded to her employer's attempts to contact her. 135 Wn. App. at 518-19. The Department, an ALJ, and the Commissioner all ruled that Nordlund's conduct constituted job abandonment and, thus, that she had voluntarily quit. 135 Wn. App. at 520-23. But on appeal, Nordlund argued only that she had voluntarily quit for good cause; she did not argue that she was involuntarily terminated. 135 Wn. App. at 523. We did not decide whether Nordlund's conduct amounted to voluntary termination; thus, *Nordlund* does not support

the Department's argument on this point.

The Department also attempts to analogize *Vergeyle*, *Safeco*, and *Korte v. Department of Employment Security*, 47 Wn. App. 296, 734 P.2d 939 (1987), each of which involved voluntary termination. In *Vergeyle*, the court held that because Vergeyle stated in writing that she did not plan to report for work as ordered, and that this failure would result in termination, her termination was voluntary. 28 Wn. App. at 401-02. In *Safeco*, the court found that Meyering voluntarily terminated her employment where the employer was happy with her work and had no intention of letting her go, but she submitted a resignation letter giving two weeks' notice. 102 Wn.2d at 393. And in *Korte*, Korte was instructed that her employment was conditioned on her signing a union contract, and she should turn in her keys at the end of the day if she did not sign. 47 Wn. App. at 297-98. Korte failed to sign the contract and turned in her keys as instructed, making her termination voluntary. 47 Wn. App. at 298, 301.

Here, neither the ALJ nor the Commissioner found that Watkins knew his failure to accept the offered work would result in his termination or that he intended such a result.[11] And our review of the record confirms that Watkins was not informed that his failure to report for work would lead to his termination until the termination letter itself.[12] On the contrary, here, the evidence does not establish that Watkins, through "his . . . own choice, intentionally, of his . . .

[11] NPS offered documentation that Watkins had acknowledged having received and having read the employee handbook containing the job abandonment policy quoted in NPS's termination letter; but because NPS failed to serve this evidence on Watkins, the ALJ did not consider it.

[12] The letter informing Watkins of available light-duty work did not inform him that he would be terminated for failing to accept the available work, but only asked him to state whether or not he accepted the work.

own free will, terminated [his] employment," even though his failure to respond to his employer's offer of medically authorized "light-duty work" clearly prompted NPS's notice of termination. *Vergeyle*, 28 Wn. App. at 402 (quoting *Allen*, 275 Md. at 79). As such, unlike in the above cases, the record reflects no voluntary action by Watkins that Watkins knew would result in termination of his employment. *Vergeyle*, *Safeco*, and *Korte* are consequently distinguishable.[13]

The Department further cites *In re Millholland*, 1975 WL 175296. Millholland filed a claim for unemployment benefits after leaving his job, mistakenly believing that the employer had terminated him. The Commissioner concluded that Millholland's termination was voluntary because he was the "moving party" in severing the employer-employee relationship.

Millholland is distinguishable from the instant case. Millholland manifested his intent to separate from employment by filing an unemployment claim. The employer had not terminated him, nor had the employer led Millholland to believe he had been terminated. Rather,

[13] The Department further argues that Watkins voluntarily quit because he did not comply with WAC 192-150-060 regarding leaving work because of disability. WAC 192-150-060 provides that an employee who leaves work due to a disability must accept alternative work to accommodate that disability unless the employee shows good cause for refusing the work. But the failure to accept an offer of work weighs on whether an employee has refused suitable work, which disqualifies the employee from receiving benefits under RCW 50.20.080. WAC 192-150-060(5). The regulation says nothing about an employee's voluntary termination. The Department apparently argues that as a matter of policy, an employee who violates WAC 192-150-060 should not be deemed to have been involuntarily terminated. But the Department cites no law to support its policy argument. Because the Department does not support its argument with citation to authority, we decline to decide this issue. *Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190 n.4, 69 P.3d 895 (2003). Additionally, there was no finding or conclusion below that Watkins violated WAC 192-150-060. As a court of review, it is not our role to make such a finding and we decline the Department's apparent request that we do so.

Millholland's belief that he had been terminated was based on inaccurate hearsay related by his sister. Thus, it was Millholland, not the employer, who acted to end the employment relationship. Here, Watkins took no comparable action that manifested his intent to separate from employment. He merely informed NPS that he was physically unable to do the work offered.

The Department argues, "It is hard to imagine what result Mr. Watkins would expect to occur other than a separation from his employment when he knew he had been released for light-duty work, knew his employer had a position for him, and knew he was expected to report to work." Br. of Resp't at 14. The Department thus appears to argue that an employee voluntarily quits if he *should* know that his conduct will result in termination. But in each case discussed above, the employee *actually knew and intended* that his or her action would result in termination and voluntarily took that action. There is no authority for the proposition that an employee voluntarily quits simply because he or she *should* know that an action will result in termination.

An employee does not voluntarily quit employment unless the employee intends to do so. *Vergeyle*, 28 Wn. App. at 402. Because the unchallenged findings of fact do not support the conclusion that Watkins had this intent, we are compelled to hold that the Commissioner erred in concluding that Watkins voluntarily terminated his employment.

C. *Remedy*

Watkins argues that we should reverse the Commissioner's decision "without need of remand." Reply Br. of Appellant at 11. The Department argues that remand is appropriate because the Commissioner did not determine whether Watkins was terminated for misconduct.[14]

[14] As noted at note 10, Under RCW 50.20.066, an employee who is involuntarily terminated for misconduct is ineligible for unemployment benefits.

We agree with the Department.

Watkins argues that remand is unnecessary because all issues were before the Commissioner, and thus the Commissioner has already determined the misconduct issue. He cites RCW 50.32.040 as authority for his position; that statute provides, "In any proceeding before an appeal tribunal involving a dispute of an individual's initial determination, all matters covered by such initial determination shall be deemed to be in issue *irrespective of the particular ground or grounds set forth in the notice of appeal*." (Emphasis added.)

Watkins misinterprets RCW 50.32.040. By its plain terms, RCW 50.32.040 merely provides that the Commissioner's review is not limited by the notice of appeal. It does not reduce the Commissioner's authority to issue a decision "affirming, modifying, or setting aside" the decision of an appeal tribunal granted by RCW 50.32.080.[15] Because the Commissioner set aside the ALJ's conclusion as to misconduct and did not issue its own conclusion on this point, there is no authority or reasonable argument that the Commissioner should be deemed to have decided the issue.

Because the Commissioner erroneously concluded that Watkins voluntarily quit, the Commissioner never considered whether Watkins was terminated for misconduct. Accordingly, we remand for further proceedings.

---

[15] RCW 50.32.080 provides, in pertinent part:

> After having acquired jurisdiction for review, the commissioner shall review the proceedings in question. . . . Upon the basis of evidence submitted to the appeal tribunal and such additional evidence as the commissioner may order to be taken, the commissioner shall render his or her decision in writing affirming, modifying, or setting aside the decision of the appeal tribunal.

ATTORNEY FEES

Watkins requests attorney fees and costs on appeal, properly setting forth his request in a separate section of his brief as required by RAP 18.1(b).[16] Watkins relies on RCW 50.32.160, which provides, "[I]f the decision of the commissioner shall be reversed or modified," reasonable attorney fees and costs "shall be payable" to the claimant "out of the unemployment compensation administration fund."

Because we reverse the Commissioner's decision, we award Watkins reasonable attorney fees on appeal under RCW 50.32.160.

Reversed and remanded.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, C.J.

We concur:

Hunt, J.

Quinn-Brintnall, J.

[16] The Department does not contest that Watkins is entitled to attorney fees if this court reverses the Commissioner's decision. Rather, the Department states that it "reserves the right to present argument regarding the reasonableness of attorney fees granted." Br. of Resp't at 27. Under RAP 18.1(f), a commissioner or clerk of this court determines the amount of an attorney fee award on appeal. RAP 18.1(e) and (g) provide the procedure for a party to contest the amount of attorney fees requested or awarded on appeal.