No. 15-AA-437

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DISTRICT OF COLUMBIA COURT OF APPEALS

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ESTHER EPSTEIN,

Petitioner,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF EMPLOYMENT SERVICES,

Respondent.

---

ON PETITION FOR REVIEW FROM THE
OFFICE OF ADMINISTRATIVE HEARINGS

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# PETITIONER'S BRIEF

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## RULE 28(a)(2)(A) STATEMENT

The parties to the case are petitioner Esther Epstein, the appellant/claimant below, and respondent Department of Employment Services, the appellee/agency below. In the proceedings before the Office of Administrative Hearings, Ms. Epstein represented herself, while the Department of Employment Services was represented by its General Counsel, Tonya Sapp. No intervenors or amici appeared during the agency proceedings.

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## STATEMENT OF THE ISSUES PRESENTED

1. Whether clear and convincing evidence is required to prove fraud under the District's unemployment compensation statute?

2. Whether there is substantial evidence that Ms. Epstein had culpable knowledge that she reported inaccurate information to DOES or that she had the intent to deceive?

3. Whether substantial evidence supports the full amount of the fraud penalty imposed on Ms. Epstein?

## STATEMENT OF THE CASE

Petitioner Esther Epstein received unemployment compensation payments from Respondent District of Columbia Department of Employment Services (DOES) on and off for a number of weeks starting in December 2011 and ending in February 2015. At the end of that period, DOES concluded that Ms. Epstein had underreported her part-time earnings and had therefore received overpayments. Ms. Epstein does not dispute the existence of these overpayments.

DOES also decided that Ms. Epstein's underreporting of weekly earnings had been fraudulent. As a result of this determination, DOES sought to collect from Ms. Epstein an additional penalty of 15% of the overpayment amount and to impose a period of disqualification during which Ms. Epstein could not receive further benefits. On administrative appeal, Ms. Epstein explained that any misreporting of data by her was inadvertent and was related to her documented math disability. An Administrative Law Judge (ALJ) affirmed. The ALJ agreed that Ms. Epstein had a math disability but concluded that she could have accurately reported her earnings by copying data from her pay stubs and that she was reckless in knowing that she had a math disability and yet not obtaining assistance in filling out the forms every week. On this basis, the ALJ concluded that DOES had proven fraud by a preponderance of the evidence.

## STATEMENT OF FACTS

A. Unemployment Claims and Compensation

Ms. Epstein's most recent full-time employment was with the National Institutes of Health and ended on January 4, 2011. On the basis of that job loss, she applied for unemployment compensation benefits, which the District of Columbia Department of Employment Services (DOES) awarded her starting with the benefit week ending December 24, 2011. *See* JA 31. During the period that she received these benefits, Ms. Epstein also worked part-time for the Phillips Collection. Such work did not, by itself, disqualify Ms. Epstein from receiving unemployment compensation benefits. Instead, her weekly part-time earnings could reduce the amount of her weekly benefit, and, if she earned more than an amount set by statutory formula in any particular week, her benefit for that particular week could be reduced to zero. *See* D.C. Code §§ 51-101(5), 51-107(e). She continued to receive payments on and off through the benefit week ending February 7, 2015. *See* JA 18-32. The payments varied (and in some weeks there was no payment) because they depended upon Ms. Epstein's part-time earnings each week, and those earnings varied based upon the varying number of hours she worked each week and a varying hourly pay rate.

On February 26 2015, DOES sent Ms. Epstein a total of ten notices of determination of overpayment, alleging that she was overpaid unemployment

benefits for certain weeks. JA 38-73. The notices stated that Ms. Epstein had been overpaid a total of $13,424 over the entire benefit period (of over three years). *Id.* That overpayment is not at issue in the instant petition for review by this Court.

Those same ten notices further stated that the agency had assessed an additional $764 penalty for fraud, which constituted 15 percent of the alleged overpayments after October 21, 2013. *Id.*; *see* D.C. Code § 51-119(e)(3) (authorizing 15% fraud penalty). DOES also sent four separate notices of determination stating that Ms. Epstein committed fraud with respect to a number of weeks from 2013 through 2015 and that, as a result, she was being disqualified from receiving further benefits for the period of February 22 through October 17, 2015. JA 74-81. It is these determinations of fraud and their associated penalties that are the subject of the instant petition for review by this Court.

B. Administrative Hearing

Ms. Epstein timely submitted administrative appeals of all the DOES determinations to the District of Columbia Office of Administrative Hearings (OAH). JA 174. Administrative Law Judge (ALJ) Bernard H. Weberman conducted a hearing on March 26, 2015. DOES Claims Examiner Rhonda Bowden testified on behalf of the agency. Ms. Bowden explained that the DOES computer system automatically triggers an audit when a person is working while also receiving

unemployment benefits. JA 91-92.[1] Ms. Bowden testified that, when she was assigned to look at Ms. Epstein's claim in 2015, she reviewed the preceding five-year period and noticed a discrepancy between the amount of earnings Ms. Epstein reported and the amount of earnings reported for Ms. Epstein by her employer, the Phillips Collection. JA 98-99. Specifically, Ms. Bowden testified that, based upon her review, Ms. Epstein "reported somewhere between $40 to as high as $150 in earnings for each week" but that her employer reported "significantly higher" earnings. *Id.*[2] These differences for specified weeks were the basis for both the agency's overpayment determination and its claims that Ms. Epstein had engaged in fraud. Ms. Bowden provided no basis for the accusation of fraud other than these inaccurate earnings reports.

[1] Ms. Epstein was working part-time at the Phillips Collection the entire time she was receiving unemployment benefits and accurately informed DOES of that fact every time she submitted a weekly claim form starting with the very first such form in December 2011. *See* JA 36. The fact that no audit took place until 2015 is inconsistent with Ms. Bowden's testimony that such an audit should have taken place automatically starting in 2011. When the ALJ confronted her with this inconsistency and specifically asked Ms. Bowden "Why is it that DOES didn't catch this in 2011?" Ms. Bowden spoke at length but provided no meaningful answer. JA 138-40.

[2] This testimony does not accurately reflect DOES's own records. Those records show that Ms. Epstein reported income as high as $220, JA 34, and that, in several weeks, she reported receiving more income than she actually received. *See* JA 13, 16, 35, 37.

At the hearing, Ms. Epstein credibly testified that she did her best to report all the numbers accurately but noted that she had great difficulty in doing so because of her life-long math disability. JA 105, 138. Ms. Epstein more specifically testified that she has had a math disability since childhood, and, as further support, gave the ALJ a statement from her former supervisor at the National Institutes of Health, documenting her disability and its impact on her work. JA 10 ("Ms. Epstein was a great [art] therapist, however, she had a major deficiency which was her inability to maintain accurate statistics . . . keeping her numbers accurate was a constant challenge.").

To further help explain the impact of her math disability on her ability to accurately report data to DOES, Ms. Epstein also gave the ALJ pages from an online encyclopedia of mental disorders explaining the causes, symptoms, and treatment of math disabilities. JA 3-10 (symptoms include "problems counting," "poor computational skills," and "difficulty copying numbers or problems"). Ms. Epstein herself testified that, as a result of her math disability, she could not explain why the numbers that she reported to DOES were different than the numbers reported by the Phillips Collection. JA 148 ("I don't know. I don't know because I sometimes didn't put numbers because I get so stressed out with the math . . . . I'm all over the place."); *see also id.* ("I was so stressed out with the numbers. That's how it gets for me."); JA 151 ("I have no idea what I did."). Her testimony also demonstrated

her confusion and difficulty with numbers and calculations at the hearing. For example, Ms. Epstein appeared to be confused at multiple times during the hearing, stating that she was "overwhelmed" when reviewing certain exhibits. JA 113. When Ms. Epstein attempted to review her weekly claim forms and remaining balances during the hearing, she testified that she "get[s] confused," that "[i]t's confusing to me with the numbers," and that "I'm getting confused." JA 161, 168.

Ms. Epstein testified that, because of her disability, she had no idea about the data disparities until DOES first contacted her about them in 2015. JA 146-47. With respect to the alleged overpayments, she "was not informed in 2011. So, I had no knowledge of this and was not notified." *Id.*; *see also* JA 138 ("[W]hy was I not informed in 2011?"); JA 138 ("I have a math disability and just why wasn't I notified in 2011?"); JA 139 ("But, my question is why wasn't I notified so I could have stopped all this . . . ?"); JA 141 ("If I had known, I don't think it would have gotten this far.").

Moreover, Ms. Epstein testified that she had taken affirmative steps to make sure her reporting was accurate and that, after taking those steps, she believed that she was reporting everything properly. In 2013, Ms. Epstein was required by DOES to attend a mandatory reemployment and eligibility assessment session at the Walter E. Washington Convention Center. She testified that, at the conference, she "had to . . . meet with a counselor" who "looked at all my records at the time." JA 149. Ms.

Epstein further testified that after looking through her records, the counselor told her that she was "doing fine." *Id.* As a result, Ms. Epstein – who had been submitting weekly claim forms for approximately two years at that point – believed that her method of reporting was satisfactory and that her prior submissions were accurate. *Id.*

C. Final Administrative Order

In a Final Order issued on April 6, 2015, the ALJ affirmed the DOES determination and concluded that Ms. Epstein must repay $13,424 in overpayments plus a $764 fraud penalty. JA 179. Also based on the finding of fraud, the ALJ affirmed Ms. Epstein's disqualification from unemployment benefits from the week ending February 22, 2015 through the week ending October 17, 2015. JA 180. The ALJ found that "DOES proved the four elements of civil fraud by a preponderance of evidence." JA 178. In reaching this conclusion, the ALJ acknowledged Ms. Epstein's "limited mathematical skills," but concluded that her disability in this regard was irrelevant because all she had to do was "copy[] her weekly wages as shown on her pay stub to the weekly claim form," which "did not require any mathematical skills but merely copying a number." *Id.* The ALJ did not find any intentional misrepresentation by Ms. Epstein but instead concluded that she was "reckless" because she knew about her disability and failed to get assistance in

reporting her weekly earnings to DOES. *See id.* (asserting that Ms. Epstein was "reckless if she knew she was operating in an area in which she was not competent").

## STANDARD OF REVIEW

Whether fraud under the unemployment compensation statute must be proven by clear and convincing evidence is a question of law reviewed *de novo*. *See, e.g.*, *In re Public Defender Serv.*, 831 A.2d 890, 898 (D.C. 2003) (standards of proof are questions of law reviewed *de novo*); *Lynch v. Masters Sec.*, No. 14-AA-1086, slip op. at 11 (D.C. Nov. 25, 2015) (reviewing *de novo* OAH legal rulings in unemployment compensation case); *Odeniran v. Hanley Wood, LLC*, 985 A.2d 421, 424 (D.C. 2009) (same). In reviewing the Office of Administrative Hearings findings and conclusions in general, this Court shall reverse unless "(1) OAH made findings of fact on each materially contested issue of fact, (2) substantial evidence supports each finding, and (3) OAH's conclusions flow rationally from its findings of fact." *Rodriguez v. Filene's Basement Inc.*, 905 A.2d 177, 180 (D.C. 2006). Any finding of fraud must be reversed unless OAH "'articulate[d] the evidence with respect to each element of fraud, ma[d]e a finding as to each, and state[d] a conclusion as to the fraud alleged.'" *Powell v. District of Columbia Hous. Auth.*, 818 A.2d 188, 197 (D.C. 2003) (quoting *Jacobs v. Dist. Unemployment Comp. Bd.*, 382 A.2d 282, 286 (D.C. 1978)).

## SUMMARY OF THE ARGUMENT

1. The Administrative Law Judge erred in applying a preponderance of the evidence standard to DOES's proof of fraud under D.C. Code § 51-119(e). Fraud is a common law concept, and, at common law, fraud must be proven by clear and convincing evidence because a finding of fraud carries with it the imprimatur of quasi-criminality. When the Legislature enacts a statute that uses a word or phrase from the common law, it is presumed to have intended to incorporate the common law with respect to that word or phrase. This Court has previously held that the use of the word "fraud" in § 51-119(e) constitutes such a borrowing from common law and that, therefore, the elements of fraud under § 51-119(e) are the elements of common law fraud. *Jacobs v. Dist. Unemployment Comp. Bd.*, 382 A.2d 282, 286 (D.C. 1978). This Court has also repeatedly held that other statutes invoking the concept of "fraud" thereby adopt not only the common law elements of fraud but also the common law standard of proof for fraud – clear and convincing evidence. It necessarily follows that fraud under § 51-119(e) must be proven by clear and convincing evidence as well.

2. There is no substantial evidence in the Record to show that Ms. Epstein committed fraud, regardless of the standard of proof. Her inaccurate reporting was a result of her undisputed math disability and was therefore neither knowing nor intentional. Ms. Epstein was not reckless; she showed her unemployment

compensation documents to a DOES representative who told her that she was "doing fine," so Ms. Epstein believed that she was properly reporting her earnings. And the fact that Ms. Epstein's mistakes were sometimes to her own detriment further illustrates that these mistakes were the result of her disability and not grounded in any ill intent.

3. The ALJ also made more limited mistakes that affect the amount of the fraud penalty imposed. For some weeks, no fraud penalty can be imposed because there is no valid evidence of any misrepresentation. In other weeks, Ms. Epstein's income was irrelevant, and therefore no misreporting of income could constitute fraud. Finally, one portion of the overpayment is based on a DOES document so devoid of detail that it cannot constitute substantial evidence of fraud by Ms. Epstein.

## ARGUMENT

In this petition for review, Ms. Epstein is not challenging the ALJ's determination that she received a substantial overpayment, which DOES may recover as allowed under D.C. Code § 51-119(d). This petition is limited to Ms. Epstein's challenge to the determination that the inaccuracies in the DOES paperwork constituted fraud and the resulting imposition of a 15% fraud penalty and

disqualification (for a specified period of time) from future benefits under D.C. Code § 51-119(e).[3]

## I. FRAUD UNDER D.C. CODE § 51-119(e) MUST BE PROVEN BY CLEAR AND CONVINCING EVIDENCE.

D.C. Code § 51-119(e), which is reproduced in the margin,[4] permits DOES to impose a 15% penalty and a period of disqualification from further benefits on

[3] Ms. Epstein reserves the right to request that the overpayment be waived by DOES. *See* D.C. Code § 51-119(d)(1) ("Any person who has received any sum as benefits under this subchapter to which he is not entitled . . . may have such sum waived in the discretion of the Director."). Ms. Epstein also reserves the right to further challenge DOES's errors, including, but not limited to, its failure to provide the correct amount of benefits for the weeks in which she reported *more* income than she actually received. *See* Section II.B, below.

[4]

> (1) Any person who the Director finds has made a false statement or representation knowing it to be false, or who knowingly fails to disclose a material fact to obtain or increase any benefit under this subchapter may be disqualified for benefits for all or part of the remainder of such benefit year and for a period of not more than 1 year commencing with the end of such benefit year. Such disqualification shall not affect benefits otherwise properly paid after the date of such fraud and prior to the date of the ruling of disqualification.
>
> (2) All findings under this subsection shall be made by a claims deputy of the Director and such findings shall be subject to review in the same manner as all other disqualifications made by a claims deputy of the Director.
>
> (3) Beginning on October 1, 2013, at the time the Director determines an erroneous payment was made to an individual due to fraud committed by such individual, the

individuals like Ms. Epstein only upon a showing of "fraud." Although the statute is silent with respect to the standard of proof for fraud in this situation, this Court's case law, detailed below, demonstrates that statutory fraud in these circumstances must, like common law fraud, be proven by clear and convincing evidence. The ALJ committed legal error by expressly applying a lower "preponderance of the evidence" standard. That legal error requires reversal.

### A. Statutory Fraud Incorporates the Cluster of Ideas of Common Law Fraud, Including Proof by Clear and Convincing Evidence.

Under the common law, fraud must be proven by clear and convincing evidence. *See, e.g.*, *Nethken v. Peerless Ins. Co.*, 978 A.2d 603, 604 (D.C. 2009) (reversing "on the ground that fraud was not established by clear and convincing evidence"); *Va. Acad. of Clinical Psychologists v. Grp. Hospitalization & Med. Servs., Inc.*, 878 A.2d 1226, 1233 (D.C. 2005) (common law "[f]raud . . . must be established by clear and convincing evidence"); *Shepherd v. Am. Broad. Cos., Inc.*, 314 U.S. App. D.C. 137, 145, 62 F.3d 1469, 1477 (1995) ("Proof of civil fraud in general therefore requires clear and convincing evidence."). This rule dates back

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> Director shall assess a penalty on the individual in an amount of 15% of the amount of the erroneous payment. Penalties paid pursuant to this paragraph shall be deposited in the District Unemployment Fund, established by [D.C. Code § 51−102]. The penalty assessed by this paragraph shall not be deducted from any future benefits payable to claimant under this act.

well over a century. *See, e.g.*, *Wynn v. Boone*, 88 U.S. App. D.C. 363, 365, 191 F.2d 220, 222 (1951) (citing *Pub. Motor Serv. v. Standard Oil Co. of N.J.*, 69 U.S. App. D.C. 89, 91, 99 F.2d 124, 126 (1938)); *Ins. Co. v. Nelson*, 103 U.S. 544, 549 (1881). As the Supreme Court explained, "civil cases involving allegations of fraud or some other quasi-criminal wrongdoing" are typically governed by a clear and convincing standard of proof because "[t]he interests at stake in those cases are deemed to be more substantial than mere loss of money" and a standard of proof higher than preponderance is necessary to "reduce the risk to the defendant of having his reputation tarnished erroneously." *Addington v. Texas*, 441 U.S. 418, 424 (1979).

The same standard of proof applies to statutory fraud. This is a specific application of the more general statutory construction rule that "[w]hen a legislature borrows common law terms of art in writing legislation, 'it presumably knows and adopts the cluster of ideas that were attached to [the] borrowed word.'" *1836 S St. Tenants Ass'n, Inc. v. Estate of B. Battle*, 965 A.2d 832, 839 (D.C. 2009) (quoting *1618 Twenty-First St. Tenants' Ass'n v. The Phillips Collection*, 829 A.2d 201, 203 (D.C. 2003)).

Accordingly, courts have repeatedly held – over a period of many decades – that statutory fraud must be proven by clear and convincing evidence (unless the Legislature has expressly stated that some other standard of proof applies). For example, D.C. Code § 28-3101 (formerly D.C. Code § 12-401) renders void certain

conveyances and assignments made with the intent to defraud. Although the statute itself is silent with respect to standard of proof, proof of fraud under this provision must be by clear and convincing evidence, just like proof of fraud under the common law. *See, e.g.*, *Roberts & Lloyd, Inc. v. Zyblut*, 691 A.2d 635, 638 (D.C. 1997); *Consumers United Ins. Co. v. Smith*, 644 A.2d 1328, 1358-59 (D.C. 1994); *Dist.-Realty Title Ins. Corp. v. Forman*, 518 A.2d 1004, 1008 (D.C. 1986); *Wynn*, 88 U.S. App. D.C. at 365, 191 F.2d at 222.

Another statute addressing fraud without specifying a standard of proof is the Consumer Protection Procedures Act. D.C. Code § 28-3904. This statute is designed to protect consumers from "intentional misrepresentation" (the Act does not use the word "fraud") and is specifically intended to be "consumer friendly," *Osbourne v. Capital City Mortg. Corp.*, 727 A.2d 322, 325 (D.C. 1999), meaning, presumably, that it should be as easy as possible for consumers to prove intentional misrepresentation. Nonetheless, because the statute does not specify any standard of proof, this Court has held that the common law standard of proof – clear and convincing evidence – applies to the statute as well. *Va. Acad.*, 878 A.2d at 1236, 1241 & n.12 (Act requires proof of fraudulent misrepresentation by clear and convincing evidence); *Osbourne*, 727 A.2d at 325 ("[W]e reach the conclusion that a claim for intentional misrepresentation under the Act requires the same burden of proof as does a common law claim for such misrepresentation—the clear and

convincing standard."); *accord Pearson v. Chung*, 961 A.2d 1067, 1074 (D.C. 2008); *Fort Lincoln Civil Ass'n, Inc. v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1073 n.21 (D.C. 2008); *Caulfield v. Stark*, 893 A.2d 970, 976 (D.C. 2006).

The same analysis also applies to the District statute that allows for the setting aside of elections due to fraud and other mistakes "serious enough to vitiate the election as a fair expression of the will of the registered qualified electors." D.C. Code § 1-1001.11(b)(2)(B) (as amended, previously codified at D.C. Code § 1-1315(b) (1992)). This statute is similarly silent with respect to standard of proof and, thus, this Court held that this statute requires proof of fraud by clear and convincing evidence. That level of proof is unique to the fraud element of the statute; other (non-fraud) problems that warrant setting aside an election need be proven only by a preponderance of the evidence. *Allen v. District of Columbia Bd. of Elections & Ethics*, 663 A.2d 489, 496 (D.C. 1995).

This same analysis applies to the statutory provision at issue here – D.C. Code § 51-119(e). Like all of the statutes noted above, § 51-119(e) requires proof of fraud (in order to impose a fraud penalty or a period of disqualification) but does not specify a standard of proof. Also like all of the statutes noted above, § 51-119(e) is

therefore properly interpreted as requiring proof of fraud by clear and convincing evidence.[5]

In addition to this general rule, two facts more specific to § 51-119(e) mandate the use of the clear and convincing standard here. First, the underlying reasons for applying the clear and convincing standard of proof in cases involving common law fraud apply equally to cases involving unemployment insurance fraud under § 51-119(e). As noted above, the bases for applying the clear and convincing evidence standard to common law fraud include the need to reduce the risk of erroneous harm to reputation given that fraud constitutes quasi-criminal wrongdoing and the need to avoid erroneous penalties deemed to be more substantial than mere loss of money. *Addington v. Texas*, 441 U.S. 418, 424 (1979). The interests at stake in an administrative action for fraud under the unemployment compensation statute are the same. In addressing this very issue under its own unemployment insurance fraud statute, the Supreme Court of Hawaii noted these similarities as part of its reasons for concluding that a clear and convincing standard of proof should apply. *See*

[5] Although the ALJ below applied the preponderance of the evidence standard, that is not the view of the Office of Administrative Hearings as a whole. To the contrary, OAH is divided on this issue, as the only other OAH decision (of which we are aware) applied the clear and convincing evidence standard after explicitly referencing "the heightened burden of proof required for fraud." *A.B. v. DOES*, No. 2012 DOES 02144, 2013 WL 431719 (D.C. OAH Jan. 15, 2013) (reproduced in the Addendum to this brief, pages Add. 1-5).

*Tauese v. State*, 147 P.3d 785, 819-21 (Haw. 2006) (holding that administrative proof of unemployment insurance fraud must be by clear and convincing evidence because such a finding brands the claimant with the imprimatur of quasi-criminality and therefore produces the same reputational harm as a finding of fraud in a civil adjudication).

Second, this Court has already specifically concluded that in using the word "fraud" in § 51-119(e), the Legislature intended to invoke the common law of fraud. *Jacobs v. Dist. Unemployment Comp. Bd.*, 382 A.2d 282, 286 (D.C. 1978). As this Court observed, not only did the Legislature use the word "fraud," which is a common law term of art, but the listed elements of fraud under § 51-119(e) are materially the same as those at common law. 382 A.2d at 286. Application of the common law clear and convincing standard of proof here is thus not only mandated by the general rule that statutory fraud must be proven by clear and convincing evidence (just like common law fraud), but is also mandated by this Court's more specific determination that the Legislature intended § 51-119(e) fraud in particular to mirror common law fraud.[6]

[6] The specific question in *Jacobs* was whether the knowledge that DOES needed to prove to demonstrate fraud under § 51-119(e) was objective (whether a reasonable person in the claimant's position would have known that his or her representations were false) or subjective (whether the specific claimant did, in fact, know that his or her representations were false). This Court answered that question by looking to what kind of knowledge was a necessary element of common law

For these reasons, DOES can only recover a 15% penalty or impose a disqualification period under § 51-119(e) by proving fraud by clear and convincing evidence. Here, the ALJ expressly found only that fraud had been proven by a preponderance of the evidence. JA 178. That use of the preponderance of the evidence standard was a legal error that requires reversal. *See In re Renovizor's, Inc.*, 282 F.3d 1233, 1237 (9th Cir. 2002) (in civil case alleging tax fraud based on underreporting of income, standard of proof is significant, and court of appeals reversed lower court's finding of fraud by a preponderance of the evidence because fraud had to be proven by clear and convincing evidence).

### B. Other Jurisdictions Agree that Unemployment Compensation Fraud Must be Proven by the Same Standard as Common Law Fraud.

In keeping with federal guidelines, *see* 42 U.S.C. § 503(a)(11), every state has enacted laws similar to § 51-119(e). In every state we have examined, the standard of proof for fraud under the applicable unemployment compensation statute is the same as the standard of proof for fraud at common law.

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fraud, and held that this was actual subjective knowledge by the particular claimant at issue. In short, this Court held in *Jacobs* that because the common law requires that a person subjectively know the falsity of his or her representation in order to be found to have committed fraud, that same subjective showing is necessary under § 51-119(e). As discussed in Section II.A, below, DOES did not prove (by *any* standard of proof) such subjective knowledge by Ms. Epstein here.

For example, the Supreme Court of Hawaii examined the standard of proof applicable to allegations of fraud under its unemployment compensation statute in *Tauese v. State*, 147 P.3d 785 (Haw. 2006). The agency in that case had applied a preponderance of the evidence standard because the unemployment compensation fraud statute, like § 51-119(e), did not include a standard of proof. *Id.* at 819. The Hawaii Supreme Court reversed, noting that the clear and convincing standard "is typically used in civil cases involving allegations of fraud" because of the risk of an individual accused of fraud "having his reputation tarnished." *Id.* at 820 (internal quotation marks omitted); *accord id.* at 821. The court concluded that a finding of fraud under the State's unemployment compensation statute produces that same type of reputational harm because such a finding connotes dishonesty and brands the claimant with an imprimatur of quasi-criminality. *Id.* at 820. Accordingly, the court held that proof of such statutory fraud had to be by clear and convincing evidence. *Id.*

That same reasoning applies in Ms. Epstein's case, as she stands accused of quasi-criminal misconduct and faces a finding that connotes dishonesty and could harm her reputation. She is also subject to two penalties, one of which is akin to a fine and the other of which is a temporary disqualification from a public benefits program. It is particularly inappropriate to lightly cause such harm to an unemployment compensation claimant because the unemployment insurance statute

has a "remedial and humanitarian purpose," *Consumer Action Network v. Tielman*, 49 A.3d 1208, 1214 (D.C. 2012), not a punitive one.

*Tauese* is just one application of the apparently universal rule that the standard of proof for unemployment insurance fraud is the same as the standard of proof for common law fraud. Because most states – like the District – require clear and convincing proof of common law fraud, they also require clear and convincing proof of unemployment insurance fraud. *See, e.g.*, *Gourley v. Dep't of Workforce Servs.*, 339 P.3d 952, 953 (Utah 2014); *Harrington v. Dep't of Emp't & Training*, 566 A.2d 988, 989-90 (Vt. 1989); *Maguire v. Unemployment Ins. Appeal Bd.*, No. N14A-03-012, 2015 BL 23015, at *2 (Del. Sup. Ct. Jan. 29, 2015); *Ross v. Acrisure P1, LLC*, No. 315347, 2014 BL 227384, at *3 n.1 (Mich. Ct. App. Aug. 14, 2014); *Gutman v. Unemployment Comp. Bd. of Review*, No. 1899 C.D. 2009, 2010 BL 334275, at *5 (Pa. Commw. Ct. Apr. 22, 2010).[7]

The administrative ruling under review is thus contrary to the approach followed in other jurisdictions. It applies a standard of proof for statutory unemployment insurance fraud (preponderance of the evidence) that is different than

[7] Even the minority of states that – unlike the District – apply a preponderance of the evidence standard to common law fraud, follow the universal rule that the standard of proof for unemployment insurance fraud is the same as the standard of proof for common law fraud. *See Tauese*, 147 P.3d at 822-23 (citing *DeNuptiis v. Unocal Corp.*, 63 P.3d 272 (Alaska 2003), and *Sjostrand v. N.D. Workers Comp. Bureau*, 649 N.W.2d 537 (N.D. 2002)).

– and, specifically, lower than – the standard applicable to common law fraud claims (clear and convincing evidence). That is legal error requiring reversal.

## II. MS. EPSTEIN DID NOT COMMIT FRAUD.

"The essential elements of common law fraud are: (1) a false representation (2) in reference to material fact, (3) made with knowledge of its falsity, (4) with the intent to deceive, and (5) action is taken in reliance upon the representation." *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 438 (D.C. 2013) (internal quotation marks omitted). As noted above, this Court has already concluded that the elements of fraud under D.C. Code § 51-119(e) are essentially the same. *Jacobs*, 382 A.2d at 286.[8] Independent of the ALJ's legal error with respect to the standard of proof, noted above, the decision below must be reversed because there is no substantial evidence in the Record to support the conclusion that Ms. Epstein *knowingly* made any false statements (that is, with the subjective knowledge that they were false), and because there is no substantial evidence in the Record to support the conclusion that Ms. Epstein made any false statements with an *intent to deceive*. Instead, the evidence shows that Ms. Epstein has a math disability, which resulted in inaccurate reporting despite her best efforts.

[8] Some opinions include only four elements of fraud, not by eliminating any of these five elements but simply by combining the first two elements listed here. *See Jacobs*, 382 A.2d at 286 (listing four elements of fraud, with the first being "false representation of a material fact").

As noted above, Ms. Epstein does not deny that she inaccurately reported her weekly part-time earnings. But this fact, by itself, does not suggest that she committed fraud. To the contrary, DOES's website concedes that "[n]avigating through the UI system can be confusing," and lists a number of common mistakes. *Common Mistakes Made By UI Claimants*, http://does.dc.gov/page/common-mistakes-made-ui-claimants (last visited Dec. 30, 2015). The top of DOES's own list of common mistakes is "Not reporting income from part-time or temporary work while looking for a full-time position." *Id.*; *see also Frequently Asked Questions (FAQs) for Claimants*, http://does.dc.gov/sites/default/files/dc/sites/does/page_content/attachments/UI%20Website%20FAQs%20-%20For%20Benefits%20(Updated%206-25-14).pdf (last visited Dec. 30, 2015) (DOES document listing as "most common reasons for overpayments," both "[f]ailure to report earnings" and "[i]ncorrectly reporting earnings"). Ms. Epstein did not make the common mistake of failing to report her income entirely; she reported that she was employed and tried to report her income, but did so inaccurately. The fact that she committed a mistake that is far less egregious than what DOES admits is a common mistake hardly suggests that she knowingly and intentionally committed fraud.

Indeed, in at least two cases, ALJs within the Office of Administrative Hearings have rejected claims of fraud based on facts very similar to those presented

here. In *J.B. v. DOES*, No. ES-P-09-113412, 2009 WL 2494651 (D.C. OAH Jun. 26, 2009) (reproduced in the Addendum to this brief, pages Add. 6-9), the evidence showed repeated underreporting of income over a period of several months, but the ALJ refused to find fraud for two reasons. First "DOES offered no specific testimony or evidence on the issue of Claimant's knowledge." Add. 8. And, second, it would be improper to "infer from Claimant's purported misreporting that his omissions were willful misrepresentations." *Id.*

In *A.B. v. DOES*, No. 2012 DOES 02144, 2013 WL 431719 (D.C. OAH Jan. 15, 2013) (reproduced in the Addendum to this brief, pages Add. 1-5), a far more egregious reporting error was held not to be fraud. The claimant in *A.B.* reported no income for almost a year and repeatedly answered "no" to the question "Did you perform work during the week claimed?" despite the fact that he had a full-time job earning an average of over $400 per week. Add. 2. The ALJ nonetheless found no fraud because it was "conceivable" that the claimant interpreted the question "Did you perform work during the week claimed?" as relating only to the part-time job that the claimant lost and not the full-time job that he retained. Add. 4. Ms. Epstein's misreporting here was far less egregious than that in *A.B.* While the *A.B.* claimant lied about performing work or having a job at all, Ms. Epstein always accurately reported that she had a job and received earnings. While the *A.B.* claimant reported no income despite having a full-time job and earning an average of over $400 per

week, Ms. Epstein always reported income from her job, which was only part-time and paid significantly less. Accordingly, Ms. Epstein's misreporting, by itself, is not substantial evidence of fraud.

In short, the system is confusing and errors of the type made by Ms. Epstein (or even more extreme errors involving the complete failure to report both employment and income) are common and do not, by themselves, constitute fraud. Even in the absence of fraud, DOES is entitled to recover any overpayment, as it is from Ms. Epstein. But without the additional proof necessary to demonstrate fraud, DOES cannot collect the 15% fraud penalty or impose a fraud-based disqualification from receiving future benefits. As detailed below, there was no proof of culpable knowledge or fraudulent intent here and therefore no fraud.

A. Ms. Epstein Did Not Know Her Statements Were False.

No substantial evidence supports the conclusion that Ms. Epstein knew that she was providing inaccurate information to the agency. To the contrary, at all times, Ms. Epstein believed she was filling out the claim forms correctly.

In *Jacobs*, this Court discussed the knowledge element of fraud at length and specifically held that this element is subjective, meaning that "it relates to the particular individual charged with the fraud, not to a hypothetical reasonable person." 382 A.2d at 287. So the relevant question is whether Ms. Epstein knew

that she was providing incorrect information to DOES. There is no evidence to support such a conclusion.

Ms. Epstein repeatedly, credibly, and unequivocally testified that she did not know that her reports to DOES were inaccurate. *See, e.g.*, JA 105 ("I had no idea that I was doing it [reporting earnings] wrong."); JA 138 ("I had no knowledge of what I was doing. I had a math disability."); JA 144 ("I thought I was doing right all along."); JA 147 ("I had no idea that the – that I was doing the wrong thing."). This testimony is particularly important because the ALJ made no negative finding regarding Ms. Epstein's credibility. *See Jacobs*, 382 A.2d at 288 ("So, too, it is a matter to be taken into account in determining the credibility of the defendant if he testifies that he believed his representation to be true."). This case is thus similar to the *A.B.* case discussed above, in which the ALJ accepted the claimant's testimony that his repeated incorrect answers to the question "Did you perform work during the week claimed?" resulted from his subjective misunderstanding of the question. Add. 4 (declining to find fraud because "it is conceivable" that the claimant believed he was answering the questions correctly).

The Record indicates that the first time Ms. Epstein had knowledge that she was incorrectly reporting data to DOES was after she received the agency notices dated February 26, 2015 – after all of the reporting at issue here – and that she immediately inquired how to report correctly going forward. JA 137-41. Not only

was she not informed of any discrepancy before 2015, but in 2013, she was told the opposite. When Ms. Epstein attended a mandatory DOES reemployment and eligibility assessment session, two years after she first began submitting weekly claim forms, she showed her unemployment compensation records to a counselor who told her that she was "doing fine," thus reinforcing Ms. Epstein's belief that her reporting was accurate. JA 149.

Ms. Epstein's lack of subjective knowledge is strongly reinforced by the Record evidence of her math disability. Ms. Epstein's former supervisor at the National Institutes of Health, Charles Butler, noted the severe difficulty she had with numbers. Mr. Butler, who has known Ms. Epstein for over 20 years, wrote that she "was a great therapist," but that "she had a major deficiency which was her inability to maintain accurate statistics." JA 10. He further stated that "keeping her numbers accurate was a constant challenge." *Id*.

Ms. Epstein provided documentation demonstrating that individuals with math disabilities like her can have difficulty in even reading and writing numbers and be totally unable to perform calculations. JA 5. This Court has made clear that, because of the subjective nature of the knowledge component of fraud, Ms. Epstein's math disability must be considered in determining whether or not she had the required culpable knowledge to commit fraud. *See Jacobs*, 382 A.2d at 288 ("Thus, the claimant's intellectual capacity is also an appropriate evidentiary factor.").

The ALJ acknowledged Ms. Epstein's math disability but appeared to discount its effect on her ability to accurately report her part-time weekly earnings. The ALJ believed that Ms. Epstein could have accurately reported her weekly earnings simply by "copying her weekly wages as shown on her pay stub to the weekly claim form" – an act the ALJ believed would not "require any mathematical skills but merely copying a number." JA 178. This statement is erroneous for a variety of reasons. First, Ms. Epstein submitted documentation to the ALJ specifically noting that even copying numbers is difficult for individuals with her type of disability. JA 4-5 (math disabilities involve "failures in copying numbers" and "difficulties in copying numbers or problems").

More fundamentally, the ALJ clearly erred in believing that Ms. Epstein could have reported the relevant income figures to DOES by merely "copying a number" that was "shown on her pay stub." JA 178. The Record contains no pay stub showing that such copying was possible. Such copying was impossible because the DOES forms require *weekly* reporting of gross earnings, and Ms. Epstein was paid only *biweekly*. This means that (1) Ms. Epstein had no pay stub to copy at least half the times she was required to report to DOES (for the first week of any biweekly pay period); (2) Ms. Epstein may not have received her pay stubs in time for her to report to DOES even the second week of her pay period (depending upon exactly when she received those pay stubs); and (3) Ms. Epstein's pay stubs would likely *not* have

contained a weekly gross earnings figure for her to copy onto the DOES forms. None of this is surprising, as DOES's own website assumes that determining weekly gross wages is not a simple matter of copying a number from a pay stub but instead will typically require complex calculations or estimation. *See Claimant's Rights and Responsibilities Handbook*, http://does.dc.gov/sites/default/files/dc/sites/does/publication/attachments/UI%20Book_2.pdf (last visited Dec. 30, 2015) ("If you do not know the actual amount of your wages, provide an estimate by multiplying your hourly wage by the number of hours worked each week.").[9] The ALJ's supposition that Ms. Epstein's math disability was irrelevant because she could have filled out the DOES forms by simple copying and without doing any calculations is thus not supported by substantial (or, indeed, any) evidence. Without this erroneous supposition on the part of the ALJ, nothing in the Record supports the conclusion that Ms. Epstein knew that the information she was supplying to DOES was inaccurate.

[9] Ms. Epstein appeared *pro se* below and bore no burden of proof. As a result, she did not introduce her pay stubs into evidence. As the Record suggests, those pay stubs are biweekly and do not contain weekly gross earnings figures that could have been copied onto the DOES forms. More importantly, because of the way the pay stubs are organized, they do not even contain information from which a person could possibly calculate weekly gross earnings, regardless of their mathematical skill; the particularized data with which to make this calculation (including hourly pay rate for each hour worked during each week) is simply not included in the pay stub, so the best Ms. Epstein could have done – even in the absence of her math disability – would have been to estimate.

B. Ms. Epstein Had No Intent to Deceive.

There is also no substantial evidence that Ms. Epstein made false statements "with the intent to deceive." *Saucier v. Countrywide Home Loans*, 64 A.3d 428, 438 (D.C. 2013). This necessary mental state is separate and distinct from the culpable knowledge requirement addressed above. Ms. Epstein did not commit fraud because her misreporting of income was a result of her math disability and did not arise out of any intent to deceive.

Inaccurate reporting is not, by itself, evidence of intent to deceive. For example, in *Powell v. District of Columbia Housing Authority*, 818 A.2d 188, 191 (D.C. 2003), this Court reversed an administrative finding of fraud, despite the fact that it was undisputed that an individual participating in the Tenant Assistance Program failed entirely to report child support payments as income, despite being informed that such payments had to be reported. The failure to report income was not fraudulent by itself, and this Court noted that the fact that the claimant had always honestly reported that she expected to receive such payments (without reference to their amount) indicated that she lacked any intent to deceive. *See id.* at 198. This is logical, since reporting the fact of income, while merely misreporting its amount, is not indicative of an intent to deceive but is indicative of an honest mistake. *Accord J.B. v. DOES*, No. ES-P-09-113412, 2009 WL 2494651 (D.C. OAH Jun. 26, 2009), Add. 9 (claimant who consistently underreported earnings

every week over a period of months was not found to have committed fraud because of the absence of affirmative evidence that he "intended to defraud the Government"); *see also A.B. v. DOES*, No. 2012 DOES 02144, 2013 WL 431719 (D.C. OAH Jan. 15, 2013), Add. 4 (DOES failed to prove fraud by claimant who was employed full-time earning an average of over $400 per week but who reported no employment and no income).

Ms. Epstein's situation is similar to that in *Powell* except that the Record here includes clear evidence of the innocent reason for Ms. Epstein's misreporting, which was her math disability. That the misreporting was due to a math disability and *not* any intent to defraud is apparent from a number of Ms. Epstein's undisputed actions. First, on all of her claim forms, Ms. Epstein answered "Yes" when asked whether she "perform[ed] work during week claimed," and always reported earnings. *See, e.g.*, JA 33.[10] Indeed, in this regard, Ms. Epstein provided the Government with more (and more accurate) information than the claimant in *Powell*. The claimant in *Powell* merely informed the Government that she expected to receive child support payments but then entirely failed to report the actual receipt of such payments. Ms. Epstein informed DOES that she was actually working and reported earnings. Her

[10] Indeed, as discussed more fully below, Ms. Epstein even reported income in weeks in which she actually received no income, despite the fact that doing so was against her own financial interests.

conduct is inconsistent with an intent to deceive, especially in this context, where it is obvious that, because Ms. Epstein informed DOES of the fact that she worked part-time and identified her employer, DOES could easily verify her income. *See also J.B. v. DOES*, No. ES-P-09-113412, 2009 WL 2494651 (D.C. OAH Jun. 26, 2009), Add. 9 (claimant who consistently underreported earnings every week over a period of months not found to have committed fraud because "DOES has failed to provide any facts establishing Claimant intended to defraud the Government").

Second, had Ms. Epstein misreported her income with the intent to defraud, her misreporting would all have been in her favor, but some of Ms. Epstein's inaccurate reports overstated her income or zeroed out her weekly benefit and thus resulted in no financial gain to her or were actually to her financial detriment. *See* JA 16, 37 (for the benefit week ending January 31, 2015, Ms. Epstein actually earned only $28.02 but reported earning $40); JA 15, 36 (for the benefit week ending December 20, 2014, Ms. Epstein had no actual earnings but reported earning $62); JA 13, 35 (for the benefit week ending February 1, 2014, Ms. Epstein had no actual earnings but reported earning $42); JA 34 (for the week ending October 20, 2012, Ms. Epstein reported $220 in earnings – too much for her to receive unemployment benefits for that week); JA 33 (for the benefit week ending January 14, 2012, Ms. Epstein reported $189 in earnings – also too much for her to receive unemployment

benefits for that week).[11] These mistakes are consistent with Ms. Epstein's math disability but are *not* consistent with any intent to deceive or defraud. *Cf. Caulfield v. Stark*, 893 A.2d 970, 974 (D.C. 2006) (even evidence that is "equally consistent with either honesty or deceit" is insufficient to prove fraud). Accordingly, there is no substantial evidence in the Record to support the conclusion that Ms. Epstein intended to deceive or defraud by giving DOES inaccurate income information.

The ALJ appears to have concluded that intent to deceive was demonstrated "because Claimant knew that filling out the form would induce reliance by DOES – Claimant knew that she would receive benefits if she filled out the weekly claim

[11] DOES records indicate that, instead of attempting to ascertain the actual amount of Ms. Epstein's earnings, DOES simply chose the higher amount of that reported by Ms. Epstein and the Phillips Collection and used that higher number. The result, assuming the Phillips Collection numbers are accurate, is that DOES sought to recover all overpayments from Ms. Epstein without crediting her for any underpayments. This is unfair and improper. Moreover, DOES did not even inform the ALJ about these underpayments; instead, DOES provided long lists of weeks in which it alleged overpayments, omitting the weeks in which DOES failed to provide adequate payments to Ms. Epstein. *See, e.g.*, JA 72 (DOES report covering benefit weeks of November 29, 2014 through January 24, 2015, but omitting the benefit week of December 20, 2014, in which Ms. Epstein reported income despite not receiving any income); JA 60 (DOES report covering benefit weeks of January 4, 2014 through May 24, 2014, but omitting the benefit week of February 1, 2014, in which Ms. Epstein reported income despite not receiving any income); JA 40 (DOES report covering benefit weeks of December 24, 2011 through October 6, 2012 but omitting the benefit week of July 7, 2012, in which Ms. Epstein reported income despite not receiving any income). Ms. Epstein reserves the right to challenge any failures by DOES to pay her the full amount of unemployment benefits that she was due.

forms." JA 178. That reasoning is flatly inconsistent with *Powell* and *J.B.* and would effectively delete the "intent to defraud" requirement from the elements of fraud. The question is not whether Ms. Epstein merely submitted this information to DOES on a claim form, but rather whether she did so with the specific intent to obtain a higher benefit than she believed she was legally entitled to receive. Ms. Epstein concedes that she included the relevant information on a claim form, but no Record evidence suggests that she did so with the necessary fraudulent intent.

As an apparent substitute for knowledge and intent, the ALJ concluded that Ms. Epstein acted "recklessly" with respect to her reporting. *See* JA 178 & n.4. This conclusion is not supported by substantial evidence. To the contrary, the Record shows that Ms. Epstein sought out professional advice at the DOES reemployment and eligibility assessment, providing a DOES representative with her relevant paperwork and being told that she was "doing fine." JA 149. Such conscientiousness in attempting to follow the confusing requirements of the unemployment benefits scheme belies any suggestion of recklessness. *Cf. A.B. v. DOES*, No. 2012 DOES 02144, 2013 WL 431719 (D.C. OAH Jan. 15, 2013), Add. 4 (claimant was not "reckless" where his explanation for not seeking clarification of form question that he was obviously misreading was "just plausible enough"). Assuming that the ALJ was correct that it would have been ideal for Ms. Epstein to have obtained help with her DOES forms every single week, JA 178 & n.4, her

failure to do so was at most negligent, and negligent misrepresentations do not constitute fraud. *See, e.g., Remeikis v. Boss & Phelps, Inc.*, 419 A.2d 986, 990 (D.C. 1980); *S. Union Co. v. FERC*, 273 U.S. App. D.C. 21, 27, 857 F.2d 812, 818 (1988) (referring to conduct as "negligent but not fraudulent"). And finally, even if Ms. Epstein had acted recklessly, recklessness does not constitute (or substitute for) "intent to defraud." *In re Cleaver-Bascombe*, 892 A.2d 396, 399 (D.C. 2006).

The ALJ also noted (and may have inferred an intent to deceive from) the fact that Ms. Epstein reported generally lower wages in 2013 than she had in 2012. JA 178. But no adverse inference can reasonably be drawn from this fact because Ms. Epstein's average weekly earnings *were* lower in 2013 than they were in 2012. If anything, this rough correlation further reinforces that Ms. Epstein was attempting, despite her math disability, to report her income. The ALJ's finding that Ms. Epstein committed fraud must be reversed.

## III. THE PENALTY AMOUNT IS INACCURATE AND PARTIALLY UNSUPPORTED.

The two preceding sections demonstrate that the fraud penalty imposed on Ms. Epstein was improper in its entirety. Three further errors below require reductions in the fraud penalty, if any such penalty remains after this Court's decision.

First, DOES's evidence that Ms. Epstein reported her earnings inaccurately consisted of computer-generated copies of her weekly claim forms. JA 134-36. But

DOES failed to provide the ALJ with any claim forms for the benefit weeks ending February 15, 2014, March 29, 2014, and January 24, 2015. Without such claim forms, there is no credible evidence of *any* representation (accurate or otherwise) by Ms. Epstein regarding those weeks and therefore no evidence whatsoever of fraud related to those weeks. *See J.B. v. DOES*, No. ES-P-09-113412, 2009 WL 2494651 (D.C. OAH Jun. 26, 2009), Add. 8 (DOES failed to prove fraud for those time periods for which it failed to file the relevant claim forms with OAH). The fraud penalties associated with those three weeks must be reversed.

Second, DOES ultimately determined that Ms. Epstein was not entitled to benefits for the benefit weeks ending November 2, 2013 and November 1, 2014 because each of those weeks was a "waiting period" during which no benefits could be paid regardless of income. *See* JA 56, 68 (referring to the "waiting week adjustment"); D.C. Code § 51-109(5). Because income during a waiting period week is irrelevant, misreporting of income for such a week cannot constitute fraud as a matter of law. *See, e.g.*, *Jacobs v. Dist. Unemployment Comp. Bd.*, 382 A.2d 282, 286 (D.C. 1978) (materiality of any false statement is an element of fraud). The fraud penalties associated with those two weeks must be reversed.

Finally, $15 of the total fraud penalty is based on the notice at JA 62. This notice does not contain enough information to impose any fraud penalty because it is completely silent as to when the alleged fraud occurred, what the alleged fraud

was, or any other material information. All it says is that DOES is imposing a $15 fraud penalty for the benefit year ending October 18, 2014. Nothing in the Record explains the basis for this fraud penalty, and it must be reversed.

## CONCLUSION

For the foregoing reasons, the ruling of the Office of Administrative Hearings that Ms. Epstein fraudulently underreported her earnings should be reversed, along with the 15% fraud penalty ($764) and the finding of disqualification for the period from February 14, 2015 through April 4, 2015.

Respectfully submitted,

_____
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## CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Petitioner's Brief to be delivered by first-class mail, postage prepaid, this 4th day of January 2016 to:

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_____

Jonathan H. Levy

## ADDENDUM

2013 DCOAH 02144 (D.C.O.A.H.), 2013 WL 431719

District of Columbia Office of Administrative Hearings

A.B., Appellant/Claimant,
v.
DOES-BPC, Appellee/Agency.

Case No. 2012-DOES-02144
January 15, 2013

**FINAL ORDER**

## I. INTRODUCTION

***1 A. Parties:** Claimant A.B. and the Department of Employment Services ("DOES"). Mr. B represented himself. Claims Examiner S D represented DOES.

**B. Issue Presented:** Is DOES entitled to recoup $12,067 in benefits overpaid to Mr. B, as asserted in its Notice of Overpayment (Exhibit 300.2)? If so, is Mr. B disqualified from receiving future benefits because he made knowing false representations to DOES, as asserted in the DOES Notice of Determination (Exhibit 300.1)?

**C. Result:** DOES proved that Mr. B failed to report earnings in weeks for which he received other income and, consequently, was overpaid $12,067 in benefits that DOES is entitled to recoup. The Notice of Overpayment is affirmed. DOES failed to prove that Mr. B made knowing false representations to DOES. Mr. B is qualified to receive future unemployment compensation benefits.

**D. Relevant Statutory Provisions:** District of Columbia Unemployment Compensation Act ("Act"), D.C. Official Code §§ 51-111(b) (timeliness of appeal), 51-107(e) (payment of benefits), and 51-119 (recoupment of benefits).

**E. Date and Time of Evidentiary Hearing:** January 7, 2013, at 1:30 p.m.

**E. Witnesses:** Mr. B and Mr. D.

**F. Documents Received into Evidence:** DOES Exhibits 200 through 216 and 219. I considered Court Exhibits 300.1 (Notice of Determination), 300.2 (Notice of Overpayment), and 301 (Request for Hearing) in determining jurisdiction.

## II. JURISDICTION

The request for hearing was timely based on the filing date and the mailing date of the Determination and Notice of Overpayment. [1] Jurisdiction is established.

## III. FINDINGS OF FACT

Mr. B lost his part-time job as an after-school teacher with E Corporation in November 2011. He continued to work at his full-time job as a Resident Advisor at the C School where his weekly earnings ranged from $155.88 to $768.69 per week, averaging over $400 per week. Exhibit 210. Mr. B telephoned DOES to ask if he was eligible for unemployment compensation benefits and was told by a DOES employee to apply for benefits. Mr. B had not received unemployment compensation benefits previously and was not familiar with the DOES requirements.

Mr. B applied for and received benefits for the weeks ending December 3, 2011, through September 1, 2012. Exhibits 202, 212. [2] To obtain these benefits, Mr. B submitted weekly claims forms on line certifying that he was unemployed and available for work. On each of the claims forms that he submitted for the week ending December 3, 2011, through the week ending September 1, 2012, Mr. B answered "no" to the question "Did you perform work during the week claimed? If so, indicate gross earnings amount in the box at right." Exhibit 219.

In May 2012, DOES initiated an audit of Mr. B's claims. In response to the audit, the C School certified that Mr. B received weekly wages from December 3, 2011, through August 29, 2012, when Mr. B resigned to take another job. Exhibits 209, 210. On October 19, 2012, DOES mailed Mr. B an Audit Notice with three questions: (1) "Did you work, receive severance, or any other income from the employer(s) listed in Column II during the weeks shown? (2) "If yes, why did you fail to correctly report the wages?" (3) "When you filed your claim, how did you receive the 'Claimant's Rights and Responsibilities Pamphlet?" Exhibit 204. The Audit Notice listed the C School as the employer in Column II and scheduled the wages that the school had reported to DOES. *Id.*

Mr. B never responded to the Audit Notice. Although the Notice was addressed to his correct address, Mr. B testified that he did not receive it. DOES was unable to contact him by telephone because his phone was disconnected after he fell behind in paying his bills.

On December 4, 2012, DOES issued the Notice of Determination and the Notice of Overpayment that are under appeal here. Exhibits 201, 202.

**IV. CONCLUSIONS OF LAW**

**A. Recoupment of Overpayments**

In order to uphold the Claims Examiner's Overpayment Determination, this administrative court must find that DOES provided substantial evidence in the record in support of its Overpayment Determination. *Anthony v. D.C. Dep't of Emp't Servs.,* 485 A.2d 605, 607 (D.C. 1984).*See also, Branson v. D.C. Dep't of Emp't Servs.,* 801 A.2d 975. 979 (D.C. 2002). This administrative court also must find that the hearing record contains "reliable, probative and substantial evidence" to support its findings of fact and conclusions of law. D.C. Official Code § 2-509(e).

I conclude that DOES has satisfied its burden and is entitled to recoup the total amount of its overpayments from Mr. B. Benefits under the Act are available only to persons who are "unemployed." D.C. Official Code § 51-107(e). The Act deems a person "unemployed" only in weeks "with respect to which no earnings are payable to him," subject to an adjustment for low earnings that is not relevant here. [3] D.C. Official Code § 51-101(5). In turn, the Act defines "earnings" as "all remuneration payable for personal services, including wages, commissions, and bonuses …."

Mr. B acknowledged that he received earnings from the C School during the weeks in which DOES paid him benefits. His only explanation was that he misunderstood the question on the DOES claims forms and thought that it applied only to the part-time job that he had lost. Because he failed to report earnings that he received, DOES paid Mr. B benefits to which he was not entitled.

DOES proved that, in each of the weeks for which it seeks to recover overpayments, Mr. B failed to report earnings that would have reduced his benefits or precluded him from receiving benefits under the Act. DOES may require Mr. B to repay the benefits he was not entitled to receive. D.C. Official Code § 51-119(d)(1).

**B. Disqualification for Making False Statements**

In addition to recouping its overpayments to Mr. B, DOES also seeks to disqualify him from receiving future benefits because he allegedly "made a false representation knowing it to be false" in failing to disclose his earnings from the C School when he filed his claims. Exhibits 200, 212. I conclude that DOES failed to sustain the heightened burden of proof required for fraud and, consequently, Mr. B remains qualified to receive benefits.

The Act provides penalties for claimants who make knowing false statements:
Any person who the Director finds has made a false statement or representation knowing it to be false, or who knowingly fails to disclose a material fact to obtain or increase any benefit under this subchapter may be disqualified for benefits for all or part of the remainder of such benefit year and for a period of not more than 1 year commencing with the end of such benefit year. Such disqualification shall not affect benefits otherwise properly paid after the date of such fraud and prior to the date of the ruling of disqualification.

D.C. Official Code § 51-119(e).

The Court of Appeals applies the common law definition of civil fraud to decide whether an unemployment compensation Claimant should be denied benefits because he or she provided false information or made a false representation to DOES. *Jacobs v. Dep't of Emp't Servs.*, 382 A.2d 282, 286 (D.C. 1978). Under the civil fraud standard, this administrative court must find that DOES has proven that there was:
false representation of a material fact or failure to disclose a material fact, knowledge of the falsity, intention to induce reliance upon the misrepresentation, and actual reliance. Whether a claimant has knowledge of the falsity at issue is to be determined by reference to a subjective standard, *i.e.*, the state of mind of the claimant rather than that of a reasonable person in the position of the claimant is to be considered.

*Rodriguez v. D.C. Dep't of Emp't Servs.*, 452 A.2d 1170, 1172 (D.C. 1982) (internal citations omitted).*See also In re Estate of Nethken*, 978 A.2d 603, 607 (D.C. 2009) (listing the elements of fraud).

Thus, in order to prevail on a claim that an employee received benefits as the result of a false statement, DOES must demonstrate the following four elements:
1. A false representation of a material fact (*i.e.*, "has made a false statement or representation," or "fails to disclose a material fact");

2. Knowledge of the falsity (*i.e.*, "knowing it to be false" or "knowingly fails to disclose…");

3. An intention to induce reliance (*i.e.*, "to obtain or increase any benefit…"); and

4. Action taken in reliance on the representation.

*Rodriguez*, 452 A.2d at 1172.

To prove the knowledge element, DOES may prove either that the Claimant had actual knowledge of the falsity, or that the Claimant made the statement "recklessly, careless of whether it is true or false." *Jacobs*, 382 A.2d at 287 (quoting *Premier Poultry Co. v. Wm. Bornstein & Son*, 61 A.2d 632, 634 (D.C. 1948)). The knowledge element is subjective, and "relates to the particular individual charged with the fraud, not to a hypothetical reasonable person." *Id.* However, the *Jacobs* court pointed out that "objective facts surrounding the incident" may manifest the requisite intent to defraud. *Jacobs*, 382 A.2d at 288.

Finally, to establish fraud, DOES must prove its case by clear and convincing evidence. *Estate of Nethken*, 978 A.2d at 607. Clear and convincing evidence is such evidence as "'would produce in the mind of the trier of fact a firm belief or conviction as to the facts sought to be established."' *Id.* (*quoting Ingersoll v. Ingersoll*, 950 A.2d 672, 693 (D.C. 2008)). [4]

In light of Mr. B's uncontradicted testimony that he thought his answers in the claims forms applied only to the part-time job that he had lost, I cannot hold a firm conviction that he consciously falsified his responses when he filed the forms. Since Mr. B was told to apply for benefits and applied because he had lost the part-time job, it is conceivable that he believed that the questions only applied to the job he lost.

For similar reasons, I conclude that Mr. B's repeated denial in the weekly claims forms that he "perform[ed] work" was not "recklessly, careless of whether it is true or false?" *Jacobs*, 382 A.2d at 287. The issue is close. A prudent claimant, faced with an unambiguous question about whether he performed work, would at least have asked DOES for clarification about whether the question applied to all employment rather than the part-time job from which he had been separated. But Mr. B's explanation of why he continued to answer "no" to the question about performing work is just plausible enough that I am not firmly convinced that his carelessness reached the level of fraud. I credit Mr. B's testimony that he was unfamiliar with DOES procedures, since this was his first claim. Given his inexperience, his testimony that he understood that the only information he was required to provide related to the part-time job from which he had been separated is not patently reckless.

It follows that DOES failed to prove by clear and convincing evidence that Mr. B made knowing false representations for which he may be disqualified from receiving future benefits. Mr. B remains qualified to receive benefits.

**V. ORDER**

Accordingly, it is this **15th** day of **January 2013,**

**ORDERED** that the Notice of Overpayment seeking to recoup $12,067 for overpayments in the weeks from December 3, 2011 through September 1, 2012 (Exhibit 300.2), is **AFFIRMED**; and it is further

**ORDERED**, that Claimant A.B. is required to refund overpayments to DOES in the total amount of **$12,067**; and it is further

**ORDERED**, that the Notice of Determination by Claims Examiner disqualifying Mr. B from receiving benefits from December 2, 2012, through November 16, 2013, is **REVERSED**; and it is further

**ORDERED,** that the appeal rights of any party aggrieved by this Final Order are set forth below.

Nicholas H. Cobbs

Administrative Law Judge

Footnotes

1 D.C. Official Code § 51-111(b). Exhibits 300.1, 300.2, 301.

2 Mr. B continued to file claims in September 2012 after he quit his job with the C School and started work for his new employer. DOES did not include any of those claims in the Determination or Notice of Overpayment here.

3 Mr. B's earnings from the C School were low enough to qualify him for significantly reduced benefits in many of the weeks in which he claimed benefits. The DOES Notice of Overpayment adjusts for the reduced benefits and claims only for the amounts that Mr. B was overpaid. Exhibit 300.2.

4 The Court of Appeals has not specifically held that the "clear and convincing" evidence standard applies in fraud cases arising under the Unemployment Compensation Act. In *Rodriguez,* 452 A.2d 1172, the court held that there was "sufficient record evidence" to sustain a finding of fraud, but did not discuss the underlying standard. In *Jacobs*, 382 A.2d at 286, the court noted that the word "fraud" was contained in the Act itself, D.C. Official Code § 51-119(e), and that the elements of proof that the Act requires "track the common law requirements for proving fraud." In *Powell v. D.C. Hous. Auth.*, 818 A.2d 188, 197 (D.C. 2003), the court approved the parties' agreement that the clear and convincing evidence standard applied in an administrative proceeding where a tenant was accused of violating a District regulation that prohibited "fraudulently" underreporting income. However, the court observed that "We therefore assume this to be the correct evidentiary standard without deciding the matter." *Id.* at 198 n.15.

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**End of Document**

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Office of Administrative Hearings

District of Columbia

J.B., Appellant/Claimant
v.
D.C. DEPARTMENT OF EMPLOYMENT SERVICES, Appellee/Agency

Case No.: ES-P-09-113412
June 26, 2009

**FINAL ORDER**

**I. INTRODUCTION**

On May 27, 2009, Claimant J.B. appealed two District of Columbia Department of Employment Services ("DOES") Claims Examiner's Determinations, each of which was mailed to him on May 20, 2009. One Determination found that Claimant had knowingly and willfully failed to report earnings and was therefore disqualified from receiving benefits from "05/17/2009 to 05/15/2010." Exhibit 300. The other determination was a Notice of Determination of Overpayment ("Overpayment Determination"), finding that Claimant was overpaid and liable for $1,239, for weeks where Claimant failed to report income. Exhibit 300.1. The appeal raises the issues (1) whether Claimant knowingly made false representations to DOES (D.C. Official Code § 51-119(e)(1)) and (2) whether Claimant was overpaid $1,239, and is therefore liable to repay that amount to DOES (D.C. Official Code §§ 51-119(d)(1)).

This administrative court issued a Scheduling Order and Notice of In-Person Hearing on June 1, 2009, scheduling the hearing for June 16, 2009, at 10:30 a.m. Claimant represented himself and testified at the hearing. Gregory Price, Claims Examiner, represented DOES and testified on its behalf. During the hearing I admitted into evidence Claimant's exhibit 100 and DOES exhibits 200-203. I held the record open so that DOES could file the claim forms Claimant submitted to DOES during the months of December 2008, January 2009 and February 2009. On June 23, 2009, DOES filed multiple copies of one claim form dated February 10, 2009, which I admit as DOES exhibit 204. I relied upon court documents marked as Exhs. 300, 300.1, and 301 to establish jurisdiction.

**II. FINDINGS OF FACT**

1. On May 27, 2009, Claimant appealed two Claims Examiner's Determinations mailed on May 20, 2009. Exhs. 300, 300.1, 301.

2. Claimant filed for benefits on July 10, 2008. Exhibit 200. Claimant was found eligible and qualified to receive weekly benefits in the amount of $359 per week, plus $25 pursuant to federal stimulus funding. Exhibit 200. Claimant was paid benefits for the weeks ending July 12, 2008, through March 14, 2009, in the total amount of $6,168. Exhibits 200 and 203.

3. In November 2008, DOES requested Claimant to confirm the wage data he had reported. Claimant works for A Hotel. Claimant spoke to someone in A Hotel's human resources department. This person gave Claimant the wage data and Claimant supplied the requested wage information to DOES. Claimant was concerned that he may have inadvertently made a mistake

in reporting his wage data, so he asked this person to personally enter his wages earned on the claim form every two weeks. The person agreed.

4. In January 2009, DOES conducted a routine audit of Claimant's benefits and requested certain wage data from A Hotel. Exhibit 201. A Hotel responded to the request from DOES. Exhibits 201 and 202. DOES gathered the wage data reported by A Hotel and Claimant and recorded it in its database. The recorded wage data is:

| A Hotel | Claimant | Claim Form |
|---|---|---|
| December 12, 2008 — $729.27 | December 12, 2008 — $183.00 | December 12, 2008 — $244 |
| December 19, 2008 — $242.48 | December 19, 2008 — $174.00 | December 19, 2008 — illeg. |
| January 16, 2009 — $361.25 | January 16, 2009 — $285.00 | |
| January 30, 2009 — $231.80 | January 30, 2009 — $9.00 | |
| February 6, 2009 — $218.08 | February 6, 2009 — $155.00 | February 6, 2009 — $218 |
| February 13, 2009 — $396.50 | February 13, 2009 — $298.00 | February 13, 2009 — $442 |
| February 20, 2009 — $193.68 | February 20, 2009 — $135.00 | |

Exhibits 202 and 203.

5. On December 15, 2008, Claimant submitted a claim form for the weeks ending December 13 and 20, 2008. Exhibit 100. Contrary to the data recorded by DOES, Claimant reported wages of $244 for December 13, 2008 (the amount reported for December 20, 2008, is illegible). *Id.* On February 10, 2009, Claimant submitted a claim form for the weeks ending February 7 and 14, 2009. Exhibit 204. Contrary to the data recorded by DOES, Claimant reported wages of $218.07 for February 7, 2009, and $446.82 for February 14, 2009. *Id.*

6. On May 20, 2009, DOES issued Claimant a Notice of Overpayment in the amount of $1,239, because Claimant received benefit payments to which he was not entitled due to unreported earnings between December 12, 2008, and February 20, 2009. Exhibit 300.1. DOES also issued Claimant a Determination disqualifying him from benefits from May 17, 2009, to May 15, 2010, because DOES determined that Claimant knowingly and willfully failed to report earnings. Exhibit 300.

**III. CONCLUSIONS OF LAW AND DISCUSSION**

Any party may file an appeal from a Claims Examiner's Determination within 10 calendar days after the mailing of the Determination to the party's last-known address or, in the absence of such a mailing, within 10 calendar days of actual delivery of the Determination. D.C. Official Code § 51-111(b). Both Determinations in this case were mailed to Claimant on May 20, 2009. Exhs. 300, 300.1. Claimant timely filed an appeal of both Determinations on May 27, 2009; jurisdiction is established. D.C. Official Code § 51-111(b).

**A. Overpayment Determination**

In order to have the Claims Examiner's Overpayment Determination upheld, DOES must establish with substantial evidence in the record that Claimant has failed to satisfy his reporting requirements. *Anthony v. D. C. Dep't of Employment Servs.*, 485 A.2d 605, 607 (D.C. 1984) (“Where the Department has determined that a claimant failed to adhere to the reporting requirements,

and consequently denied unemployment compensation, we must affirm if their finding is supported by substantial evidence in the record."). Further, my findings of fact and conclusions of law must be "supported by and in accordance with [] reliable, probative, and substantial evidence" in the record. D.C. Official Code § 2-509(e).

DOES failed to establish that Claimant was paid $1,239 in benefits from December 12, 2008, and February 20, 2009, to which he was not entitled. As reflected in the chart above, a comparison of the wage data submitted by Claimant and that recorded by DOES in its database establishes that DOES incorrectly recorded the wage data submitted by Claimant. The two examples of significance in the record are for the weeks ending December 13, 2008, and February 14, 2009. Exhibits 100 and 204. For December 13, 2008, Claimant reported wages of $244; however, DOES recorded that Claimant reported wages of $183. Exhibits 100 and 200. For February 14, 2009, Claimant reported wages of $446.82; however, DOES recorded that Claimant reported wages of $298. Exhibits 200 and 204. Even though given a chance, DOES failed to file with this administrative court Claimant's other claim forms. Based on the record before me and the identified discrepancies, I conclude there is not reliable evidence and, therefore, no probative and substantial evidence that Claimant was paid benefits to which he was not entitled because he underreported his wages.

Accordingly, the Overpayment Determination of the Claims Examiner dated May 20, 2009, is reversed. Claimant is not liable to pay DOES $1,239 for the overpayment of benefits. D.C. Official Code §§ 51-119(d)(1) and (2).

**B. Knowing Failure by Claimant to Report Earnings**

In this jurisdiction, if a claimant knowingly makes a false statement or knowingly fails to disclose material facts to obtain or increase benefits, the claimant may be disqualified from receiving benefits for all or part of the benefit year in question and the subsequent benefit year. D.C. Official Code § 51-119(e)(1). [1] DOES has not met its burden to show that Claimant knowingly made false representations.

DOES offered no specific testimony or evidence on the issue of Claimant's knowledge and asks this administrative court to infer from Claimant's purported misreporting that his omissions were willful misrepresentations. In addition to the fact that DOES failed to establish that Claimant erroneously reported his wages, Claimant offered credible and plausible testimony that beginning in December 2008, a colleague from A Hotel's human resource department wrote the wage data recorded on his claim forms for him. Claimant argued that comparing the handwriting on the claim forms he prepared (dated before December 2008) and the ones prepared later establishes that someone other than he entered the wage data for the period in question. I kept the record open so that the DOES representative could retrieve the forms for such a comparison; however, the representative filed only one form. Exhibit 204. And this claim form, establishes that Claimant reported earning more wages than A Hotel reported he earned.

The District of Columbia Court of Appeals utilizes the common law definition of civil fraud to decide whether an unemployment compensation claimant should be denied benefits because he provided false information or made a false representation to DOES. *Jacobs v. Dep't of Employment Servs.*, 382 A.2d 282, 286 (D.C. 1978). Under the civil fraud standard, DOES must prove a "false representation of a material fact or failure to disclose a material fact, knowledge of the falsity, intention to induce reliance upon the misrepresentation, and actual reliance." *Rodriguez v. D.C. Dep't of Employment Servs.*, 452 A.2d 1170, 1172 (D.C. 1982) (internal citations omitted) (*citing Jacobs*, 382 A.2d at 286-87).

The standard of knowledge required is also the knowledge required for a finding of civil fraud. In *Jacobs*, 382 A.2d at 286-87, the court explained that the knowledge required for a finding of fraud is subjective but "does not necessarily mean actual knowledge of falsity; the scienter element is satisfied if the representation is 'recklessly and positively made without knowledge of its truth'." *Jacobs*, 382 A.2d at 287 (*quoting Premier Poultry Co. v. Wm. Bornstein & Son*, 61 A.2d 632, 634 (D.C. 1948)).

A false representation, therefore, may be made recklessly when a person is careless about presenting a fact as true or false. The *Jacobs* court also pointed out that "objective facts surrounding the incident" may manifest the requisite intent to defraud. *Jacobs*, 382 A.2d at 288.

DOES has failed to provide any facts establishing Claimant intended to defraud the Government. DOES did not enter into evidence the bi-weekly claim forms for benefits that Claimant filed to corroborate its contention that Claimant under-reported his earnings. Accordingly, the Claims Examiner's Determination finding Claimant disqualified for the period of May 17, 2009, to May 15, 2010, because he knowingly failed to disclose earnings is reversed. D.C. Official Code § 51-119(e)(1).

**IV. ORDER**

Based upon the foregoing findings of fact and conclusions of law and the entire record in this matter, it is, this 26th day of June 2009

**ORDERED**, that the Claims Examiner's Notice of Determination of Overpayment dated May 20, 2009, holding Appellant/Claimant J.B. liable for an overpayment of unemployment compensation benefits in the amount of $1,239 is **REVERSED**; and it is further

**ORDERED**, that Appellant/Claimant J.B. is **NOT LIABLE** to repay Appellee/Agency DOES the amount of $1,239; and it is further

**ORDERED**, that the May 20, 2009, Claims Examiner's Determination that Appellant/Claimant J.B. knowingly provided a false statement to DOES and is ineligible from May 17, 2009 to May 15, 2010 is **REVERSED**; and it is further

**ORDERED**, that the appeal rights of any person aggrieved by this Order are stated below.

Jesse P. Goode
Administrative Law Judge

Footnotes

1 "Any person who the Director finds has made a false statement or representation knowing it to be false, or who knowingly fails to disclose a material fact to obtain or increase any benefit under this subchapter may be disqualified for benefits for all or part of the remainder of such benefit year and for a period of not more than 1 year commencing with the end of such benefit year. Such disqualification shall not affect benefits otherwise properly paid after the date of such fraud and prior to the date of the ruling of disqualification." D.C. Official Code § 51-119(e)(1).

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