

70805-8

70805-8

NO. 70805-8-1

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

KIMBERLIE D. TUTTLE,

Appellant,

vs.

STATE OF WASHINGTON DEPARTMENT OF EMPLOYMENT
SECURITY,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

A person may not simultaneously receive unemployment benefits and workers' compensation benefits. RCW 50.20.085. After applying for and receiving unemployment benefits, Kimberlie Tuttle received a back pay award of workers' compensation benefits, which covered 93 of the 100 weeks she had received unemployment benefits. Therefore, she was liable for repayment of \$46,567 in unemployment benefits, unless the Commissioner of the Employment Security Department (Department) granted her a waiver.

Ms. Tuttle asked the Department to waive the overpayment of unemployment benefits, alleging that requiring repayment would cause her financial hardship. But her household's monthly income greatly exceeded its monthly expenses, and she had just received a lump sum payment of \$65,134.06 from the Department of Labor and Industries (L & I). From this lump sum payment, Ms. Tuttle paid the attorney who represented her in her workers' compensation claim approximately \$20,000 in attorney fees and costs. She asked the Department to waive a similar amount. In effect, she asked the Department to pay her attorney fees for her worker's compensation appeal.

The Commissioner correctly denied the request determining that it would not be against equity and good conscience to require Ms. Tuttle to repay the overpayment where her household's monthly income greatly exceeded its significant monthly expenses. Moreover, neither the Industrial Insurance Act nor the Employment Security Act provide for recovery of attorney fees for successful administrative litigation. The Department should not be required to pay the fees Ms. Tuttle could not recover from L & I. This Court should affirm the Commissioner's decision because it is supported by substantial evidence and is free of errors of law.

II. COUNTERSTATEMENT OF THE ISSUES

1. Under RCW 50.20.190, the Commissioner *may* waive an overpayment of unemployment benefits only if the overpayment was not the result of fault attributable to the individual *and* recovery of the overpayment would not be against equity and good conscience. Did the Commissioner correctly conclude that it would not be against equity and good conscience to require Ms. Tuttle to repay her overpayment when her household income greatly exceeded its expenses, and she had just received a lump sum payment of \$65,134.06 from the Department of Labor and Industries?

2. Under the Industrial Insurance Act, a workers' compensation benefits claimant who successfully appeals to the Board of Industrial Insurance Appeals is not entitled to recover attorney fees from the Department of Labor and Industries (L & I). RCW 51.52.120. Where Ms. Tuttle could not recover her attorney fees and costs from L & I for her workers' compensation appeal, would it be an absurd result to require the Employment Security Department to cover those fees and costs?
3. An unemployment benefits claimant is entitled to reasonable attorney fees and costs under RCW 50.32.160 only if the Commissioner's decision is modified or reversed. If this Court affirms the Commissioner's decision, should this Court deny Ms. Tuttle attorney fees?

III. STATEMENT OF THE CASE¹

In 2009, Ms. Tuttle separated from her employer due to certain medical conditions. Commissioner's Record (AR)² at 41; Finding of Fact (FF) I. She applied for unemployment benefits in April 2009. AR at 41, 55, 72-73; FF I, 1.

In September 2009, Ms. Tuttle filed a claim for workers' compensation with the Department of Labor and Industries (L & I). AR at 41; FF II. L & I initially rejected her claim and Ms. Tuttle retained counsel to appeal the decision to the Board of Industrial Insurance Appeals. AR at 41; FF II. The Board of Industrial Insurance Appeals

¹ Ms. Tuttle makes numerous assertions without citation or reference to the record, violating RAP 10.3(a)(5) and (6).

² The superior court transmitted the Certified Appeal Board Record (AR) as a stand-alone document. See Index to Clerk's Papers (CP). Because it is separately paginated from the Clerk's Papers, this brief cites to the appeal board record as "AR."

ultimately reversed L & I's decision and granted Ms. Tuttle workers' compensation. AR at 41; FF II. In January 2012, Ms. Tuttle received a lump sum of time loss compensation in the amount of \$65,134.06 for the period June 16, 2009, through January 10, 2012. AR at 41, 56, 72-73; FF II, 2.

Because a person may not simultaneously receive unemployment and workers' compensation benefits, the Employment Security Department (Department) determined that from June 16, 2009, through March 26, 2011, Ms. Tuttle was overpaid \$46,567 in unemployment benefits because she had received workers' compensation benefits for the same time period. AR at 12, 55, 72; FF 2. Ms. Tuttle requested a waiver of the overpayment and appealed the Department's subsequent denial of her request on the basis that she was at fault for the overpayment. AR at 42; FF IV. The Department's Commissioner³ ultimately determined that Ms. Tuttle was not at fault for the overpayment and remanded the matter to the Department to determine whether Ms. Tuttle was eligible for a partial or full waiver of the overpayment. AR at 41-43, 55; Conclusion of Law (CL) IV.

³ Decisions on petitions for Commissioner review are made by review judges in the Commissioner's review office but are treated as decisions of the Commissioner due to statutory delegation. *See* RCW 50.32.070; WAC 192-04-020(5).

Ms. Tuttle then provided the following information to the Department: she lives with her husband and their 17-year-old daughter. AR at 12-13, 38, 56, 72; FF 2, 3. Ms. Tuttle's household earns more in monthly income than it spends in necessary monthly expenses. AR at 35, 38-39. She further asserted that repayment "would cause financial distress [and] is against equity and good conscience." AR at 38. The Department declined to waive the overpayment. AR at 56, 72; FF 2.

Ms. Tuttle appealed the Department's determination that she was liable for refund of the overpayment and requested a hearing before an administrative law judge (ALJ). AR at 34. At the hearing, Ms. Tuttle's attorney for the workers' compensation matter and Ms. Tuttle testified that Ms. Tuttle used the lump-sum payment from L & I to pay \$16,029 in attorney fees and \$4458 in litigation costs to her workers' compensation attorney.⁴ AR at 18-21, 56, 72; FF 4. She also used the lump-sum payment to pay for orthodontia and medical care for her daughter, to cover extracurricular activities for her teenage daughter, and to pay for car repairs. AR at 18-19, 56, 72; FF 4.

Ms. Tuttle testified that her household earns a monthly income of \$8048: each month, her husband receives \$6000 in income, and Ms. Tuttle

⁴ At the administrative hearing, Ms. Tuttle's attorney testified that this is the amount Ms. Tuttle paid in attorney fees and costs to recover workers' compensation for the weeks she also received unemployment benefits. AR at 21.

receives approximately \$2048 in unemployment benefits.⁵ AR at 13-14, 38-39, 56, 72; FF 3. Ms. Tuttle confirmed that her household's monthly expenses total \$5707, which includes \$2520 in rent for a four-bedroom home, \$600 for utilities, \$350 for gas, and \$950 for food. AR at 15-18, 39, 56, 72; FF 3. At the hearing, Ms. Tuttle argued, "[T]his is causing me financial distress trying to pay back the full amount of the overpayment and it has – it – it does not seem right that an employee has to pay more – has to pay to prove that they got sick at work and the process that it takes. And it costs a lot of money." AR at 25.

Following the hearing, the ALJ found that the monthly costs for car repairs, school expenses, and medical expenses for Ms. Tuttle's daughter could be subtracted from her monthly expenses because Ms. Tuttle had used her lump-sum payment from L & I to fund these costs. AR at 18-19, 57; CL 3. The ALJ also noted that Ms. Tuttle's monthly food costs of \$950 were "more than adequate for basic necessity expenses for three people" and that \$500 per month was a "more realistic number." AR at 57; CL 3. Because Ms. Tuttle's monthly income exceeded her monthly expenses by hundreds of dollars, and she would not be in a worse position after repaying the unemployment benefits than she

⁵ In 2012, after she stopped receiving workers' compensation benefits, Ms. Tuttle reapplied for and received unemployment benefits. See AR at 9-10, 13-14, 78.

was prior to receiving it, the ALJ determined that requiring repayment would not be against equity and good conscience. AR at 57; CL 4, 5, 6. The ALJ further concluded that repayment would not deny her household the income required for basic necessities. AR at 57; CL 4.

Ms. Tuttle petitioned the Department's Commissioner for review of the ALJ's initial order. AR at 64-65. The Commissioner affirmed the initial order, adopting the ALJ's findings of fact and conclusions of law and augmenting conclusion of law 3. AR at 72.

Ms. Tuttle appealed to the King County Superior Court, which affirmed the Commissioner's decision. CP 54-56. This appeal followed. CP at 57-66.

IV. STANDARD OF REVIEW

Washington's Administrative Procedure Act (APA), chapter 34.05 RCW, governs judicial review of a final decision by the Department's Commissioner. RCW 34.05.510; RCW 50.32.120; *Rasmussen v. Dep't of Emp't Sec.*, 98 Wn.2d 846, 849, 658 P.2d 1240 (1983). Although this is an appeal from the superior court's order affirming the Commissioner's decision, this Court "sits in the same position as the superior court" and reviews the Commissioner's decision, applying the APA standards "directly to the record before the agency." *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993); *see also* RCW 34.05.558;

Emps. of Intalco Aluminum Corp. v. Emp't Sec. Dep't, 128 Wn. App. 121, 126, 114 P.3d 675 (2005) (“The appellate court reviews the findings and decision of the commissioner, not the superior court decision . . .”).

In this appeal, the Commissioner’s decision is *prima facie* correct, and the burden is on Ms. Tuttle to establish its invalidity. See RCW 34.05.570(1)(a); *Smith v. Emp't Sec. Dep't*, 155 Wn. App. 24, 32, 226 P.3d 263 (2010). Under the APA, a reviewing court may reverse the Commissioner’s decision only if, among other things, the decision is not supported by substantial evidence or is based on an error of law. RCW 34.05.570(3).

Ms. Tuttle also asserts that relief should be granted, in part, because the agency has not decided all issues requiring resolution by the agency; however, her argument is better characterized as an assertion that the Department’s Commissioner erroneously applied the law. See RCW 34.05.570(3)(d),(f); Br. of Appellant at 9. In this appeal, Ms. Tuttle does not argue that the Commissioner did not decide the issue of whether she is liable for the overpayment of unemployment benefits. Rather, she argues that in reaching its conclusion, the Commissioner erred by applying a narrow definition of “equity and good conscience.” Br. of Appellant at 13-14.

A. Review of Findings of Fact

Findings of fact will be upheld if supported by substantial evidence. RCW 34.05.570(3)(e); *Smith*, 155 Wn. App. at 32. Ms. Tuttle has not challenged any of the Commissioner's findings of fact. Accordingly, they are verities on appeal. *See Tapper*, 122 Wn.2d at 407.

B. Review of Questions of Law

Questions of law are reviewed under the error of law standard and are subject to de novo review. *See Shaw v. Emp't Sec. Dep't*, 46 Wn. App. 610, 613, 731 P.2d 1121 (1987); *Ciskie v. Emp't Sec. Dep't*, 35 Wn. App. 72, 74, 664 P.2d 1318 (1983). While review is de novo, courts have consistently accorded a heightened degree of deference to the Commissioner's interpretation of employment security law in view of the Department's expertise in administering the law. *See Safeco Ins. Cos. v. Meyering*, 102 Wn.2d 385, 391, 687 P.2d 195 (1984).

C. Review of Mixed Questions of Law and Fact

Where there are mixed questions of law and fact, this Court must: (1) determine whether substantial evidence supports the Commissioner's factual findings, (2) make a *de novo* determination of the correct law, and (3) apply the law to the applicable facts. *Tapper*, 122 Wn.2d at 403.

V. ARGUMENT

The Legislature enacted the Employment Security Act, RCW Title 50, to provide compensation to persons who are “unemployed through no fault of their own” and to help lighten the burden that falls on unemployed workers and their families. RCW 50.01.010. Because the unemployment compensation fund is a finite resource, the money in the fund is reserved only for those who are qualified to receive it.

Ms. Tuttle does not dispute that she was disqualified from receiving unemployment benefits for the weeks she received workers’ compensation benefits. Thus she was required to repay the overpayment amount unless the Commissioner granted her a waiver. *See* RCW 50.20.190(2); WAC 192-220-017(1) (“You must repay the full amount of the overpayment, even if you are not at fault, unless you are granted a waiver.”). The Commissioner correctly determined that Ms. Tuttle was liable for the full amount of the overpayment because requiring repayment would not be against equity and good conscience. RCW 50.20.190(2); former WAC 192-220-030 (2008)⁶.

Ms. Tuttle essentially asks that the Employment Security Department (Department) be required to pay for her workers’ compensation attorney fees and costs. But not even the Industrial

⁶ The Department amended the regulation in 2014. WSR 14-04-073 (2014). A copy of former 192-220-030 (2008) is attached as Appendix A.

Insurance Act, RCW Title 51, provides for recovery of attorney fees when the Board of Industrial Insurance reverses a decision of the Department of Labor and Industries (L & I). Ms. Tuttle should not be allowed to recover from the Department what she could not recover from L & I in litigating her workers' compensation appeal. The Court should affirm the Commissioner's decision.

A. The Commissioner Correctly Concluded That Ms. Tuttle Is Liable for Repayment of the Overpayment of Unemployment Benefits to Which She Is Not Entitled

An individual who is paid any amount of unemployment benefits to which she is not entitled shall be liable for repayment of the amount overpaid. RCW 50.20.190(1); *Edinger v. Emp't Sec. Dep't*, 58 Wn. App. 525, 529, 793 P.2d 1004 (1990). The Department's Commissioner "*may* waive an overpayment if the commissioner finds that the overpayment was not the result of fraud, misrepresentation, willful nondisclosure, or fault attributable to the individual and that the recovery thereof would be against equity and good conscience." RCW 50.20.190(2) (emphasis added); see *Granite Beach Holdings, LLC. v. Dep't of Natural Res.*, 103 Wn. App. 186, 206-07, 11 P.3d 847 (2000) ("The term 'may' is presumed to be used in a permissive or discretionary sense.").

Ms. Tuttle was not entitled to the \$46,567 of unemployment benefits she received for the same weeks she was ultimately paid workers'

compensation benefits because an individual is disqualified from receiving unemployment benefits with respect to any day or days for which he or she “is receiving, has received, or will receive” workers’ compensation benefits. RCW 50.20.085. The Commissioner found she was not at fault for this overpayment.

Accordingly, Ms. Tuttle must repay the full amount of the overpayment, unless she establishes a ground for a waiver. RCW 50.20.190(2); WAC 192-220-017(1) (“You must repay the full amount of the overpayment, even if you are not at fault, unless you are granted a waiver.”). Because Ms. Tuttle’s income greatly exceeded her monthly expenses, repayment would return her to the same financial position she was in prior to receipt of the overpayment—liable for the expense of litigating her workers’ compensation claim—and her attorney fees are not statutorily recoverable, the Commissioner properly found requiring repayment would not be against equity and good conscience. Further, the Department’s regulation explaining when it is “against equity and good conscience” is consistent with the statute and case law. This Court should affirm.

1. The Commissioner correctly determined it would not be against equity and good conscience to require Ms. Tuttle to repay the overpayment

The only issue before this Court is whether the Commissioner erred in concluding that it would not be against equity and good conscience to require Ms. Tuttle to repay the overpayment.

By rule, the Department has defined equity and good conscience as “fairness as applied to a given set of circumstances.” Former WAC 192-220-030(1); *see also Delagrave v. Emp’t Sec. Dep’t*, 127 Wn. App. 596, 613, 111 P.3d 879 (2005) (“Equity and good conscience means fairness.”). The Department considers the totality of the claimant’s circumstances when deciding whether to grant or deny a waiver. Former WAC 192-220-030(4).

It is against equity and good conscience to deny a waiver “when repayment of the overpayment would deprive [the claimant] of income required to provide for basic necessities including food, shelter, medicine, utilities, and related expenses.” Former WAC 192-220-030(2). The Department has also identified the following factors it “may” consider, “but is not limited to,” “in determining whether a waiver should be granted for reasons of equity and good conscience:”

- the claimant’s general health
- the claimant’s education level

- the claimant's employment status and history of unemployment
- the claimant's future earnings potential
- the claimant's marital status and number of dependents, including whether other household members are employed
- whether an error by the Department contributed to the overpayment
- whether the employer contributed to the overpayment
- whether the claimant refused other government benefits because the claimant received unemployment benefits; and
- other factors indicating that repayment of the full amount would cause the claimant undue economic, physical, or mental hardship.

WAC 192-220-030(3).

Here, the Commissioner found that Ms. Tuttle's household's monthly income totaled \$8048 per month and her estimated monthly expenses equaled \$5707 per month. AR at 56, 72; FF 3. The Commissioner determined that her monthly expenses actually totaled \$4937 per month, since Ms. Tuttle had paid for some of the estimated monthly expenses with the lump-sum payment from L & I. AR at 56-57, 72; FF 4; CL 3. Ms. Tuttle does not challenge the Commissioner's

findings; therefore, they are verities on appeal. *See Tapper*, 122 Wn.2d at 407.

Ms. Tuttle repeatedly asserted that requiring her to repay the overpayment would cause her an undue financial hardship. AR at 25, 38. However, Ms. Tuttle's monthly income, \$8084, greatly exceeded her reported monthly expenses, \$5707, by several thousands of dollars, and the Department determined her basic monthly expenses were more appropriately \$4937. AR at 13-16, 39, 56-57, 72-73; FF 3; CL 4. Requiring her to repay the unemployment benefits to which she was not entitled would not deprive her family of basic necessities or cause her family undue financial hardship. Former WAC 192-220-030(2). In fact, her household—which consists of her, her employed husband, and their teenage daughter—had income to pay for more than an adequate amount on necessities: \$2520 in rent for a four-bedroom home, \$600 for utilities, and \$950 for food. AR at 15-16, 39, 56, 72-73; FF 3.

Refunding the overpayment would simply return Ms. Tuttle to the same financial position she was in prior to her receipt of unemployment benefits: liable for the payment of the attorney fees and costs incurred to pursue her workers' compensation claim. Here, the Commissioner properly considered the totality of Ms. Tuttle's circumstances and correctly determined it would not be against equity and good conscience

to require Ms. Tuttle to repay the overpayment of unemployment benefits.

AR at 57, 72-73; CL 1-6.

2. Because Ms. Tuttle's attorney fees before the Board of Industrial Insurance Appeals are not statutorily recoverable, it is not against equity and good conscience to require Ms. Tuttle to pay her attorney fees

Ms. Tuttle was overpaid \$46,567.00 in unemployment benefits because she received workers' compensation for the same time period. AR at 55, 67, 72; FF 2; CL I. Ms. Tuttle contends that \$48,557.62 of the \$65,134.06 lump-sum workers' compensation payment covered the time period during which she received unemployment benefits. Br. of Appellant at 3. She spent approximately \$20,487.26 on attorney fees and litigation costs.⁷ Br. of Appellant at 3. Subtracting the amount for attorney fees and costs from her workers' compensation payment, she claims she ultimately received less money for her workers' compensation claim than she did for her unemployment benefits claim. Br. of Appellant at 3. Thus, Ms. Tuttle asserts that \$18,496 of her overpayment—the difference between the unemployment benefits she received and the workers' compensation less attorney fees and costs (i.e., \$46,567 – (\$48,557.62 – \$20,487.26) = \$18,496.64)—should be waived. Br. of Appellant at 2-3, 15.

⁷ At the administrative hearing, Ms. Tuttle's attorney testified that this is the amount Ms. Tuttle paid in attorney fees and costs to recover workers' compensation for the weeks she also received unemployment benefits. AR at 21.

First, attorney fees are a cost any civil litigant must contemplate before deciding whether to pursue the litigation. *See generally In re South*, 689 F.2d 162, 166 (10th Cir. 1982) (rejecting argument that “because the value of its interest relative to the filing fee renders litigation economically impractical, the fee requirement denies Otasco an opportunity to be heard” because “[t]his is only admitting that its interest may not be worth the cost of litigation, a question litigants face in almost every lawsuit, particularly considering the American rule that attorney’s fees are not ordinarily recoverable even though the suit is won.”). Second, where the Industrial Insurance Act does not allow for recovery of attorney fees for Ms. Tuttle, it would be an absurd result to require the Department to cover her workers’ compensation attorney fees.

Second, when a worker appeals to the Board of Industrial Insurance Appeals and L & I’s decision is then reversed or modified, the successful worker may not recover her attorney fees from the L & I. *See* RCW 51.52.120; *cf.* RCW 51.52.130 (stating that if on appeal to the superior court or appellate court from the decision and an order of the Board of Industrial Insurance Appeals, the board’s decision is reversed or modified, the claimant may recover attorney fees and costs from L & I’s administrative fund). *See also Borenstein v. Dep’t of Labor & Indus.*, 49 Wn.2d 674, 676-77, 306 P.2d 228 (1957) (determining that the legislature

made no provision for the recovery of attorney fees from or payable by the Department for services rendered before the Board of Industrial Insurance Appeals); *Piper v. Dep't of Labor and Indus.*, 120 Wn. App. 886, 889-92, 86 P.3d 1231 (2004) (holding that it was error for the trial court to award attorney fees incurred before the Board of Industrial Insurance Appeals in addition to fees before the Superior Court).

Similarly, when a claimant appeals to the Department's Commissioner and the Department's initial determination is reversed or modified, attorney fees are also not statutorily recoverable for services provided at the administrative level. See RCW 50.32.100 (stating that "[i]n all proceedings provided by this title prior to court review" involving a dispute of an individual's claim for benefits, all costs of such proceedings otherwise chargeable to the individual, *except charges for services rendered by counsel*, shall be paid out of the unemployment compensation administration fund); cf. RCW 50.32.160 ("[I]f the decision *of the commissioner* shall be reversed or modified, such fee and costs shall be payable out of the unemployment compensation administration fund.") (Emphasis added). Therefore, requiring Ms. Tuttle, and not the Department, to pay the attorney fees and litigation costs to pursue her workers' compensation claim, as other workers' compensation claimants are required to do, cannot, in and of itself, be against equity and good

conscience. *See Delagrave*, 127 Wn. App. at 614 (Brown, J., dissenting) (“Because no attorney fees are statutorily recoverable in either the L & I or unemployment compensation contexts before us, it is difficult to envision how the payment of attorney fees alone can support an unjust enrichment or a hardship equitable recovery.”).

In re Peltier, Emp’t Sec. Comm’r Dec.2d 910 (2007), cited by Ms. Tuttle as support for her argument that she should be granted a partial waiver in the amount of \$18,406.00, does not require a different result.⁸ *See* Br. of Appellant at 13-14. In *Peltier*, the claimant argued she should only have to repay \$7,230 of her \$9,581 overpayment, since she only took home \$7,230 in workers’ compensation after she paid her attorney. Emp’t Sec. Comm’r Dec.2d 910 (2007). The Department’s Commissioner waived \$2351 of the overpayment, concluding that “claimant’s argument has merit *in the instant case and is certainly reasonable when considering fundamental fairness of the claimant’s situation.*” *Id.* (emphasis added).

Peltier does not require the Department to grant Ms. Tuttle a partial waiver in the amount she spent on attorney fees and litigation costs to pursue her workers’ compensation appeal. Rather, *Peltier* emphasizes that in determining whether to grant or deny a waiver, the Department

⁸ Under RCW 50.32.095, the Commissioner may designate certain Commissioner’s decisions as precedents. These precedents are to be treated as persuasive authority by a reviewing court. *Martini v. Emp’t Sec. Dep’t*, 98 Wn. App. 791, 795, 990 P.2d 981 (2000). A copy of *Peltier* is attached to this brief as Appendix B.

considers each case independently, looking at the totality of each claimant's individual circumstances. This is precisely what the regulation requires. See former WAC 192-220-030(1) ("Equity and good conscience' means fairness as applied to a given set of circumstances.").

In this case, however, Ms. Tuttle's individual circumstances do not require waiver in the amount of her workers' compensation attorney fees and costs, as her household's monthly income far exceeds its monthly expenses. Therefore, she can afford to repay the amount she was overpaid in unemployment benefits without suffering financial hardship. See *In re Hader*, Emp't Sec Comm'r Dec.2d 952 (2010) (concluding it would not be against equity or good conscience to deny waiver of an overpayment when the claimant's monthly household income substantially exceeded her monthly household expenses).⁹ Under these circumstances, the Commissioner properly declined to waive Ms. Tuttle's overpayment. The Court should affirm.

3. The Department's regulation interpreting when it is "against equity and good conscience" to require repayment of an overpayment is consistent with the Employment Security Act and case law

Ms. Tuttle contends that the Department's Commissioner misapplied RCW 50.20.190 and former WAC 192-220-030, improperly

⁹ A copy of this case is attached as Appendix C.

limiting its interpretation of “against equity and good conscience” to whether Ms. Tuttle would suffer economic hardship. Br. of Appellant at 9-13. Ms. Tuttle is incorrect.

In *Delagrave*, the court held that a waiver for “equity and good conscience” was not restricted to the limited circumstances set forth in a former Department regulation, which defined the term “against equity and good conscience” as when “repayment of the overpayment would deprive the individual of income required for necessary living expenses unless there are unusual circumstances which would militate against waiver.” 127 Wn. App. at 610. The regulation further stated that “[t]he presence of unusual circumstances may justify waiver on other than a financial basis when not to waive would be unconscionable.”¹⁰ *Id.* The court held that because equity and good conscience means fairness, the Commissioner made an error of law in determining that a waiver for equity and good conscience was limited to the circumstances set forth in the narrow regulation. *Id.* at 613.

Since the issuance of *Delagrave*, the Department has redefined the term “equity and good conscience.” *See* former WAC 192-220-030(2). The current version of the regulation defines equity and good conscience as “fairness as applied to a given set of circumstances.” Former WAC

¹⁰ A copy of former WAC 192-28-115 (1990) is attached as Appendix D.

192-220-030(1). The regulation then sets forth several factors the Department may consider in determining whether to grant or deny a waiver. Former WAC 192-220-030(3). However, in determining whether to grant a waiver for reasons of equity and good conscience, the Department is not restricted to consideration of only the factors set forth in the regulation. *See* former WAC 192-220-030(3) (“The department may also consider, but is not limited to, the following factors in determining whether waiver should be granted for reasons of equity and good conscience...”); former WAC 192-220-030(4) (“The decision to grant or deny waiver will be based on the totality of the circumstances rather than the presence of a single factor listed in subsections (2) and (3).”).

Ms. Tuttle asserts that the Commissioner incorrectly focused “on the issue of economic hardship and not the totality of circumstances” as required by *Delagrave* and RCW 50.20.190. Br. of Appellant at 13. But the Commissioner did so because Ms. Tuttle consistently asserted that it was unfair to require her to repay the full amount of the overpayment because it caused her an undue economic hardship. *See* AR at 38 (stating “[i]t would cause financial distress [and] is against equity and good conscience” as the factors she wanted the Department to consider in reviewing her request for a waiver); AR at 25 (asserting it “is causing me financial distress trying to pay back the full amount of overpayment and it

has – it – it does not seem right that an employee has to pay more – has to pay to prove that they got sick at work and the process that it takes.”). The Commissioner’s focus on Ms. Tuttle’s financial circumstances was not due to restrictions in the Department’s regulation; rather, it was due to the basis on which Ms. Tuttle sought a waiver.

Based on Ms. Tuttle’s assertions, the Commissioner then thoroughly considered the totality of Ms. Tuttle’s financial circumstances: her household’s gross monthly income, assets, and monthly expenses; her education level and health conditions; her marital status and the number of dependents living in her home; and whether she was denied other government assistance because she was receiving unemployment benefits. AR at 12-19, 38-39, 55-58, 72-73; FF 2, 3, 4. After considering these various factors, the Commissioner determined that Ms. Tuttle would not suffer economic hardship if required to pay the full amount of the overpayment. After Ms. Tuttle’s household pays its monthly expenses, it has hundreds of dollars to spare. AR at 12, 15-16, 39, 56, 72; FF 3. Requiring Ms. Tuttle to repay the full amount of the overpayment would not cause her the undue economic hardship she asserts she will suffer.

Ms. Tuttle also appears to argue that the Department exceeded its rulemaking authority when it adopted a regulation with a “narrow and limiting” definition of “equity and good conscience.” Br. of Appellant at

9-12. Ms. Tuttle contends that former WAC 192-220-030 improperly defines equity and good conscience as “fairness as applied to a given set of circumstances,” even though the court held in *Delagrave* that equity and good conscience, as set forth in RCW 50.20.190, means “fairness, without the limitation of a set of circumstances.” Br. of Appellant at 12.

Ms. Tuttle did not raise this argument before the agency and thus this Court should not consider it. See AR 64-65; *see* CP at 11-22, 42-52 (Ms. Tuttle also failed to brief the arguments at the superior court level). The APA limits a claimant’s ability to raise issues for the first time on appeal. *See ZDI Gaming, Inc. v. State ex rel. Wash. State Gambling Comm’n*, 151 Wn. App. 788, 811, 214 P.3d 938 (2009) (declining to review an issue involving a regulatory definition when appellant did not seek declaratory relief from the agency, and the ALJ and the agency commissioner did not consider the issue). Specifically, RCW 34.05.554(1) provides that on judicial review of administrative action, “[i]ssues not raised before the agency may not be raised on appeal,” except in certain identified circumstances. This rule “is more than simply a technical rule of appellate procedure; instead, it serves an important policy purpose in protecting the integrity of administrative decisionmaking.” *King Cnty v. Wash. State Boundary Review Bd. for King Cnty*, 122 Wn.2d 648, 668, 860 P.2d 1024 (1993). Ms. Tuttle has

neither argued nor demonstrated that any of those circumstances are present in her case. This Court should decline to address this argument.

Even if this Court considers Ms. Tuttle's argument, this Court should conclude that the Department's regulation does not conflict with RCW 50.20.190. "An agency may not promulgate a rule that amends or changes a legislative enactment." *Delagrave*, 127 Wn. App. at 611 (quoting *Edelman v. State ex rel. Pub. Disclosure Comm'n*, 152 Wn.2d 584, 591, 99 P.3d 386 (2004)). Here, the Department promulgated a rule that defines equity and good conscience consistent with the plain meaning of the statute. *See Delagrave*, 127 Wn. App. at 612 ("It is clear that equity and good conscience means, quite simply, fairness."). Former WAC 192-220-030(1) defines "equity and good conscience" as "fairness as applied to a given set of circumstances."

In order to determine whether, as a matter of fairness, the Department should grant a waiver of an overpayment, it is necessary for the Department to consider the facts and circumstances of the case before it. *See Delagrave*, 127 Wn. App. at 612 (remanding the matter to the Commissioner to determine whether "under these facts," the Department should waive repayment as a matter of fairness). The Department's regulation sets forth a number of factors the Department may consider in making its determination, but the regulation is clear that the list of factors

is not exhaustive. *See* former WAC 192-220-030(3). The Department did not exceed its rule-making authority when it enacted former WAC 192-220-030.

B. Because This Court Should Affirm the Commissioner's Decision, Ms. Tuttle Should Not Receive Attorney Fees and Costs

Ms. Tuttle is entitled to reasonable attorney fees and costs only if this Court ultimately modifies or reverses the Commissioner's decision. RCW 50.32.160. As shown above, this Court should affirm the Commissioner's decision. Thus, this Court should deny Ms. Tuttle's request for attorney fees and costs.

VI. CONCLUSION

The Commissioner correctly determined that requiring Ms. Tuttle to repay the full amount of her unemployment benefits overpayment would not be against equity and good conscience. To hold otherwise would require the Department to bear the costs of Ms. Tuttle's workers' compensation appeal. For the foregoing reasons, the Department asks this

Court to affirm the Commissioner's decision denying Ms. Tuttle's request for waiver of her unemployment benefits overpayment.

RESPECTFULLY SUBMITTED this 7th day of March 2014.

ROBERT W. FERGUSON
Attorney General



MARYA COLIGNON
WSBA # 42225
Assistant Attorney General
Attorneys for Respondent
OID #91020

PROOF OF SERVICE

I, Roxanne Immel, declare as follows:

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

2. That on the 7th day of March 2014, I caused to be served a copy of **Brief of Respondent with Appendices A-D** on the Appellant of record on the below stated date as follows:

U.S. mail postage prepaid

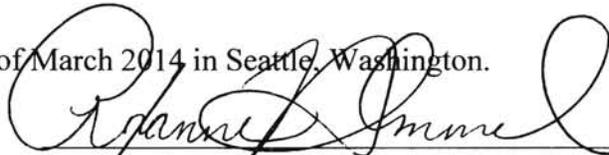
ROBERT SILBER
FOSTER STATON P.C.
8204 GREEN LAKE DRIVE N
SEATTLE, WA 98103

Filed with

RICHARD JOHNSON, CLERK
COURT OF APPEALS, DIVISION I
ONE UNION SQUARE
600 UNIVERSITY STREET
SEATTLE, WA 98101-1176

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

Dated this 7th day of March 2014 in Seattle, Washington.


Roxanne Immel, Legal Assistant

Appendix A

(b) You reported that you were unavailable for one or more customary work days, but the department paid at the full amount and the payment was not a conditional payment.

(c) You received a retroactive pension payment that you had applied for and were reasonably sure would be awarded.

(d) You did not inform the department that you were eligible for benefits on an unexpired claim against another state.

(e) A lower level decision was reversed by the office of administrative hearings, the commissioner, or a court because of new information that you did not disclose to the department.

(f) Other circumstances in which the department finds you knew the payment was improper.

(3) In deciding if you are at fault, the department will also consider your education, mental abilities, emotional state, experience with claiming unemployment benefits, and other personal factors which affect your ability to report all relevant information to the department. This includes any written information provided to you by the department.

(4) You are not at fault when you provided the department with all relevant information before a decision was issued and you would not reasonably have known the payment was improper. The following are some, but not all, examples of instances in which you may not reasonably have known that a payment was improper. These are examples only and do not mean that the department would rule in this manner in every such situation.

(a) The department removed a payment stop in error, resulting in improper payment.

(b) You received a retroactive pension which was back-dated by the pension source, not at your request.

(c) A combined wage or federal claim was filed against Washington that should have been filed against another state.

(d) Extended benefits were paid by the department when you would have been eligible for a new claim against Washington or another state.

(e) A lower level decision, in which you had provided all information, was reversed by the office of administrative hearings, the commissioner, or a court.

(f) Other circumstances in which the department finds you did not know the payment was improper.

[Statutory Authority: RCW 50.12.010, 51.12.040, and 50.20.010. 08-21-056, § 192-220-020, filed 10/9/08, effective 11/9/08. Statutory Authority: RCW 50.12.010, 50.12.040, 50.12.042. 05-01-076, § 192-220-020, filed 12/9/04, effective 1/9/05.]

WAC 192-220-030 What does equity and good conscience mean? (1) "Equity and good conscience" means fairness as applied to a given set of circumstances.

(2) It will be against equity and good conscience to deny waiver when repayment of the overpayment would deprive you of income required to provide for basic necessities including food, shelter, medicine, utilities, and related expenses. Unless there are unusual circumstances which would argue against waiver, the department will presume repayment would leave you unable to provide basic necessities if your total household resources in relation to household size do not exceed seventy percent of the Lower Living Standard Income Level (LLSIL) and circumstances are not expected to change within the next ninety days.

[Ch. 192-220 WAC—p. 2]

(3) The department may also consider, but is not limited to, the following factors in determining whether waiver should be granted for reasons of equity and good conscience:

(a) Your general health, including disability, competency, and mental or physical impairment;

(b) Your education level, including literacy;

(c) Whether you are currently employed and your history of unemployment;

(d) Your future earnings potential based on your occupation, skills, and the local labor market;

(e) Your marital status and number of dependents, including whether other household members are employed;

(f) Whether an error by department staff contributed to the overpayment;

(g) Whether the employer contributed to the overpayment by providing inaccurate information or failing to respond to the department's request for information within a reasonable period of time;

(h) Whether you refused or were ineligible for other government benefits because you received unemployment benefits; and

(i) Other factors indicating that repayment of the full amount would cause you undue economic, physical, or mental hardship.

(4) The decision to grant or deny waiver will be based on the totality of circumstances rather than the presence of a single factor listed in subsections (2) and (3).

[Statutory Authority: RCW 50.12.010, 51.12.040, and 50.20.010. 08-21-056, § 192-220-030, filed 10/9/08, effective 11/9/08. Statutory Authority: RCW 50.12.010, 50.12.040, 50.12.042. 05-01-076, § 192-220-030, filed 12/9/04, effective 1/9/05.]

WAC 192-220-040 How will the disqualification period and penalty established by RCW 50.20.070 be assessed? (1) RCW 50.20.070 provides for increasing disqualification periods and dollar penalties when a second, third or subsequent fraud is committed. The department will decide whether an action is the first, second, third or subsequent occurrence based on the factors in this section.

(2) Once the department mails a fraud decision, any fraud that is found for weeks filed before, or within fourteen days after, the mailing date of the decision will be treated as part of the same occurrence of fraud. This applies even if the decisions involve different eligibility issues.

Example: A fraud decision is mailed on June 1 for weeks claimed on April 30. On July 1, a decision is mailed assessing fraud for weeks claimed on March 31. Both decisions will be treated as the same level occurrence because the weeks covered by the July 1 decision were filed before the June 1 decision was mailed.

(3) The department will treat any fraud for weeks filed more than fourteen days after the mailing date of a prior fraud decision as a separate occurrence of fraud. This applies even if the weeks claimed occur before the weeks for which fraud was assessed in the prior decision.

Example: On June 1, a decision is mailed assessing fraud for weeks you claimed on March 31. On July 10, late claims are filed for weeks before March 31 in which fraud is committed. The later decision is treated as a subsequent occurrence of fraud because the late claims were filed more than fourteen days after June 1.

(10/9/08)

Appendix B

Empl. Sec. Comm'r Dec.2d 910 (WA), 2007 WL 5172355

Commissioner of the Employment Security Department.

State of Washington.

IN RE: SUZANNE L. PELTIER

Case No. 910

Review Nos. 2007-0276 and 2007-0277

Docket Nos. 04-2006-22057 and 04-2006-22058

February 16, 2007

DECISION OF COMMISSIONER

*1 On January 25, 2007, SUZANNE L. PELTIER petitioned the Commissioner for review of decisions issued by the Office of Administrative Hearings on January 11, 2007. Pursuant to chapter 192-04 WAC these matters have been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the entire record and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), the undersigned does not adopt the Office of Administrative Hearings' findings of fact or conclusions of law but enters the following therefor.

At issue are the weeks ending May 20, 2006 through October 21, 2006. Claimant was injured while on the job and was unable to continue in her previous work. Claimant received workers' compensation through May 13, 2006. Claimant's workers' compensation benefits ended on or before May 13, 2006 and she was released to return to work with restrictions. Claimant was a member of referral union and, beginning with the week ending May 20, 2006, began looking for work within her restrictions through her referral union, as well as making some employer contacts on her own.

Claimant claimed unemployment benefits through the week ending October 21, 2006. She found a job and began working on October 23, 2006. For the weeks claimed she was paid a total of \$9,581 in unemployment insurance benefits.

Claimant's attorney filed a request for an extension of her workers' compensation benefits. The request was granted and on November 9, 2006 the claimant received an award of workers' compensation in the amount of \$10,351.56 for the period of May 20, 2006 through October 16, 2006. The claimant's attorney was paid his fees and the claimant received a balance of \$7,230.

A claimant is disqualified from receiving unemployment insurance benefits for any week in which he or she receives workers' compensation. RCW 50.20.085. Because the claimant received workers' compensation during all the weeks at issue herein, she is disqualified from receiving unemployment benefits and has been overpaid benefits in the amount of \$9,581.

As a general rule, benefits overpaid must be refunded unless the claimant is free from fault in the matter of the overpayment and requiring a refund would deprive a claimant of income required for necessary living expenses. *See generally* WAC 192-220-030. Additionally, when the claimant is not at fault, the Department may consider partial or full waiver of claimant's overpayment pursuant to the rationale in *Delagrave v. Employment Sec. Dept.*, 127 Wn. App. 596, 111 P.3d 879 (2005), which allows partial waiver on the basis of fairness.

Here, the claimant was not at fault in causing the overpayment as she answered all questions truthfully when claiming benefits each week. In so holding, we do not view the claimant's attorney's request to reopen her workers' compensation claim as an application for workers' compensation during a week that the claimant was claiming unemployment benefits. Where, as here, a claimant is without fault in the matter of an overpayment, the overpayment may be waived if to require refund would violate principles of equity and good conscience. RCW 50.20.190(2). Here, the claimant argues that she should only have to repay

\$7,230 of her \$9,581, since \$7,230 is all that she received in workers' compensation after her attorney was paid. We believe that claimant's argument has merit in the instant case and is certainly reasonable when considering fundamental fairness of the claimant's situation. Accordingly, we hold that the claimant is liable for repayment of her overpayment in the amount of \$7,230 and that \$2351 of her overpayment is waived pursuant to RCW 50.20.190. See Delagrave, supra.

*2 Now, therefore,

IT IS HEREBY ORDERED that the decision of the Office of Administrative Hearings issued on January 11, 2007, is MODIFIED. Claimant is not ineligible pursuant to RCW 50.20.010(1)(c) but is disqualified pursuant to RCW 50.20.085 for the weeks ending May 20, 2006 through October 21, 2006. Benefits paid for weeks within this period of disqualification constitute a regular overpayment pursuant to RCW 50.20.190(1) in the amount of \$9,581. Claimant is not at fault in the matter of this overpayment, but is liable for repayment of \$7,230. Waiver of \$2,351 of the overpayment is hereby granted pursuant to RCW 50.20.190(2) and the rationale in Delagrave, supra.

DATED at Olympia, Washington, February 16, 2007. ^{a1}

Donald K. Westfall III
Review Judge Commissioner's Review Office

RECONSIDERATION

Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9046, Olympia, Washington 98507-9046, and to all other parties of record and their representatives. The filing of a petition for reconsideration is not a prerequisite for filing a judicial appeal.

JUDICIAL APPEAL

If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the superior court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such judicial appeal is filed, the attached decision/order will become final.

If you choose to file a judicial appeal, you must both:

a. Timely file your judicial appeal directly with the superior court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the superior court of Thurston County. See RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND

b. Serve a copy of your judicial appeal by mail or personal service within the 30-day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General and all parties of record.

*3 The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park, Post Office Box 9046, Olympia, WA 98507-9046. To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the 30th day of the appeal period. See RCW 34.05.542(4) and

WAC 192-04-210. The copy of your judicial appeal you serve on the Office of the Attorney General should be served on or mailed to the Office of the Attorney General, Licensing and Administrative Law Division, 1125 Washington Street SE, Post Office Box 40110, Olympia, WA 98504-0110.

REVIEW NO.	CASE NO.
2005-0078	900
2005-0779	901
2005-1338	902
2005-2345	903
2005-3274	904
2005-3449	905
2006-0280 and	906
2006-0281	906
2006-0984	907
2006-1784	908
2006-2579	909
2007-0276 and	910
2007-0277	910
2007-0648	911
2007-0899	912
2007-0902	913
2007-0924	914
2007-1490	915
2007-2586 and	916
2007-2587	916
2007-2819	917

Footnotes

a1 Copies of this decision were mailed to all interested parties on this date.

Empl. Sec. Comm'r Dec.2d 910 (WA), 2007 WL 5172355

Appendix C

Empl. Sec. Comm'r Dec.2d 952 (WA), 2010 WL 6795718

Commissioner of the Employment Security Department.

State of Washington.

In re: CAROL L. HADER

Case No. 952

Review Nos. 2010-5008 & 2010-5009

Docket Nos. 02-2010-25173 & 02-2010-25465

October 29, 2010

DECISION OF COMMISSIONER

*1 On September 29, 2010, CAROL HADER petitioned the Commissioner for review of Initial Orders issued by the Office of Administrative Hearings on September 3, 2010. Pursuant to chapter 192-04 WAC these matters have been delegated by the Commissioner to the Commissioner's Review Office. Having reviewed the entire record and having given due regard to the findings of the administrative law judge pursuant to RCW 34.05.464(4), the undersigned adopts the Office of Administrative Hearings' findings of fact under Docket No. 02-2010-25465, but not the findings of fact under Docket No. 02-2010-05173. The undersigned does not adopt the Office of Administrative Hearings' conclusions of law in either decision, but instead adopts the following.

FINDINGS OF FACT

I

Claimant opened a claim for benefits in May 2009 after she was laid off from her part-time job with the employer. At the time she opened her claim, claimant informed the Department that she was not available for full-time employment because full-time employment would jeopardize her receipt of her social security benefits. Claimant was not informed by the Department that she was required to seek full-time work.

II

In October 2009, claimant returned to part-time work with the employer. Her weekly earnings varied from \$0 to \$250. Claimant continued to file her unemployment claims and she reported her earnings to the Department each week.

III

When claimant filed a new claim in May 2010, she again informed the Department that she was not available for full-time work.

IV

The Department allowed benefits to claimant each week from the week ending June 6, 2009 through the week ending May 22, 2010. Claimant's weekly benefit amount varied from \$20 to her full benefit amount of \$200, depending on her reported weekly earnings. She received a total of \$5,397 in benefits for the weeks in issue.

V

On June 17, 2010, the Department issued a Determination Notice, stating that claimant had materially restricted her availability for work for the weeks ending May 30, 2009 through June 5, 2010. On that basis, the Department determined that claimant was not eligible for benefits for these weeks and the payments she received during these weeks were overpayments. The Department also determined that she was not at fault for the overpayments because they were not a direct result of her actions.

CONCLUSIONS OF LAW

I

Claimant's appeal under Docket No. 02-2010-25465 was two days late. In determining whether good cause exists to waive the late filing of an appeal, three factors are considered: (1) the length of the delay; (2) the excusability of the delay; and (3) whether the delay will result in prejudice to other interested parties, including the Department. WAC 192-04-090. Misleading or contradictory communications from the Department can make the delay of the filing of an appeal or Petition for Review excusable. Scully v. Department of Empl. Sec., 42 Wn. App. 596, 712 P.2d 870 (1986). Applying the foregoing to the instant case, we conclude that claimant's delay in filing the appeal was excusable. Claimant received several documents from the Department around the same time she received the June 17, 2010, Determination Notice, such as the waiver packet and the Determination Notice for the overpayment. Because these documents had different response deadlines than the June 17, 2010, Determination Notice, it is understandable that claimant would be confused about the deadline to appeal. The Department's confusing communications excuse the delay. Nothing in the record reflects that any prejudice will be caused to any party by virtue of the delay and, consequently, we conclude that claimant had good cause for her late-filed appeal.

II

*2 Applicable statutes and precedential decisions present a basic threshold issue on the record now before us. The issue is whether the Department had the authority to issue the Determination Notice on June 17, 2010. RCW 50.20.160(3) provides that: "A determination of allowance of benefits shall become final, in absence of a timely appeal therefrom: PROVIDED, That the commissioner may redetermine such allowance at any time within two years following the benefit year in which such allowance was made in order to recover any benefits improperly paid and for which recovery is provided under the provisions of RCW 50.20.190: AND PROVIDED FURTHER, That in the absence of fraud, misrepresentation, or nondisclosure, this provision or the provisions of RCW 50.20.190 shall not be construed so as to permit redetermination or recovery of an allowance of benefits which having been made after consideration of the provisions of RCW 50.20.010(1)(c), or the provisions of RCW 50.20.050, 50.20.060, 50.20.080, or 50.20.090 has become final."

As found above, the Department allowed benefits to claimant for the weeks ending June 6, 2009 through May 22, 2010. Each payment of benefits constituted a separate informal determination of allowance of benefits for the purpose of RCW 50.20.160(3). In re Barrett, Empl. Sec. Comm'r Dec.2d 878 (1999); In re Pederson, Empl. Sec. Comm'r Dec.2d 139 (1976). Except the last payment for the week ending May 22, 2010, each determination became final pursuant to RCW 50.32.020 when no appeal was filed. Except the last payment for the week ending May 22, 2010, the Determination Notice issued on June 17, 2010, was a redetermination, and, in accordance with RCW 50.20.160(3), it was valid only if claimant was culpable of fraud, misrepresentation or nondisclosure, or if the Department's consideration of RCW 50.20.010(1)(c) had not become final. In re Gregory, Empl. Sec. Comm'r Dec.2d 216 (1976).

III

Fraud, misrepresentation, and nondisclosure have not been alleged or proven in this case. Here, the Department had full information about claimant's availability at the time she applied for benefits because she disclosed to the Department that she was not available for full-time work. *See* Exhibit No. 2, p. 2 in Docket No. 02-2010-25173. The Department concedes that the overpayment was not a result of claimant's actions.

IV

The Department is precluded from issuing a redetermination when its determination of allowance was made with full information and the time for filing an appeal from the determination has lapsed. *In re Gregory, supra*. This principle is recognized in the Department's published Benefit Policy Guide, under the heading "Procedure 50.7, Redeterminations," which states in essence that a redetermination must include a statement of how an allowance was made inadvertently without consideration of the appropriate statute or that the Department must establish fraud, misrepresentation, or nondisclosure by the claimant in order to redetermine an allowance after the determination has become final. Nothing in the June 17, 2010, Determination Notice or the hearing record shows that the Department failed to consider RCW 50.20.010(1)(c) when allowing benefits to claimant or within the period for filing an appeal from the first determination. Neither the Determination Notice nor the record shows that claimant could be found culpable of fraud, misrepresentation or nondisclosure. Except for payment for the final week ending May 22, 2010, the Determination Notice was therefore a nullity at the time it was issued.

V

*3 As to the final week ending May 22, 2010, the thirty-day appeal period was not complete at the time the Department issued its June 17, 2010 Determination Notice. Therefore, the May 22, 2010, payment had not become a final determination, and the June 17, 2010 determination was valid as to this payment. Claimant was not eligible for benefits pursuant to RCW 50.20.010(1)(c) for this week because she was neither available for nor actively seeking full-time work. The \$76 payment claimant received for this week constitutes an overpayment pursuant to RCW 50.20.190.

VI

Based on the financial information in the record, it appears that claimant's monthly household income substantially exceeds her monthly household expenses. Under these circumstances, it would not be against equity or good conscience to deny waiver of the \$76 overpayment in this case. Claimant is liable to repay the \$76 overpayment for the week ending May 22, 2010.

VII

Claimant was also ineligible pursuant to RCW 50.20.010(1)(c) for all weeks claimed after May 22, 2010, and prior to her September 2, 2010, hearing date. However, claimant did not receive any benefit payments for these weeks.

Now, therefore,

IT IS HEREBY ORDERED that the Initial Orders of the Office of Administrative Hearings issued on September 3, 2010, are MODIFIED. Claimant had good cause for her late-filed appeal. For all weeks prior to the week ending May 22, 2010, the Determination Notices issued by the Department on June 17, 2010, are void *ab initio* pursuant to RCW 50.20.160(3). Claimant is ineligible pursuant to RCW 50.20.010(1)(c) for the week ending May 22, 2010, and for all subsequent weeks claimed as of her September 2, 2010, hearing date. The benefit payment claimant received for the week ending May 22, 2010, constitutes an overpayment in the amount of \$76. Claimant is not at fault for the \$76 overpayment, but is nonetheless liable for refund pursuant to RCW 50.20.190(1) and (2) and chapter 192-220 WAC.

DATED at Olympia, Washington, October 29, 2010. ^{a1}

S. Andrew Grace
Review Judge Commissioner's Review Office

RECONSIDERATION

Pursuant to RCW 34.05.470 and WAC 192-04-190 you have ten (10) days from the mailing and/or delivery date of this decision/order, whichever is earlier, to file a petition for reconsideration. No matter will be reconsidered unless it clearly appears from the face of the petition for reconsideration and the arguments in support thereof that (a) there is obvious material, clerical error in the decision/order or (b) the petitioner, through no fault of his or her own, has been denied a reasonable opportunity to present argument or respond to argument pursuant WAC 192-04-170. Any request for reconsideration shall be deemed to be denied if the Commissioner's Review Office takes no action within twenty days from the date the petition for reconsideration is filed. A petition for reconsideration together with any argument in support thereof should be filed by mailing or delivering it directly to the Commissioner's Review Office, Employment Security Department, 212 Maple Park Drive, Post Office Box 9046, Olympia, Washington 98507-9046, and to all other parties of record and their representatives. The filing of a petition for reconsideration is not a prerequisite for filing a judicial appeal.

JUDICIAL APPEAL

*4 If you are a party aggrieved by the attached Commissioner's decision/order, your attention is directed to RCW 34.05.510 through RCW 34.05.598, which provide that further appeal may be taken to the superior court within thirty (30) days from the date of mailing as shown on the attached decision/order. If no such judicial appeal is filed, the attached decision/order will become final.

If you choose to file a judicial appeal, you must both:

a. Timely file your judicial appeal directly with the superior court of the county of your residence or Thurston County. If you are not a Washington state resident, you must file your judicial appeal with the superior court of Thurston County. See RCW 34.05.514. (The Department does not furnish judicial appeal forms.) AND

b. Serve a copy of your judicial appeal by mail or personal service within the 30-day judicial appeal period on the Commissioner of the Employment Security Department, the Office of the Attorney General and all parties of record.

The copy of your judicial appeal you serve on the Commissioner of the Employment Security Department should be served on or mailed to: Commissioner, Employment Security Department, Attention: Agency Records Center Manager, 212 Maple Park, Post Office Box 9046, Olympia, WA 98507-9046. To properly serve by mail, the copy of your judicial appeal must be received by the Employment Security Department on or before the 30th day of the appeal period. See RCW 34.05.542(4) and WAC 192-04-210. The copy of your judicial appeal you serve on the Office of the Attorney General should be served on or mailed to the Office of the Attorney General, Licensing and Administrative Law Division, 1125 Washington Street SE, Post Office Box 40110, Olympia, WA 98504-0110.

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Footnotes

a1 Copies of this decision were mailed to all interested parties on this date.

Empl. Sec. Comm'r Dec.2d 952 (WA), 2010 WL 6795718

Appendix D

(e) A lower level decision, in which all information was provided by the individual, was reversed by the office of administrative hearings, the commissioner or a court.

(f) Other circumstances in which department fact finding indicates that the individual did not know the payment was improper.

(6) Fault and waiver are not considered if the individual agrees to an account adjustment as explained in WAC 192-28-120(4).

[Statutory Authority: RCW 50.12.010, 50.12.040 and 50.20.010. 95-09-085, § 192-28-110, filed 4/19/95, effective 5/20/95. Statutory Authority: RCW 50.12.010 and 50.01.040 [50.12.040]. 88-10-021 (Order 4-88), § 192-28-110, filed 4/29/88; 86-17-023 (Order 3-86), § 192-28-110, filed 8/12/86. Statutory Authority: RCW 50.20.190, 50.12.010 and 50.12.040. 85-21-024 (Order 6-85), § 192-28-110, filed 10/10/85.]

WAC 192-28-115 Recovery of benefit overpayment—Equity and good conscience provisions. (1) The department will not consider or grant waiver of an overpayment and will not consider or accept an offer in compromise of an overpayment, when the overpayment is based on an overpayment decision written by a state other than Washington.

(2) The department will grant waiver of an overpayment when it is found that the individual was without fault in the overpayment and when it is determined that to require repayment would be against equity and good conscience. It will be against equity and good conscience to deny waiver when repayment of the overpayment would deprive the individual of income required for necessary living expenses unless there are unusual circumstances which would militate against waiver.

(3) The individual will be required to provide financial information for the determination of waiver of the overpayment. Failure on the part of the individual to provide such information within 10 days from the request date will result in the department making a decision, based on available information, regarding the individual's eligibility for waiver. All such information is subject to verification by the department. Any overpayment amount waived on the basis of information which is later determined to be fraudulent or misrepresented shall be restored to the overpayment balance.

(4) The financial information requested shall include:

(a) An account of the individual's income and to the extent available to the individual, other financially contributing members of the household for the month preceding, the current month and the month following the date the financial information is requested.

(b) An account of the individual's current and readily available liquid assets. Liquid assets may include, but are not limited to, checking and savings account balances, stocks, bonds and cash on hand.

(c) An account of the individual's expenses for the month preceding, the current month and the month following the date the financial information is requested.

(5) If average monthly expenses equal or exceed average monthly income and there are no substantial liquid assets available, waiver of the overpayment will be considered. The presence of unusual circumstances may justify waiver on other than a financial basis when not to waive would be unconscionable.

(6) When an individual has been denied waiver or waiver was not considered, the individual may enter into a payment agreement with the department.

(7) When an individual has been denied waiver or has been unable to reach a payment agreement with the department, he or she may make an offer in compromise pursuant to the provisions of RCW 50.24.020. The allowance or denial of an offer in compromise will be in accordance with the same criteria used by the department for allowance or denial of waiver of an overpayment. Any overpayment amount compromised on the basis of information which is later determined to be fraudulent or misrepresented shall be restored to the overpayment balance.

[Statutory Authority: RCW 50.12.010 and 50.12.040. 90-17-103, § 192-28-115, filed 8/21/90, effective 9/21/90; 86-17-023 (Order 3-86), § 192-28-115, filed 8/12/86. Statutory Authority: RCW 50.20.190, 50.12.010 and 50.12.040. 85-21-024 (Order 6-85), § 192-28-115, filed 10/10/85.]

WAC 192-28-120 Recovery of benefit overpayment—By repayment or offset against past or future benefits.

(1) If you do not repay an overpayment in full or make the minimum monthly payments provided for in WAC 192-28-130, the overpayment will be deducted from benefits payable for any week(s) you claim.

(2) For overpayments assessed under RCW 50.20.010 because you asked to have your unemployment insurance claim cancelled, the amount deducted will be one hundred percent of benefits payable for each week(s) you claim. The department will ensure you are informed of the advantages and/or disadvantages of cancelling an existing claim to file a new claim.

(3) If you are currently claiming benefits, the overpayment will not be offset from future weeks payable unless you have missed two or more payments as provided in WAC 192-28-130. If you have missed two or more payments, the overpayment will be offset as described in (a) and (b) below:

(a) If the overpayment was caused by a denial for fraud, misrepresentation, or wilful nondisclosure as provided in RCW 50.20.070, the amount deducted will be one hundred percent of benefits payable for each week(s) you claim. These overpayments will be collected first.

(b) For all other overpayments, the amount deducted will be fifty percent of benefits payable for each week you claim. However, you may request the overpayment be repaid at one hundred percent of benefits payable for each week you claim.

(4) If the overpayment has been assessed by another state, the amount deducted will be as follows:

(a) If the overpayment was caused by a denial for fraud, misrepresentation, or wilful nondisclosure, the amount deducted will be one hundred percent of benefits payable for each week(s) you claim. These overpayments will be collected first.

(b) For all other overpayments, the amount deducted will be fifty percent of benefits payable for each week you claim. However, you may request the overpayment be repaid at one hundred percent of benefits payable for each week you claim.

(5) If you have been denied waiver, or if waiver was not considered, you will be notified in writing of your right to enter into a payment agreement with the department or to make an offer in compromise. An offer in compromise will