FILED
Sep 30, 2016
Court of Appeals
Division III
State of Washington

NO. 34066-0

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CHRISTOPHER BELLING,

Appellant/Cross-Respondent,

v.

STATE OF WASHINGTON EMPLOYMENT SECURITY DEPARTMENT,

Respondent/Cross-Appellant.

BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. INTRODUCTION

From June 2011 until April 2012, Christopher Belling applied for and received unemployment insurance benefits from the Employment Security Department (Department) totaling $22,924.00. In July 2012, Belling won an appeal of the Department of Labor and Industries' (L&I) denial of workers' compensation benefits, and L&I awarded Belling $48,251.19 (including $9,271.80 previously paid) in time loss payments covering the entire period for which Belling received unemployment benefits. Because a person may not receive both unemployment benefits and workers' compensation benefits during the same period of time, the Department required Belling to repay all unemployment benefits he received.

Belling sought a waiver of part of the Department's overpayment assessment, arguing that the Department was required to bear a portion of his attorney fees and costs for his L&I appeal. After considering the totality of the circumstances, the Commissioner found that it was not against "equity and good conscience" to require Belling to refund all of the unemployment benefits. RCW 50.20.190(2); WAC 192-220-030. The Yakima County Superior Court modified the Commissioner's decision and granted Belling a partial waiver.

The Commissioner's decision should be affirmed. It is not against equity and good conscience to require repayment as, even after Belling paid his attorney fees, he received more in workers' compensation than he owed the Department, his monthly income significantly exceeded his

monthly expenses, he had no outstanding debt, he had no minor children to support, and repaying all of the benefits would not create an undue financial hardship. Further, because neither the Industrial Insurance Act nor the Employment Security Act permits recovery of attorney fees for successful administrative litigation, the Commissioner correctly determined that the Department was not required to pay a portion of Belling's legal fees. Finally, the Commissioner appropriately exercised his discretion in denying Belling's request for waiver. Therefore, this Court should reverse the superior court and affirm the Commissioner's decision.

II. ASSIGNMENT OF ERROR

The Department assigns no error to the final decision issued by the Commissioner.[1] However, because the Yakima County Superior Court erred in modifying the Commissioner's decision and the Department is now a cross-appellant, the Department assigns error to the superior court's modification of the Commissioner's decision and conclusion that Belling was entitled to a waiver of $3,645.18 of his overpayment.

III. COUNTERSTATEMENT OF THE ISSUES

1. Did the Commissioner correctly conclude that it would not be against equity and good conscience to require Belling to repay his

[1] This is a judicial review of a final agency decision under the Washington Administrative Procedure Act, chapter 34.05 RCW. The Court of Appeals sits in the same position as the superior court and reviews the Commissioner's decision. *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993). Accordingly, the Appellant/Cross-Respondent, Belling, must assign error to the Commissioner's findings of fact and conclusions of law. *See* RAP 10.3(h); RCW 50.32.120 (judicial review of the Commissioner's decision is governed by the Administrative Procedure Act).

overpayment when his household income greatly exceeds his expenses, he has no debt, and he just received an award of $48,251.19?

2. Is the Department required to fund a claimant's administrative appeal against the Department of Labor and Industries where the claimant is not entitled to recover attorney fees and costs for administrative appeals under either the Industrial Insurance Act or the Employment Security Act?

3. Did Belling meet his burden of showing that the Commissioner acted arbitrarily and capriciously in denying Belling's waiver request?

IV. STATEMENT OF THE CASE

Belling was injured on the job in 2005 and separated from his employer. CP at 48. He thereafter received time loss benefits from the Department of Labor and Industries (L&I) until they were halted in March 2011. CP at 48, 203; Finding of Fact (FF) 1. L&I also awarded Belling $9,271.80 for permanent partial disability. CP at 55, 203; FF 1.

After L&I suspended his time loss benefits, Belling applied for and received unemployment benefits. CP at 94, 204; FF 2. All told, Belling was paid $22,924.00 in unemployment compensation for the period of June 2011, through April 7, 2012. CP at 38, 93-94, 204; FF 2.

While he was receiving unemployment benefits, Belling was also appealing L&I's decision to halt his time loss benefits. CP at 49, 204; FF 3. Through counsel, Belling filed three appeals of L&I's decision to halt the time loss benefits. *Id.* In June 2012, the Board of Industrial Insurance Appeals reversed the previous decision and awarded Belling time loss benefits, including an award back to the time L&I initially halted the

benefits in March 2011. CP at 130-36, 204; FF 4. Belling was awarded $48,251.19 in time loss benefits for the period he received unemployment benefits. CP at 54, 132-36, 204 (FF 4). Belling's total award included the $9,271.80 he was previously paid in permanent partial disability benefits.[2] CP at 55, 204; FF 4. 4. The award included the entire period Belling received unemployment benefits. CP at 132-36.

Though Belling never informed the Department of L&I's decision, the Department learned of the award of time loss benefits. CP at 41, 204; FF 7. Because a person cannot simultaneously receive unemployment benefits and workers' compensation benefits, the Department determined that Belling was overpaid $22,924.00 in unemployment benefits and issued him an overpayment assessment for that amount. CP at 108-115, 204; FF 7.

After receiving the Department's determination, Belling appealed, asserting that "Employment security [was] legally obligated" to pay "its

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[2] For the period in which he received unemployment benefits (June 6, 2011 – April 7, 2012), Belling received $48,251.19 in time loss benefits. However, Belling actually received three time loss benefits payment orders from L & I, which totaled $81,235.32. (CP at 132-136). The first was issued in the amount of $1,728.87 covering the period from 2/25/2011 through 03/07/2011 (outside the unemployment benefits period) (CP at 132); the second was issued for $34,263.06, covering the period from 03/08/2011 through 10/11/2011 (overlapping the unemployment benefits period) (CP at 133-34); and the third was issued for $45,243.39, covering the period from 10/12/2011 through 07/24/2012 (overlapping the unemployment benefits period) (CP at 135-36). The $9,271.80 previously paid was included in the total of the second payment order, including the three-month period prior to when Belling began receiving unemployment benefits. (CP at 133-34).

share" of his attorney fees. CP at 102-103, 204; FF 8. His attorney fees to appeal the L&I decision amounted to $14,475.36—or 30 percent of the total L&I award—plus $5,225.21 in costs.[3] CP at 54-55, 102, 204, 212; FF 5. With his appeal letter, Belling sent the Department a check for $16,046.80, thus unilaterally withholding $6,877.20—or 30 percent of the $22,924.00 unemployment overpayment, the same rate he paid his L&I attorney. CP at 102-104, 204; FF 8.

Belling receives $1,486.00 twice a month in workers' compensation and $1,700 per month in social security, for a total monthly income of $4,672.00. CP at 62, 204; FF 9. Belling's monthly bills include $650 in rent,[4] $45 for cable, $280 for cellular phones,[5] and $200 for gasoline. CP at 63-67, 204; FF 9. He has no debt in collections, owns three vehicles, and is not responsible for any minor children. *Id.* Belling's medical expenses are covered by a combination of L&I and Medicare/Medicaid. CP at 64. When asked to provide an estimate for his monthly grocery expenses, Belling did not provide a typical budget,

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[3] Finding of Fact 5 and Conclusion of Law 4 incorrectly state Belling paid $5,255.21 in costs. It was actually $5,225.21. This error is not material to the issues here.

[4] Belling's adult son was going to move in and offset some portion of the rent. CP at 67.

[5] Belling's adult children are included on this cellular phone bill. Finding 9 also includes a scrivener's error: the ALJ wrote that Belling spent $280 per *week* on his cell phone bill, but Belling testified that he spent $280 per *month*. CP at 66.

because he "eats out a lot." CP at 65, 204; FF 9. Thus his monthly income far exceeds his necessary monthly expenses.

After the hearing, the ALJ determined that while Belling was not at fault in causing the overpayment, it was not against equity and good conscience for the Department to recover the overpayment from him. CP at 205-206; Conclusion of Law (CL) 3, 7. As part of the equity analysis, the ALJ compared the money Belling was awarded, less his attorney fees and costs, to the amount of the overpayment. CP at 205-06; CL 4-7. After subtracting attorney fees and costs, Belling netted a total of $28,850.62 from L&I.[6] *Id.* The total Belling netted ($28,850.62) exceeded the overpayment amount ($22,924.00) by $5,626.62. *Id.* Based in part on that analysis, and in part on the fact that Belling's income exceeded his monthly expenses, the ALJ affirmed the Department's overpayment determination. CP at 206.

Belling petitioned the Department's Commissioner for review of the ALJ's initial order. CP at 210-16. The Commissioner affirmed the initial order, adopting the ALJ's findings of fact and conclusions of law. CP at 220-21. Belling appealed to the Yakima County Superior Court, which modified the Commissioner's decision and waived $3,645.18 of the overpayment. CP at 307-11. This appeal followed. CP at 313-14.

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[6] $48,251.19 (total award) – $19,700.57 (total fees and costs) = $28,850.62.

V. STANDARD OF REVIEW

The appellate court's "limited review of an agency decision is governed by the Administrative Procedure Act (APA), chapter 34.05 RCW." *Campbell v. Emp't Sec. Dep't*, 180 Wn.2d 566, 571, 326 P.3d 713 (2014); RCW 50.32.120. This Court sits in the same position as the superior court and applies the APA standards directly to the administrative record. *Campbell*, 180 Wn.2d at 571. Thus, the decision on review is the Commissioner's final order, which adopted the ALJ's factual findings and legal conclusions. *Id.*; *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 406, 858 P.2d 494 (1993). The superior court's findings of fact and conclusions of law are superfluous to the appellate court's review. *Delagrave v. Emp't Sec. Dep't*, 127 Wn. App. 596, 604, 111 P.3d 879 (2005).

The Commissioner's decision is considered *prima facie* correct, and Belling has the burden of demonstrating the invalidity of the Commissioner's decision. RCW 34.05.570(1)(a); *Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 244, 350 P.3d 647 (2015). The Court should reverse the Commissioner's decision only if it determines "that [the] person seeking judicial relief has been substantially prejudiced by the action complained of." RCW 34.05.570(1).

Under the APA, the court gives "[g]reat deference" to the Commissioner's factual findings and substantial weight to the agency's

interpretation of the law. *Daniels v. Dep't of Emp't Sec.*, 168 Wn. App. 721, 727, 281 P.3d 310 (2012) (quoting *Galvin v. Emp't Sec. Dep't*, 87 Wn. App. 634, 641, 942 P.2d 1040 (1997)).

A. Review of Findings of Fact

The Commissioner's findings of fact must be upheld if supported by substantial evidence in the agency record. RCW 34.05.558; RCW 34.05.570(3)(e); *William Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 914 P.2d 750 (1996). Substantial evidence is "sufficient to persuade a rational, fair-minded person of the truth of the finding," *In re Estate of Jones,* 152 Wn.2d 1, 8, 93 P.3d 147 (2004), and evidence may be substantial even if conflicting, or susceptible to other reasonable interpretations, *Fred Hutchinson Cancer Research Ctr. v. Holman,* 107 Wn.2d 693, 713, 732 P.2d 974 (1987). "Unchallenged findings are treated as verities on appeal." *Darkenwald,* 183 Wn.2d at 244; *Smith v. Emp't Sec. Dep't,* 155 Wn. App. 24, 32–33, 226 P.3d 263 (2010).

Belling has not materially challenged any findings of fact. He challenges the date of one of his L&I appeals in Finding of Fact 3 and asserts the total amount of his payment from L&I in Finding of Fact 4 is off by approximately $21.00. Br. of Appellant at 2-3; CP 203. The Department agrees that L&I paid Belling a total of $48,251.19, which included a previous payment of $9,271.80, and further concurs that the errors are

immaterial to whether he was entitled to a waiver of his unemployment benefits overpayment. Br. of Appellant at 2-3. Belling also challenges the characterization of his waiver request in Finding 8. Br. of Appellant at 4; CP 203 (FF 8). The Department agrees he requests a partial waiver and not a full waiver. Finally, the Department agrees that the record does not support the portion of Finding 9 that states that Belling "could at some point in the future receive another Permanent [P]artial Disability payout." Br. of Appellant at 4; CP 203 (FF 9). Whether or not that is true, it is immaterial to the issues here. Given that Belling challenges no further findings of fact, they are considered verities in this appeal.

B. Review of Questions of Law

The question in this case is whether the Commissioner properly applied the overpayment and waiver provisions of RCW 50.20.190(1) and (2) and WAC 192-220-030 to the material, unchallenged facts. The Court reviews questions of law de novo, under the error of law standard. RCW 34.05.570(3)(d); *Tapper*, 122 Wn.2d at 407. Because the Department has expertise in interpreting and applying unemployment benefits law, the Court should accord substantial weight to the agency's decision. *Markam Group, Inc. v. Dep't of Emp't Sec.*, 148 Wn. App. 555, 561, 200 P.2d 748 (2009); *William Dickson Co.*, 81 Wn. App. at 407.

Here, whether Belling is liable for repayment of the amount overpaid under RCW 50.20.190(1) is a question of law. However, whether the Commissioner properly exercised his discretionary authority under RCW 50.20.190(2) in denying Belling's request to waive a portion of the overpayment is reviewed under the arbitrary and capricious standard.

C. Review of Discretionary Acts

Whether to waive an overpayment of benefits is within the Commissioner's discretion. RCW 50.20.190(2) provides that the "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." (emphasis added). "The term may is presumed to be used in a permissive or discretionary sense." *Granite Beach Holdings, LLC. v. Dep't of Natural Res.*, 103 Wn. App. 186, 206-07, 11 P.3d 847 (2000). That is especially true here, where repayment is mandatory, RCW 50.20.190(1) ("An individual who is paid any amount as benefits . . . to which he [] is not entitled *shall* . . . be liable for repayment . . . " (emphasis added)), while the Commissioner's decision to grant a waiver is discretionary. RCW 50.20.190(2).

Where an agency is acting within its discretionary authority, the Court must apply the "arbitrary and capricious" standard. *See Lenca v. Emp't*

Sec. Dep't, 148 Wn. App. 565, 575, 200 P.3d 281 (2009); RCW 34.05.570(3)(i). "A decision is arbitrary or capricious for purposes of RCW 34.05.570(3)(i) if it is a 'willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.'" *Alpha Kappa Lamda Fraternity v. Wash. State Univ.*, 152 Wn. App. 401, 421, 216 P.3d 451 (2009) (quoting *Bowers v. Pollution Control Hearings Bd.,* 103 Wn. App. 587, 596, 13 P.3d 1076 (2000). "If there is room for two opinions, a decision is not arbitrary or capricious if it is made honestly and upon due consideration, even though [the court may] think a different conclusion might have been reached," *Bowers*, 103 Wn. App. at 596. The party asserting an agency's decision was arbitrary and capricious carries "'a heavy burden.'" *Alpha Kappa Lamda Fraternity*, 152 Wn. App. at 522 (quoting *Pierce Cnty Sheriff v. Civil Serv. Comm'n,* 98 Wn.2d 690, 695, 658 P.2d 648 (1983)).

VI. ARGUMENT

The Employment Security Act exists to provide a temporary wage replacement for those who are "unemployed through no fault of their own." RCW 50.01.010. In order to provide compensation for eligible beneficiaries, the Department holds collected funds in trust with the United States Treasury, RCW 50.16.020, and is only permitted to access those funds in order to provide benefits or to repay loans from the federal

government, RCW 50.16.030. Because the unemployment fund is a finite resource, that money is reserved only for those who are qualified to receive benefits. RCW 50.20.10 *et seq*.

There is no question that Belling was disqualified from receiving unemployment benefits for the weeks he received workers' compensation benefits. RCW 50.20.085. Thus, he was required to repay the entire overpayment amount, unless the Commissioner granted him 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."). The Commissioner, in keeping with his discretionary authority, properly required Belling to refund the Department in full because doing so would not be against equity and good conscience and is not arbitrary and capricious. RCW 50.20.190(2); WAC 192-220-030. Belling received $48,251.19 in workers' compensation benefits for the period he received $22,924 in unemployment benefits. Even if Belling's attorney fees and costs should be subtracted from his workers' compensation award in determining "equity and good conscience," Belling still received $5,626.62 more than he owed the Department for the overpayment.

Belling asks the Department to pay "its pro rata share" of his workers' compensation attorney fees and costs. Br. of Appellant at 1. But

not even the Industrial 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. Belling should not be allowed to recover from the Department what he could not recover from L&I in litigating his workers' compensation appeal. The Court should reverse the superior court and affirm the Commissioner's decision.

A. Belling Is Liable for Repayment of Unemployment Benefits to Which He Was Not Entitled

A person is disqualified from receiving unemployment benefits for any periods he or she also received workers' compensation benefits. RCW 50.20.085. A person who receives any amount of unemployment benefits to which he is not entitled is liable for repayment of those benefits. RCW 50.20.190(1); *Edinger v. Emp't Sec. Dep't*, 58 Wn. App. 525, 529, 793 P.2d 1004 (1990). If the person is not at fault for causing the overpayment, the Commissioner may waive a part or all of an overpayment if he finds that recovery "would be against equity and good conscience." RCW 50.20.190(2).

Belling received $22,294.00 in unemployment benefits to which he was not entitled because he received $48,251.19 in workers' compensation for the same period. CP at 54, 132-36, 204 (FF 4). Because Belling did not know at the time he received the unemployment payments that he would

later be paid workers' compensation for the same period, the Commissioner found that he was not at fault for the overpayment. CP at 205; CL 3.

Nonetheless, Belling was required to reimburse the Department, unless he was granted a waiver. RCW 50.20.190(2); WAC 192-220-017(1). It was Belling's burden to establish grounds for the waiver. *See Townsend v. Emp't Sec. Dep't*, 54 Wn.2d 532, 534, 341 P.2d 877 (1959) (claimant has the burden to establish his rights to benefits under the Employment Security Act). [7] Belling did not meet his burden, and thus the Commissioner properly found that a waiver was not warranted.

B. The Commissioner Properly Declined to Waive Belling's Unemployment Benefits Overpayment

1. It is not against equity and good conscience to require Belling to reimburse the Department in full

In the context of waiving overpayments, the Department has defined equity and good conscience as "fairness as applied in a given set of circumstances." WAC 192-220-030(1); *see also Delagrave v. Emp't*

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[7] Although no Washington decision has addressed whose burden it is to establish that equity and good conscience favor a waiver, it is logical that the party seeking a waiver bears the burden of establishing that she qualifies. Additionally, numerous federal circuits, interpreting a similar federal statute, have placed the burden on the person seeking the waiver to establish that equity and good conscience weigh in favor of a waiver. *See e.g.*, *Banuelos v. Apfel*, 165 F.3d 1166, 1169-70 (7th Cir. 1999) (overruled on other grounds, *Johnson v. Apfel*, 189 F.3d 561 (7th Cir. 1999)); *Bray v. Bowen*, 854 F.2d 685 (5th Cir. 1988); *Valente v. Sec'y of Health and Human Servs.*, 733 F.2d 1037 (2d Cir. 1984) (all interpreting similar federal statutes governing waiver of social security benefits overpayments).

Sec. Dep't, 127 Wn. App. at 613 ("Equity and good conscience means fairness."). In determining whether a waiver would be fair, the Department considers the totality of the circumstances. WAC 192-220-030(4). The Department has determined that it is *per se* against equity and good conscience to pursue recovery of an overpayment when doing so would "deprive [the claimant] of income required to provide for basic necessities including food, shelter, medicine, utilities, and related expenses." WAC 192-220-030(2). However, when recovery would not deprive a claimant of basic necessities, the Department has identified factors it "may" consider, "but is not limited to":

- 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 claimant refused other government benefits because the claimant received unemployment benefits; and

- any other factors indicating that repayment of the full amount would cause the claimant undue economic, physical, or mental hardship.

WAC 192-220-030(3).

It was Belling's burden to prove that it would be inequitable and against good conscience to require him to repay the Department. Among the relevant facts the Department may consider in granting a waiver is whether a claimant's household income exceeds their monthly expenses, and if so, to what degree. *See In re Hader*, Emp't Sec. Comm'r Dec.2d 952 (2010)[8] (concluding it would not be against equity or good conscience to deny waiver of an overpayment when the claimant's monthly household income substantially exceed her monthly household expenses); *Tuttle v. Dep't of Emp't Sec.*, 2014 WL 5465408 at *4-5 (Wash. Ct. App. Oct, 27, 2014) (unpublished).

Here, the unchallenged facts show that Belling's income significantly exceeds his monthly expenses. Belling's monthly bills include $650 in rent, $45 for cable, $280 for cellular phones, and $200 for gasoline. CP at 63-67, 204; FF 9. He has no debt in collections, owns three vehicles, and is not responsible for any minor children. *Id.* Belling's

[8] Pursuant to 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 *Hader* is attached to this brief as Appendix A.

medical expenses are covered by a combination of L&I and Medicare/Medicaid. CP at 64. Belling did not provide a typical budget for food because he "eats out a lot." CP at 65, 204; FF 9. Thus Belling's income is $4,672.00 per month, while his identified monthly expenses are approximately $1,200.00 per month. And some of those expenses are offset by contributions from his adult children. *Id.* Requiring repayment would not deprive Belling of "income required to provide for basic necessities including food, shelter, medicine, utilities, and related expenses." WAC 192-220-030(2)

Moreover, Belling received a total award of $48,251.19 from L&I, $25,327.19 more than he received in unemployment benefits. He paid his attorney a total of $19,700.57 in fees and costs. Even after subtracting the amount he paid his attorney from his total award,[9] Belling netted $5,626.62 in workers' compensation payments for the period in which he received unemployment benefits. Belling asserts, without citation to any authority, that this calculation is flawed because the Commissioner was required to deduct the $9,271.80 Belling previously received from the total

[9] The Commissioner had no legal obligation under the statute or WAC to perform this calculation in order to determine the total of Belling's award. In *In re Peltier*, the case cited in the relevant conclusions of law, a similar calculation was performed, in order to help evaluate the totality of the circumstances in that particular case. *In re Peltier* Emp't Sec. Comm'r. Dec.2d 910 (2007). The ALJ and the Commissioner used the calculation to similar effect here in evaluating the equity of Belling's claims. A copy of *In re Peltier* is attached as Appendix B.

award. Br. of Appellant at 3.[10] But the $9,271.80 covers the period he received unemployment benefits. Moreover, the underlying assumption is belied by the calculation of Belling's own attorney fees. Belling's counsel received $14,475.36—30 percent of the total award of $48,251.19. CP at 54-55, 102, 204; FF 5. Belling advances no rationale explaining why his attorney fees should be calculated on the basis of the total award, but the total award should not be taken into account in evaluating his waiver request.

Importantly, Belling has never claimed that having to repay the unemployment benefits would cause him undue financial hardship. His only rationale for challenging the Department's recovery is that he was required to pay attorney fees to receive workers' compensation benefits from L&I, and therefore, Belling believes, the Department should be forced to pay a portion of those fees. Br. of Appellant at 10. But the Department is not obligated to help pay for claimants' appeals before other agencies. The Commissioner properly considered the totality of Belling's circumstances and correctly determined that requiring repayment

[10] In modifying the Commissioner's decision, the superior court deducted the $9,271.80 previously paid from Belling's total award without explanation, and then asserted that the Commissioner was required to apply the *Peltier* calculation to the remainder. CP at 309-311. As noted above, the calculation in *Peltier* was applied at the discretion of the Commissioner as a means to evaluate the equities of the particular circumstances of that matter.

would not be against equity and good conscience. The Court should affirm the Commissioner's decision.

2. The Department is not obligated to finance Belling's L&I appeal

Belling asks this Court to impose on the Department an obligation to help finance his administrative appeal before the Board of Industrial Insurance Appeals. While Belling now couches his argument in the language of equity, it is clear that Belling's position has not changed since he first claimed that the Department was "legally obligated to pay [its] share of his attorney fees." CP at 102-03. All litigants assume the costs and bear the burden of litigation; it is their choice to pursue litigation or not. And where Belling is prohibited from receiving attorney fees from L&I for administrative appeals of that agency's decision, RCW 51.52.120, it would be an absurd result to require the Department to award him attorney fees for that litigation.

Attorney fees and costs are expenses that any litigant must contemplate when deciding whether to pursue 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 denies Otasco an opportunity to 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."). Indeed, as this Court noted in *Delagrave*, "Washington follows the American rule" under which attorney fees are "not recoverable unless provided for in contract, statute, or recognized equitable principles." *Delagrave*, 127 Wn. App. at 606 (citing *Rettkowski v. Dep't of Ecology*, 128 Wn.2d 508, 514, 910 P.2d 462 (1996)). However, where "a statutory scheme . . . allows such an award [of attorney fees] under narrow circumstances, a party cannot enlarge those circumstances by reference to the common fund doctrine or other equitable powers . . . ." *Id.* (citing *Leischner v. Alldridge*, 114 Wn.2d 753, 757, 790 P.2d 1234 (1990)) (internal quotations omitted). A statute awarding attorney fees against the state must be strictly construed because it constitutes a waiver of sovereign immunity and an abrogation of the American rule on attorney fees. *Rettkowski v. Dep't of Ecology*, 76 Wn. App. 384, 389, 885 P.2d 852 (1994), *aff'd in part, rev'd on other grounds in part* 128 Wn.2d 508, 910 P.2d 462 (1996). That strict construction applies here, as both the Industrial Insurance Act and the Employment Security Act specifically limit the circumstances in which attorney fees may be awarded.

The Industrial Insurance Act, Title 51 RCW, prohibits claimants from receiving attorney fees or costs for appeals at the administrative level. RCW 51.52.120; *cf.* RCW 51.52.130 (stating only that if on appeal *to the superior court or appellate court*, the Board's decisions is reversed or modified, then the claimant may recover attorney fees and costs from L&I's administrative fund); *Borenstein v. Dep't of Labor and Indus.*, 49 Wn.2d 674, 676-77, 306 P.2d 228 (1957) (holding that the legislature made no provision for the recovery of attorney fees incurred 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) (trial court erred in awarding attorney fees incurred before the Board of Industrial Insurance Appeals in addition to fees before the Supreme Court.) Thus, Belling seeks payment from the Department that he is prohibited from obtaining from L&I, for his appeal of an L&I decision.

Similarly, under the Employment Security Act, Title 50 RCW, attorney fees may not be recovered for services provided at the administrative level. RCW 50.32.100 (costs for proceedings "prior to court review" are paid out of the unemployment compensation fund, "except charges for services rendered by counsel"); *Gaines v. Dep't of Emp't. Sec.*, 140 Wn. App. 791, 801-02, 166 P.3d 1257, 1262-63 (2007) ("[T]here is no

award of fees from the state fund for proceedings at the administrative level.").

The legislature plainly intended litigants at the administrative level to bear their own costs. And it has made no provision for recovery of attorney fees in overlapping benefits scenarios such as this one. *See Delagrave*, 127 Wn. App. at 605. Therefore, requiring Belling to pay his own attorney fees and costs for pursuing his workers' compensation claim cannot, in and of itself, be against equity and good conscience simply because he also received unemployment benefits to which he was not entitled. Refunding the overpayment would place Belling in exactly the same financial position he was in prior to receiving unemployment benefits: responsible for any fees and costs associated with litigating his workers' compensation claim.

Additionally, Belling misapprehends the purpose of unemployment benefits and workers' compensation, and the reason for requiring repayment. *See* Br. of Appellant at 15. Both workers' compensation and unemployment benefits are wage replacement mechanisms. Unemployment benefits are reserved for those who can work, but, through no fault of their own, are unemployed. *See* RCW 50.20.10. Workers' compensation is designed for those injured on the job who cannot work. *See* RCW 51.32.010 *et seq*. Unemployment benefit funds are held in trust

by the Department for the benefit of future claimants. RCW 50.16.020. It is simply incorrect to argue that the Department would be, in any way, enriched by requiring Belling to refund the overpayment. *See* Br. of Appellant at 1. Instead, the Department is required to seek repayment from unqualified recipients in order to ensure that funds are available for qualified claimants. RCW 50.20.190(1). The Commissioner correctly determined that the Department was not required to fund Belling's litigation and that he was not entitled to a partial waiver of his overpayment. This Court should reverse the superior court and affirm the Commissioner's decision.

C. The Department Did Not Act Arbitrarily or Capriciously In Denying Belling a Waiver

It is Belling's burden to demonstrate that the Department acted arbitrarily and capriciously in denying his request for a waiver of the overpaid unemployment benefits. RCW 34.05.570(1), (3)(i). He has not done so. To act arbitrarily or capriciously, the Department's actions must be "willful, unreasoning and in disregard of facts and circumstances." *Lenca v. Emp't Sec. Dep't*, 148 Wn. App. 565, 575, 200 P.3d 281 (2009). "Where there is room for two opinions" an action is not arbitrary and capricious "even though one may believe an erroneous conclusion has been reached." *Pierce Cnty. Sheriff v. Civil Svc. Com'n of Pierce Cnty.*, 98 Wn.2d 690, 695,

658 P.2d 648 (1983)(citing *State v. Rowe*, 93 Wn.2d 277, 284, 609 P.2d 1348 (1980). Because the "scope of court review should be very narrow" the petitioner, here Belling, "must carry a heavy burden." *Id.*

The uncontroverted evidence demonstrates that the Commissioner and ALJ acted with due regard for the totality of the circumstances presented. The Commissioner considered Belling's equitable arguments, the total award he received from L&I, his legal costs, his current income and expenses, and his living arrangements. CP at 204-06; FF 9; CL 4-7. The Commissioner's decision to deny Belling a waiver was not "unreasoning" or "in disregard of facts and circumstances." The Commissioner acted appropriately, competently, and rationally, and this Court should reverse the superior court and affirm the Commissioner's decision.

D. Because this Court Should Affirm the Commissioner's Decision, Belling Should Not Be Awarded Attorney's Fees

Belling may receive reasonable attorney fees and costs only if this Court ultimately modifies or reverses the Commissioner's decision. RCW 50.32.160. Because the Commissioner properly determined that Belling was not entitled to a waiver of the overpayment here, this Court should affirm the Commissioner's decision. Therefore, this Court should deny Belling's request for attorney fees and costs.

VII. CONCLUSION

The Commissioner properly determined that requiring Belling to repay the full amount of his unemployment benefits would not be against equity and good conscience. The Department is not obligated, and should not be required, to bear the costs of Belling's workers' compensation appeals. Moreover, the Department acted within the scope of its discretion in denying Belling a waiver of his overpayment. Therefore, this Court should reverse the superior court and affirm the Commissioner's decision.

RESPECTFULLY SUBMITTED this 30th day of September, 2016.

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Appendix A

THOMSON REUTERS
WESTLAW

Washington State Employment Security Department Precedential Decisions of Commissioner

In re: CAROL L. HADER

Commissioner of the Employment Security Department.
October 29, 2010

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

Commissioner of the Employment Security Department.

State of Washington.

*1 **In re**: CAROL L. **HADER**

*1
Case No. 952
*1
Review Nos. 2010-5008 & 2010-5009
*1
Docket Nos. 02-2010-25173 & 02-2010-25465
*1 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

*1 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

*1 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

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

IV

*1 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

*1 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

*1 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:

*2 "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."

*2 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

*2 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

*2 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

*3 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

*3 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.

*3 Now, therefore,

*3 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 *$16* overpayment, but is nonetheless liable for refund pursuant to RCW 50.20.190(1) and (2) and chapter 192-220 WAC.
*3 DATED at Olympia, Washington, October 29, 2010.[a1]

*3 S. Andrew Grace
*3 Review Judge Commissioner's Review Office

RECONSIDERATION

*3 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.

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

*4 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

*4 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.

*4 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.

0628

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

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Appendix B

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WESTLAW

Washington State Employment Security Department Precedential Decisions of Commissioner

IN RE: SUZANNE L. PELTIER

Commissioner of the Employment Security Department.
February 16, 2007

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

Commissioner of the Employment Security Department.

State of Washington.

*1 **IN RE**: SUZANNE L. **PELTIER**

*1
Case No. 910
*1
Review Nos. 2007-0276 and 2007-0277
*1
Docket Nos. 04-2006-22057 and 04-2006-22058
*1 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.

*1 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.

*1 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.

*1 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.

*1 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.

*1 As a general rule, benefits overpaid must be refunded unless the claimant is free from fault in the mater 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. Dep't, 127 Wn. App. 596, 111 P.3d 879 (2005), which allows partial waiver on the basis of fairness.

*1 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,

*2 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*.
*2 DATED at Olympia, Washington, February 16, 2007.[a1]

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

RECONSIDERATION

*2 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

*2 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.

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*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
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2007-0277	910
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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

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PROOF OF SERVICE

I, Amy Phipps, certify that I caused a copy of this document—**Brief of Respondent/Cross-Appellant with Appendix A and Appendix B**—to be served on all parties or their counsel of record on the date below as follows:

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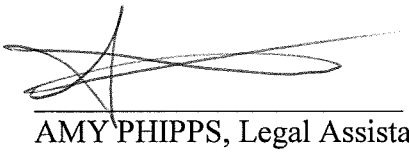
Court of Appeals III
500 N Cedar St.
Spokane, WA 99201-1905

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

DATED this 30th day of September, 2016, at Olympia, Washington.



AMY PHIPPS, Legal Assistant