

**FILED**

DEC 19 2016

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 34066-0 III

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON

CHRISTOPHER BELLING, individually,

Appellant

v.

EMPLOYMENT SECURITY DEPARTMENT of the state of  
Washington,

Respondent

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REPLY BRIEF OF APPELLANT

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## I. INTRODUCTION

The Department of Employment Security (ESD) agrees with Mr. Belling that the sole issue on appeal is whether, under the totality of the circumstances, it is against equity and good conscience to deny his request for a partial waiver of an ESD overpayment. The request was based on Mr. Belling's having sole financial responsibility for the attorney fees and costs of his successful litigation in his workers' compensation appeal when nearly the entire proceeds of the litigation were paid to ESD. Resp. br. 2-3<sup>1</sup> This court may find it significant that Mr. Belling's successful appeal is the *only* reason ESD is eligible for any reimbursement for overpayment at all. Mr. Belling's waiver request was based on his contention that ESD should pay its pro rata share of the attorney fees incurred in the workers' compensation litigation.

As an initial matter, Mr. Belling takes issue with ESD's argument in its response/cross appeal based on *two* words found in *one* document in this record. Those words are "legally obligated" found in an August 23, 2012 formal appeal letter. CP 102 Mr. Belling

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<sup>1</sup> In its response/cross-appeal brief ESD sets forth two additional issues (Resp. br. 3) but they both pertain to the correctness of the Commissioner's fair and equitable decision as set forth by Mr. Belling thus are discussed as such.

agrees the two words *as written in the letter* do not reflect the proper legal standard for consideration of a waiver request as set forth in RCW 50.20.190(2), which states in relevant part: “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.” Contrary to what ESD would have this court believe, there is *no* evidence in the record that Mr. Belling presented a “legally obligated” challenge before ESD, the ESD Commissioner, the superior court or this court. ESD’s argument that “it is clear that [Mr.] Belling’s position has not changed since he first claimed [ESD] was ‘legally obligated to pay [its] share of his attorney fees’”<sup>2</sup> is baseless, specious and should not be considered. A review of the record reveals Mr. Belling has consistently argued that the principle of “equity and good conscience” applies to his partial waiver request as set forth in RCW 50.20.190(2) and former WAC 192-220-030 (2008).

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<sup>2</sup> Resp. br. 19

## II. ESD STAEMENT OF THE CASE

Mr. Belling wants to clear up any misconceptions regarding alleged facts made in its statement of the case section in ESD's brief. First, on page 4 in footnote 2, ESD states that Mr. Belling received time loss payments in the amount of \$81, 235.32. It is not clear why ESD included this number since at all times both parties litigated the overpayment in the amount of \$22, 924 based on Mr. Belling's \$48,251.19 workers' compensation lump sum payment of improperly denied benefits. The record does not supply any information regarding any payment other than the \$48,251.19 payment.

Next, ESD attempts to cast doubt on Mr. Belling's character when it states: "[t]hough [Mr.] Belling *never informed* the Department of the L&I decision, the Department learned of the award of time loss benefits." Resp. br. at 4 (emphasis added). This situation was clearly explained in the hearing before the ALJ and neither she nor the Commissioner found Mr. Belling was at fault in causing the overpayment, lack of in-person notification or not. CP 73-78. It was determined that the lack of direct contact with ESD after the time loss payment was unintentional. CP 205-206. Truth be told, ESD discovered Mr. Belling's L&I payment within a few *weeks* of him

receiving it. Mr. Belling immediately ceased applying for ESD benefits as soon as he learned the L&I payments would commence. CP 74, 104

Third, on page 5 of its brief in footnote 4, ESD makes the comment “[Mr.] Belling’s adult son *was going to* move in and offset some portion of the rent.” However, because the ALJ’s findings were inadequate it is not known whether she considered this *potential, future* occurrence; however the speculative nature of this issue is not relevant in this appeal.

Next, ESD repeats the ALJ’S determination that Mr. Belling had “no debt in collections.” Resp. br. at 5. However, at the hearing Mr. Belling testified he *did* have outstanding debt but that it wasn’t in collections. CP 63. The fact there is debt at all is much more relevant to ESD’s determination regarding the financial elements considered when determining whether a partial waiver of overpayment is fair. Logically, a past-due debt in collections is no more or less a financial liability than “mere” outstanding debt.

Finally, ESD states Mr. Belling “owns three vehicles,” which may imply financial stability. Resp. br. at 5. This was also fleshed out at the hearing when Mr. Belling testified that the vehicles were all

quite old (2001, 1970 and a 1976) and one of them had no motor.  
CP 64.

### **III. ESD'S STATEMENT RE: STANDARD OF REVIEW**

As far as it went, ESD properly set forth the standard of review. Resp. br. 7-8. However, it did not articulate that a reviewing court may reverse an agency decision when: (1) the decision is based upon an error of law; (2) the decision is not based upon substantial evidence; or (3) the decision is arbitrary and capricious. *Tapper v. State Employment Sec. Dep't*, 122 Wash.2d 397, 402, 858 P.2d 494 (1993). Likewise, it neglected to mention that where, as here, the Commissioner's findings of fact (which merely affirmed those of the ALJ) are not clearly described or where findings are buried or hidden within the conclusions of law, it is within the prerogative of an appellate court to exercise its own authority in determining what facts have actually been found below. *Id.* at 406.

While ESD focuses its argument on the arbitrary and capricious standard Mr. Belling, who bears the burden of demonstrating the invalidity of the Commissioner's decision, relies on the lack of substantial evidence to support that decision standard. The rule set forth in *Tapper* is written in the disjunctive. Mr. Belling

is not required to prove the arbitrary and capricious standard was not met. *Tapper* reveals there are 3 methods of challenging an agency Commissioner's decision and Mr. Belling argued the Commissioner's decision was not supported by substantial evidence.

#### **IV. ESD RESPONSE TO CHALLENGED FINDINGS AND CONCLUSIONS**

ESD correctly asserts Mr. Belling made no material challenge to the Commissioner's findings of fact and acknowledges the Commissioner's findings 3-4 and 8-9 contained erroneous information. Mr. Belling's main contention on appeal is exactly that – the Commissioner provided *no* material facts on which it relied regarding the elements of the overpayment waiver provision.<sup>3</sup> This violates the APA. RCW 34.05.570(1)(c) ("The court shall make a separate and distinct ruling on each material issue on which the court's decision is based) Here, there were no findings to which Mr. Belling *could* assign error for this court's review. If this court agrees, pursuant to *Tapper*, it may exercise its authority to determine what facts existed below but were not set forth in findings to see if

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<sup>3</sup> The Commissioner listed some financial information in finding #9 but did not explain how that information effected its decision to deny Mr. Belling's partial waiver request.

substantial evidence supports the Commissioner's final order and if not, whether Mr. Belling has been substantially prejudiced. RCW 34.05.570(1)(d).

## **VI. ESD'S ARGUMENT**

Citing WAC 192-220-030 and RCW 51.20.190(2) ESD argues the Commissioner used its discretionary authority to deny Mr. Belling's request for a partial waiver and that the decision was not arbitrary and capricious. Resp. br. at 12. WAC 192-220-030 sets forth some of the factors ESD is to consider when making its decision regarding partial waiver and the "arbitrary and capricious" standard is not the only one by which a claimant may challenge an ESD decision. See *Valley Fruit v. State, Dep't of Revenue*, 92 Wn. App. 413, 416, 963 P.2d 886, 888 (1998)(reviewing court may reverse agency decision when decision is (1) based upon an error of law; (2) is not based upon substantial evidence; or (3) arbitrary and capricious, citing, *Tapper v. State Employment Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993)). Again, it is important to note that Mr. Belling is challenging the lack of substantial evidence supporting the Commissioner's decision, *not* that it was arbitrary and capricious.

ESD then repeats the statutes and case law that requires a claimant to repay ESD overpayments unless a waiver is granted. Resp. br. 13-14. It properly sets forth factors ESD may consider when determining whether to grant a waiver. Resp. br. 15-16. Mr. Belling has no disagreement with the law cited by ESD. He does however challenge the Commissioner's complete lack of findings that demonstrate any of the discretionary factors were considered prior to making its decision that it was not unfair or against equity and good conscience to require repayment. (CP 206 – finding #7). The record reveals the Commissioner's findings and conclusions do not address how it equitably and in good conscience considered the facts of Mr. Belling's case under the totality of the circumstances in light of RCW 50.20.190(2) and former WAC 192-220-030 (2008). A thorough review of the record reveals the Commissioner considered Mr. Belling's waiver argument and decided it did not apply, which it has the discretion to do. However, in making that decision the only element the Commissioner appeared to have considered was the income and expenses Mr. Belling could recall off the cuff during the March 15, 2013 ALJ hearing. (CP 61-67, 204) (As an aside, ESD claims Mr. Belling did not challenge finding #9, (Resp. br. 16) which is not true. Mr. Belling explained his disagreement with finding #9 in

his appellant's brief.) Even if one assumes the Commissioner considered the financial information that is but one element under the "totality of the circumstances"<sup>4</sup> a Commissioner, if it decides to determine the waiver issue, may consider.

WAC 192-220-030 provides in relevant part:

(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. . .

(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;

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<sup>4</sup> See WAC 192-220-030(5)

(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; and

. . .

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

(5) 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), (3), and (4)

Former WAC 192-220-030 (2008)

Although it is not known whether the Commissioner considered any of these factors, Mr. Belling points out that he was forced to apply for unemployment benefits when L&I wrongfully denied his application for benefits. He simply had no means of income to pay for the basic necessities of life at that time. CP 48-51. The ALJ had the audacity to ask him why he hadn't "save[d]" any of the ESD benefits if he knew he might have to pay it back one day! He told her he relied on it to live. CP 50-51, 57

The Commissioner's findings, as argued in his appellant's brief did not contain substantial evidence of the inapplicability of a partial waiver of Mr. Belling's ESD overpayment under the totality of the circumstances. In addition to his financial information, the record reveals Mr. Belling is 54 years old (DOB: 10/21/62)<sup>5</sup>, he is completely disabled due to a workplace back injury and as a result of his disability he has been unable to work since October 4, 2005 – a period of over 11 years. CP 47-48. In March of 2011, Mr. Belling even attempted to take a college computer class in order to prepare himself to enter a new labor market but was not successful. CP 49. Any type of reference that the Commissioner considered, if she did so, regarding the physical abilities of Mr. Belling to earn a living performing some type of employment is entirely lacking in this record. Additionally, it is significant that the WACs/statutes state that the circumstances a Commissioner may consider when making a waiver decision are not limited to those so itemized. Mr. Belling strongly argues this record does not supply substantial evidence that the Commissioner fairly, equitably and in good conscience considered

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<sup>5</sup> CP 102

the totality of the circumstances in reviewing his request for a partial waiver of his overpayment.

ESD spends a significant portion of its brief arguing it is not *obligated* to finance Mr. Belling's L&I appeal. Resp. br. 19-22. Mr. Belling completely agrees with this statement. ESD is not *obligated* to finance a worker's attorney fees. However, a claimant is allowed to request a waiver, full or partial, of the overpayment regardless of the reason put forth. The decision to allow the waiver is discretionary with each Commissioner. Attorney fees and costs may not always be the reason for seeking a waiver. But if they are, a Commissioner may and has granted such a waiver. See, *In re Peltier*, No. 04–2006–22057 (Wash. Emp't Sec. Comer Dec. No. 910 2d Series Feb. 16, 2007) where an ESD Commissioner granted a partial waiver to the claimant whose ESD overpayment exceeded her L&I award *after her attorney was paid*.<sup>6</sup> Like in *Peltier*, this appeal commenced when Mr. Belling requested a partial waiver of the amount owed for the ESD overpayment. The issue on appeal is the fairness and

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<sup>6</sup> 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).

substantial evidence surrounding the Commissioner's consideration of Mr. Belling's request. He does raise the argument that under the totality of *his particular circumstances* it is not fair or equitable to absorb the entire fees and costs in order for ESD to recover its overpayment but the issue on appeal is the denial of his waiver request. Attorney fees and costs will not be the issue in every person's appeal of the denial of their request for a waiver of an ESD overpayment. Each case must be evaluated on its own merits.

#### **VII. ATTORNEY FEES**

ESD claims Mr. Belling should not be entitled to attorney fees. (Resp. br. 24) It apparently decides for this court that the Commissioner's decision was correct. However, if successful in this appeal, Mr. Belling *is* entitled to reasonable attorney fees in both the superior court and this court subject to compliance with RAP 18.1(d). *See* RCW 50.32.160; *Delagrave v. Employment Sec. Dep't*, 127 Wn. App. 596, 612-613, 111 P.3d 879 (2005).

## VIII. CONCLUSION

Judge Blaine of the Yakima County Superior Court summed up Mr. Belling's viewpoint.<sup>7</sup> The judge said, "it's a matter of fairness and equity that one party should not have to incur all of the expense to make a recovery so another party can waltz in and say, Okay, now I'm taking my share of this [dollar for dollar] and not bearing any of the risk." "There's justice that it should be fair [and equitable] that the person who incurred the expense and risk . . . not have to bear all of that expense if it's benefitting somebody else." He continued, "You've got the State [L&I] on one hand not paying [Mr. Belling] what it should have paid him, forcing him to get an attorney to get the money back, and then we have the State [ESD] coming around the other direction saying, Okay, now you have got to give us back money, and *still* you have to pay all your expenses" (emphasis added). Judge Blaine then added, "If the State had just paid him [Mr. Belling] what he - - now we know he had coming to him, the Employment Security, you know, wouldn't have had to pay anything and [Mr. Belling] wouldn't have had to pay anything. So it's the State's fault that [Mr. Belling] had to incur the expense [of litigation],

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<sup>7</sup> Mr. Belling understands there is nothing in the superior court opinion that is relevant in this appeal.

so why shouldn't the State as a matter of fairness and equity, at least share [by waiving a portion of the overpayment] in the expense that he - - that they forced him to go to?" (December 17, 2014 RP 12-13, 16)

Pursuant to the *Tapper* case this court may choose to exercise its own authority and determine what facts the Commissioner actually relied on in making her decision below and whether those facts are substantial evidence to support her ultimate conclusion to deny Mr. Belling's waiver request. *Id.* at 206. Mr. Belling suggests that without more thorough findings or conclusions that task may prove unmanageable.

Even though this appeal started with a request to waive a portion of the ESD overpayment when attorney fees and costs were shouldered by Mr. Belling, he is not asking this court, the legislature or ESD to revise or rewrite the laws or code regarding repayment of overpayments. Nor does he argue, as suggested by ESD, that it is *obligated* to waive a portion of every claimant's attorney fees and costs in order to recoup the money a worker rightfully owes for an ESD overpayment. Each situation must be determined on a case-by-case basis. Mr. Belling's appeal has a narrow scope that is very much in line with what the case law, statutes and WACs allow. The

law states ESD must, in fairness, equity and good conscience consider the totality of every worker's circumstances when making its discretionary determination whether a full or partial waiver of overpaid ESD benefits is proper. This was not done in Mr. Belling's case and he was substantially prejudiced as a result.

Finding # 3<sup>8</sup> declares Mr. Belling was not at fault in causing the ESD overpayment but the Commissioner made no findings regarding whether a partial waiver of the overpayment was appropriate under his particular circumstances, which was the entire focus of his appeal of the initial ESD decision. The Commissioner's finding #9 lists some financial information but does not apply that information to the final conclusion that Mr. Belling's request for a waiver should be denied. Nor is any other factor the Commissioner considered regarding the totality of Mr. Belling's circumstances set forth. On this record, as presented, substantial evidence does not support the Commissioner's conclusion regarding the denial of Mr. Belling's waiver request. (It is noteworthy that the only reference to "waiver" the Commissioner made is found in finding #8 where it erroneously determined Mr. Belling requested "up to the total

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<sup>8</sup> CP 205

overpayment amount be waived.” CP 204. With no finding or substantial evidence in the record to support it the Commissioner merely concluded “repayment [of the \$22,924 overpayment] would not be *unfair* and repayment would not be *against equity and good conscience*.”<sup>9</sup> With the complete lack of findings setting forth the information on which it relied in making the waiver decision, it cannot be said substantial evidence supports the Commissioner’s decision. Accordingly, Mr. Belling respectfully requests the decision be overruled.

Respectfully submitted this 15<sup>th</sup> day of December, 2016



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<sup>9</sup> Conclusion #7 CP 206

NO. 340660 III

**COURT OF APPEALS FOR DIVISION III  
STATE OF WASHINGTON**

CHRISTOPHER BELLING, )  
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 Appellant, )  
 )  
 vs. )  
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 WASHINGTON STATE EMPLOYMENT )  
 SECURITY DEPARTMENT, )  
 )  
 Respondent. )  
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**DECLARATION OF  
SERVICE**

STATE OF WASHINGTON )  
 ) ss.  
 County of Yakima )

I, Susan Little, do hereby certify that I am an employee of Smart, Connell, Childers & Verhulp, PS, attorneys for the Respondent. That I am a citizen of the United States and competent to be a witness herein. That on the 15th day of December, 2016, I sent, via United States Mail at Yakima, Washington, first class postage prepaid addressed as follow:

Jonathan Pitel, AAG  
Attorney for Respondent  
1125 Washington Street SE  
POB 40110  
Olympia WA 98504

an envelope containing the true and correct copy of the following documents:

**Appellant's Reply Brief**, in the above entitled case.



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Susan Little, Legal Assistant to  
Darrell K. Smart