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Feb 15, 2017
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.

REPLY BRIEF OF RESPONDENT/CROSS-APPELLANT

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I. INTRODUCTION

The Commissioner of the Employment Security Department has the discretion to grant waivers of overpayments due the Department. That decision is reviewed under the arbitrary and capricious standard of the Administrative Procedure Act. In this appeal, Belling challenges no material findings of fact; agrees that the Commissioner properly stated and applied the law; and concedes that the decision to deny him a waiver of his overpayment was not arbitrary and capricious. Instead, Belling's sole rationale for challenging the Commissioner's final order rests on a mischaracterization of the applicable standard of review and his unsupported belief that the State must bear the costs of his industrial insurance appeal.

Belling's position is contrary to both the Employment Security Act and the Industrial Insurance Act. It would permit Belling to double-dip from the unemployment benefits and workers' compensation funds, funds that are intended for different, mutually exclusive groups of workers. This Court should affirm the Commissioner's decision denying Belling a waiver of his overpayment and require Belling to repay the Department the \$22,924.00 in unemployment benefits he received, but to which he was not entitled.

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II. ARGUMENT IN REPLY

A. The Commissioner's Discretionary Decision to Deny Belling a Waiver Is Reviewed Under the Arbitrary and Capricious Standard

Whether to grant a waiver of an overpayment is a decision left to the discretion of the Commissioner or his delegate. RCW 50.20.190(2). When appellate courts review matters of discretion, the inquiry is limited “to ensuring that the agency has exercised its discretion in accordance with the law and has not abused its discretion.” *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 Lambda 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.

Here, Belling asserts that he is “challenging the lack of substantial evidence supporting the Commissioner’s decision,” Appellant’s Reply Br. 7, and that the Commissioner’s determination, “did not contain substantial

evidence of the inapplicability of a . . . waiver of Belling's ESD overpayment." Appellant's Reply Br. 11. But this is a misstatement of the applicable standard of review, for which Belling relies on a misinterpretation of a single sentence in *Tapper v. Emp't. Sec. Dep't*, 122 Wn.2d 397, 858 P.2d 494 (1993). Appellant's Reply Br. 5-6.

Contrary to Belling's assertion, the substantial evidence standard does not apply broadly to the Commissioner's discretionary decision to deny Belling a waiver. Instead, the substantial evidence standard applies to the court's review of the Commissioner's *factual* findings. RCW 34.05.570(3)(e); *see also B&R Sales, Inc. v. Dep't of Labor & Indus.*, 186 Wn. App. 367, 375, 344 P.3d 741 (2015) ("We review the Board's *findings of fact* under a substantial evidence standard, which addresses whether the record contains evidence sufficient to persuade a fair-minded, rational person of the finding's truth.") (emphasis added); *Wm. Dickson Co. v. Puget Sound Air Pollution Control Agency*, 81 Wn. App. 403, 411, 915 P.2d 750, 755 (1996). Indeed, the *Tapper* court itself explained that the substantial evidence standard applies to challenges of the Commissioner's findings, "Tapper has not argued that the Commissioner's findings of fact were not supported by substantial evidence under RCW 34.05.570(3)(e)." *Tapper*, 122 Wn.2d at 403.

Nonetheless, the Commissioner's adopted findings of fact *do* support the Commissioner's ultimate conclusion that waiver was not appropriate here.¹ The findings included the fact that, even after deducting his attorney's fees, Belling received \$5,626.62 more from L&I than he owed the Department.² CP 38, 54, 93-94, 132-36, 204; Finding of Fact (FF) 2, 4. And they included Belling's income and financial obligations: his monthly income of \$4,672.00 exceeded Belling's stated monthly expenses by \$3,497.00. CP 62-67, 204; FF 9. Additionally, there was no evidence that Belling had any trouble meeting his monthly bills, as he had no debt in collections. *Id.*

It appears that Belling now argues that the Commissioner erred by failing to consider "the physical abilities of Mr. Belling to earn a living performing." Appellant's Reply Br. at 11. This argument is unavailing for multiple reasons. First, Belling failed to raise this argument at the administrative level and should not be permitted to raise it for the first time on this appeal. *See Darkenwald v. Emp't Sec. Dep't*, 183 Wn.2d 237, 245 n.3, 350 P.3d 647 (2015) ("... the Administrative Procedure Act, chapter 34.05 RCW, bars litigants from raising issues on judicial review

¹ The parties agree that the adopted Findings of Fact contain non-material errors. *See* Respondent/Cross-Appellant's Br. 5, 8-9.

² This figure is limited to the amount Belling received from L&I for the same time period he received unemployment benefits. However, Belling actually received three time loss benefits payment orders from L&I, which totaled \$81,235.32. (CP at 132-136).

that were not raised before the agency with few exceptions”). Second, if Belling wished the Commissioner to consider factors beyond his financial circumstances, it was his obligation to place them before the ALJ. *See Tuttle v. Dep’t of Emp’t Sec.*, 2014 WL 5465408 at *5 (Wash. Ct. App. Oct. 27, 2014) (unpublished).³ And, finally, the Commissioner considered the income Belling receives, from a combination of workers’ compensation and social security disability, which goes to Belling’s “future earnings potential” pursuant to WAC 192-220-030(3)(d).

The Commissioner’s decision to deny Belling’s waiver request was far from “unreasonable” or “in disregard of facts and circumstances.” In adopting the ALJ’s findings and conclusions, the Commissioner reviewed the evidence and arguments presented to the ALJ, as well as the arguments Belling included in his petition for review. CP 220-21. The decision gave due regard to Belling’s legal arguments and the evidence he presented. *Id.* In short, the Commissioner considered all of the evidence that Belling, represented by counsel, put forth. And, as Belling concedes, the Commissioner’s decision was not arbitrary and capricious in this regard. Appellant’s Reply Br. 7. Therefore, this Court should affirm the

³ The Department cites *Tuttle* per GR 14.1. Under GR 14.1, the decision has no precedential value, is not binding on any court, and is cited only for such persuasive value as the Court deems appropriate.

Commissioner's decision and require Belling to return the overpayment he received.

B. It Is Not Against Equity or Good Conscience to Require Belling to Pay to Appeal Another Agency's Determination

As explained in the Department's opening brief, it was Belling's burden to establish that it would be against equity and good conscience to require him to repay the Department. Dep't Br. 14. To establish that a waiver should be granted, Belling was entitled to present any evidence that requiring repayment of the full amount would cause him "undue economic, physical, or mental hardship." WAC 192-220-030(3)(h). Belling has never claimed that he would suffer any hardship by being required to repay the Department the \$22,924.00 overpayment he received.

Instead, the only reason Belling advances that he should receive a partial waiver is that "it is not fair and equitable [for him] to absorb the entire fees and costs in order for ESD to recover its overpayment. . . ." Appellant's Reply Br. at 13. This is a reformulation of Belling's contention that it was inequitable for the Department to "merely sit back while Mr. Belling fights for benefits that were rightfully his all along." Appellant's Br. at 14. Belling's position is contrary to both the Employment Security Act and the Industrial Insurance Act, and

fundamentally misunderstands that the Department's role is to provide unemployment benefits for only those who are eligible to receive them.

The Legislature intended for unemployment benefits and workers' compensation claimants to bear their own litigation costs at the administrative level. The Employment Security Act, Title 50 RCW, prohibits claimants from receiving attorney fees and costs incurred for administrative appeals. 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"); *see also 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."). And the Industrial Insurance Act, Title 51 RCW, similarly prohibits claimants from receiving attorney fees and costs for appeals at the administrative level. *See* RCW 51.52.150; *cf.* RCW 51.52.130 (stating only that if on appeal *to the superior court or appellate court*, the Board's decision is reversed or modified, then the claimant may recover attorney fees and costs from L&I's administrative fund); *see also 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).

Regardless of the law, Belling asks this Court to require the Department to “pay its pro rata share of the attorney fees incurred in the workers’ compensation litigation.” Appellant’s Reply Br. 1. This would amount to a payment from the Department to Belling, in the form of unemployment benefits to which he was not entitled, for his litigation against L&I, even though the Legislature made no provision for the recovery of attorney fees for workers’ compensation appeals at the administrative level.

Belling’s reliance on the Commissioner’s decision in *In re Peltier*, Emp’t Sec. Comm’r Dec.2d 910 (2007)⁴ is misplaced. In that case, the claimant, after paying her attorney fees, received less in workers’ compensation than she owed the Department. *In re Peltier* at *1. Based on the particular equities of that situation, the Commissioner waived the difference between what the claimant received from L&I—after subtracting attorney fees—and the overpayment due the Department. *Id.* (“claimant’s argument has merit in the instant case and is certainly reasonable when considering the fundamental fairness of the claimant’s situation.”). *Peltier* should be limited to its facts, and does not *require* the Commissioner to

⁴ 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 *Peltier* is attached to this brief as Appendix A

waive any portion of an overpayment because a claimant has used a portion of their L&I payment on attorney fees.

Though it was not required, both the ALJ and Commissioner evaluated Belling's case in light of *Peltier*. CP 203-208 (ALJ); CP 219-222 (Commissioner). But Belling failed to meet even the first criteria present in the *Peltier* calculation: he did not receive less from L&I, after paying attorney fees, than he owed the Department. For the period in which he received unemployment benefits, Belling received \$48,251.19 in workers' compensation. CP at 54, 132-36, 204 (FF 4). His overpayment from the Department was \$22,924.00. CP at 38, 93-94, 204; FF 2. Even after paying attorney fees and costs of \$19,700.57, (CP at 54-55, 102, 204, 212; FF 5) Belling netted \$5,626.62 more from L&I than he owed the Department.⁵ *Peltier* should not apply.

Unemployment benefits are intended as short-term relief for individuals who are able and available to work, but have not found employment, RCW 50.20.010. The Department's role is to ensure that benefits are distributed only to those who are eligible. *See* RCW 50.20.010 *et seq.* What Belling seeks is to double-dip from both the unemployment insurance and worker's compensation funds. He was entitled to receive either unemployment benefits *or* worker's compensation, not both.

⁵ \$48,251.19 (total award)–\$19,700.57 (total fees and costs) = \$28,550.62.

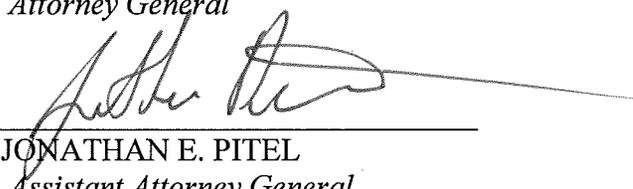
RCW 50.20.085. And he has not claimed that causing him to repay the Department would cause him any hardship. The Commissioner's decision should be affirmed.

III. CONCLUSION

Belling concedes that the Commissioner's discretionary decision to deny him a waiver was not arbitrary and capricious. Further, it is not against equity and good conscience to require Belling to pay his own attorney fees and costs. The Commissioner's decision was correct and there are no grounds to reverse it. The Commissioner's decision should be affirmed.

RESPECTFULLY SUBMITTED this 15th day of February, 2017.

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500 N Cedar St.
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Washington that the foregoing is true and correct.

DATED this 15th day of February, 2017, at Olympia,
Washington.



AMY PHIPPS, Legal Assistant

Appendix A

THOMSON REUTERS
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 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. 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

Appendix A

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(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 to 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.

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

*2 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

*2 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

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