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Washington State
Supreme Court

No. 95097-1

IN THE SUPREME COURT
FOR THE STATE OF WASHINGTON

CHRISTOPHER BELLING, individually,

Appellant

v.

EMPLOYMENT SECURITY DEPARTMENT of the state of
Washington,

Respondent

SUPPLEMENTAL BRIEF OF APPELLANT

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III. INTRODUCTION

Under the Employment Security Act, a claimant is disqualified from receiving unemployment benefits for any periods he or she also received workers' compensation benefits. RCW 50.20.085. Any overpayment must be repaid unless the claimant establishes a basis for a waiver, which may be partial or complete. RCW 50.20.190(2)¹; WAC 192-220-017(1).²

Mr. Belling agrees with that portion of the majority opinion in *Belling v. Employment Sec. Dep't.* 2017 WL 4012946 (WA. Ct. App. Div. III 2017), that determined there is no express provision in the law of this state that *requires* the Employment Security Department (ESD) be responsible for a proportional share of attorney fees and costs when an injured worker expends his *own* time and risks money for legal fees and costs to recover improperly withheld workers' compensation benefits only to have the monetary settlement

¹ The commissioner may waive an overpayment if they find 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. When determining whether the recovery would be against equity and good conscience, the department must consider whether the employer or employer's agent failed to respond timely and adequately to a written request of the department for information relating to the claim or claims without establishing good cause for the failure.

² State law permits the department to accept an offer in compromise for less than the full amount owed. WAC 192-220-017(1)

immediately demanded by ESD for an innocent overpayment of unemployment benefits. By the same token, there is no law that *prohibits* such a result either. In this appeal Mr. Belling argues that under RCW 34.05.570(3) and WAC 192-220-330 the Commissioner's findings lack substantial evidence because there is no indication in her findings and/or conclusions that she considered the totality of the circumstances when making her decision, which was supposedly based upon the principles of fairness, equity and good conscience. Instead the Commissioner summarily dismissed Mr. Belling's request for partial waiver of his unintended ESD overpayment. Mr. Belling maintains that a careful reading of the record reveals that under the totality of circumstances presented it *was* fair and equitable for ESD to partially waive his overpayment in an amount equal to its pro rata share of the attorney fees and costs expended in full by Mr. Belling.

Furthermore, as outlined in the dissent by Justice Fearing and presented in Mr. Belling's Petition for Review, this appeal presents an opportunity for this Court to apply the common fund doctrine. The common fund doctrine would correct the injustice currently occurring when an injured worker is forced into litigation to obtain wrongfully denied time loss benefits by the Department of Labor & Industries

(DLI) and has earlier received unemployment benefits from the ESD. In this scenario, the injured worker bears the burden and risk associated with litigation to obtain these wrongfully denied time loss benefits, and yet it is the ESD that first receives the benefits of the fund created by this litigation without any risk or burden to ESD.

IV. LEGAL HISTORY

A. Delagrave

Factually similar to this case, in *Delagrave v. Employment Security Department*, 127 Wn. App. 596, 111 P.3d 897 (2005), an injured worker requested that ESD pay its proportional share of attorney fees incurred as the result of a successful appeal of the improper denial of L&I benefits. Mr. Delagrave was forced to apply for unemployment benefits because he had no financial means on which to live during the lengthy and expensive appeal process attempting to collect retroactive L&I benefits. *Id.* at 600-601. Because Mr. Delagrave's retroactive L&I benefits, minus attorney fees and costs, netted *less* than the overpayment *owed* ESD the *Delagrave* court determined it was not fair or equitable for Mr. Delagrave to go into debt just to repay the ESD lien. It pointed to

RCW 50.90.190(2) and ESD regulation WAC 192-28-115(2)(5) as providing discretionary authority to the ESD Commissioner to waive an overpayment under certain circumstances. The court reminded the reader that the ESD regulation also “may justify waiver on other than a financial basis when not to waive would be unconscionable.” *Id.* at 609-610. Ultimately, the *Delagrave* court remanded the case to ESD to reconsider, as a matter of fairness, its decision to deny Mr. Delagrave’s waiver.

B. Peltier

Two years after *Delagrave*, in *In re Peltier*, an ESD decision,³ DLI denied Ms. Suzanne Peltier time loss benefits, after which she applied for and received unemployment compensation of \$9,581.00. Later, Ms. Peltier received retroactive DLI benefits of \$10,351.56. After paying fees and costs, Ms. Peltier received a net recovery of \$7,230.00. Even so, ESD sought reimbursement of the total \$9,581.00 it had paid her in unemployment compensation. Ms.

³ Wash. Emp’t Sec. Dep’t Comm’r Dec. 910, 2d Series Feb. 16, (2007). Courts of this state may consider ESD commissioner rulings, such as *Peltier*, as persuasive authority. RCW 50.32.095; *Graves v. Dep’t of Employment Sec.*, 144 Wn. App. 302, 309, 182 P.3d 1004 (2008). However, *Peltier* has no precedential value to the issues on appeal.

Peltier appealed the decision. On appeal, the ESD commissioner ruled that under principles of equity and good conscience, Ms. Peltier was only required to reimburse ESD her net payment of \$7,230.00. Although this amount happened to equate to a deduction of her fees and costs from the ESD overpayment the commissioner's decision made no comment regarding whether *other* circumstances might merit waiver to an extent more than the worker's net recovery.

C. WAC 192-22-330

One year later, in 2008, in response to *Peltier*, ESD amended the equity and good conscience definition, which was formerly codified under WAC 192-28-115. It is now defined in WAC 192-220-330(1). It is the new regulation that applies to and is referenced in this appeal.

V. ANALYSIS

A. STANDARD OF REVIEW

Under the facts of this case, review of the Commissioner's decision is governed by the Washington Administrative Procedure

Act (WAPA), specifically RCW 34.05.570(3),⁴ and is based solely on the administrative record the Commissioner reviewed. *Crosswhite v. Washington State Dep't of Soc. & Health Servs.*, 197 Wn. App. 539, 548, 389 P.3d 731, 735 (2017), *review denied*, 188 Wn.2d 1009, 394 P.3d 1016 (2017). The Commissioner's factual findings must be supported "by evidence that is substantial when viewed in light of the *whole record* before the court," which necessitates this court looking

⁴ The court *shall* grant relief from an agency order in an adjudicative proceeding only if it determines that:

- (a) The order, or the statute or rule on which the order is based, is in violation of constitutional provisions on its face or as applied;
- (b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;
- (c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;
- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;
- (f) The agency has not decided all issues requiring resolution by the agency;
- (g) A motion for disqualification under RCW 34.05.425 or RCW 34.12.050 was made and was improperly denied or, if no motion was made, facts are shown to support the grant of such a motion that were not known and were not reasonably discoverable by the challenging party at the appropriate time for making such a motion;
- (h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or
- (i) The order is arbitrary or capricious.

beyond whether there is merely *some* evidence that supports the agency order. RCW 34.05.570(3)(e).

B. OVERVIEW OF ISSUES

Three subsections of the applicable WAPA statute, RCW 34.05.570(3), are germane to Mr. Belling's arguments in this appeal. First, section (d) (erroneous interpretation or application of the law); next, section (e) (decision not supported by substantial evidence in the record); and third, section (h) (order is inconsistent with agency rule without explanation). These are fleshed out below and because the arguments overlap they are discussed under one heading. If this court determines any of these errors occurred the statute requires "the court *shall* grant relief from an agency order in an adjudicative proceeding." RCW 34.05.570(3). The relief Mr. Belling seeks is reversal of the Commissioner's denial of his partial waiver request. Requiring the agency to consider the common fund doctrine in this context would insure that appropriate relief is provided to Mr. Belling and other similarly situated injured workers. Remanding this case and requiring application of the common fund doctrine is the appropriate remedy.

C. ANALYSIS

There has never been any dispute regarding Mr. Belling's candor and honesty with ESD. Administratively, he was an eligible candidate for an ESD waiver pursuant to WAC 192-220-017(3). The record clearly shows he was not at fault in causing the overpayment and has always been willing to repay ESD the sum of unemployment benefits he received minus the amount he requested be waived, which was ESD's *proportional share* (not the "total overpayment" amount stated in finding #9) of attorney fees and costs he expended during his legal battle to recover wrongfully denied worker's compensation benefits by DLI. He understands that a proportionate share of attorney fees and costs recovered by DLI should be used to repay ESD. The issue on appeal concerns whether the ESD commissioner properly considered all the bases that, according to WAC 192-220-030(1)(2) and developing case law, may be taken into account when considering equity and good conscience, the standard used to determine when a waiver may be granted.⁵

In conclusion #7 the Commissioner summarily determined that requiring full repayment of his ESD overpayment would not be

⁵ (1) "Equity and good conscience" means fairness as applied to a given set of circumstances.

unfair to Mr. Belling nor was it against equity and good conscience. However, the Commissioner's findings did not contain substantial evidence that she considered any regulatory factors other than basic financial information. The entire focus was on whether Mr. Belling was impoverished. Her lack of analysis is not a proper interpretation or application of WAC 192-220-030(5), which requires consideration of the *totality of the circumstances*. This is an erroneous interpretation and application of RCW 34.05.570(3)(d) and (e).

When considering a claimant's request for a waiver the initial inquiry is whether they are able to financially provide themselves with "food, shelter, medicine, utilities and related expenses."⁶ Factually, the only finding the Commissioner made that even applies to Mr. Belling's partial waiver request is #9, which properly discusses his financial information in accordance with WAC 192-220-030(2). However, finding #9 is misleading or at least incomplete and provides no guidance as to the basis for the Commissioner's decision. For example, the Commissioner's statement that Mr. Belling had "no debt in collections" although true, does not disclose the fact that his testimony revealed that he had approximately \$1,400 in credit card

⁶ (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 necessities including food, shelter, medicine, utilities, and related expenses.

debt as well as “recurring” monthly bills. There is no allusion in the record as to why the Commissioner considered only debt that had gone to collections in making her waiver decision. “Debt in collections” is not a standard found in the ESD regulation. The Commissioner misinterpreted ESD’s own regulation in violation of 34.05.570(3)(d) and (h). Next, while it is true Mr. Belling “owns” three vehicles, one is without a motor, one is a nearly 50-year old Jeep “that is not worth much” and the third is 17-years old, which is presumably his only mode of transportation. While owning three vehicles certainly sounds like potential evidence of financial wealth, under the totality of the circumstances presented here, the age and condition of Mr. Belling’s three vehicles makes the Commissioner’s decision to deny Mr. Belling’s partial waiver request based on a question of fairness a dubious one. It certainly does not provide substantial evidence of financial wealth that would support her denial of his partial waiver request in violation of RCW 34.05.570(3)(e).

The Administrative Law Judge (ALJ) at the waiver hearing made a brief attempt to flesh out financial details, which as noted above is proper. However, according to its own regulation *numerous* other factors may be considered. WAC 192-220-030(3)(4) and (5) state:

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

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

(b) Your education level, including literacy;

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

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

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

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

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

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

(4) When determining whether a waiver of benefit overpayments may be granted based on equity and good conscience, the department must consider whether the employer or employer's agent failed to respond timely or adequately without good cause to the department's written request for claim information. This subsection does not apply to negotiated settlements.

(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).

(Emphasis added.) *Vital* to this court's analysis is the fact that pursuant to WAC 192-220-030(4)(h), this list is not intended to be exhaustive.

Careful examination of the record and the written findings and conclusions reveal the Commissioner failed to consider any factor

other than the amount of money Mr. Belling currently earned each month and a cursory inquiry of how it was spent. Mr. Belling's ability to pay for food, shelter, utilities, gas and a cell phone are all appropriate inquiries; but they are not the only queries worth consideration. What must be kept in the pole position in this court's review of the Commissioner's succinct rejection of Mr. Belling's waiver request is, was the decision fair under his specific circumstances? See former WAC 192-220-030(1) (2008). An additional, relevant and much needed inquiry, was what Mr. Belling spent and risked on litigation before the Board of Industrial Insurance Appeals.

The Commissioner made no findings or conclusions of her own, merely adopting the ALJ's March 19, 2013 findings and conclusions. Not considered by the Commissioner, but highly relevant to this ESD standard, is consideration of Mr. Belling's overall health – physical as well as mental. It is undisputed that he has been deemed totally disabled by two state agencies: Labor & Industries and the Social Security Administration. Even so, no mention of this fact was made in the Commissioner's findings as a condition considered. Also crucial to his financial situation is that as a direct result of his disabilities Mr. Belling has been unable to work since

2005, which directly impacts his current and future wages, which are relevant injuries under the ESD regulation. WAC 192-220-030(3)(a)(c)(d). Interestingly, no mention was made in the findings that the *only* reason Mr. Belling owed a debt to ESD at all was because the DLI wrongfully denied his workers' compensation benefits in the first place. The appeals process to correct DLI's wrongful decision involves the necessity of formal litigation before the Board of Industrial Insurance Appeals, which is extensive both in terms of time and money. It is clear from the content of WAC 192-220-030(3)(f) that even ESD recognizes that errors by state agents may leave a claimant with dire financial difficulties. It was a factor that could and should have been taken into account especially when as here, Mr. Belling acknowledged that it was *only* because he had no other income on which to live while waiting for his workers' compensation appeal that he was forced to apply for unemployment benefits. He testified that as soon as he learned the Department of Labor and Industries had reversed its decision to deny him benefits he immediately terminated his receipt of unemployment benefits.

Mr. Belling set forth numerous bases the Commissioner failed to consider prior to denying his waiver request. He is a disabled and unemployed injured worker asking only that he be granted a partial

waiver because he was forced to bear the *entire* expense of correcting one state agency's error when that correction benefits (without risks or burdens) another state agency's accounting balance. The Commissioner's decision was patently unfair and violative of the ESD's regulations. Based on the totality of the circumstances her denial of his partial waiver request should be reversed and this matter remanded to the agency to require application of the common fund doctrine or otherwise require consideration of the totality of the circumstances so that a proportionate share of attorney fees and costs is born by ESD. The support for the common fund doctrine was previously outlined in Mr. Belling's Petition for Review filed with this Court. See, *John P. Lynch v. Deaconess Medical Center*, 113 Wn.2d 162, 167-68, 776 P.2d 681 (1989); *Winters v. State Farm Mutual Automobile Insurance Co.*, 144 Wn.2d 869, 31 P. 3d 1164, 63 P.3d 764 (2001).

VI. CONCLUSION

Because the purpose of unemployment compensation is to reduce involuntary unemployment and ease the suffering it causes the Employment Security Act must be liberally construed in favor of the unemployed worker. RCW 50.01.010. *Delagrave*, 127 Wn. App.

at 608–09. Based on this fact and that reversible errors were committed by the Commissioner in her consideration of his partial waiver request, Mr. Belling respectfully requests this court reverse the Commissioner’s decision pursuant to RCW 34.05.570(3) and WAC 192-220-030. Under the totality of the circumstances it is consistent with equity and good conscience to grant Mr. Belling’s partial waiver request, equivalent to ESD’s pro rata share of attorney fees and costs. Application of the common fund doctrine to these facts insures an outcome consistent with equity and good conscience. Injured workers, administrative agencies and courts are in sincere need of guidance regarding when ESD may and/or should grant a partial waiver of innocent ESD overpayments based on a pro rata share of attorney fees and costs. This is especially true when, as here, the claimant bears the entire burden of the time, stress and expense of attempting (with absolutely *no* guarantee of success) to recover wrongfully denied worker’s compensation benefits from one state agency (DLI) only to have another state agency (ESD) immediately collect these funds. The state of the law, as it currently stands allows ESD to passively sit back and wait for a claimant to choose one of two scenarios: (a) live on unemployment benefits and not appeal an improper denial of DLI benefits; or (b) live on

unemployment benefits and at the same time fight the DLI decision at great mental, emotional and economic expense with no guaranteed result. This creates a lose/lose situation. Even when an injured worker is successful in litigation before the Board of Industrial Insurance Appeals, the final outcome is often muted resulting in benefits that hardly justify the risk and expense of litigation. In the first scenario cited above, ESD may pay out needless unemployment benefits with no hope of recovering those funds even though the inability to work is due to an industrial injury. In this scenario DLI should be assisting with the financial needs of an injured worker. In the second scenario, the injured worker lives on unemployment benefits while properly utilizing the legal system to fight for their DLI rights after which, if successful, ESD steps in and asks, "How much did you receive? Give it to us." At that point, the injured worker has gained little to nothing financially and in some cases has *lost* money due to the fees and costs associated with the appeal. How can this be considered fair to either party?

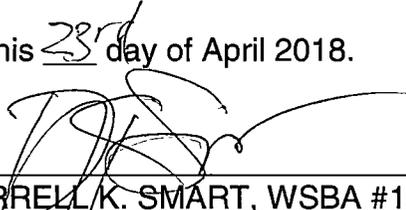
The Commissioner's one relevant finding of fact was not supported by substantial evidence and she did not correctly apply the facts of Mr. Belling's situation to the totality of the circumstances in violation of RCW 34.05.570(3)(d)(e) and (h). The law states that

if this court determines any *one* error occurred “the court *shall* grant relief from an agency order in an adjudicative proceeding.” RCW 34.05.570(3). The relief Mr. Belling seeks is reversal of the Commissioner’s denial of his partial waiver request and remand to require ESD to pay a proportionate share of attorney fees and costs. WAC 192-28-115(5) states that “[t]he presence of unusual circumstances may justify waiver on other than a financial basis when not to waive would be unconscionable.” Under the totality of the circumstances those unusual conditions exist in Mr. Belling’s case and were not recognized by the Commissioner.

VII. ATTORNEY FEES

If successful in this appeal Mr. Belling requests attorney fees and costs on appeal pursuant to RCW 50.32.160 and *Michaelson v. Employment Sec. Dept.*, 187 Wn. App. 293, 302, 349 P.3d 896, 901 (2015), subject to his compliance with RAP 18.1.

Respectfully submitted this 23rd day of April 2018.



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vs.)

DEPARTMENT OF)
LABOR & INDUSTRIES,)

Respondent.)

**DECLARATION OF
SERVICE**

STATE OF WASHINGTON)

County of Kennewick)

) ss.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the 23rd day of April, 2018, I served the Supplemental Brief of Appellant in the below-described manner:

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