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CASE NO. 70805-8-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KIMBERLIE D. TUTTLE, Appellant,

v.

STATE OF WASHINGTON EMPLOYMENT SECURITY
DEPARTMENT, Respondent.

REPLY BRIEF OF THE APPELLANT

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TABLE OF CONTENTS

I. INTRODUCTION1
II. ARGUMENT 1
III. ATTORNEY FEES ON APPEAL7
IV. CONCLUSION8

TABLE OF AUTHORITIES

Cases

Delagrave v. EDS, 127 Wn. App. 596, 609, 111 P.3d 879 (2005)
..... 2, 3, 5
Quinlivan v. Sullivan, 916 F.2d 524, 527 (9th Cir. 1990) 2
In re Peltier, Empl. Sec. Comm’r Dec.2d 910 (2007) 6

Statutes

RCW 50.20.085 1
RCW 50.01.010 5
RCW 50.20.190 1, 2, 6
RCW 50.32.160 7, 8

Regulations

WAC 192-28-115 3

WAC 192-220-030 3, 6

I. INTRODUCTION

Appellant Kimberlie Tuttle is liable for a \$46,567.00 overpayment on the basis of receiving unemployment benefits from Employment Security Department (Employment Security) during a period she was later deemed entitled to workers' compensation benefits from the Washington State Department of Labor and Industries (Labor and Industries). Ms. Tuttle seeks a partial reduction of the overpayment assessment because Employment Security found she was not at fault for the overpayment and, after deduction of attorney fees and litigation costs for her workers' compensation matter, the \$46,567.00 unemployment benefits overpayment assessment is \$18,496.00 *more* than the amount she received between unemployment and workers' compensation benefits. This nearly \$20,000.00 net loss to Ms. Tuttle is in opposition to the concepts of fairness, equity, and good conscience.¹

II. ARGUMENT

RCW 50.20.085 disqualifies a person from receiving unemployment insurance benefits for any week in which he or she receives workers' compensation in the form of permanent or temporary total disability benefits. Pursuant to RCW 50.20.190(1), Employment Security can issue an overpayment assessing and request the recipient return unemployment benefits he or she received. Following the issuance of an overpayment assessment, the Commissioner may also partially or fully waive an overpayment if it finds the overpayment was not the result of fraud, misrepresentation,

¹ While Ms. Tuttle believes the number of weeks she received both workers' compensation benefits and unemployment benefits, is 92 weeks, and not 93 weeks as suggested by the Respondent, this discrepancy does not change either the overpayment assessment amount or the amount she requests to be reduced.

willful nondisclosure, or fault attributable to the individual and the recovery thereof would be against equity and good conscience. RCW 50.20.190(2). The Commissioner concluded Ms. Tuttle was not at-fault for causing the overpayment.

Determining whether or not reducing overpayment assessments complies with the principles of equity and good conscience, *Delagrave v. Employment Security Department*, 127 Wn. App. 596, 111 P.3d 879 (2005), serves as important precedent. The Court of Appeals Division III addressed whether Employment Security was obligated under the statute to review whether to reduce an overpayment when a person received overlapping benefits from Employment Security and Labor and Industries. The Employment Security Commissioner had refused to review the request to reduce the overpayment because he concluded Employment Security did not have the authority to waive part or all of an overpayment for any reason other than the “equity and good conscience” provisions of the cited statute and regulation. *Delagrave*, 127 Wn. App. at 855. The court concluded that the Commissioner’s narrow reading of the statute was an error of law by finding that the equity and good conscience statute did not limit the circumstances under which the commissioner may find that a waiver is warranted. *Id.* While RCW 50.20.190(2) provides certain circumstances (e.g., economic hardship) when the commissioner “may” waive recovery if it would be “against equity and good conscience,” there were no limitations in the statute because it would exceed Employment Security’s rulemaking authority. *Delagrave*, 127 Wn. App. at 887. The Court cited *Quinlivan v. Sullivan*, 916 F.2d 524, 527 (9th Cir. 1990), which held that the Social Security Administration should not limit the term equity and good conscience to three narrow definitions but instead use a broad concept of fairness on a case-by-case

basis. Division III agreed with the Ninth Circuit that “**equity and good conscience means, quite simply, fairness.**” *Id.* at 887 - 888. (Emphasis added.)

As a result of *Delagrave*, Employment Security amended WAC 192-28-115 in 2008. WAC 192-220-030 now defines equity and good conscience:

What does equity and good conscience mean?

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

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

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

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

(b) Your education level, including literacy;

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

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

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

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

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

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

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

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

Neither paragraph (1) nor (2) present an exhaustive list of circumstances the

Commissioner should consider while determining equity and good conscience to individual cases. Rather, phrases like “given set of circumstances” and “totality of circumstances” instruct that each case should be considered and determined individually. Economic hardship is no doubt one of the key issues the Commissioner should examine and consider to reach its decision. In Ms. Tuttle’s case, it is necessary to make a distinction in time to determine whether paying back the entire amount of overpayment would cause her undue economic, physical, or mental hardship. The Commissioner concluded that, despite having a net loss of over \$18,000.00, “refunding the overpayment will return her to the same financial position she was in prior to her receipt of the overpayment in question...” CP at 57. Ms. Tuttle respectfully disagrees. She suffered an economic loss of over \$18,000.00; how is losing \$18,000.00 breaking even? Furthermore, Ms. Tuttle could not have foreseen her injuries and planned ahead by reducing her car and home payments, or telling her daughter not to have certain expenses. The fact that Ms. Tuttle’s husband earned a decent income should not differentiate them from people with little income. A deficit of \$18,000.00 is the same for somebody who has a good paying full-time job and somebody who has little income. Either way, it is not “fair” to put either person in the red.

Employment Security reviewed Ms. Tuttle’s monthly income ratio in comparison to her basic monthly expenses. This is not the correct analysis. The correct analysis is how the entire overpayment impacts the injured worker. Ms. Tuttle may have had what looked like disposable income but, once she paid her workers’ compensation attorney fees and costs and completely reimbursed Employment Security, she would be in the deficit over \$18,000.00. No matter how you look at the numbers, she would not be in

the same financial position she was in prior to her receipt of unemployment benefits. This simply is an inaccurate statement and conclusion.

Ms. Tuttle understands she must return a large portion of her overpayment, and she has been doing so. Suggesting her paying back the entire amount right now would not deprive her and her family (after her finances already changed) is simply not true. In order to pay back the entire overpayment, serious financial decisions must be made and hardship endured. Forcing a family to endure financial hardship not of their own making is not within the bounds of "fairness". And equity and good conscience means fairness as applied to a given set of circumstances.

To achieve its purpose, the Employment Security Act must be liberally construed in favor of the unemployed worker. RCW 50.01.010. When the legislature mandates liberal construction in favor of the worker, courts should not narrowly interpret provisions to the worker's disadvantage when the statutory language does not suggest that such a narrow interpretation was intended. *Delagrave v. Employment Security Department*, 127 Wn. App. 596, 609, 111 P.3d 879 (2005).

Nevertheless, the *Delagrave* court concluded the list of "circumstances" was non-exhaustive and went beyond economic hardship issues. If Employment Security had defined equity and good conscience as outlined by *Delagrave*, Ms. Tuttle would have received a reduction of her overpayment in the amount of attorney fees and costs paid under her workers' compensation claim. Employment Security created a limited WAC that focuses on economic hardship and not the overall concept of fairness as directed by the court's decision.

In *In re Peltier, Empl. Sec. Comm'r*, Dec.2d 910 (2007), the claimant was injured on the job. She received unemployment benefits for the weeks ending May 20, 2006 through October 21, 2006. Following closure of her workers' compensation claim, she was later awarded workers' compensation time loss benefits in the amount of \$10,351.56 for the period May 20, 2006 through October 16, 2006. The claimant's attorney was paid his attorney fees and the claimant received a balance of \$7,230.00. Employment Security issued an overpayment in the amount of \$9,581.00. The review judge concluded that Ms. Peltier was not at-fault in the matter of the overpayment but was liable for repayment of \$7,230.00, after waiving \$2,351.00, representing the exact amount of attorney fees deducted from her workers' compensation benefits. The review judge relied upon RCW 50.20.190(2) and the *Delagrave* decision. "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." *Peltier* at 2. In *Peltier*, the review judge correctly applied *Delagrave* and acknowledged Employment Security's ability to reduce an overpayment by using the broader concept of equity and good conscience.

A similar fact pattern to *Peltier* exists in the instant case. Consequently, Ms. Tuttle should receive a waiver of \$18,496.00. Without such a waiver, she has to return \$18,406.00 of her own personal money. This opposes the purpose and intent of WAC 192-220-030 that describes "equity and good conscience" as fairness as applied to a given set of circumstances.

Employment Security asserts, "Ms. Tuttle essentially asks that the Employment Security Department be required to pay for her workers' compensation attorney fees

and costs.” Employment Security misses the point. Employment Security just received a large check not because of any work it performed but because Ms. Tuttle had the courage and tenacity to fight Labor and Industries to recover back time loss benefits to which she was entitled. This was not done at the request or direction of Employment Security. Nor did Employment Security offer any assistance or guidance. Instead, it waited for the money to be recovered and then demanded its full portion without any consideration that Ms. Tuttle’s payment of attorneys fees for her workers’ compensation benefits enriched Employment Security through the recovery of its funds. This is not equity and good conscience.

Even though the amount in question equals Ms. Tuttle’s attorney fee and costs, which occurred because Ms. Tuttle had to ask for remedy at the Board of Industrial Insurance Appeals against the Labor and Industries’ unjust decision, her request is not concerning recovery for the above-mentioned fees from Employment Security. She merely asks for partial waiver of her overpayment in the amount she cannot recover and pay back without making serious financial sacrifices, which offends the principles of fairness, equity and good conscience.

III. ATTORNEY FEES ON APPEAL

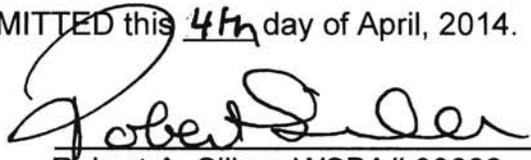
Ms. Tuttle is entitled to an award of attorney fees and expenses on appeal pursuant to RCW 50.32.160. This statute provides that “...if the decision of the commissioner shall be reversed or modified, such fee and the costs shall be payable out of the unemployment compensation administration fund.” Here, Ms. Tuttle seeks to reverse the Superior Court Judgment and Commissioner’s ruling to waive \$18,496.00 from the \$46,567.000 overpayment assessment. If the prior decisions are reversed,

Ms. Tuttle should receive an award of attorney fees and expenses for her attorneys' work on the matter before this Court and the Superior Court or the opportunity to file a supplemental motion for attorney fees and costs in the event she is successful.

VI. CONCLUSION

Based on the foregoing, Ms. Tuttle respectfully requests this Court reverse the July 29, 2013 Order of Superior Court Judge Monica J. Benton affirming the November 12, 2012 Commissioner's decision and remand this matter to Employment Security to issue a new directive waiving \$18,496.00 from Ms. Tuttle's overpayment assessment. Ms. Tuttle further requests an award for her reasonable attorney fees and costs pursuant to RCW 50.32.160.

RESPECTFULLY SUBMITTED this 4th day of April, 2014.



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CERTIFICATE OF MAILING

SIGNED at Seattle, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 4th day of April, 2014, the document to which this certificate is attached, Reply Brief of the Appellant, was mailed to the following party via U.S. postage pre-paid, first class mail:

Marya Colignon, AAG
Office of the Attorney General
800 Fifth Ave, Suite 2000
Seattle, WA 98104-3188

DATED this 4 day of April, 2014

FOSTER | STATON, P.C.


Mindy Engstrom
Law Firm Administrator

CERTIFICATE OF DELIVERY

SIGNED at Seattle, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 4th day of April, 2014, an original and one copy of the document to which this certificate is attached, Reply Brief of the Appellant, was served upon the following parties via personal delivery by the Kaylee Cox:

Richard D. Johnson, Court Administrator/Clerk
Court of Appeals, Division I
One Union Square 600 University St
Seattle, WA 98101-1176

DATED this 4 day of April, 2014.

FOSTER | STATON, P.C.



Kaylee Cox
Administrative Assistant