

70805-8

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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.

BRIEF OF APPELLANT

Robert A. Silber
WSBA 33882
Attorney for Appellant
Kimberlie D. Tuttle

Foster | Staton, P.C.
8204 Green Lake Drive N.
Seattle, WA 98103
T: 206.682.3436
F: 206.682.3362

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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I. INTRODUCTION

Appellant Kimberlie Tuttle appealed a July 29, 2013 Superior Court decision affirming a November 21, 2012 decision of the Commissioner of the Washington State Employment Security Department (Employment Security) finding Ms. Tuttle liable for a \$46,567.00 overpayment on the basis of receiving unemployment benefits from Employment Security concomitantly with workers' compensation benefits from the Washington State Department of Labor and Industries (Labor and Industries).¹ Ms. Tuttle contends she is entitled to a partial reduction of the overpayment assessment because Employment Security found she was not at fault for the overpayment and after paying attorney fees and litigation costs for her workers' compensation matter, the \$46,567.00 overpayment assessment is \$18,496.00 more than the amount she eventually received between unemployment and workers' compensation benefits. This nearly \$20,000.00 net loss to Ms. Tuttle is in opposition

¹ King County Superior Court transmitted the Administrative Record, aka Certified Appeals Board Record, as a single, stand-alone document; that Record is separately paginated so references in this brief to that record will appear as "CP Comm. Rec.," ("Clerk's Papers Commissioner's Record)." All other references to the Clerk's Papers will be in standard citation format, "CP," with reference to the page number as it appears on the Superior Court Clerk's Papers Index.

to the concepts of fairness, equity, and good conscience.

II. ASSIGNMENT OF ERROR

An injured worker assessed an overpayment by the Employment Security Department of the State of Washington for receiving employment security (unemployment) benefits and workers' compensation time loss benefits for the same time period is eligible to receive a partial reduction of the overpayment if she is found not at fault for the overpayment and the overpayment would result in a net loss to the worker.

This assignment of error establishes that the Superior Court's July 29, 2013 decision affirming the decision of the Commissioner of the Washington State Employment Security Department that adopted the Office of Administrative Hearings' Findings of Fact and Conclusions of Law is incorrect.

III. STATEMENT OF THE CASE

Ms. Tuttle separated from her employer in early 2009 due to medical reasons that precluded her from returning to her job-of-injury. She filed for and received unemployment benefits for each of the weeks ending May 2, 2009 through March 26, 2011.

Ms. Tuttle filed with the Department of Labor and Industries a claim for workers' compensation on September 8, 2009. Labor and Industries rejected her claim for benefits. Ms. Tuttle appealed this decision. On December 16, 2011, the Board of Industrial Insurance Appeals reversed the rejection order and directed Labor and Industries to allow her claim. Subsequently, Ms. Tuttle became

entitled to \$65,134.06 in time loss compensation for the period June 16, 2009 through January 10, 2012. Out of this amount, \$48,557.62 was paid for the period May 2, 2009 through March 26, 2011, of which Ms. Tuttle netted approximately \$28,736.00, following a \$16,029.05 reduction for attorney fees and \$4,458.21 for litigation costs.

On February 16, 2012, Employment Security issued a determination notice denying Ms. Tuttle unemployment benefits for the weeks ending June 20, 2009 through March 26, 2011, and assessed a \$46,567.00 overpayment pursuant to RCW 50.30.085 on the basis that she received workers' compensation for the same period. CP Comm. Rec. at 89 – 97. On or about March 19, 2012, Ms. Tuttle petitioned Employment Security for review of the February 16, 2012 determination. Employment Security sent the appeal to the Office of Administrative Hearings (OAH) on April 3, 2012. OAH issued an initial order on April 27, 2012. CP Comm. Rec. at 87 – 88. On June 22, 2012, the Commissioner's Review Office of the Employment Security Department issued a decision: (1) finding Ms. Tuttle not eligible for unemployment benefits for the weeks ending June 20, 2009 through March 26, 2011; (2) finding her not at-fault for causing the overpayment; (3) remanding the case to Employment

Security to determine if Ms. Tuttle was eligible for waiver of the overpayment; and (4) directing Employment Security to consider partial or full waiver of the overpayment pursuant to its decision. CP Comm. Rec. at 41 – 45.

On August 4, 2012, Employment Security issued an overpayment assessment against Ms. Tuttle in the amount of \$46,567.00 and denied a reduction of the overpayment following a review of financial information Ms. Tuttle provided. CP Comm. Rec. at 30 – 31. Employment Security believed Ms. Tuttle had “probable unreported income from self or other household members, Plaintiff’s necessary expenses were unrealistic, and she had received time loss benefits from the Department of Labor and Industries totaling \$65,134.06.” Ms. Tuttle appealed this decision on or about September 1, 2012, and once again requested a partial waiver of the overpayment based on economic hardship. CP Comm. Rec. at 34. On September 25, 2012, Administrative Law Judge Kathleen O’Shea Senecal affirmed the \$46,567.00 overpayment assessment. CP Comm. Rec. at 55 – 60. In Conclusions of Law, paragraph 5, she concluded, “The evidence does not indicate that she would be in a worse position after repaying it than she was prior to receiving it.

Because refunding the overpayment will return her to the same financial position she was in prior to her receipt of the overpayment in question, she must repay same.” CP Comm. Rec. at 57. The judge concluded it was not against equity and good conscience despite the fact that Ms. Tuttle did not cause the overpayment. Ms. Tuttle filed a Petition for Review on October 29, 2012. CP Comm. Rec. at 64 – 65. On November 21, 2012, Review Judge S. Alexander Liu of the Commissioner’s Review Office affirmed the September 25, 2012 Order finding Ms. Tuttle liable for refund of the regular overpayment in the amount of \$46,567.00. CP Comm. Rec. at 72 – 75. On July 29, 2013, Honorable Judge Monica J. Benton affirmed the prior decisions, concluding that the payment of attorney fees and costs in her workers’ compensation claim were not contemplated by the law and the principles of equity and good conscience took into consideration economic hardship which, based on the record, Ms. Tuttle did not meet. Judge Benton concluded:

From my reading of the Delagrave case, 127 Wa. App. 596, 2005 case, I’m not persuaded that it supports the petitioner. What I am heartened by is the fact that it does say that the WACs list of circumstances is non-exhaustive, or non-exclusive. I should say, or an exhaustive list.

I think that the party is - - parties are free to argue that it's broader than what is enumerated there.

The payment of attorney's fees and costs, though, which is at issue here, I don't think is contemplated by the list, nor by principals of equity and good conscience. I'm not persuaded that that's true.

The right to bring litigation to ensure one's rights under Labor and Industry's regulations is not considered to be a constitutional right. Were it that, then I think we would have issues of fundamental fairness challenged. We're not there as a body of juris prudence.

I don't wish to suggest that I don't think we should be there, because I have other personal view about it. But I think that based on the case law, I'm going to affirm the Commissioner's rulings. I think they're complete and thoughtful. I think they are - - there is no error of law or fact.

I might have been persuaded otherwise if there were some details which showed hardship, financial hardship. But I just don't see them in the facts in this record.

I think the body of - well, I think the regulations give the Court and the Commissioners quite a bit of leeway to weigh the exact numbers and to figure out exactly what the households can tolerate and what's considered hardship. And I just don't see anything in these facts that are - - that show an undue hardship.

Verbatim Report of Proceedings, Tuttle 36 – 37.

IV. ARGUMENT

The Employment Security Commissioner's decision is reviewed under the Administrative Procedure Act and will be reversed on judicial review if any one of several grounds is satisfied. *RCW 34.05.570*. Specifically, in the instant case, "the agency has erroneously interpreted or applied the law," "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," and the agency has not decided all issues requiring resolution by the agency." *RCW 34.05.570(3)(d, e and f)*.

Issues of law are the responsibility of the judicial branch. *Tapper v. Employment Security Department*, 66 Wn. App. 448, 451, 832 P.2d 449 (1992), *rev'd on other grounds*, 122 Wn.2d 397, 858 P.2d 494 (1993). Therefore, when reviewing legal questions, the court is allowed to substitute its judgment for that of the administrative agency. *Franklin County Sherriff's Office v. Sellers*, 97 Wn.2d 317, 324-325, 646 P.2d 113 (1982) *cert. denied*, 495 U.S. 1106 (1983). Pure questions of law are reviewed *de novo*. *Id.* In resolving a mixed question of law and fact, the court first establishes the relevant facts,

determines the applicable law, and applies it to the facts. *Tapper v. Employment Security*, 66 Wn. App. at 403. While deference is granted to the agency's factual findings, the agency's application of the law is reviewed *de novo*. *Dermond v. Employment Security Department*, 89 Wn. App. 128, 132, 947 P.2d 1271 (1997).

The courts will uphold an agency's interpretation of a regulation only if "it reflects a plausible construction of the language of the statute and is not contrary to the legislative intent." *Seatoma Convalescent Ctr. v. Dep't of Soc & Health Servs.*, 82 Wn. App. 495, 518, 919 P.2d 602 (1996). "In determining legislative intent, we interpret the language at issue within the context of the entire statute." *In re Sehome Park Care Ctr, Inc.*, 127 Wn.2d 74, 778, 93 P.2d 443 (1995) as cited in *Safeway, Inc. v. Dep't of Revenue*, 96 Wn. App. 156, 160, 978 P.2d 559 (1999). If the agency's interpretation of the law conflicts with an applicable statute, the statute controls. *Id.*

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).

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 requesting the recipient to pay back received benefits. Following the issuance of an overpayment, the Commission may also partially or fully waive an overpayment if it finds the overpayment was not the result of fraud, misrepresentation, willful nondisclosure, or fault attributable to the individual and the recovery thereof would be against equity and good conscience. *RCW 50.20.190(2)*

In *Delagrave v. Employment Security Department*, 127 Wn. App. 596, 111 P.3d 879 (2005), Division III reviewed 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 other reason 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).

This definition takes a narrow and limiting approach to *Delagrave*. The court did not define equity and good conscience as fairness as applied to a given set of circumstances. Instead, the court defined equity and good conscience in broader terms as simply fairness, without the limitation of a set of circumstances. 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.

Nevertheless, alternatively, assuming Employment Security correctly applied *Delagrave* in drafting WAC 293-230-030, the Commissioner incorrectly interpreted RCW 50.12.010 and WAC 192-220-030 in finding Ms. Tuttle was not entitled to an overpayment

reduction. Paragraph (2)(i) notes that the Commission may consider “other factors indicating that repayment of the full amount would cause you undue economic, physical, or mental hardship.” Paragraph 4 states that “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).” A review of the questions asked at Ms. Tuttle’s hearing evidences the fact that the hearings judge and the Commissioner only focused on the issue of economic hardship and not the totality of circumstances. CP at 10–17. Furthermore, as Conclusion of Law number 5 indicates, the Commissioner concluded that, despite having a net loss of over \$18,000, “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.

Clearly, Employment Security was misguided in its interpretation of *Delagrave*. 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 of May 20, 2006 through October 16, 2006.

The claimant's attorney was paid his fees and the claimant received a balance of \$7,230.00. 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 rationale in *Delagrave*. "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, which may not include a review of economic hardship.

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 pay \$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. The Commissioner's Determination, Conclusions of Law, paragraph 5, stated, "The evidence does not indicate that she would be in a worse position after repaying it than she was prior to receiving it. Because refunding the overpayment will return her to the same financial position she was in prior to her receipt of the overpayment in question, she must repay same". Ms. Tuttle respectfully disagrees. She is in a far worse position if she has to repay the entire overpayment. She did not seek either workers' compensation or unemployment benefits to lose \$18,496.00 of her own personal savings. This Conclusion of Law is incorrect, inaccurate, and is an error of law.

V. 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. If the prior decisions are reversed, Ms. Tuttle should be entitled to 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. Ms. Tuttle further requests an award for her reasonable attorney fees and costs pursuant to RCW 50.32.160.

RESPECTFULLY SUBMITTED this 2nd day of January, 2014.



Robert A. Silber, WSBA# 33882
Attorney for Appellant
Foster | Staton, P.C.
8204 Green Lake Drive N.
Seattle, WA 98103
206-682-3436

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 2th day of January, 2014, the document to which this certificate is attached, Appellant's Brief, was served upon the following parties in the manner stated:

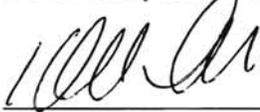
Richard D. Johnson, Court Administrator (ABC Legal Messenger)
Court of Appeals, Division I
One Union Square 600 University St
Seattle, WA 98101-1176

Marya Colignon, AAG (via Postage Pre-Paid First Class Mail)
Office of the Attorney General
800 Fifth Ave, Suite 2000
Seattle, WA 98104-3188

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STATE OF WASHINGTON
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DATED this _____ day of January, 2014.

FOSTER | STATON, PC



Emily Higgins, Paralegal *for*
Kellie Carr, Legal Assistant