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NO. 95097-1

SUPREME COURT
OF THE STATE OF WASHINGTON

CHRISTOPHER BELLING,

Petitioner,

v.

EMPLOYMENT SECURITY DEPARTMENT, STATE OF WASHINGTON,

Respondent.

RESPONDENT'S SUPPLEMENTAL BRIEF

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I. INTRODUCTION

While Christopher Belling appealed the revocation of his worker's compensation benefits by the Department of Labor and Industries (L&I), he applied for and received $22,924.00 in unemployment benefits from the Employment Security Department (Department). Belling prevailed in his L&I appeal, and L&I paid him a lump sum of $48,251.19 in back benefits for the 10-month period he received unemployment benefits.

Because RCW 50.20.085 prohibits the simultaneous receipt of both unemployment benefits and worker's compensation benefits, the Department required Belling to refund the overpaid unemployment benefits. Belling requested a partial waiver of the overpayment under RCW 50.20.190(2), which permits a waiver when repayment would be against "equity and good conscience." He argued the common fund doctrine required the Department to pay a share of the attorney fees and costs he incurred to appeal the L&I decision. Concluding it would not be against "equity and good conscience" to require Belling to refund the duplicative unemployment benefits, the Department's Commissioner denied a waiver. The Court of Appeals affirmed in an unpublished decision. *Belling v. Emp't Sec. Dep't*, No. 34066-0-III, slip op. (Wash. Ct. App. September 12, 2017) (unpublished), http://www.courts.wa.gov/opinions/pdf/340660_unp.pdf.

This Court should decline to expand the narrow boundaries of the common fund doctrine—an equitable exception to the American rule that litigants bear their own expenses—to the Department's permissive overpayment waiver authority in RCW 50.20.190(2). The Employment

Security Act provides for recovery of attorney fees under limited circumstances. *See* RCW 50.32.160. Accordingly, this Court previously held that the common fund doctrine may not be used to enlarge those circumstances. *Pennsylvania Life Ins. Co. v. Emp't Sec. Dep't*, 97 Wn.2d 412, 417-18, 645 P.2d 693, 695 (1982). To find that the common fund doctrine applies here would transform the meaning of "equity and good conscience" in RCW 50.20.190(2) into a rule that the Department *must* waive a portion of an overpayment attributable to attorney fees every time a worker's compensation claimant prevails and has a resulting unemployment benefits overpayment. Because the legislature has already provided for an equitable remedy based on individual circumstances but has not mandated fee sharing, the Court should decline to read such a requirement into the statute.

II. STATEMENT OF THE CASE

A. Background on Unemployment Benefits and Worker's Compensation Benefits

The Employment Security Act provides financial assistance to those who are unemployed, able to work, and seeking work. RCW 50.01.010, RCW 50.20.010. The Industrial Insurance Act, in contrast, pays wage replacement benefits to workers who are injured on the job and cannot work. *See* RCW 51.32.010, .060, .090. Thus eligibility for two types of benefits is mutually exclusive. A person may not simultaneously receive unemployment benefits and worker's compensation benefits. RCW 50.20.085.

A person who receives unemployment benefits to which he or she is not entitled must refund those benefits. RCW 50.20.190(1). If the person is not at fault for causing the overpayment of benefits, the Commissioner "may waive" part or all of the overpayment if he finds that requiring repayment "would be against equity and good conscience." RCW 50.20.190(2); RCW 50.24.020. The Department's rule defines "equity and good conscience" as "fairness as applied to a given set of circumstances" and lists several factors the Commissioner may consider. WAC 192-220-030. The Commissioner's decision to grant or deny waiver is "based on the totality of the circumstances." WAC 192-220-030(5).

B. Belling Received Both Unemployment Compensation Benefits and Worker's Compensation Benefits for the Same Period

Christopher Belling suffered a disabling workplace injury in 2005. CP 48. Thereafter, L&I paid him bimonthly temporary total disability benefits (called time loss compensation benefits) under RCW 51.32.090, a temporary wage replacement for a worker recovering from injury. CP 48, 203 (Finding of Fact (FF) 1); *see* RCW 51.32.090. In March 2011, L&I determined Belling was able to work, terminated his time loss compensation benefits, and awarded him $9,271.80 in permanent partial disability benefits as compensation for impairment caused by the injury. CP 55, 203 (FF 1).

After L&I terminated his time loss compensation benefits, Belling applied for and received unemployment benefits. CP 42, 114, 204 (FF 2). From June 2011 to April 2012, Belling received a total of $22,924.00 in unemployment benefits. CP 38, 114-15, 204 (FF 2).

Belling also retained an attorney and appealed L&I's decision to terminate his time loss compensation benefits. CP 49, 204 (FF 3). In June 2012, the Board of Industrial Insurance Appeals reversed L&I's decision, reinstated Belling's time loss benefits, and awarded him a lump sum of benefits back to March 2011. CP 130-36, 204 (FF 4). L&I paid Belling $48,251.19 in time loss compensation benefits for the same 10-month period he received unemployment benefits. CP 54-55, 132-36, 204 (FF 4). Because a person may not simultaneously receive permanent and temporary disability benefits, L&I deducted the $9,271.80 it previously paid him in permanent partial disability benefits from the back pay award.[1] CP 55, 134, 204 (FF 4). Belling's legal expenses for the portion of the award that covered the period he received unemployment benefits totaled $14,475.36 in fees—or 30 percent of the $48,251.19 back pay award—plus $5,225.21 in costs.[2] CP 54-55, 102, 204 (FF 5), 212.

Once Belling received time loss compensation for June 2011 to April 2012, he became unentitled to unemployment benefits for that same time. RCW 50.20.085. Therefore, the Department issued a determination requiring Belling to repay the $22,924.00 in overpaid unemployment benefits. CP 38, 108-15, 204 (FF 7); RCW 50.20.190(1).

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[1] Belling appealed three separate L&I decisions and thus received three time loss compensation benefits payment orders, totaling $81,235.32 in back benefits for February 2011 through July 2012. (CP 132-36). Of that amount, $48,251.19 covered the same period he received unemployment benefits. CP 54-55, 204 (FF 4). Since L&I previously paid Belling $9,271.80 for permanent partial disability, that amount was deducted from the total of the second payment order. CP 133-34, 204 (FF 4).

[2] Finding of Fact 5 and Conclusion of Law 4 incorrectly state Belling paid $5,255.21 in costs. CP 204-05. It was $5,225.21. CP 55.

Belling appealed. Although he did not dispute that he had been paid unemployment benefits to which he was not entitled, he argued that the Department was "legally obligated to pay its share of attorney fees for the efforts" his attorney took to recover the retroactive time loss benefits from L&I. CP 102-03, 204 (FF 8). He asked the Department to waive $6,877.20—or 30 percent of the $22,924.00 overpayment, the same rate he paid his L&I attorney. CP 102-104, 204 (FF 8).

At an administrative hearing, Belling testified that his total monthly income is $4,672.00, which includes a twice-monthly time loss payment of $1,486.00. CP 62, 204 (FF 9). His monthly bills equal $1,175.00. CP 63-67, 204 (FF 9). He has no debt in collections, owns three vehicles, and is not responsible for any minor children. *Id.* Belling's medical expenses are covered by a combination of L&I and Medicare/Medicaid. CP 64. In short, Belling's monthly income exceeds his set expenses by nearly $3,500.00.

The administrative law judge determined that while Belling was not at fault for causing the overpayment, it was not against equity and good conscience under RCW 50.20.190(2) and WAC 192-220-030 to require him to refund the entire amount. CP 205-206 (Conclusion of Law (CL) 3, 7). Subtracting Belling's attorney fees and costs ($14,475.36 fees + $5,225.21 costs = $19,700.57) from the total back pay award ($48,251.19), the ALJ found Belling netted a total of $28,850.62 from the L&I award ($48,251.19 – $19,700.57 = $28,850.62). CP 205-06 (CL 4-7). This amount exceeded the overpayment amount ($22,924.00) by $5,626.62 ($28,850.62 – $22,924.00 = $5,626.62). *Id.* Based in part on that analysis and in part on

the fact that Belling's income exceeded his monthly expenses, the ALJ denied a waiver. CP 206.

Belling appealed the decision to the Department's Commissioner, who affirmed the initial order. CP 210-16, 220-21. Belling appealed to the Yakima County Superior Court, which modified the Commissioner's decision and waived $3,645.18 of the overpayment. CP 307-11.[3]

The parties cross-appealed the superior court's decision to the Court of Appeals, Division III. Adhering to its opinion in *Delagrave v. Employment Security Department*, 127 Wn. App. 596, 605, 111 P.3d 879 (2005), the Court affirmed the Commissioner's decision, finding it was "consistent with the American rule" on attorney fees and "consistent with this court's refusal to read an equitable expansion of entitlement of attorney fees into the Employment Security Act." *Belling*, slip op. at 11.

III. ARGUMENT

A. *Delagrave* and *Belling* Got It Right: the Common Fund Doctrine Does Not Apply

The American rule on attorney fees provides that litigants must bear their own legal expenses unless otherwise provided in contract, statute, or recognized ground in equity. *Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993). One such equitable exception—the common fund doctrine—applies "where litigants preserve or create a common fund for the benefit of others as well as themselves." *Id.* at 70-71. When the doctrine

[3] The superior court deducted the $9,271.80 in permanent partial disability benefits L&I previously paid to Belling from the total award to find that full repayment would leave Belling $3,645.18 short. CP 309-11. The court, therefore, waived that amount.

applies, the "others" who have benefited must contribute to the litigant's attorney fees. *Bowles*, 121 Wn.2d at 72-73.

But when the legislature has allowed for attorney fees, "it creates a substantive right and not a procedural remedy, and it attaches only as provided in the statute." *Pennsylvania Life Ins. Co.*, 97 Wn.2d at 415. Thus "[i]f the merits of the litigation fall within a statutory scheme which prohibits the award of attorney fees, or allows such an award under narrow circumstances, a party cannot enlarge those circumstances by reference to the common fund doctrine or other equitable powers of the trial court." *Leischner v. Alldridge*, 114 Wn.2d 753, 757, 790 P.2d 1234 (1990).

The common fund doctrine should not apply to an overpayment waiver request under RCW 50.20.190(2) because the Employment Security Act allows attorney fees only under narrow circumstances. This Court has previously refused to read into the Act an equitable expansion of that statutory right to fees, and it should do so here too. *Pennsylvania Life Ins. Co.*, 97 Wn.2d at 417-18. Declining to apply the doctrine in this case also aligns with the Court's decisions holding the doctrine does not apply when the litigant owes the recouped money to the third party who benefits from the common fund. The Court should affirm the Commissioner's decision.

1. Because the Employment Security Act permits attorney fees under narrow circumstances, the common fund doctrine cannot enlarge those circumstances

The Employment Security Act allows for attorney fees under limited circumstances: when a benefits claimant "appeal[s] to the courts" and the

commissioner's decision is "reversed or modified." RCW 50.32.160. Under this circumstance—when a claimant prevails on judicial review—attorney fees are payable out of the unemployment compensation administration fund. RCW 50.32.160.[4] The Act does not permit recovery of fees for legal services at the administrative level. RCW 50.32.100 (costs for proceedings "prior to court review" are paid out of the administration fund, "except charges for services rendered by counsel").[5] Because the legislature has allowed for attorney fees under narrow circumstances, the Court should decline to read an equitable fee sharing provision into the Act. *Leischner*, 114 Wn.2d at 757.

To provide compensation for eligible beneficiaries, the Department collects premiums from Washington employers, deposits them into the unemployment compensation fund, and holds those funds in trust with the United States Treasury. RCW 50.16.010, 50.16.020, 50.24.010; 26 U.S.C. § 3304(a)(3). When an unemployed worker qualifies for benefits, the Department pays those benefits out of the unemployment compensation fund. RCW 50.16.030(1)(a); *see also* RCW 50.20.200. Thus when the

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[4] The unemployment compensation administration fund is financed by federal dollars and is used to support the Department's overhead. RCW 50.16.050; 42 U.S.C. § 502(a). The administration fund is separate from the unemployment compensation fund, which, with limited exceptions, is used strictly for unemployment benefits. 26 U.S.C. § 3304(a)(4) ("all money withdrawn from the unemployment fund of the State shall be used solely in the payment of unemployment compensation, exclusive of expenses of administration, and for refunds of sums erroneously paid into such funds . . . .").

[5] Neither does the Industrial Insurance Act. RCW 51.52.120, .130 (stating only that if on appeal *to the superior or appellate court*, the Board's decisions is reversed or modified, claimant may recover attorney fees and costs from L&I's administrative fund).

Department collects overpayments, the collected money reimburses the unemployment compensation fund.

This Court previously rejected using the common fund doctrine to award attorney fees when a litigant preserves money for the unemployment compensation fund. In *Pennsylvania Life*, an *employer* obtained a reversal of the Department's allowance of benefits to an employee, saving money for the unemployment compensation fund. *Pennsylvania Life Ins. Co.*, 97 Wn.2d at 413. The employer argued that it should be entitled attorney fees under the common fund doctrine based on the last sentence of RCW 50.32.160: "In all other respects the practice in civil cases shall apply." But because RCW 50.32.160 expressly permits an award of attorney fees only to a successful claimant and not to an employer, the Court found "it would be a strained construction to read into this sentence an intention to authorize the courts to award attorney fees to employers as well as employees." *Id.* at 414. The Court reasoned:

> If the respondent's success in this regard entitles it to attorney fees where none are provided by statute simply because . . . some money has been saved for the fund administered by the agency, then there is no logical reason why every party whose challenge to an administrative decision results in denial of benefits to an applicant should not also be entitled to such fees—whether the decision was rendered by the Employment Security Department, the Division of Industrial Insurance of the Department of Labor and Industries, or any other department administering a fund.

Id. at 418.[6] The Court further explained that the rights and remedies under the Act are purely statutory. *Id.* at 415. Accordingly, where the legislature has provided "specific direction as to how [the unemployment compensation fund] is to be spent," this Court determined it should "allow only the attorney fees which are provided for in the statute." *Id.* at 417-18.

The Court's logic in *Pennsylvania Life* applies with equal force here. The right to unemployment benefits is purely statutory. So too is the right to attorney fees under the Act. And the legislature has specifically directed when attorney fees are to be paid: only upon a claimant's successful appeal to the courts. RCW 50.32.100, 50.32.160. Because a claimant's right to benefits—and the Department's right to recover those benefits for the fund when overpaid—are statutory, the Court should not read into the Act a right to attorney fees under any circumstance other than expressly permitted by statute. *Pennsylvania Life Ins. Co.*, 97 Wn.2d at 414; *see also Rhoad v. McLean Trucking Co., Inc.*, 102 Wn.2d 422, 427, 686 P.2d 483 (1984) ("'Equitable principles cannot be asserted to establish equitable relief in derogation of statutory mandates.'" (quoting *Dep't of Labor & Indus. v. Dillon*, 28 Wn. App. 853, 855, 626 P.2d 1004 (1981))); *Regnier v. Dep't of Labor and Indus.*, 110 Wn.2d 60, 64-65, 749 P.2d 1299 (1988).

This is especially true when the legislature has expressly provided for equitable sharing of attorney fees in the Industrial Insurance Act, but not

[6] If the common fund doctrine applied to the refund of overpaid unemployment benefits, then it should also apply to the reimbursement of the $9,271.80 permanent partial disability payment that L&I collected when it awarded Belling time loss pay for the same period. CP 134. But as this Court already explained, "there is no logical reason" for this. *Pennsylvania Life Ins. Co.*, 97 Wn.2d at 418.

the Employment Security Act. Under RCW 51.24.060(1), L&I must bear a proportionate share of the fees and costs an injured worker incurs in obtaining a recovery against a third party. In contrast, in the unemployment benefits overpayment statute, RCW 50.20.190, "There is no express provision . . . that allows ESD to forgive an amount attributable to attorney fees." *Delagrave*, 127 Wn. App. at 605; *see also Rhoad*, 102 Wn.2d at 430 (interpreting *former* RCW 51.24.060 (1982), which did *not* require fee sharing: "a statutory right to reimbursement is not to be diminished absent an express statutory provision."). The Court must presume that the legislature's omission of any such equitable sharing of attorney fees from the Employment Security Act is intentional. *See Wright v. Lyft, Inc.*, 189 Wn.2d 718, 727, 406 P.3d 1149 (2017) (court presumes the legislature means exactly what it says, and omissions are deemed to be exclusions).

Because of the statutory bar on simultaneously receiving worker's compensation and unemployment benefits, Belling has no *right* to retain any of the overpaid unemployment benefits. RCW 50.20.085; *see Maxey v. Dep't of Labor and Indus.*, 114 Wn.2d 542, 545, 789 P.2d 75 (1990) (worker had no property right or interest in the amount of the funds RCW 51.24.060(1) required him to reimburse). The legislature's limited provision in the Employment Security Act for attorney fees precludes importing any equitable doctrine into the Act to enlarge the circumstances for recovery beyond what the legislature has already provided. *See Leischner*, 114 Wn.2d at 757 (party seeking award of attorney fees must

demonstrate legislature has not preempted such an award by statute). The Court should affirm the Commissioner's decision.

2. The Court has declined to apply the common fund doctrine in similar cases

This Court has awarded fees under the common fund doctrine in limited circumstances: for example, actions benefiting large classes of taxpayers (*Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995); *Weiss v. Bruno*, 83 Wn.2d 911, 523 P.2d 915 (1974)); auto insurance actions where the injured incurred fees to recover funds that benefitted a personal injury protection insurer (*e.g.*, *Matsyuk v. State Farm Fire & Cas. Co.*, 173 Wn.2d 643, 272 P.3d 802 (2012); *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632 (1998)), and an action benefiting a large class of pensioners (*Bowles v. Dep't of Ret. Sys.*, 121 Wn.2d 52, 847 P.2d 440 (1993)).

In contrast, the Court has declined to apply the doctrine where a statute's limited provision for attorney fees prohibited an equitable expansion of that allowance (*Pennsylvania Life Ins. Co.*, 97 Wn.2d 412; *see Rhoad*, 102 Wn.2d 422), and where the litigant who preserved or created a common fund owed money to the third party who benefited from the common fund (*Lynch v. Deaconess Medical Ctr.*, 113 Wn.2d 162, 776 P.2d 681 (1989); *see Leischner*, 114 Wn.2d at 759).[7] In *Lynch*, because the money repaid to the hospital from the common fund simply reflected the amount the litigant patient owed, it could not "be said that [the hospital]

[7] The Court in *Leishcner* also found that no common fund was created by the litigants' quiet title action. *Leischner*, 114 Wn.2d at 758.

should not, in equity and good conscience, retain" all of the funds it recouped. *Lynch*, 113 Wn.2d at 166; *see also Leischner*, 114 Wn.2d at 759 (because IRS was entitled to funds by virtue of its tax levy and the statutory scheme, common fund doctrine did not apply). In these latter cases, the Court concluded that the third party beneficiaries were not required to share in the litigants' legal expenses because reimbursing the third parties with money from the common fund did not unjustly enrich them. *Lynch*, 113 Wn.2d at 166-68; *Leischner*, 114 Wn.2d at 759.[8]

That is because the common fund doctrine is grounded in the principle of unjust enrichment. *U.S. Airways, Inc. v. McCutchen*, 569 U.S. 88, 100, 133 S. Ct. 1537, 185 L. Ed. 2d 654 (2013) (Common-fund doctrine "has deep roots in equity . . . [which] are set in the soil of unjust enrichment."). "Stated another way, the doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense." 20 Am. Jur. 2d Costs § 63. But where, as here, the byproduct of Belling's L&I appeal is that the unemployment compensation fund recoups benefits it is owed because Belling is ineligible for them, the fund is not "unjustly enriched." Reimbursement of the funds does not "boost[the Department's] ledger sheet." *Belling*, slip op., dissent at 23 (Fearing, J., dissenting). And, unlike the plaintiffs in *Bowles,* Belling's L&I recovery did not increase the benefits

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[8] Other courts have reached a similar result. *See, e.g.*, *Hayden v. Medcenter One, Inc.*, 828 N.W.2d 775, 786 (N.D. 2013) (citing *Lynch*); *Wendling v. Southern Ill. Hosp. Serv.*, 242 N.E.2d 646, 651 (Ill. 2011) (citing *Lynch*); *Robinson v. City of Wichita Emps.' Ret. Bd. of Trs.*, 241 P.3d 15, 33 (Kan. 2010); *In re Butson*, 892 A.2d 255 (Vt. 2006).

paid out of the unemployment fund. *Bowles*, 121 Wn.2d at 70-71. Rather, reimbursement merely replenishes the fund held in trust for eligible beneficiaries with money that never should have been withdrawn from it.

Because the unemployment compensation fund is a finite resource, only those who qualify may receive benefits from it. RCW 50.20.010 *et seq.*; *Caughey v. Emp't Sec. Dep't*, 81 Wn.2d 597, 599, 503 P.2d 460 (1972) (unemployment fund "is clearly a finite resource"). When an individual has been paid unemployment benefits to which he or she is not entitled, he or she must refund the benefits, unless the Department grants a waiver. RCW 50.20.190(1). The Department "shall issue an overpayment assessment," *id.*, which "constitute[s] a determination of liability." RCW 50.20.190(3). Once that determination becomes final, the Commissioner may file with the superior court a warrant in the amount owed, which amount "become[s] a lien upon the title to, and any interest in, all real and personal property of the" individual. *Id.* Thus once a claimant receives worker's compensation for the same period he received unemployment compensation, he effectively becomes a debtor to the Department.

Belling's successful L&I appeal made him a debtor to the Department for the overpaid unemployment benefits. Like the patient in *Lynch*, Belling *owes* the trust fund $22,924.00. Thus it cannot be said that that the Department, or recipients of the unemployment compensation fund, must, in equity and good conscience, share in his legal fees for obtaining his worker's compensation benefits. *Lynch*, 113 Wn.2d at 166. The Court

should follow *Lynch*, *Leischner*, *Pennsylvania Life*, and *Rhoad* and hold that the common fund doctrine does not apply here.

B. It Is Not Against Equity and Good Conscience To Require Belling To Refund the Benefits He Was Ineligible To Receive

The only argument Belling has made in support of a waiver is that it would be unfair for the Department to not pay its "pro rata share" of attorney fees for his L&I appeal. But the waiver statute, RCW 50.20.190(2), and rule, WAC 192-220-030, already incorporate equitable considerations into the decision to waive an overpayment. While the Commissioner may consider a claimant's expenses to obtain worker's compensation in evaluating a waiver request, equity does not always *require* a waiver under those circumstances. No one factor is dispositive; rather, the "totality of the circumstances" justifies whether the Commissioner should grant or deny a waiver in a particular case. WAC 192-220-030(5).

Here, the Commissioner considered Belling's L&I litigation fees and other personal factors and determined it was not against equity and good conscience to deny a waiver under the particular circumstances of this case. CP 204-06 (FF 5, CL 4-7). Because this decision was not arbitrary and capricious, the Court should affirm.

1. The waiver statute and regulation already incorporate equitable considerations

Although RCW 50.20.190(2) does not define "equity and good conscience," the Department's rule, WAC 192-220-030, interprets the term to mean generally, "fairness as applied to a given set of circumstances,"

WAC 192-220-030(1), and more specifically, when repayment "would deprive [the recipient] of income required for basic necessities . . . ." WAC 192-220-030(2). The rule also lists other factors the Commissioner may consider that indicate full repayment would cause "undue economic, physical, or mental hardship." WAC 192-220-030(3). Thus under the Department's rule, the Commissioner gives "equity and good conscience" its ordinary meaning and may consider a broad range of factors for each individual's circumstances. *See Delagrave*, 127 Wn. App. at 611-12 ("It is clear that equity and good conscience means, quite simply, fairness."); *c.f. Quinilvan v. Sullivan*, 916 F.2d 524, 527 (9th Cir. 1990) (when applying the Social Security Act's "equity and good conscience" overpayment waiver provision, 42 U.S.C. § 404(b), "a broad concept of fairness [should] apply . . . , one that reflects the ordinary meaning of the statutory language and takes into account the facts and circumstances of each case.").[9]

Here, Belling has not argued that full repayment would deprive him of income for basic necessities.[10] He has argued only that the Commissioner should waive a portion of his overpayment solely on the basis of having incurred legal expenses in his L&I appeal.[11] He effectively asks the Court

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[9] In *Quinilvan*, the court found it was against equity and good conscience to recoup social security disability benefits from a recipient who was overpaid benefits while incarcerated, when he had no material goods, income, or means of transportation when he was released, and he was only able to work sporadically due to his psychological impairment. *Quinilvan*, 916 F.2d at 527.

[10] The uncontroverted evidence revealed that Belling's total monthly income exceeded his set expenses by nearly $3,500.00. CP 62-67, 204 (FF 9).

[11] Although he has argued that full repayment would leave him at a net less, for reasons explained below, Belling's math is wrong. *See* infra Section III.B.2; *Belling*, slip op. at 8-9.

to read into "equity and good conscience" a requirement that the Department *must* waive a portion of an overpayment attributable to attorney fees every time a worker's compensation claimant prevails and has a resulting overpayment of unemployment benefits. But if the legislature had intended for that to be the rule, it would have included a fee sharing provision in the Employment Security Act like the one it included in the Industrial Insurance Act. RCW 51.24.060(1). Because it did not, the Court should not read such a requirement into RCW 50.20.190(2).

Rather, "equity and good conscience" requires the Commissioner to consider the particular circumstances in each case. WAC 192-220-030(1) ("'Equity and good conscience' means fairness as applied to a given set of circumstances."); *Delagrave*, 127 Wn. App. at 611-12; *c.f. Quinilvan*, 916 F.2d at 527; *Groseclose v. Bowen*, 809 F.2d 502 (1987) (recovery of child's insurance benefits from parent who had no knowledge of the payments would be against equity and good conscience "in these circumstances."). Thus in *In re Peltier*, Emp't Sec. Comm'r Dec.2d 910, 2007 WL 5172355 (2007), the Commissioner agreed with a claimant who argued that where the amount she received in her L&I recovery, minus attorney fees, was less than the amount of her unemployment benefits overpayment, the difference should be waived. The Commissioner found that the "claimant's argument has merit *in the instant case* and is certainly reasonable when considering the fundamental fairness of *the claimant's situation*." *Id.* at *1 (emphasis added). There is no reason to read *Peltier* as requiring fee sharing in every case. To do so would read a requirement into the waiver statute and

regulation that does not exist, which the Court may not do. *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002) ("Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute.").

2. The Commissioner's discretionary decision to deny a waiver was not arbitrary and capricious

The legislature gave the Commissioner the discretion to waive an overpayment. RCW 50.20.190(2) ("The Commissioner *may* waive an overpayment if the commissioner finds that . . . recovery thereof would be against equity and good conscience." (emphasis added)); RCW 50.24.020 ("The Commissioner *may* compromise . . . any amount owed by an individual because of benefit overpayments . . . in any case where collection of the full amount . . . would be against equity and good conscience." (emphasis added)). "The term may is presumed to be used in a permissive or discretionary sense." *Granite Beach Holdings, LLC. v. Dep't of Nat. Res.*, 103 Wn. App. 186, 206-07, 11 P.3d 847 (2000). That is especially true here, where repayment is mandatory, RCW 50.20.190(1) (a person who has been paid benefits "to which he or she is not entitled *shall* . . . be liable for repayment . . . ." (emphasis added)), while the waiver decision is discretionary, RCW 50.20.190(2).

When an agency makes a discretionary decision, the Court reviews it under the "arbitrary and capricious" standard. RCW 34.05.570(3)(i); *see Lenca v. Emp't Sec. Dep't*, 148 Wn. App. 565, 575, 200 P.3d 281 (2009). A decision is arbitrary and capricious only if it is a "'willful and unreasoning

action, taken without consideration and in disregard of facts and circumstances.'" *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 609, 903 P.2d 433 (1995) (quoting *Pierce Cnty. Sheriff v. Civil Serv. Comm'n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983)).

The Commissioner and ALJ acted with due regard for the facts and circumstances of this particular case. They considered Belling's equitable arguments, the total award he received from L&I, his legal costs, his current income and expenses, and his living arrangements. CP 204-06 (FF 9; CL 4-7). The Commissioner correctly determined that even after paying his attorney fees and refunding the unemployment benefits, Belling was still left with an additional $5,626.62 for the period he received duplicative benefits. Although L&I deducted the $9,271.80 previously paid in permanent partial disability benefits, as the Court of Appeals aptly explained, "if I deliver you a piece of cake on Monday, realize on Tuesday that I was supposed to deliver you a whole cake, and bring you the whole cake in exchange for return of the piece, you have received a whole cake." *Belling*, slip op. at 9 n.3.[12] Thus the Commissioner properly subtracted Belling's overpayment amount of $22,924.00 from the whole cake—$48,251.19—less Belling's attorney fees and costs of $19,248.82, to conclude Belling netted $5,626.62 for June 2011 to April 2012. CP 205-06 (CL 4, 5, 7).

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[12] Put another way, "If he had returned that [$9,271.80] check, to which he ultimately proved unentitled, he would have been paid the full $48,251.19 awarded in retroactive time loss benefits." *Belling*, slip op. at 8.

The Court of Appeals also noted that Belling's lawyers calculated their 30 percent fee on the $48,251.19 award. *Id.* at 8-9.

Additionally, Belling's time loss compensation award is not finite; it is a continuing benefit paid bimonthly until he once again becomes able to work. CP 62, 204 (FF 9). Moreover, if the Department waived 30 percent of Belling's overpayment, he would receive a benefit that no other claimant receives at this level, because attorney fees are not compensable for administrative proceedings. Similarly, a worker's compensation litigant who did not receive unemployment benefits while his or her L&I appeal was pending would be entitled to no such fee sharing from L&I.

Given this "set of circumstances," it cannot be said that the waiver denial was unfair, against equity and good conscience, or arbitrary and capricious. RCW 50.20.190(2); WAC 192-220-030; RCW 34.05.570(3)(i).

IV. CONCLUSION

The Court should decline to read into RCW 50.20.190(2) a requirement that the Department must waive a portion of Belling's L&I attorney fees for "equity and good conscience." The Department respectfully asks the Court to affirm the Commissioner's decision.

RESPECTFULLY SUBMITTED this 23rd day of April, 2018.

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PROOF OF SERVICE

I, Jennifer Bancroft, hereby state and declare as follows:

1. That I am a citizen of the United States of America, a resident of the State of Washington, over the age of eighteen (18) years, and not a party to the above-entitled action.

2. That on the 23rd day of April 2018, I caused to be served a true and correct copy of **Respondent's Supplemental Brief**, as follows:

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I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON that the foregoing is true and correct.

DATED this 23rd day of April 2018, in Seattle, Washington.

Jennifer Bancroft
JENNIFER BANCROFT, Legal Assistant

AGO/LICENSING AND ADMINISTRATIVE LAW DIV

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