

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

CLERK'S OFFICE

Dec 21, 2017, 12:10 pm

RECEIVED ELECTRONICALLY

FILED
DEC 21 2017
WASHINGTON STATE
SUPREME COURT

NO. 95097-1

SUPREME COURT OF THE STATE OF WASHINGTON

CHRISTOPHER BELLING, individually,

Petitioner,

v.

EMPLOYMENT SECURITY DEPARTMENT, of the State of
Washington,

Respondent.

ANSWER TO PETITION FOR REVIEW

ROBERT W. FERGUSON
Attorney General

Jonathan Pitel
Assistant Attorney General
WSBA No. 47516
Attorneys for Respondent
OID No. 91029
PO Box 40110
Olympia, WA 98504-0110
Phone: (360) 586-2588

FILED AS
ATTACHMENT TO EMAIL



ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. COUNTERSTATEMENT OF THE ISSUES2

III. COUNTERSTATEMENT OF THE FACTS3

 A. Background on Unemployment Benefits and Workers’
 Compensation Benefits3

 B. Belling Received Both Unemployment Benefits and
 Workers’ Compensation4

IV. REASONS WHY REVIEW SHOULD BE DENIED8

 A. The Court of Appeals Decision Does Not Conflict With
 Other Appellate Decisions9

 B. Under the Law and Facts of This Case, Requiring Belling
 to Repay the Duplicative Unemployment Benefits is Not
 a Matter of Substantial Public Interest.....12

 1. Requiring Belling to bear his own legal expenses is
 consistent with both the Employment Security Act
 and the Industrial Insurance Act, which require
 claimants to pay for their legal costs at the
 administrative level12

 2. Belling did not establish that he merited a waiver
 under the facts of this case because his income
 exceeded his expenses, and after the L&I award and
 repaying the Department, he netted \$5,626.62.....14

 3. The Court of Appeals correctly concluded that it was
 not an abuse of discretion to deny Belling a waiver.....17

V. CONCLUSION20

TABLE OF AUTHORITIES

Cases

<i>Alpha Kappa Lambda Fraternity v. Wash. State Univ.</i> , 152 Wn. App. 401, 216 P.3d 451 (2009).....	19
<i>Borenstein v. Dep’t of Labor & Indus.</i> , 49 Wn.2d 674, 306 P.2d 228 (1957).....	10
<i>Bowers v. Pollution Control Hearings Bd.</i> , 103 Wn. App. 587, 13 P.3d 1076 (2000).....	19
<i>Bowles v. Dep’t of Retirement Systems</i> , 121 Wn.2d 52, 847 P.2d 440 (1993).....	14
<i>Delagrave v. Emp’t Sec. Dep’t</i> , 127 Wn. App. 596, 111 P.3d 879 (2005).....	2, 10, 11, 15
<i>Edinger v. Emp’t Sec. Dep’t</i> , 58 Wn. App. 525, 793 P.2d 1004 (1990).....	4
<i>Gaines v. Dep’t of Emp’t. Sec.</i> , 140 Wn. App. 791, 166 P.3d 1257 (2007).....	11
<i>Granite Beach Holdings, LLC. v. Dep’t of Natural Res.</i> , 103 Wn. App. 186, 11 P.3d 847 (2000).....	18
<i>Lenca v. Emp’t Sec. Dep’t</i> , 148 Wn. App. 565, 200 P.3d 281 (2009).....	18
<i>Mahler v. Szucs</i> , 135 Wn.2d 398, 957 P.2d 632 (1998).....	10
<i>Matsyuk v. State Farm & Cas. Co.</i> , 173 Wn.2d 643, 272 P.2d 802 (2012).....	10
<i>Tuttle v. Dep’t of Emp’t Sec.</i> , 2014 WL 5465408 at *5 (Wash. Ct. App. Oct, 27, 2014) (unpublished)	17

Statutes

RCW 34.05.570(3)(i)..... 18

RCW 50.01.010 3

RCW 50.16.010 3

RCW 50.16.020 3

RCW 50.20.010 3

RCW 50.20.085 1, 4

RCW 50.20.190(1)..... 4, 13, 18

RCW 50.20.190(2)..... 4, 13, 14, 18

RCW 50.24.020 4, 13

RCW 50.32.100 10

RCW 51.32.010 4

RCW 51.52.120 10

RCW 51.52.130 10, 13

Rules

RAP 13.4(b)..... 2

RAP 13.4(b)(1) 9

RAP 13.4(b)(2) 9

RAP 13.4(b)(3) 9

RAP 13.4(b)(4) 9, 14

Regulations

WAC 192-220-030 15

WAC 192-220-030(2)..... 15, 16

WAC 192-220-030(3)..... 15

WAC 192-220-030(3)(h) 16

WAC 192-220-030(4)..... 15

WAC 192-220-030(5)..... 15

I. INTRODUCTION

Christopher Belling was injured on the job and could not work. While he appealed the revocation of his workers' compensation benefits by the Department of Labor and Industries (L&I) to the Board of Industrial Insurance Appeals, Belling applied for and received \$22,924.00 in unemployment benefits from the Employment Security Department (Department). Eventually the Board reinstated Belling's workers' compensation benefits, including a back award of \$48,251.19 for the 10-month period he received unemployment benefits.

The law does not permit a person to receive both unemployment benefits and workers' compensation benefits for the same period. RCW 50.20.085. So after Belling received the back-pay award of workers' compensation from L&I, the Department required him to repay the unemployment benefits he received for the same period. Belling requested a partial waiver of the overpayment of unemployment benefits, claiming the Department was required to help pay a share of the attorney fees and costs he incurred to appeal the L&I decision. The Department's Commissioner denied a waiver, concluding that it would not be against equity and good conscience to require Belling to refund the duplicative unemployment benefits. The Court of Appeals affirmed the Commissioner's decision in an

unpublished decision. *Belling v. Emp't Sec. Dep't*, No. 34066-0-III (September 12, 2017).

There is no basis to review the Court of Appeals' decision under RAP 13.4(b). The Court of Appeals correctly determined that the Commissioner did not act arbitrarily and capriciously in denying Belling's request for a waiver and that Belling did not establish that it would be against equity and good conscience to require repayment. Further, the Court of Appeals' decision is consistent with *Delagrave v. Emp't Sec. Dep't*, 127 Wn. App. 596, 111 P.3d 879 (2005), the only published decision on the issue. The Court should deny the petition for review.

II. COUNTERSTATEMENT OF THE ISSUES

As discussed below, the issues raised in Belling's Petition for Review are not appropriate for this Court's discretionary review under RAP 13.4(b). However, if the Court does accept review, the issues presented would be:

- 1) Did the Commissioner properly follow sound, existing case law in determining that the common fund doctrine does not apply when attorney fees are not recoverable by statute?
- 2) Did the Commissioner properly determine that the Employment Security Department is not required to help a claimant pay for an administrative appeal before the Board of Industrial Insurance

Appeals when no fees for administrative appeals are permitted under either the Employment Security Act or the Industrial Insurance Act?

- 3) Did the Commissioner properly apply the law to the facts of this case to determine that requiring Belling to repay the unemployment benefits he was not entitled to would not be against equity and good conscience?
- 4) Did Belling meet his heavy burden of showing that the Commissioner's decision to deny him a waiver was arbitrary and capricious?

III. COUNTERSTATEMENT OF THE FACTS

A. Background on Unemployment Benefits and Workers' Compensation Benefits

The Employment Security Act exists to provide a temporary wage replacement for those who are able to work yet are "unemployed through no fault of their own." RCW 50.01.010, RCW 50.20.010. In order to provide compensation for eligible beneficiaries, the Department holds collected funds in trust with the United States Treasury. RCW 50.16.010, RCW 50.16.020. Because the unemployment fund is a finite resource, that money is reserved for only those who are qualified to receive benefits. RCW 50.20.010 *et seq.*

The Industrial Insurance Act compensates those who are injured on the job and cannot work. *See* RCW 51.32.010 *et seq.* Thus the two funds benefit two different groups of unemployed workers: those who are able to work and are seeking work may receive unemployment benefits, and those who are unable to work may receive workers' compensation benefits. Accordingly, a person cannot receive unemployment benefits for any period he or she also received workers' compensation benefits. RCW 50.20.085.

A person who receives unemployment benefits to which he is not entitled must repay those benefits to the Department. RCW 50.20.190(1); *Edinger v. Emp't Sec. Dep't*, 58 Wn. App. 525, 529, 793 P.2d 1004 (1990). If the person is not at fault for causing the overpayment, the Commissioner has the discretion to waive part or all of an overpayment if he finds that requiring repayment "would be against equity and good conscience." RCW 50.20.190(2); RCW 50.24.020.

B. Belling Received Both Unemployment Benefits and Workers' Compensation

Belling lost his job after he was injured in 2005. CP 48. From that point until March 2011, he received workers' compensation benefits from L&I. CP 48, 203; Finding of Fact (FF) 1. In 2011, L&I halted his workers' compensation benefits and awarded Belling \$9,271.80 for permanent partial disability. CP 55, 203; FF 1.

After L&I suspended his workers' compensation benefits, Belling applied for and received unemployment benefits. CP 94, 204; FF 2. In total, Belling received \$22,924.00 in unemployment compensation for the period of June 2011, through April 7, 2012. CP at 38, 93-94, 204; FF 2. Belling spent that money to support himself while he was not receiving workers' compensation. CP 51, 57.

While Belling was receiving unemployment benefits, Belling retained an attorney and appealed L&I's decision to end his workers' compensation benefits. CP 49, 204; FF 3; *Belling*, slip op. at 2. In June 2012, the Board of Industrial Insurance Appeals reversed the previous decision and awarded Belling workers' compensation benefits, including a back award to March 2011. CP 130-36, 204; FF 4; *Belling*, slip op. at 2. The Board awarded Belling \$81,235.32 in total workers' compensation benefits. CP 132-36. Of that total, \$48,251.19 covered the entire period Belling received unemployment benefits. CP 54, 132-36, 204; FF 4; *Belling*, slip op. at 2. The award included the \$9,271.80 previously paid in permanent partial disability benefits.¹ CP 55, 204; FF 4; *Belling*, slip op. at 8.

¹ For the period in which he received unemployment benefits (June 6, 2011–April 7, 2012), Belling received \$48,251.19 in time loss benefits. However, Belling actually received three time loss benefits payment orders from L&I, which totaled \$81,235.32. (CP 132-36). The \$9,271.80 previously paid was included in the total of the second payment order, including the three-month period prior to when Belling began receiving unemployment benefits. (CP 133-34).

The Department learned of the award of workers' compensation benefits. CP 41, 204; FF 7. Because a person cannot simultaneously receive unemployment benefits and workers' compensation benefits, the Department determined that Belling was overpaid \$22,924.00 in unemployment benefits and issued him an overpayment assessment for that amount. CP 108-115, 204; FF 7.

Belling appealed the overpayment assessment, claiming that "Employment security [was] legally obligated" to pay "its share" of his attorney fees. CP 102-03, 204; FF 8. The fees for his L&I appeal totaled \$14,475.36—or 30 percent of the total L&I award—plus \$5,225.21 in costs.² CP 54-55, 102, 204, 212; FF 5. With his appeal, Belling sent the Department a check for \$16,046.80, unilaterally withholding \$6,877.20—or 30 percent of the \$22,924.00 unemployment overpayment, the same rate he paid his L&I attorney. CP 102-104, 204; FF 8; *Belling*, slip op. at 3.

A hearing was held before an administrative law judge (ALJ) on the Department's overpayment assessment. The evidence at the hearing revealed that Belling's total monthly income is \$4,672.00. CP 62, 204; FF 9. His set 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

² Finding of Fact 5 and Conclusion of Law 4 incorrectly states Belling paid \$5,255.21 in costs. It was actually \$5,225.21. This error is not material to the issues here.

children. *Id.* Belling's medical expenses are covered by a combination of L&I and Medicare/Medicaid. CP 64. Belling could not identify a typical budget for groceries, because he "eats out a lot." CP 65, 204; FF 9. In short, Belling's monthly income exceeds his set expenses by nearly \$3,500.00.

Following the hearing, the ALJ determined that while Belling was not at fault for the overpayment of unemployment benefits, it was not against equity and good conscience for the Department to recover the overpayment from him. CP 205-206; Conclusion of Law (CL) 3, 7. As part of the equity analysis, the ALJ compared the money Belling was awarded by the Board of Industrial Insurance Appeals, less his attorney fees and costs, to the amount of the overpayment. CP 205-06; CL 4-7.³ After subtracting attorney fees and costs, Belling netted a total of \$28,850.62 from L&I.⁴ *Id.*; *Belling*, slip op. at 8. The total Belling netted (\$28,850.62) exceeded the overpayment amount (\$22,924.00) by \$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 affirmed the Department's overpayment determination and denied a waiver. CP 206.

Belling appealed the ALJ's initial order to the Department's Commissioner, who affirmed initial order. CP 210-16, 220-21. Belling

³ Though it was not required, the ALJ followed the Commissioner's precedential decision *In re Peltier*, Emp't Sec. Comm'r Dec.2d 910 (2007).

⁴ \$48,251.19 (total award) - \$19,700.57 (total fees and costs) = \$28,850.62.

appealed to the Yakima County Superior Court, which modified the Commissioner's decision and waived \$3,645.18 of the overpayment. CP 307-11.

Both parties appealed the superior court's decision to the Court of Appeals, Division III. In an unpublished opinion, the Court affirmed the Commissioner's decision, holding that the Commissioner "did not abuse her discretion." *Belling*, slip op. at 11. As the Court noted, Belling did not "demonstrate financial hardship or that repayment of the duplicative unemployment insurance benefits would cause him to sustain a net loss" *Id.* Rather, Belling demonstrated "only that the Commissioner did not share his view [that the Department should] . . . contribute toward the contingent fee he owes his lawyer so he can retain a larger percentage of his recovery from the successful appeal." *Id.* The Court found that the Commissioner's decision was "not manifestly unreasonable" because it is "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." *Id.*

IV. REASONS WHY REVIEW SHOULD BE DENIED

Rule of Appellate Procedure 13.4(b) sets forth the criteria governing this Court's acceptance of review of a Court of Appeals decision. *Belling*

does not identify which provision of RAP 13.4(b) he thinks this case meets. But this fact-dependent matter does not meet any of the criteria for review.

Belling acknowledges that there is no conflict between the decision below and any published appellate decision. Pet. for Review 7; RAP 13.4(b)(1), (2). Nor does this matter involve a significant question of constitutional law or an issue of substantial public interest. RAP 13.4(b)(3), (4). Rather, this case involves a straightforward application of the waiver provision of the Employment Security Act and the appropriate standard of review when evaluating the Commissioner's discretionary decision. Belling's disagreement with the outcome does not transform this into a matter of substantial public interest appropriate for review.

A. The Court of Appeals Decision Does Not Conflict With Other Appellate Decisions

This Court may grant discretionary review if the decision of the Court of Appeals conflicts with any decision of this Court or with a published decision of the Court of Appeals. RAP 13.4(b)(1), (2). Neither criteria applies here. The decision below is consistent with the sole published decision from the Court of Appeals on this issue, *Delagrave v. Employment Security Department*, in which the Court held that the common fund doctrine does not apply when an individual receives overlapping benefits from the Department and L&I and is ultimately required to repay

the duplicative unemployment benefits to the Department. *Delagrave*, 127 Wn. App. at 606.

“Washington follows the American rule” of attorney fees: “attorney fees are not recoverable unless provided for in contract, statute, or recognized equitable principles.” *Delagrave*, 127 Wn. App. at 606. The common fund doctrine, which is an exception to the American rule, “applies to cases where litigants preserve or create a common fund for the benefit of others as well as themselves.” *Mahler v. Szucs*, 135 Wn.2d 398, 426-27, 957 P.2d 632 (1998). Under the doctrine, the beneficiaries of the common fund share the costs of litigation on a pro-rata basis. *Matsyuk v. State Farm & Cas. Co.*, 173 Wn.2d 643, 649, 272 P.2d 802 (2012).

Under both the Industrial Insurance Act and the Employment Security Act, attorney fees may not be recovered for services provided at the administrative level. RCW 51.52.120, .130 (stating only that if on appeal *to the superior court or appellate court*, the Board’s decisions is reversed or modified, then the claimant may recover attorney fees and costs from L&I’s administrative fund); *Borenstein v. Dep’t of Labor & Indus.*, 49 Wn.2d 674, 676-77, 306 P.2d 228 (1957) (legislature made no provision for recovery of attorney fees incurred before the Board of Industrial Insurance Appeals); RCW 50.32.100 (costs for proceedings “prior to court review” are paid out of the unemployment compensation fund, “except charges for

services rendered by counsel”); *Gaines v. Dep’t of Emp’t. Sec.*, 140 Wn. App. 791, 801-02, 166 P.3d 1257 (2007) (“[T]here is no award of fees from the state fund for proceedings at the administrative level.”).

Thus in *Delagrave*, the Court of Appeals concluded that the common fund doctrine did not apply to the recovery of attorney fees on an overpayment of benefits, because where “a statutory scheme . . . allows such an award [of attorney fees] under narrow circumstances, a party cannot enlarge those circumstances by reference to the common fund doctrine” *Delagrave*, 127 Wn. App. at 606 (quoting *Leischner v. Alldridge*, 114 Wn.2d 753, 757, 790 P.2d 1234 (1990)). As the Court explained, under the Employment Security Act, RCW 50.32.160 provides for attorney fees only under narrow circumstances—when a decision of the Commissioner is reversed on judicial review. *Id.* “There is no express provision in the statute that allows ESD to forgive an amount attributable to attorney fees on an overpayment,” or a provision for “attorney fees to be available in overlapping benefits scenarios.” *Id.* at 605. Accordingly, “[t]he statute may not be enlarged under the [common fund] doctrine.” *Id.* at 606.

Belling’s disagreement with *Delagrave*, and with the Court of Appeals’ reliance on it to reach the same outcome here, does not create a conflict warranting this Court’s review. *Delagrave* is good law, and the Court of Appeals properly relied on it to reach the proper outcome here.

This case presents no conflict with any published opinion of this Court or the Courts of Appeals, and this Court should deny review under RAP 13.4(b)(1) and (2).

B. Under the Law and Facts of This Case, Requiring Belling to Repay the Duplicative Unemployment Benefits is Not a Matter of Substantial Public Interest

Belling's Petition does not present a matter of substantial public interest under RAP 13.4(b)(4) because: 1) requiring Belling to bear his own legal costs for the L&I appeal is consistent with both the Employment Security Act and the Industrial Insurance Act; 2) the Department's unchallenged regulation defines the circumstances when "equity and good conscience" may result in an overpayment waiver, and the Commissioner properly applied the regulation to the facts of this case; and 3) the Commissioner's decision to deny a waiver is discretionary and based on the particular facts of this case, and the Court of Appeals appropriately found she did not abuse her discretion.

1. Requiring Belling to bear his own legal expenses is consistent with both the Employment Security Act and the Industrial Insurance Act, which require claimants to pay for their legal costs at the administrative level

The only basis Belling asserts for review is that injured workers will face uncertainty and potentially unreimbursed costs if they choose to appeal an L&I decision. Pet. for Review 12-13. But, that is a function of the

Industrial Insurance Act, which precluded him from receiving fees and costs for his appeal. RCW 51.52.130.

Belling claims that in successfully pursuing an appeal before the Board of Industrial Insurance Appeals, he created a “fund” that “enriched” the Department and, therefore, the Department “should be required to pay something.” Pet. for Review 13. But the Department is not being “enriched;” it is simply being reimbursed the benefits it paid Belling and to which Belling ultimately was not entitled, as required by law. RCW 50.20.190(1). As noted above, the Department holds its funds in trust for those eligible to receive them. In order to ensure those funds are available for qualified claimants, the Department seeks reimbursement of funds distributed to claimants who are not eligible. The Department should not have to bear the costs of L&I’s mistake.

Finally, requiring that the common fund doctrine or some other cost-sharing mechanism be imposed when the Department is repaid following the award of workers’ compensation benefits violates the plain language of the Employment Security Act. The decision to waive an overpayment is at the discretion of the Commissioner. RCW 50.20.190(2); 50.24.020. Under Belling’s position, the Department would be required to waive at least a portion of an overpayment in every instance of overlapping benefits where

an attorney represented a claimant before L&I. Such a requirement would contradict the plain language of the Act.

The Industrial Insurance and Employment Security Acts are clear: litigants must bear their own fees and costs at the administrative level. *See* Section IV.A, *supra*. Relying on *Bowles v. Dep't of Retirement Systems*, 121 Wn.2d 52, 847 P.2d 440 (1993), Belling asserts that the "Government's involvement should not preclude use of the [common fund] doctrine." Pet. for Review 15. But unlike here, that case did not involve specific statutory provisions governing the payment of attorney fees by the State, and, in fact, the State paid no fees there. *Bowles*, 121 Wn.2d at 70-71. In contrast, here, the Legislature has statutorily limited when fees may be paid under the Employment Security Act, as the court properly recognized in *Delagrave*.

The Court of Appeals' straightforward application of this law is not a matter of significant public interest requiring this Court's intervention. RAP 13.4(b)(4). The Court should deny review.

2. **Belling did not establish that he merited a waiver under the facts of this case because his income exceeded his expenses, and after the L&I award and repaying the Department, he netted \$5,626.62**

Under RCW 50.20.190(2), the "commissioner may waive an overpayment if the commissioner finds that 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.” Similarly, under 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)

Following *Delagrave*, the Department amended its regulation defining “equity and good conscience.”⁵ The regulation now defines “equity and good conscience” as “fairness as applied to a given set of circumstances” and sets out a non-exhaustive set of circumstances the Department may consider when evaluating a waiver request. WAC 192-220-030. First, the Department considers it *per se* against equity and good conscience to require repayment when doing so “would deprive [the claimant] of income required to provide for basic necessities including food, shelter, medicine, utilities, and related expenses.” WAC 192-220-030(2). If a claimant will not be deprived of basic necessities, then the Department considers the totality of the circumstances, including a non-exclusive list of factors it has identified. WAC 192-220-030(3), WAC 192-220-030(4), WAC 192-220-030(5).

⁵ In *Delagrave* the Commissioner ruled that a waiver was limited to the circumstances expressly identified under the regulations in place at the time of the decision. The Court held that such an interpretation would impermissibly limit the statutory language and remanded for the Commissioner to reconsider in light of the required, broader interpretation of “equity and good conscience.” *Delagrave*, 127 Wn. App. at 610-13.

It was Belling's burden to establish that it would be against equity and good conscience to require him to repay the Department. Here, the unchallenged facts showed that Belling's income significantly exceeded his monthly expenses. *Belling*, slip op. at 4.⁶ 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; *Belling*, slip op. at 4. The Commissioner correctly concluded that repayment would not deprive Belling of "income required to provide for basic necessities." WAC 192-220-030(2).

Despite Belling's claim that the Department will only grant a waiver if a claimant demonstrates financial distress, Pet. for Review 7, under the plain language of WAC 192-220-030, the Department may waive an overpayment for reasons other than financial hardship. But because repayment would not deprive Belling of income required for basic necessities, he was required to put forth evidence that requiring repayment would cause him some other "undue economic, physical, or mental hardship." WAC 192-220-030(3)(h). Belling simply did not produce any evidence beyond his financial circumstances. *See Tuttle v. Dep't of Emp't*

⁶ Belling's monthly bills included \$650 in rent, \$45 for cable, \$280 for cellular phones, and \$200 for gasoline. CP 63-67, 204; FF 9; *Belling*, slip op. at 7. He did not provide a typical budget for food because he "eats out a lot." CP 65, 204; FF 9; *Belling*, slip op. at 7.

Sec., 2014 WL 5465408 at *5 (Wash. Ct. App. Oct, 27, 2014) (unpublished) (where the claimant “presented no evidence of other mitigating circumstances . . . other than financial hardship” the Department did not err by considering only the circumstances presented). Instead, the only basis Belling has ever claimed for a waiver is that the Department should be obligated to help pay for his appeal before a different state agency.

Further, Belling’s assertion that he was left worse-off because he had to repay the Department after he prevailed before the Board of Industrial Insurance Appeals is not supported by the record. Even accounting for his costs, Belling netted a total of \$28,850.62 from L&I. *Id.*; *Belling*, slip op. at 8. The total exceeded the overpayment amount (\$22,924.00) by \$5,626.62. In light of the evidence presented—Belling’s monthly income exceeded his expenses by nearly \$3,500.00, and Belling would still come out ahead if he repaid the Department—the Commissioner did not err in denying Belling’s request to waive a portion of his overpayment assessment, and the Court of Appeals properly affirmed that decision. *Belling*, slip op. 12.

3. The Court of Appeals correctly concluded that it was not an abuse of discretion to deny Belling a waiver

RCW 50.20.190(2) provides that the “Commissioner *may* waive an overpayment if the commissioner finds that 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.” (Emphasis added). Similarly, under 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 Natural 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) (“An individual who is paid any amount as benefits . . . to which he [] is not entitled *shall* . . . be liable for repayment” (Emphasis added)), while the Commissioner’s decision to grant a waiver is discretionary, RCW 50.20.190(2).

Because the Commissioner has discretion to waive an overpayment, the Court was required to apply the “arbitrary and capricious” standard in the Administrative Procedure Act’s provision for reviewing adjudicative orders. *See Lenca v. Emp’t Sec. Dep’t*, 148 Wn. App. 565, 575, 200 P.3d 281 (2009); RCW 34.05.570(3)(i). “A decision is arbitrary or capricious for purposes of RCW 34.05.570(3)(i) if it is a ‘willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the

action.” *Alpha Kappa Lambda Fraternity v. Wash. State Univ.*, 152 Wn. App. 401, 421, 216 P.3d 451 (2009) (quoting *Bowers v. Pollution Control Hearings Bd.*, 103 Wn. App. 587, 596, 13 P.3d 1076 (2000)). “If there is room for two opinions, a decision is not arbitrary or capricious if it is made honestly and upon due consideration, even though [the court may] think a different conclusion might have been reached.” *Bowers*, 103 Wn. App. at 596. The party asserting an agency’s decision was arbitrary and capricious must carry “a heavy burden.” *Alpha Kappa Lambda Fraternity*, 152 Wn. App. at 522 (quoting *Pierce Cnty Sheriff v. Civil Serv. Comm’n*, 98 Wn.2d 690, 695, 658 P.2d 648 (1983)).

The Court of Appeals found that Belling failed “to show that the commissioner misconstrued RCW 50.20.190(2) or abused her discretion.” *Belling*, slip op. at 12. The record supports that decision. The Commissioner considered the totality of the circumstances presented, including 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 at 204-06; FF 9; CL 4-7. The Court appropriately determined that the Commissioner’s decision to deny Belling a waiver was not “manifestly unreasonable.” *Belling*, slip op. at 11. Instead, Belling demonstrated only that “the commissioner did not share his view that ESD should, in equity and good conscience, contribute toward the contingent fee he owes his lawyer so he can retain a larger percentage of

his recovery. . . .” *Id.* This case does not present a matter of substantial public interest. The Court should deny review.

V. CONCLUSION

The Department’s Commissioner, exercising the discretion granted by the Legislature, denied Belling’s request for a waiver of an overpayment he owed the Department. The Court of Appeals properly decided that refusal was not an abuse of the Commissioner’s discretion. That decision did not conflict with any published appellate decisions. Nor is it a matter of substantial public interest that Belling is required to repay the Department benefits he received, but for which he was not eligible. The Court should deny the Petition for Review.

RESPECTFULLY SUBMITTED this 20th day of December,
2017.

ROBERT W. FERGUSON
Attorney General


Jonathan Pitel
Assistant Attorney General
Attorneys for Respondent
WSBA No. 47516
PO Box 40110
Olympia, WA 98504-0110
Phone: (360) 586-2588
OID# 91029

PROOF OF SERVICE

I, Amy Phipps, certify that I caused a copy of this document—
Answer to Petition for Review—to be served on all parties or their counsel
of record on the date below as follows:

Sent via USPS through consolidated mail services to:
Darrell K. Smart
Smart Connell & Childers, P.S.
PO Box 228
Yakima, WA 98901-2309

Filed Electronically with:
Supreme Court

I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

DATED this 21st day of November, 2017, at Olympia,
Washington.



AMY PHIPPS, Legal Assistant

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Thursday, December 21, 2017 12:11 PM
To: 'Phipps, Amy (ATG)'
Subject: RE: Belling v. Emp't Sec. Dep't No. 95097-1 - Filing our Answer to Petition for Review

Received 12-21-17.

Supreme Court Clerk's Office

ATTENTION COURT FILERS: The Supreme Court and the Court of Appeals now have a web portal to use for filing documents. Beginning July 3, 2017, all electronic filing of documents in the Supreme Court should be through the web portal. We will accept your attached document for filing, but you should immediately follow the directions below to register for and begin using the appellate courts web portal for all future filings.

Here is a link to the website where you can register to use the web portal: <https://ac.courts.wa.gov/>
A help page for the site is at: <https://ac.courts.wa.gov/index.cfm?fa=home.showPage&page=portalHelp>
Registration FAQs: <https://ac.courts.wa.gov/content/help/registrationFAQs.pdf>
Registration for and use of the web portal is free and allows you to file in any of the divisions of the Court of Appeals as well as the Supreme Court. The portal will automatically serve other parties who have an e-mail address listed for the case. In addition, you will receive an automated message confirming that your filing was received.

From: Phipps, Amy (ATG) [mailto:AmyP4@ATG.WA.GOV]
Sent: Thursday, December 21, 2017 11:05 AM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Subject: Belling v. Emp't Sec. Dep't No. 95097-1 - Filing our Answer to Petition for Review

Attached please find our Answer to Petition for Review for filing in the above-referenced matter. The e-filing portal was not working this morning after a few failed attempts and I was directed to send it via e-mail.

Thank you!

Amy Phipps, Legal Assistant

Office of the Attorney General | Licensing and Administrative Law
PO Box 40110 | 1125 Washington Street SE, Olympia, WA 98504-0110
Direct: (360) 586-7315 | **Fax:** (360) 664-0174

THIS E-MAIL AND ANY ATTACHMENTS IS INTENDED ONLY FOR THE NAMED ADDRESSEE(S). THIS E-MAIL AND ANY ATTACHMENTS MAY CONSTITUTE A PRIVILEGED ATTORNEY-CLIENT COMMUNICATION AND/OR WORK PRODUCT. REVIEW, DISSEMINATION, OR USE OF THIS TRANSMISSION OR ITS CONTENTS BY PERSONS OTHER THAN THE ADDRESSEE(S) MAY BE PROHIBITED. IF YOU RECEIVE THIS MESSAGE IN ERROR, PLEASE DELETE IT.