

No. 95097-1

FILED

SEP 02 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 34066-0

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON

CHRISTOPHER BELLING, individually,

Appellant

v.

EMPLOYMENT SECURITY DEPARTMENT of the state of
Washington,

Respondent

BRIEF OF APPELLANT

Darrell K. Smart
WSBA No. 15500
Smart, Connell, Childers & Verhulp P.S.
501 North Second Street, PO Box 228
Yakima, WA 98901-2309
509-537-3333
Attorneys for Appellant

I. TABLE OF CONTENTS

I. TABLE OF CONTENTS.....	i
II. TABLE OF AUTHORITIES	ii
III. INTRODUCTION	1
IV. ASSIGNMENTS OF ERROR	1
V. ISSUES RELATED TO THE ASSIGNMENTS OF ERROR	2
VI. STATEMENT OF THE CASE.....	6
VII. ARGUMENT	9
A. Standard of review.....	9
B. Analysis	10
C. Attorney Fees.....	19
VIII. CONCLUSION.....	19

Cases

Delagrave v. ESD, 127 Wn. App. 596, 603, 111 P.3d 879, *reconsideration denied* (2005) 10, 12, 14, 17
In re Peltier, Empl. Sec. Comm'r Dec.2d 910 (2007)5, 12
Kelly v. State, 144 Wn. App. 91, 95, 181 P.3d 871, *review denied*, 165 Wn.2d 1004, 198 P.3d 511 (2008)9
Michaelson v. Employment Sec. Dept., 187 Wn. App. 293, 302, 349 P.3d 896, 901 (2015)19
Tapper v. Employment Sec. Dep't., 122 Wn.2d 397, 404, 858 P.2d 494 (1993).....10
Verizon NW., Inc. v. Employment Sec. Dep't., 164 Wn.2d 909, 915, 194 P.3d 255 (2008).....9

Statutes

RCW 50.20.0102
RCW 50.20.085 2, 7, 11, 13
RCW 50.20.190 7, 11, 12, 13, 15, 17
RCW 50.32.16019
WAC 192-100-015.....18
WAC 192-220-017.....17
WAC 192-220-030.....15
WAC 192-220-030.....5, 16
WAC 192-28-115.....13

Rules

RAP 18.119

III. INTRODUCTION

Mr. Christopher Belling appeals an Employment Security Department (ESD) decision whereby it determined he was solely responsible for the attorney fees and costs expended in successful litigation to recover his inappropriately denied worker's compensation benefits. ESD seeks to appropriate for itself the entire net proceeds of Mr. Belling's retroactive worker's compensation benefit. The contested issue is whether ESD should be required to pay its pro rata share of attorney fees and costs, or make some other adjustment of what it receives, when *it*, not Mr. Belling, acquired the greatest financial benefit from Mr. Belling's successful litigation. ESD received this financial benefit without risk or the expenditure of any monies.

IV. ASSIGNMENTS OF ERROR

The ESD Commissioner made no findings or conclusions, instead relying on those of the Administrative Law Judge (ALJ). (CP 220-222) For this reason Mr. Belling assigns error to the ALJ's findings of fact # 3-4 and 8-9 (CP 204) as well as conclusions of law # 4-7. (CP 205-206) However, the ESD Commissioner's decision does contain one scrivener's error that can be easily rectified within

the text of the decision. The fourth sentence in the Commissioner's Order states: "Claimant is *not ineligible* during the weeks at issue pursuant to RCW 50.20.010(1)(c). (CP 220) Mr. Belling has consistently agreed he was statutorily ineligible for unemployment compensation¹ once he received back time loss benefits from the Department of Labor and Industries (L&I). For this reason, the Commissioner's scrivener's error does not influence the outcome of this appeal.

V. ISSUES RELATED TO THE ASSIGNMENTS OF ERROR

The assignments of error to which Mr. Belling objects mainly involve numerical or mathematical errors. Regarding the dates Mr. Belling's attorney filed appeals of the Department's improper denial of time loss benefits, finding # 3 (CP 204) begins with: "On June 6, 2012. . ." The correct date is June 6, 2011. (CP 40) This scrivener's error is of no consequence to this appeal but the record should be accurate nonetheless.

Second, regarding the total amount of benefits Mr. Belling received when the Department of Labor and Industries (L&I)

¹ See RCW 50.20.085

reversed its denial of Mr. Belling's time loss claim, the IAJ's finding #4 (CP 204) states in relevant part: ". . . and [Mr. Belling] was paid . . . a lump sum payment for back time loss, minus the permanent partial disability payment which he had already been paid . . . (\$48,251.90 - \$9271.80= \$39,000.1" The numbers here are inaccurate. The lump sum pay off from L&I for back time loss was \$48,251.19. (CP 54) If one subtracts \$9,271.80 from \$48,251.19 the correct total is \$38,979.39. If one subtracts the attorney fees paid by Mr. Belling (\$14,475.36) and the costs incurred to obtain these benefits from the Department of Labor & Industries (\$5,255.21) the total is \$19,730.57. In subtracting this from the correct number, \$38,979.39 minus \$19,730.57 the correct total is \$19,248.82.² Using the net amount of L&I benefits received that Mr. Belling recited at the March 15, 2013 hearing, the actual time loss benefit Mr. Belling netted was \$19,278.88. This thirty dollar error has little to no impact on the issue being appealed.

Next, the first two sentences in finding # 8 are true and supported in the record. (CP 204) However, the third sentence

² In his testimony before the ALJ Mr. Belling testified he netted \$19,278.88, a difference of just over \$30.00. This error has little to impact on the issue being appealed. For this reason Mr. Belling utilizes this total (\$19,278.88) throughout his briefing. (CP 54)

states: "At the hearing, the claimant requested that up to the total overpayment amount be waived." This statement misstates the position asserted by Mr. Belling and should be disregarded and stricken. Mr. Belling has consistently stated he will pay back the ESD overage subject only to ESD paying its pro rata share of the attorney fees he was forced to incur in order to receive his time loss benefits. In a showing of good faith Mr. Belling even sent ESD a check for the money he owed minus ESD's pro rata share of attorney fees. (CP 35, 55-56, 102, 104, 127)

Finally, in finding # 9 the ALJ included another statement that is not supported in the record thus should be stricken and not considered. ". . . The claimant *could* at some point in the future receive another Permanent [P]artial Disability payout." (CP 204) Mr. Belling does not know where the ALJ got this information but it is speculative at best and has nothing to do with the issue on appeal. Accordingly, it should be disregarded. Mr. Belling requests this court accept the corrected findings as outlined above when making its decision in Mr. Belling's' appeal.

The math errors originating in the findings transferred to the ALJ's conclusions of law # 4-7. Conclusion # 4 is nearly³ correct as far as it goes but it failed to subtract the \$9,271.80 prior disability award L&I had already paid Mr. Belling. The correct total should be \$19,278.88. In conclusions # 5-7, the ALJ attempted to utilize the concept of waiver set forth in an ESD decision, *In re Peltier*, Empl. Sec. Comm'r Dec.2d 910 (2007). (CP 274-275). But, again the math errors prevent accurate totals.

Peltier states that ESD "may consider partial or full waiver of claimant's overpayment." It held: "[if] a claimant is without fault in the matter of an overpayment, the overpayment may be waived if to require refund would violate principles of equity and good conscience." The term "equity and good conscience" has been defined by rule as "fairness as applied to a given set of circumstances." Former WAC 192-220-030(1)(2008). Furthermore, agency rules emphasize that the decision to grant or deny a waiver of any ESD payment owed must be "based on the totality of circumstances rather than the presence of a single factor listed in subsections (2), (3), and (4)." Former WAC 192-220-030(5)

³ There is a \$2.00 error in the "amount claimant received" box. (CP 205)

(2008). As a result, the *Peltier* decision is not useful as any kind of precedent because, just like in Mr. Belling's appeal, the Commissioner/ALJ failed to enter findings or conclusions that would allow one to understand the basis on which it refused to grant the waiver. Here, with no explanation the ALJ summarily determined that ". . . repayment [of the full \$22,924.99] would not be unfair and repayment would not be against equity and good conscience." (CP 206) As set forth above, no instructive information or empirical data exists to explain how the ALJ reached this dismissive stance.

VI. STATEMENT OF THE CASE

A majority of the underlying facts are not contested. Mr. Belling suffered a workplace injury in 2005. Because he was unable to work he initially received time loss benefits under a worker's compensation claim. In March 2011 L&I notified Mr. Belling the time loss payments would cease as he had been adjudicated capable of working. (CP 132) Mr. Belling, through his attorney, appealed the L&I decision. (CP 125) In the meantime, because he had no source of income on which to live, and because he was advised by L&I that he was able to work, Mr. Belling applied for unemployment

compensation. The benefits commenced in June 2011 and ended in April 2012. (CP 54-55, 88, 93-94)

Although it took three different appeals to do so, in June of 2012 L&I ultimately agreed and awarded Mr. Belling retroactive time loss benefits from March 8, 2011 to July 24, 2012. (CP 130-131, 133-136) As a result, he received a lump sum payment of \$48,251.19 from which was deducted attorney fees, costs, as well as a deduction for a prior permanent partial disability payment L&I had made to him. After subtracting the deductions, Mr. Belling netted approximately \$19,278.88.

Within days of his receipt of the lump sum payment from L&I, ESD notified Mr. Belling it intended to recoup \$22,924 of the unemployment benefits he had been paid during the time period June 11, 2011 through April 7, 2012 because, by law, a claimant may not receive unemployment compensation and time loss payments at the same time. RCW 50.20.085. (CP 87-92, 95-99) ESD initially determined he was at fault for the overpayment so none of the recoupment amount it demanded could be waived pursuant to RCW 50.20.190. (CP 90)

Mr. Belling appealed ESD's decision, stating "...there is no contention with the claimed overpayment amount..." And in fact at *no* time did Mr. Belling argue he did not: (a) owe; or (b) intend to repay ESD for the benefits received with one exception – ESD's pro rata share of attorney fees and costs should be applied to reduce the amount Mr. Belling had to repay ESD. (CP 55-56, 102)

The ALJ that heard the appeal ultimately concluded Mr. Belling was not at fault in causing the overpayment yet nevertheless, pursuant to RCW 50.20.190, decided no waiver applied. As a result, the ALJ determined Mr. Belling was responsible for the entire \$22,924.00 overpayment. (CP 206) With no explanation and minimal findings, the ALJ summarily determined her decision regarding "repayment would not be unfair and repayment would not be against equity and good conscience." (CP 206) Because no findings explain this conclusion (which was not listed as a conclusion) Mr. Belling has no way to assign error or properly argue the issue.

Mr. Belling filed a Petition for Review of the ALJ's decision to the Commissioner of the ESD. (CP 212-216). Again, the *sole* issue on appeal was whether ESD's recoupment request should "be

reduced by a proportionate share of attorney fees and costs paid by Mr. Belling to his attorney for legal services necessary to obtain payment of total temporary disability from the Department of Labor and Industries.” (CP 213) In an exceedingly brief decision, the Commissioner adopted the ALJ’s findings and conclusions *in toto*. (CP 87-92, 102, 220-222) After an appeal to the Yakima County superior court Mr. Belling requests this court review the Commissioner’s (thus the ALJ’s) decision. (CP 313-314)

VII. ARGUMENT

A. Standard of review

The Washington Administrative Procedure Act (Act), chapter 34.05 RCW, governs this court’s review of the ESD Commissioner’s decision. *Verizon NW., Inc. v. Employment Sec. Dep’t*, 164 Wn.2d 909, 915, 194 P.3d 255 (2008). It is only the *Commissioner’s* decision, not the administrative law judge’s decision or the superior court’s ruling that is reviewed by the court of appeals. *Id.*; *Kelly v. State*, 144 Wn. App. 91, 95, 181 P.3d 871, *review denied*, 165 Wn.2d 1004, 198 P.3d 511 (2008). This is because the Commissioner is the final authority for ESD’s decisions regarding unemployment

compensation. *Tapper v. Employment Sec. Dep't.*, 122 Wn.2d 397, 404, 858 P.2d 494 (1993).

In its review, this court's decision must be based solely on the administrative record considered by the Commissioner in reaching a decision. (CP 9-255). It reviews the Commissioner's ruling "to the extent it modifies or replaces the ALJ's findings relevant to the appeal." *Delagrave v. ESD*, 127 Wn. App. 596, 603, 111 P.3d 879, *reconsideration denied* (2005)(citation omitted). The challenged findings of fact are reviewed for substantial evidence and the challenged conclusions of law de novo. *Delagrave*, 127 Wn. App at 604(citations omitted).

B. Analysis

The sole issue is whether, under the totality of the circumstances, it is against equity and good conscience to require Mr. Belling to be financially responsible for ESD's proportional share of the attorney fees and costs of litigation when he alone took the financial risk in an effort to recover a lump-sum retroactive time loss benefit that should never have been withheld in the first place. This is not fair or equitable under the totality of the specific circumstances because, as a result of his monetary gamble, it was ESD, *not* Mr.

Belling that gained the most financially. ESD took no responsibility or risk in attempting to collect the inappropriately withheld L&I payment. ESD simply sat back and waited for L&I to pay Mr. Belling benefits so it could then recoup the amount he was paid. ESD reaped all the benefits while Mr. Belling who was *forced* to litigate his L&I claim closure with the resulting costs, time and attorney fees, ended up not even receiving enough of an L&I payment to cover the unemployment compensation ESD sought to recoup. This is not fair, not equitable and the decision was not made in good conscience. The ALJ presented no findings to indicate that it was.

From their written decisions it is clear the ALJ and the ESD Commissioner did not fully consider Mr. Belling's argument on appeal. The ALJ framed the first issue as ". . . whether [Mr. Belling] is disqualified [from receiving unemployment compensation] under RCW 50.20.085 due to receipt of [L&I time loss benefits]." This should not even be a finding because Mr. Belling admits he is disqualified and did not argue to the contrary. The second issue was ". . . whether [Mr. Belling] is liable for any, all or part of the refund of regular benefits pursuant to RCW 50.20.190 in the amount of \$22,924.00." Again, he admits he is. Although by now this may sound repetitive, but Mr. Belling's only contention on appeal was

(and is) whether it was reasonable and equitable for ESD to refuse to pay its pro rata share of attorney fees and costs or otherwise reduce what it recoups based upon principles of equity and good conscience. (CP 102) Nevertheless, the ALJ entered findings and conclusions which affirmed the original ESD decision. Even though it was determined Mr. Belling was not at fault in causing the overpayment the ALJ made no finding as to whether Mr. Belling's circumstances supported a waiver of any portion of the overpayment pursuant to the *Peltier*⁴ or *Delagrave* (infra) decisions.

This court has, under distinguishable facts, briefly considered the issue Mr. Belling raises. See *In re Delagrave v. ESD*, 127 Wn. App. 596, 111 P.3d 879, *reconsideration denied* (2005). The issue on appeal in *Delagrave* was dissimilar to that of Mr. Belling in that Mr. Delagrave did not expressly argue the equity and good conscience waiver provisions found in RCW 50.20.190 and WAC

⁴ Reading the ALJ's decision one will notice a discrepancy between what the conclusion *said* and what the calculations reveal. At first glance it might appear the ALJ concluded that Mr. Belling's overpayment was reduced between what he actually received from L&I and what he owed ESD. However, the ALJ's math calculation in conclusion # 5 shows he received approximately \$5000 more than he owed ESD so no reduction was taken. (CP 205) That being the case, apparently the ALJ determined *Peltier* did not apply and Mr. Belling was required to repay the "regular overpayment, pursuant to RCW 50.20.190 in the amount of \$22,924." This is incorrect.

192-28-115 even when prompted by the court it might be a colorable argument. Even without the specific argument the court of appeals found Mr. Delagrave's argument was "imbued with and grounded in equity." *Id.* at 608. The rules and statutes cited by the *Delagrave* court are relevant so Mr. Belling will continue to reference it. As noted above, Mr. Belling agrees that he may not receive unemployment compensation if he also receives L&I disability benefits pursuant to RCW 50.20.085. He agrees he must repay ESD for the overpayment unless he is granted a waiver. RCW 50.20.190. The *Delagrave* court found there is no *express* provision in Title 50 RCW "that allows ESD to forgive an amount attributable to attorney fees on repayment" and declined to expand the statute to create one. *Id.* at 605. Mr. Belling agrees with that too. But just because there is no express provision in the statute does not mean a waiver should not be granted at all. The *Delagrave* court also determined "[t]he equity and good conscience statute does not limit the circumstances under which the commissioner may find that a waiver is warranted." *Id.* at 605.

Because, just like Mr. Belling, Mr. Delagrave's argument on appeal involved the pro rata sharing of attorney fees, the *Delagrave* court first explained that Washington state follows the "American

Rule” under which attorney fees may not be recovered unless expressly provided for in contract, by statute or *recognized equitable principles*. *Id.* at 606 (citation omitted). It is this portion of the *Delagrave* decision on which Mr. Belling relies. He invites this court to consider whether, under the totality of the circumstances it was fair and equitable for ESD not to be required to pay its pro rata share of attorney fees and costs when it benefited financially from Mr. Belling’s litigation. Mr. Belling argues that under these specific circumstances where he: (a) did all the legwork; (b) took all the financial risk; and (3) paid all the fees and costs to obtain a settlement, it is against equity and good conscience to allow ESD to recoup its entire payout especially when, from the decisions of the ALJ and Commissioner, ESD didn’t even have to explain why a waiver wasn’t considered or applied. All ESD has to do is merely sit back while Mr. Belling fights for benefits that were rightfully his all along. In essence, one state agency (L&I) withholds money from an injured worker. When forced through litigation to pay past due benefits, *within days*, a second state agency (ESD) demands it receive Mr. Belling’s lump sum payment for which Mr. Belling fought so tenaciously. This is government bureaucracy at its finest. There is nothing fair nor equitable about an injured worker having to spend

time, energy and money trying to obtain what was rightfully his all along. There is nothing fair nor equitable about a government agency being able to sit back and lie in wait for a payday it didn't even care enough about to fight for in the first place. What *is* fair and equitable under these circumstances is to simply require ESD to pay their fair share of the fees and costs Mr. Belling spent in litigating an issue that benefitted ESD. In the alternative the ESD should have applied some formula that factored in the costs and risks undertaken by Mr. Belling to obtain these benefits.

There is in place a mechanism that is fair to each party – a type of win/win situation. Because it was determined he was not at fault in causing the overpayment Mr. Belling maintains the equitable principle that applies under the specific facts of his case is found in RCW 50.20.190(2). This statute explains that an ESD Commissioner *may waive* an overpayment if, as here, it was not the result of fraud, misrepresentation, willful nondisclosure or fault on the part of the claimant. The statute articulates that overpayment *may be waived* if the recovery of such “would be against equity and good conscience.” *Id.* Equity and good conscience has been further defined by agency rule as “fairness as applied to a given set of circumstances.” Former WAC 192-220-030(1) (2008).

In determining whether ESD should have granted Mr. Belling a waiver in an amount based on ESD's proportional share of attorney fees, the ALJ was required to consider the totality of circumstances. Former WAC 192-220-030(4) (2008). In Mr. Belling's case it does not appear she did. While the ALJ appeared to have taken into account Mr. Belling's ability to purchase basic necessities if he paid the full recoupment amount (CP 62-67, FF # 9 CP 204) there is nothing in the Commissioner's record, the testimony or the findings that reveals the ALJ even considered the only issue he is appealing – whether it is equitable or against good conscience for him to be forced to pay ESD's portion of the attorney fees and costs. Instead, the ALJ merely tacked on one sentence to the end of conclusion # 7 that states (with no factual finding to back it up): "repayment [of the total amount of \$22,924] would not be against equity and good conscience." (CP 206). That's it. Likewise, the Commissioner's decision said nothing that would modify or replace the ALJ's findings relevant to the appeal. (CP 220) This effectively leaves Mr. Belling with nothing on which to assign error.

To his credit and revealing his moral sense of right and wrong, Mr. Belling has never disputed the rule of law that holds any claimant who receives unemployment benefits to which they are not entitled

must return those benefits. RCW 50.20.190(1). Although he agrees he has a financial obligation to repay a majority of the overpaid unemployment compensation benefits received, he contends ESD should waive that portion of the recoupment that equates to its pro rata share of the attorney fees and costs. RCW 50.20.190(2); WAC 192-220-017(1) (“You must repay the full amount of the overpayment, even if you are not at fault, unless you are granted a waiver.”). It would not even *be possible* for ESD to seek reimbursement from Mr. Belling had he not risked money, time and energies in forcing L&I to pay him what was rightfully his. There would have been no lump sum to benefit ESD had Mr. Belling not litigated and proved his entitlement to these benefits. Now ESD reaches with the long and ironclad hand of the State and demands these benefits in their entirety without paying its fair share of attorney fees and costs. ESD expended no time or resources yet now seeks to recover the full monetary benefits it paid to Mr. Belling. As set forth above, under the totality of the circumstances this is manifestly against equity and good conscience. *Delagrave*, at 612.

WAC 192-100-015 defines equity and good conscience and notes in (2)(h) that the “costs of collection compared to the amount of the outstanding debt” is something to be considered by ESD. Is

not the cost of litigating by Mr. Belling to obtain his L&I benefits comparable to the “costs of collection” likely incurred by ESD in recovering its debt? ESD is not limited to consideration of the factors outlined in WAC 192-100-015. Subsection (1) states that “‘equity and good conscience’ means fairness as applied to a given set of circumstances.” Furthermore subsection (2) specifies that “the department may consider, but is not limited to, the [specifics set forth in subsection (2).]”

Finally, this Court should consider the likely outcome of ESD’s position that injured workers might choose to forfeit their right to pursue L&I benefits because of the costs and attorney fees necessary to obtain those benefits. One of the great maxims of equity in the Common Law is that “the law abhors a forfeiture.” ESD’s slavish reliance on its statutory right to recover the entirety of Mr. Belling’s overpayment with essentially no consideration of what it cost Mr. Belling to obtain these benefits is anything but equitable. If ESD’s position is affirmed, Mr. Belling, and other similarly situated injured workers will necessarily weigh the costs of obtaining L&I benefits knowing that the entirety of their overpayment will be transferred from state agency to another state agency without

consideration of the risks and burdens incurred to prove entitlement to these benefits.

C. Attorney Fees

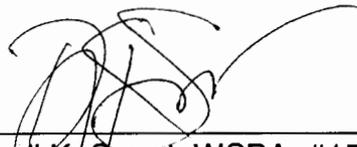
If successful, Mr. Belling seeks reasonable attorney fees on appeal pursuant to RCW 50.32.160 and *Michaelson v. Employment Sec. Dept.*, 187 Wn. App. 293, 302, 349 P.3d 896, 901 (2015), subject to his compliance with RAP 18.1.

VIII. CONCLUSION

Mr. Belling has been nothing but forthright and honest in his words and actions when dealing with representatives of ESD over the years. Of his own accord he discontinued filing for unemployment benefits immediately upon learning his L&I appeal was successful even though nearly three months elapsed before he actually received his first L&I benefit payment. (CP 75) As further evidence of his willingness to work with the ESD, once requested, Mr. Belling in good conscience immediately sent ESD a check for \$16,046.80, representing the overage amount minus its share of attorney fees. (CP 104) If Mr. Belling had not chosen to litigate with L&I the improper denial of time loss benefits, ESD would have never had the opportunity to endeavor so arduously in its attempt to recoup

his overpayment. Only because of his dogged determination in pursuing his L&I appeal, ESD, *not* Mr. Belling, bore the consequences of the litigation. In truth, he alone bore a burden which has unjustly enriched ESD. For the reasons set forth above, under the totality of circumstances of this case it is fair, equitable and in good conscience to require ESD to waive from the recoupment amount its pro rata share of attorney fees and costs.

Respectfully submitted this 3rd day of August, 2016



Darrell K. Smart, WSBA #15500
Smart, Connell, Childers & Verhulp P.S.
501 North Second Street
Yakima, WA 99336
(509) 573-3333
Attorneys for appellant