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Court of Appeals
Division III
State of Washington

SUPREME COURT OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioner,

v.

JOSÉ BIRRUETA,

Respondent,

**DEPARTMENT OF LABOR & INDUSTRIES
PETITION FOR REVIEW**

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I. INTRODUCTION

A worker should not profit when he or she has misrepresented a fact to obtain benefits, which is why the Legislature authorized the Department of Labor and Industries to recoup erroneously paid benefits within one year after the overpayment. The Court of Appeals turns this fundamental principle of fairness upside down. Although courts must harmonize statutes to effectuate the Legislature's intent, the Court of Appeals introduced discord, not harmony, into RCW 51.32.240(1) when it held that the Department may not claim overpayments made after an order becomes final even though the plain language of the statute allows the Department one year to claim an overpayment, regardless of finality. Taxpayers must now pay Jose Birrueta, age 31, higher pension benefits for life as a married worker (65 percent of wages instead of 60 percent) because he told the Department he was married, which was not true.

But this case is not just about the thousands of dollars that taxpayers will likely overpay Birrueta in the years ahead. The Court of Appeals' erroneous interpretation of RCW 51.32.240(1) affects a multitude of other cases in which similar misrepresentations will cause the Department to issue orders, which become final in 60 days if not appealed, that cause benefits to be overpaid or underpaid. The scope and magnitude of the court's decision make this case a matter of substantial public

interest warranting review under RAP 13.4(b)(4).

This Court should also accept review under RAP 13.4(b)(2) because Division Three's decision in this case conflicts with Division Two's decision in *Matthews v. Department of Labor & Industries*, 171 Wn. App. 477, 288 P.3d 630 (2012). *Matthews* allows what this case now forbids: the recoupment of overpaid benefits that occur as a result of a worker's innocent misrepresentation.

II. IDENTITY OF PETITIONER AND DECISION

The Department petitions for review of the published decision of Division Three of the Court of Appeals, *Birrueta v. Department of Labor & Industries*, __ Wn. App. __, __ P.3d __ (2015), filed July 9, 2015, reconsideration denied on July 30, 2015 (see attached).

III. ISSUES PRESENTED FOR REVIEW

1. When the Department relies on a worker's misrepresentation that he is married to issue an order with the incorrect marital status, and that order is otherwise final, may the Department subsequently issue an order assessing an overpayment of benefits under RCW 51.32.240(1)(a), which provides that a worker "shall repay" an overpayment when the Department claims repayment within one year?

2. Does RCW 51.32.240(1)(a) authorize the Department to correct a worker's marital status where the worker innocently

misrepresented his marital status, the Department relied on the misrepresentation to issue an order with the incorrect marital status that is otherwise final, and the alternative is to continue overpaying benefits for the life of the pension?

IV. STATEMENT OF THE CASE

A. When Birrueta Applied for Workers' Compensation Benefits in 2004, He Said That He Was Married, Which Was Not True, and He Did Not Tell the Department He Was Single Until 2011

In 2004, Birrueta injured his back at work and stated that he was married in his application for workers' compensation benefits. Ex. 1; BR 147. This was not true. *See* BR 28; CP 7. He did not fill out the application, but he signed it underneath the statement, "I declare that these statements are true to the best of my knowledge and belief." Exs. 1, 15.

Birrueta did not tell the Department he was single at the time of his injury until February 2011, when the Department awarded him a pension. Exs. 8, 14; BR 148. He stated in a pension benefits questionnaire that he was not married at the time of his injury. Ex. 14; BR 148.

B. The Department Relied on Birrueta's Statement That He Was Married To Calculate His Workers' Compensation Benefits

From 2005 to 2008, the Department issued several orders to establish Birrueta's wages for benefit purposes. *See* Exs. 2, 4, 18, 20. All stated that he was married. *See* Exs. 2, 4, 18, 20. Birrueta protested these orders on various grounds, including through counsel, but did not state in

any of his protests that he was single. *See* Exs. 3, 5, 19, 21.

Ultimately, the Department issued a wage order in September 2008 that incorporated Birrueta's misrepresentation, noting incorrectly that he was married. Ex. 2. The Department affirmed the wage order in December 2008. Exs. 4; BR 147-48. That order became final after Birrueta dismissed his appeal to the order. Ex. 7; RCW 51.52.050(1), .060(1).

C. When Birrueta Informed the Department in 2011 That He Was Single at the Time of Injury, the Department Issued Orders Under RCW 51.32.240(1)(a) Assessing an Overpayment and Changing His Marital Status

When the Department learned in February 2011 that Birrueta was single at the time of injury, it issued an order assessing an overpayment of \$100.86 for time loss benefits paid from February 3, 2011 (the day after it received the questionnaire) to March 15, 2011 (the day before he was placed on pension) because Birrueta had innocently misrepresented his marital status. Ex. 9; *see also* Exs. 8, 11, 12. Birrueta protested this order, which the Department affirmed.¹ Exs. 10, 12. The Department issued a separate order changing his marital status from married to single. Ex. 11.

¹ From 2004 to 2011, Birrueta received time loss benefits for periods when he could not work at a higher percentage of wages (65 percent) than he would have if the Department had known he was single (60 percent). *See* RCW 51.32.060(1)(a), (g), .090(1). He likely received considerably more than \$100.86 in overpaid time loss benefits over the course of the claim. The Department limited its recoupment to the benefits it had overpaid in the six weeks before placing Birrueta on pension rather than seeking repayment for one full year of benefits, as RCW 51.32.240(1)(a) authorizes. *See* Ex. 9.

D. The Board Affirmed the Department's Authority To Assess an Overpayment and Change the Incorrect Marital Status Under RCW 51.32.240(1), But the Superior Court and Court of Appeals Reversed

Birrueta appealed the order changing his marital status and the overpayment order to the Board of Industrial Insurance Appeals. Ex. 13; BR 148-49. The Board granted summary judgment to the Department, but the superior court reversed. BR 5, 28; CP 7-8.

The Department appealed to the Court of Appeals. CP 5. The Department asserted that RCW 51.32.240(1)(a)'s plain language allowed it to claim an overpayment for innocent misrepresentation within one year of the payment, quoting the statute: "The department . . . must make claim for such repayment or recoupment within one year of the making of any such payment or it will be deemed any claim therefor has been waived." App. Br. 14 (quoting RCW 51.32.240(1)(a)).

Division Three affirmed. *Birrueta*, slip op. at 1-2. Notably, the court did not analyze RCW 51.32.240(1)(a)'s language authorizing collection of an overpayment made "within one year of the making of any such payment" The court denied the motion for reconsideration.

V. ARGUMENT WHY REVIEW SHOULD BE GRANTED

In 1975, in response to *Deal v. Department of Labor & Industries*, 78 Wn.2d 537, 540, 477 P.2d 175 (1970), the Legislature authorized the

Department to recoup overpayments based on innocent misrepresentations, mistakes of identity, and clerical errors within one year of the overpayment. Turning 40 years of history on its head, Division Three now prohibits the Department from collecting such overpayments.

The Court of Appeals rendered the one year statute of limitation in RCW 51.32.240(1)(a) meaningless by holding that the Department's reliance on an innocent misrepresentation is an adjudicator error that, under subsection RCW 51.32.240(1)(b), must be corrected before the order causing the overpayment is final in 60 days. The same logic would render meaningless the worker's ability under RCW 51.32.240(2)(a) to request an adjustment of benefits if an innocent misrepresentation has caused an underpayment, also limited to one year. The court did not analyze either provision, and neither can be squared with its rationale.

This is an issue of substantial public interest warranting review under RAP 13.4(b)(4). The court's decision affects many similar cases. Taxpayers must now overpay benefits, potentially for years in pension cases, to workers who misrepresent their marital status (or another fact to determine benefits, like the number of children) if that misrepresentation is undetected for 60 days after the order with the misrepresented fact is issued. Under the decision, workers will also lose the right to request an adjustment of benefits under RCW 51.32.240(2)(a) within one year.

This Court should also accept review under RAP 13.4(b)(2) because the Court of Appeals' decision conflicts with *Matthews*. There, the court allowed the Department to collect several months of overpaid benefits caused by the worker's innocent misrepresentation after the Department discovered the misrepresentation despite the fact that the orders paying these benefits were final. Unlike the Court of Appeals in this case, the *Matthews* Court gave meaning to the one-year statute of limitation for repayment of benefits under RCW 51.32.240(1)(a).

A. This Case Presents a Matter of Substantial Public Interest Because Taxpayers Are Now Forever Bound To Overpay Benefits if a Department Employee Does Not Discover the Misrepresentation Within 60 Days of Issuing an Order

Taxpayers should not be forever bound to overpay workers' compensation benefits to a worker who has misrepresented his or her marital status. The Department processes tens of thousands of workers' compensation applications each year and must ensure that workers receive "sure and certain relief." RCW 51.04.010. It is reasonable for the Department to rely on the certified information a worker provides in the application for benefits, as it did here.

This case presents a matter of substantial public interest because the court has essentially created a new rule that innocent misrepresentations must be discovered within 60 days, not one year as the

statute provides. This new rule fundamentally alters the Department's ability to collect overpayments based on innocent misrepresentation. This will likely affect a multitude of cases, at potentially great cost to taxpayers when misrepresentations are not timely discovered.

Workers also face an altered landscape in which they can no longer request an adjustment of benefits within a year of an underpayment due to an innocent misrepresentation. This imposes a hardship on workers who discover the effects of the innocent misrepresentation too late.

1. The Court of Appeals Disregarded the Plain Language of RCW 51.32.240(1)(a), Which Makes Repayment of Overpaid Benefits Mandatory When Caused By a Worker's Innocent Misrepresentation

The Court of Appeals disregarded the plain language in RCW 51.32.240(1)(a) when it concluded that Birrueta did not have to repay six weeks' worth of overpaid benefits. That statute requires, without any limitation, that workers repay up to one year of incorrect benefits they received as a result of their innocent misrepresentations:

Whenever any payment of benefits under this title is made because of clerical error, mistake of identity, innocent misrepresentation by or on behalf of the recipient thereof mistakenly acted upon, or any other circumstance of a similar nature, all not induced by willful misrepresentation, the recipient thereof shall repay it and recoupment may be made from any future payments due to the recipient on any claim with the state fund or self-insurer, as the case may be. The department or self-insurer, as the case may be, must make claim for such repayment or recoupment within one

year of the making of any such payment or it will be deemed any claim therefor has been waived.

RCW 51.32.240(1)(a) (emphases added). This subsection does not limit the worker's repayment obligation to non-final orders. This provision is a limited exception to the general rule that Department orders are final after 60 days. *See* RCW 51.52.050(1), .060(1).

A different subsection limits the Department's ability to collect overpayments in cases of adjudicator error to non-final orders:

Except as provided in subsections (3), (4), and (5) of this section, the department may only assess an overpayment of benefits because of adjudicator error when the order upon which the overpayment is based is not yet final as provided in RCW 51.52.050 and 51.52.060. "Adjudicator error" includes the failure to consider information in the claim file, failure to secure adequate information, or an error in judgment.

RCW 51.32.240(1)(b).

RCW 51.32.240(1)(a) is not ambiguous. It states unequivocally that a worker "shall repay" benefits overpaid due to a worker's innocent misrepresentation if the Department claims the overpaid benefits within a year of payment. The only reasonable interpretation of this language is that the Department can seek the overpayment within a year when it discovers an innocent misrepresentation. That language controls here.

Although the Court of Appeals did not reach the issue, subsection (1)(a) also authorizes the Department to correct the misrepresented fact that

month going forward, the Department would have to overpay pension benefits to Birrueta and then, at least annually under RCW 51.32.240(1)(a), issue an overpayment order to recoup the overpaid benefits. This would have to occur for the life of the pension, which will likely be several decades because Birrueta is 31. *See* Ex. 1.

The court's decision will cause benefits to be overpaid not just to Birrueta, but to potentially many other workers whose misrepresentations are not discovered within 60 days. By re-writing the statute, the Court of Appeals has affected a multitude of cases where innocent misrepresentation occurs, and the scope of the court's decision presents a matter of substantial public interest under RAP 13.4(b)(4).

2. The Court of Appeals' Analysis of RCW 51.32.240(1) As A Whole Fails to Give Effect to the Legislature's Intent and Renders the One-Year Statutes of Limitation in Subsections (1)(a) and (2)(a) Meaningless

The Court of Appeals erroneously concluded that the adjudicator error provision in subsection (1)(b) applies to instances of innocent misrepresentation in subsection (1)(a), and therefore the worker does not need to repay overpaid benefits based on misrepresented facts if the order with the misrepresented fact is final, which is 60 days after issuance if there is no appeal. Slip op. at 8-9; RCW 51.52.050(1), .060(1). Contrary to the court's opinion, the adjudicator error provision in subsection (1)(b)

the court's opinion, the adjudicator error provision in subsection (1)(b) does not apply to innocent misrepresentations under subsection (1)(a). If the Legislature meant to limit the worker's repayment obligations in cases of innocent misrepresentation to non-final orders, it would have said so in subsection (1)(a), as it chose to do in subsection (1)(b).

Subsections (1)(a) and (1)(b) may be read harmoniously to mean that overpayments due to clerical error, mistake of identity, or innocent misrepresentation may be recovered regardless of whether the order causing the overpayment is final, whereas overpayments resulting from adjudicator errors must be sought before the order is final. *See Koenig v. City of Des Moines*, 158 Wn.2d 173, 184, 142 P.3d 162 (2006) ("Related statutory provisions must be harmonized to effectuate a consistent statutory scheme that maintains the integrity of the respective statute.") Subsection (1)(a) is a limited exception to finality that prevents erroneous payments when the Department discovers an innocent misrepresentation.

Subsection (1)(b) provides, "Except as provided in subsections (3), (4), and (5) of this section, the department may only assess an overpayment of benefits because of adjudicator error when the order upon which the overpayment is based is not yet final as provided in RCW 51.52.050 and RCW 51.52.060." This savings clause does not support the court's reasoning that adjudicator errors, as defined in subsection (1)(b),

apply to cases of innocent misrepresentation under (1)(a). The court's reasoning is based in part on an incorrect premise that because subsection (5), which addresses willful misrepresentations, is included in the savings clause, an adjudicator commits an adjudicator error every time he or she relies on a willful misrepresentation. *See* slip op. at 8.

But this unreasonable reading of the savings clause ignores the only plausible reading that not every instance of an adjudicator's reliance on willful misrepresentation is adjudicator error. Under subsection (5), a worker "shall repay" benefits "induced by willful misrepresentation." RCW 51.32.240(5)(a). Thus, where the adjudicator's decision is based entirely on the worker's willful misrepresentation, subsection (5) alone provides the mechanism for recovering overpaid benefits. The savings clause only becomes necessary to ensure recovery of overpaid benefits when there is an adjudicator error (such as failure to consider information in the claim file), in addition to a willful misrepresentation, that contributes to an overpayment of benefits. The savings clause operates to require repayment even when an adjudicator error overlaps with a worker's willful misrepresentation to cause the overpayment.

Adjudicator error thus is not present each time an adjudicator relies on a willful misrepresentation, contrary to the court's premise. *Contra* slip op. at 8. Because the court's premise fails, its conclusion that reliance on

an innocent misrepresentation is adjudicator error does not follow.

The omission of subsection (1)(a) from the savings clause is likewise of no import. *Contra* slip op. at 6. That is because the Legislature made plain in subsection (1)(a) that it was treating innocent misrepresentations differently than other situations. The Legislature intended that the worker repay incorrect benefits secured through innocent misrepresentation, regardless of finality.

In any case, the court's unreasonable reading of the savings clause renders the one-year statutes of limitation in subsections (1)(a) and (2)(a) meaningless. A savings clause cannot be read to destroy the meaning of a statute that contains it. *See Hardy v. Claircom Commc'ns Grp., Inc.*, 86 Wn. App. 488, 496, 937 P.2d 1128 (1997). If reliance on an innocent misrepresentation is an adjudicator error that cannot be fixed after the order is final, normally 60 days later, these statutes of limitation would have no meaning. Neither the Department under subsection (1)(a) nor the worker under subsection (2)(a) could collect overpaid benefits or request underpaid benefits, respectively, after 60 days had passed. There would be no need for the Legislature to include a one-year period in these statutes.

It is especially troubling that the court did not even address the one-year statute of limitations in subsections (1)(a) and (2)(a), except to mention in passing that they exist. *See* slip op. at 5, 11. Nowhere did the

court contemplate the Legislature's intent in including this language. In effect, the court amended the period in these subsections from one year to 60 days. Now, as never before, the Department (for overpayments) and worker (for underpayments) have only 60 days to discover an innocent misrepresentation and claim overpaid or underpaid benefits. The court has legislated under the guise of interpreting a statute, which it cannot do. *See Sedlacek v. Hillis*, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001).

The court's interpretation also renders subsection (1)(a) superfluous in its entirety. If, as the court's logic demands, an adjudicator's clerical error, mistake of identity, and reliance on an innocent misrepresentation are merely examples of adjudicator error that cannot be corrected if the resulting error appears in a final order, there would be no need for subsection (1)(a) at all. These errors, like all other adjudicator errors not excepted by subsections (3), (4), and (5), would be covered by subsection (1)(b). There would be no need to specifically name clerical error, mistake of identity, or innocent misrepresentation if they are no different than any other kind of adjudicator error.

Another fundamental error is the court's overly broad definition of adjudicator error, which it stretches to include "any error by an adjudicator," including reliance on a worker's misrepresentation. Slip op. at 8. Even if subsection (1)(b) can be construed to apply to subsection

(1)(a), which it cannot, trusting the worker to tell the truth is not adjudicator error, either under subsection (1)(b)'s definition or as a matter of common sense.

Further, the Court of Appeals' analysis encompasses not only innocent misrepresentations in RCW 51.32.240(1)(a), but also clerical errors and mistake of identity under that subsection. *See* slip op. at 14. Under the court's reasoning, clerical errors are also adjudicator errors that cannot be corrected if the underlying order is final. *See* slip op. at 14. But this conflicts with previous cases that hold that res judicata does not prevent the correction of a clerical error. *See Leuluai v. Dep't of Labor & Indus.*, 169 Wn. App. 672, 682, 279 P.3d 515 (2012); *Callihan v. Dep't of Labor & Indus.*, 10 Wn. App. 153, 156-57, 516 P.2d 1073 (1973).

The court's misapplication of the adjudicator error provision in (1)(b) to innocent misrepresentations is a matter of substantial public interest that potentially impacts a multitude of cases at great financial cost to the public. It means that when a worker misstates, but does not willfully misrepresent, a fact on an application for benefits and receives greater benefits as a result, the worker will enjoy a windfall every time he or she is paid under the claim as long as the misstated fact is not discovered within 60 days. Conversely, if the Court of Appeals' rationale were to hold, workers who were underpaid based on clerical errors, mistakes of

identity, or innocent misrepresentations would have no recourse once the order underpaying benefits became final. That cannot be what the Legislature intended when it adopted the adjudicator error provision.

3. Because RCW 51.32.240(1)(a) Is Not Ambiguous, Resort to Legislative History Is Inappropriate, But That History Also Does Not Support the Court of Appeals' Opinion

Resort to legislative history is not appropriate because RCW 51.32.240(1)(a)'s mandatory repayment provision is not ambiguous. *See Cerrillo v. Esparza*, 158 Wn.2d 194, 202, 142 P.3d 155 (2006). The legislative history nevertheless does not support the court's opinion.

Forty years ago, the Legislature enacted RCW 51.32.240 in direct response to *Deal*'s holding that, absent express statutory authority, the Department could not recoup benefits overpaid due to a mistake of fact. *See Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 298, 916 P.2d 399 (1996); *see also Deal*, 78 Wn.2d at 540. Not once in the 40 years since has the Legislature amended the language that a worker "shall repay" benefits that are overpaid due to an innocent misrepresentation if the Department claims repayment within one year. *Compare* Laws of 1975, 1st Ex. Sess., ch. 224, § 13 *with* RCW 51.32.240(1)(a).²

The Legislature's 2004 amendments did not alter the worker's

² In the last 40 years, the only amendment to what is currently the first sentence of RCW 51.32.240(1)(a) was to change "fraud" to "willful misrepresentation." *See* Laws of 2004, ch. 243, § 7.

obligation to repay such benefits. The Legislature added a new subsection (1)(b) that limited the Department's powers regarding "adjudicator error" to situations when the order causing the overpayment was not yet final. Laws of 2004, ch. 243, § 7. But the inclusion of "not yet final" language only in subsection (1)(b), and not in subsection (1)(a), signaled the Legislature's intent to treat the two situations differently, not the same. It intended to limit the Department's overpayment powers in cases of adjudicator error, but not in cases of innocent misrepresentation.

The court's flawed premise that the adjudicator error provision in subsection (1)(b) applies to subsection (1)(a) taints its entire legislative history analysis. Without that premise, its legislative analysis does not make sense. For instance, the court speculates, without citing any supporting legislative document, that the 1999 addition of the adjudicator error provision in subsection (2)(b) "likely reflected the department's concern" about "an onslaught of requests for increased benefits" from workers alleging that someone "once made a clerical error, mistake of identity, or innocent misrepresentation." Slip op. at 12. But that assumes at the outset that adjudicator errors apply to clerical errors, mistakes of identity, or innocent misrepresentations rather than to just those situations included in the definition of adjudicator error. The court never explains how it knows that the Department was concerned about an onslaught of

requests alleging innocent misrepresentations rather than requests, for example, that it failed to consider information in the claim file. Nor does the court explain how the actual language of the statute, which does not include clerical errors or innocent misrepresentations among the examples of adjudicator error, supports its speculation that the language was proposed in order to address those precise concerns. The court's distortion of the legislative history is a matter of substantial public interest because it undermines the Legislature's decades-long intent that workers repay benefits secured through innocent misrepresentation.

B. This Court Should Accept Review Because the Court of Appeals' Opinion Conflicts With *Matthews*, Which Requires a Worker To Repay Benefits After an Innocent Misrepresentation

Just three years ago, in *Matthews*, the Court of Appeals held that a worker "must repay" overpaid benefits she received due to her innocent misrepresentation. 171 Wn. App. at 497-98. This was true even though the orders overpaying benefits were otherwise final. *See* RCW 51.52.050(1), .060(1). The Department now faces an irreconcilable dilemma when it learns only after 60 days that it has overpaid a worker due to an innocent misrepresentation: it can collect the overpayment under *Matthews*, or it must refrain from collection under *Birrueta*. This conflict causes uncertainty for workers, employers, and the Department, and it warrants

this Court's review.

In *Matthews*, the Department issued several payment orders for time loss benefits from July 2007 to January 2008 to a worker who was unable to work due to her work injury. 171 Wn. App. at 483-84. Each payment order became final after 60 days. RCW 51.52.050(1), .060(1). The Department later learned that Matthews worked during this period. *Matthews*, 171 Wn. App. at 484. In June 2008, the Department issued an order under RCW 51.32.240(5) alleging willful misrepresentation, but on appeal the Board accepted the worker's testimony that the misrepresentation was not willful. *Id.* at 484-88. At issue, therefore, was the Department's ability under RCW 51.32.240(1)(a) to recoup overpaid benefits caused by the innocent misrepresentation. *Id.* at 496-98.

The *Matthews* Court held that the Department could recoup the overpaid benefits for the one-year period preceding its June 2008 order. *Id.* at 497-98. Because the worker's lack of notice caused the time-loss benefits to continue after they should have stopped or been reduced, "the Department has shown 'innocent misrepresentation' of the facts of her employment" and could recover the overpayment. 171 Wn. App. at 497.

Under *Birrueta's* erroneous analysis, Matthews would not have to repay these benefits because the payment orders were final, and the Department's reliance on her innocent misrepresentation was adjudicator

error. But, unlike *Birrueta*, *Matthews* addressed the one-year statute of limitations in RCW 51.32.240(1)(a), which provided the statutory basis for its holding. *Matthews* gave meaning to this language where *Birrueta* did not. This Court should accept review to resolve this conflicting case law.

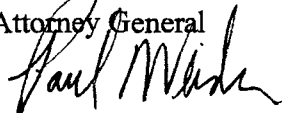
VI. CONCLUSION

The Court of Appeals decision disregards RCW 51.32.240(1)(a)'s plain language and brings discord to RCW 51.32.240 by rendering meaningless the one-year periods in subsections (1)(a) and (2)(a). It directly conflicts with Division Two's *Matthews* decision, and it enshrines in law the problematic principle that a worker can profit from a misrepresentation if it passes undetected for 60 days. This Court should accept review to allow the Department to recoup payments that it made solely because someone provided untrue information on an application for workers' compensation benefits.

RESPECTFULLY SUBMITTED this 27th day of August, 2015.

ROBERT W. FERGUSON

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APPENDIX A

FILED
JULY 9, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

JOSE L. BIRRUETA,)	
)	No. 32210-6-III
Respondent,)	
)	
v.)	
)	
DEPARTMENT OF LABOR AND)	PUBLISHED OPINION
INDUSTRIES OF THE STATE OF)	
WASHINGTON)	
)	
Appellant.)	

SIDDOWAY, C.J. — The superior court in this case held that the Department of Labor and Industries was without authority to assess Jose Birrueta for an overpayment of time-loss benefits and to change his marital status for compensation purposes under RCW 51.32.240. This was because Mr. Birrueta’s marital status had been determined in a 2008 notice of decision by the department that had become final under RCW 51.52.050. In so holding, the trial court implicitly rejected at least two decisions by the Board of Industrial Insurance Appeals that construed the current version of RCW 51.32.240 as providing authority for recovering overpayments following a final order. The department appeals.

The construction of RCW 51.32.240 urged by the department fails to read the statute as a whole and fails in particular to consider language added by the legislature in

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1999 and 2004. The board decisions on which the department relies also fail to address that critical language and reflect no specialized analysis to which we should accord deference. We agree with the trial court's reading of the statute and affirm.

FACTS AND PROCEDURAL BACKGROUND

The material facts are not in dispute. In August 2004, Jose Luis Birrueta suffered a back injury when he fell from a ladder at work. He was taken to Our Lady of Lourdes Hospital, where someone completed patient information for him on a Department of Labor and Industries claim form evidently made available to the hospital.¹ The attending emergency room physician completed the medical section on the same day, indicating that Mr. Birrueta suffered a strain and would miss two days of work as a result. The patient information section indicated that at the time of the injury, Mr. Birrueta was married, that his spouse's name was Graciela, and that he had one child, Araceli.

In fact, Mr. Birrueta was not married at the time he was injured. But he thereafter

¹ The form, which was addressed to the Department of Labor and Industries' Insurance Services Division in Olympia, included the following "Instructions" at the top:

MEDICAL PERSONNEL (NOTE: MEDICAL COMPLETION INSTRUCTION ON PAGE 2) Give the last page of this form to the patient *before* you complete your section. After you complete the medical section, send page 1 to the address listed to the left. Keep page 2 and send the remainder to the patient's employer.

Board Record, Ex. 1.

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received time-loss benefits calculated as if he was, resulting in larger payments than he would have received as a single individual. Mr. Birrueta would later testify by declaration that he does not read or write in English; that the patient information included on the claim form was not his handwriting; that the form bears his signature but he doesn't recall signing it; that when he was taken to the emergency room he was unconscious much of the time; and that during transport by ambulance to the hospital he recalls being asked whether he had family in the area and responding that he had a sister, Graciela, who had a daughter, Araceli. At the time of his injury, Mr. Birrueta was living in the same house with Graciela and Araceli.

In September 2008, the department issued a notice of decision announcing its determination of Mr. Birrueta's wage for compensation purposes. The notice of decision stated that the department treated his marital status eligibility as "married with 0 children." Board Record, Ex. 2. It disclosed the following additional determinations on which the wage was based:

The wage for the job of injury is based on reported income for the twelve-month period from 01/01/2003 to 12/31/2003 of \$14,577.48 equaling \$1,214.79 per month.

Additional wage for the job of injury include:

Health care benefits	NONE per month
Housing/Board/Fuel	NONE per month

Worker's total gross wage is \$1,214.79 per month.

Id.

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At the bottom of the notice was prominent text stating, "This order becomes final 60 days from the date it is communicated to you unless you do one of the following: file a written request for reconsideration with the Department or file a written appeal with the Board of Industrial Insurance Appeals." *Id.* Although Mr. Birrueta initially protested the order, he eventually dismissed his appeal.

After a number of time-loss payments to Mr. Birrueta, the department found him to be totally and permanently disabled in January 2011 and ordered him placed on a pension. In that connection, he completed a pension benefits questionnaire that asked among other matters about his marital status at the time of injury. He answered that he had been single.

In light of this corrected information, the department issued an order assessing an overpayment of \$100.86 for time-loss benefits paid between the time it received the pension questionnaire and the day before Mr. Birrueta was placed on pension, treating the time-loss benefits as having been overpaid due to an innocent misrepresentation as to marital status. In June 2011, the department issued an order changing Mr. Birrueta's marital status for compensation purposes from married to single, effective as of the time it received the pension questionnaire, again because of the innocent misrepresentation.

Mr. Birrueta appealed both orders to the Board of Industrial Insurance Appeals, arguing that the department lacked authority to assess an overpayment and to change his marital status because its September 2008 wage order was final and binding. An

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industrial appeals judge granted a department motion for summary judgment and affirmed both orders. Mr. Birrueta's petition for review was denied by the board, which adopted the industrial appeal judge's proposed decision as its final decision and order.

Mr. Birrueta appealed to the Franklin County Superior Court. Following trial, the court ruled that RCW 51.32.240 does not authorize the department to assess payments that are made pursuant to final adjudications as asserted overpayments, and the wage rate order establishing Mr. Birrueta's marital status was final. In its findings of fact and conclusions of law, the court adopted several of the board's findings but reversed its decision, concluding that the department lacked authority to issue the assessment and marital status change orders. The department appeals.

ANALYSIS

Plain Language Analysis

RCW 51.32.240 provides in part that

[w]henver any payment of benefits under this title is made because of clerical error, mistake of identity, innocent misrepresentation by or on behalf of the recipient thereof mistakenly acted upon, or any other circumstance of a similar nature, all not induced by willful misrepresentation, the recipient thereof shall repay it.

RCW 51.32.240(1)(a). Under this "innocent error provision" (a term we sometimes use as shorthand in referring to subparagraph (1)(a) hereafter), the department is allowed to recoup the overpayment from future payments. The provision limits the time within which the department may make claim for repayment to one year.

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Elsewhere, however, the statute provides that “[e]xcept as provided in subsections (3), (4), and (5) of [RCW 51.32.240], the department may only assess an overpayment of benefits because of adjudicator error when the order upon which the overpayment is based is not yet final as provided in RCW 51.52.050 and 51.52.060.” RCW 51.32.240(1)(b). Subsection (3) of the statute deals with a recipient’s obligation to repay temporary disability benefits if the department later rejects his or her claim. Subsection (4) deals with a recipient’s obligation to repay benefits that are paid pursuant to a department, board, or lower court determination that is reversed by a final decision on appeal. Subsection (5) deals with a recipient’s obligation to repay benefits that have been induced by a recipient’s “willful misrepresentation.” Notably, the statute does not say “except as provided in subsections (1)(a), (3), (4), and (5) . . . the department may only assess an overpayment . . . when the order upon which the overpayment is based is not yet final.”

The department’s position is that unlike subsections (3), (4), and (5) of RCW 51.32.240, the innocent error provision does not need to be excluded from the operation of subparagraph (1)(b) because the innocent errors it describes and “adjudicator error” are mutually exclusive. How to construe an overpayment “because of adjudicator error” proves to be at the heart of the parties’ dispute. Because the department contends that innocent error addressed by subparagraph (1)(a) and adjudicator error are mutually exclusive concepts, it argues that the department may always collect overpayments

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attributable to innocent error but may never collect overpayments attributable to adjudicator error. For his part, Mr. Birrueta contends that “adjudicator error” means any adjudication that squarely encompasses and resolves the matter at issue and is now contended to be wrong for any reason. While the department’s position has some surface appeal, it cannot withstand critical or historical analysis.

Chapter 51.52 RCW deals with industrial insurance appeals and “provides finality to decisions of the Department.” *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 169, 937 P.2d 565 (1997). RCW 51.52.050(1) states that all department orders “shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department . . . or an appeal is filed with the board of industrial insurance appeals.” Thus, “[o]nce the 60-day appeal period expires and the order becomes final, it cannot be appealed.” *Leuluaialii v. Dep't of Labor & Indus.*, 169 Wn. App. 672, 678, 279 P.3d 515 (2012) (citing *Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d 710, 717, 213 P.3d 591 (2009)). RCW 51.52.050(1) makes no reference to RCW 51.32.240.

As a limitation on setting aside final orders, “adjudicator error” is broadly defined by RCW 51.32.240; it “*includes* the failure to consider information in the claim file, failure to secure adequate information, or an error in judgment.” RCW 51.32.240(2)(b) (emphasis added). In construing a statute, the word “includes” is a term of enlargement. *Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349, 359, 20 P.3d 921 (2001).

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Elsewhere, the statute uses the parallel term "erroneous adjudication" in a context that clearly means erroneous for any reason:

Whenever any payment of benefits under this title has been made pursuant to an adjudication by the department or by order of the board or any court and timely appeal therefrom has been made where the final decision is that any such payment was made pursuant to an *erroneous adjudication*, the recipient thereof shall repay it.

RCW 51.32.240(4) (emphasis added). And by explicitly providing that the department can assess overpayments under subsection (5) following a final order, RCW

51.32.240(1)(b) treats a decision induced by a recipient's willful misrepresentation of facts as adjudicator error. If a decision induced by a recipient's willful representation is adjudicator error, then how can a decision induced by a recipient's innocent representation not be?

Because the same words used in the same statute should be interpreted alike, "includes" is a term of enlargement, and the common meaning of "adjudicator error" is any error by an adjudicator, "adjudicator error" is reasonably construed to include an adjudicator's clerical error, his or her mistake of identity, or his or her reliance on an innocent misrepresentation. There is no basis for the department's treatment of the concepts of adjudicator error and subsection (1)(a)'s categories of innocent error as mutually exclusive. As a result, RCW 51.32.240(1)(b) plainly provides that apart from temporary benefits advanced on a claim that is later denied, benefits paid pursuant to an order reversed on appeal, or benefits induced by a willful misrepresentation, "the

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department may only assess an overpayment of benefits because of adjudicator error”—
even innocent error—“when the order upon which the overpayment is based is not yet
final as provided in RCW 51.52.050 and 51.52.060.”

Legislative History

Legislative history further supports this plain reading of the statute.

In 1994, the Washington Supreme Court decided *Marley v. Department of Labor and Industries*, 125 Wn.2d 533, 886 P.2d 189, a seminal decision on the finality of the department's orders. The department had issued an order that Beverly Marley was not eligible for payments as a beneficiary following her husband's death, based on her admission that while her husband had been paid child support up to the time of his death, he and she had lived separately for over 10 years. *Id.* at 535. She did not appeal the agency's order, which therefore became final after 60 days. *Id.* at 536. She challenged it six years later on the grounds that it contained an error of law as to her eligibility.

As of 1994, RCW 51.32.240 was similar to its present form in providing for repayment to the department of benefits overpaid because of clerical error, mistake of identity, or innocent mistake; temporary benefits advanced on a claim that was later denied; and benefits paid pursuant to an order reversed on appeal. It was unlike the present statute in that benefits were required to be repaid if overpayment was induced by “fraud” and it made no mention of finality or adjudicator error. Most importantly for the issues in *Marley*, it included no provision under which a recipient could recover benefits

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that had been underpaid. Former RCW 51.32.240(1)-(4) (1991). Rather than rely on the statute, then, Ms. Marley relied on this court's decision in *Fairley v. Department of Labor and Industries*, 29 Wn. App. 477, 481, 627 P.2d 961 (1981), which held that a department's order misconstruing the Industrial Insurance Act, Title 51 RCW, was void and did not require that an appeal be taken.

Marley overruled *Fairley*, holding that “[a]n order from the Department is void only when the Department lacks personal or subject matter jurisdiction.” *Marley*, 125 Wn.2d at 542. It explained that

[e]ven assuming Mrs. Marley's argument has merit, she has only proved that the Department made an error, not that it ruled without jurisdiction. Whether right or wrong, the Department clearly had the authority to decide whether Mrs. Marley was living in a state of abandonment [as defined under the Act].

Id. at 543 (footnote omitted).

It was in response to the decision in *Marley* that legislators proposed the adoption of what became current subsection (2) of RCW 51.32.240 in 1999. As originally proposed, House Bill 1894 would have simply modified former RCW 51.32.240(1) to include underpayments as well as overpayments by providing, e.g., “Whenever any payment of benefits under this title is . . . withheld because of clerical error . . . the recipient thereof shall be entitled to benefits underpaid, or shall repay. . . .” H.B. 1894, at 1, 56th Leg., Reg. Sess. (Wash. 1999). The House Bill Analysis described the disparity under then-current law between the department's right to recover overpayments and a

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beneficiary's burden to timely appeal an underpayment, mentioned *Marley*, and summarized the proposed legislation as follows:

If industrial insurance benefits are withheld because of clerical error, mistaken identity, innocent misrepresentation, or other similar circumstances, the recipient is entitled to the benefits underpaid. The claim for these benefits must be made within one year of the underpayment or it is deemed waived.

H.B. ANALYSIS ON H.B. 1894, at 2, 56th Leg., Reg. Sess. (Wash. 1999). In its originally proposed form, the bill made no exception for adjudicator error.

The House Committee on Commerce & Labor took action on the bill on February 24 and 25, 1999. At the committee meeting on February 24, Douglas Connell, the assistant director of insurance services for the department, appeared and explained that based on the department's concerns with the way the bill was then written, the department had prepared and had circulated, that morning, a revised version, to "define some of the terms that we're dealing with" and "put some parameters around it." Hr'g on H.B. 1894 Before the H. Commerce and Labor Comm., 56th Leg., Reg. Sess. (Feb. 24, 1999) at 5 min., 37 sec. through 5 min., 50 sec., *available at* <http://www.digitalarchives.wa.gov>. He described the objective as being "so it is clear as to when the overpayment or underpayments can take place." Hr'g on H.B. 1894, *supra*, at 6 min. 12 sec. through 6 min., 18 sec. While Mr. Connell's explanation of the changes was extremely general, he provided the following answer to a question posed by Representative Conway:

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Q. Being around these worker comp benefits . . . time-loss benefits, and . . . I would assume this also would . . . Does this apply to the PPD awards as well? Is that . . .

A. The proposal that we have would apply only to the payment of temporary total disability or time-loss . . .

Q. Time-loss benefits.

Hr'g on H.B. 1894, *supra*, at 7 min., 22 sec. through 7 min., 46 sec.

The department's concerns appear to have been addressed by amendments introducing the "adjudicator error" limitation. As amended, what became Engrossed House Bill 1894 added a new section to the statute to address underpayments rather than incorporate provision for them in RCW 51.32.240(1). The new section largely paralleled RCW 51.32.240(1)'s provision for recovering overpayments but also included the following unique limitation now codified at RCW 51.32.240(2)(b):

The recipient may not seek an adjustment of benefits because of adjudicator error. "Adjudicator error" includes the failure to consider information in the claim file, failure to secure adequate information, or an error in judgment.

ENGROSSED H.B. 1894, at 2, 56th Leg., Reg. Sess. (Wash. 1999).

The limitation likely reflected the department's concern that the new section could open the door to an onslaught of requests for increased benefits from recipients alleging that some staff member, witness, or information provider once made a clerical error, mistake of identity, or innocent misrepresentation. The "adjudicator error" limitation placed an important limit on reopening department determinations.

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Finally, amendments to RCW 51.32.240 in 2004 added clarity to the relationship between adjudicator error and finality. Several amendments to the Industrial Insurance Act were made by Engrossed Substitute House Bill 3188, passed by the legislature in 2004. The two principal amendments to the overpayment and underpayment provisions of RCW 51.32.240 were to allow the department to recover overpayments induced by a recipient's willful misrepresentation rather than fraud, and to increase parity between the department's right to recover overpayments and a worker's right to recover underpayments. It did so by adding a limitation for adjudicator error to the department's rights under RCW 51.32.240(1).

Perhaps because it would make subsection (1) quite long, and perhaps to parallel subsection (2), the amendment to subsection (1) was broken into subparagraphs for the first time, including the adjudicator error limitation in new subparagraph (b). Contrary to the department's argument that subparagraphs (1)(a) and (1)(b) address different matters and that (1)(b)'s general limitation of overpayment recovery to nonfinal orders does not apply to (1)(a), the legislature's House Bill Report on Engrossed Substitute House Bill 3188 recognizes no distinction and characterizes the limitation to nonfinal orders as applying to innocent error. The House Bill Report's summary of the bill described the adjudicator error changes as follows:

If benefits are overpaid because of adjudicator error, the Department may only assess an overpayment when the order on which the overpayment is based is not yet final, unless the overpayment relates to an order rejecting

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the claim, results from a final appeal of a Department or Board of Industrial Appeals order, or has been induced by willful misrepresentation. If benefits fail to be paid because of adjudicator error, the claimant must address the adjustment by filing a written request for reconsideration or an appeal within the statutory sixty-day appeal period.

H.B. REP. ON ENGROSSED SUBSTITUTE H.B. 3188, at 4, 58th Leg., Reg. Sess., (Wash. 2004) (emphasis added).

This legislative history, like the plain language of RCW 51.32.240, demonstrates the legislature's intent that only nonfinal orders are subject to a claim that benefits were underpaid or overpaid as a result of clerical errors, mistake of identity, or innocent misrepresentation.

Board Decisions

We finally turn to decisions of the Board of Industrial Insurance Appeals brought to our attention by the parties, at least two of which conflict with our construction of the statute. This court will accord "deference to an agency interpretation of the law where the agency has specialized expertise in dealing with such issues." *City of Redmond v. Cent. Puget Sound Growth Mgmt. Hr'gs Bd.*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998); *Doty v. Town of S. Prairie*, 155 Wn.2d 527, 537, 120 P.3d 941 (2005) (a board's interpretation of the Industrial Insurance Act is not binding on this court, but "is entitled to great deference") (quoting *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991)). Nonetheless, this court is "not bound by an agency's interpretation of a statute." *Redmond*, 136 Wn.2d at 46. "The Department's interpretation of the [Industrial

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Insurance Act] is subject to de novo review.” *Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d at 715.

The board reached the opposite conclusion to our own in both *In re Veliz*, No. 11 20348, 2013 WL 3185978 (Wash. Bd. Indus. Ins. Appeals Mar. 4, 2013) and *In re Johnson*, No. 12 15248, 2013 WL 3636375 (Wash. Bd. Indus. Ins. Appeals April 11, 2013). The facts in both cases were materially identical to those presented here. In both cases, the department issued orders establishing the workers' compensation rate based on the workers' representations that they were married at the time of their injury. Upon later learning that the information about their marital status at the time of injury was incorrect, the department in both cases issued orders changing the workers' status to single for wage calculation purposes. Despite earlier entered wage determination orders that had become final, the board held in both cases that the department had authority under RCW 51.32.240(1) to change a worker's marital status that had been based on an innocent misrepresentation.²

In *Veliz*, the board stated that “[o]nce [a] misrepresentation has been established,

² One member of the board filed a dissent in *Veliz*. He disagreed that the department could use RCW 51.32.240 to avoid the res judicata effect of its wage order in light of the Washington Supreme Court's rulings in *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533 and *Kingery*, 132 Wn.2d 162 (plurality opinion). *Veliz*, 2013 WL 3185978, at *4.

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RCW 51.32.240(1) provides relief from the res judicata application of an otherwise final determination and allows the Department to recoup benefits that had been overpaid.”

Veliz, 2013 WL 3185978, at *2. That would be true if subsection (1) was all that the statute had to say on the subject. But RCW 51.32.240(2) limits the department’s right of recoupment to overpayments made under nonfinal orders, except as provided by RCW 51.32.240(3), (4), and (5). *Veliz* fails to address that limitation.

In *Johnson*, the board cited an earlier *Johnson* decision, *In re Teresa M. Johnson*, No. 853229, 1987 WL 61380 (Wash. Bd. Indus. Ins. Appeals Aug. 26, 1987), for its reasoning that “the overpayment statute would be rendered meaningless if the principle of res judicata prevented the Department from correcting an inaccurate rate of compensation after sixty days had elapsed.” *Lloyd D. Johnson*, 2013 WL 3636375, at *2. But in *Teresa M. Johnson*, the department had not yet adjudicated Ms. Johnson’s wage rate at the time it sought to recover overpayments, it had simply paid time-loss compensation on an unexplained basis that it later determined to be inaccurate. Unlike the order in this case, which laid out the basis on which the department would calculate Mr. Birrueta’s wage for compensation purposes, a mere payment order does not adjudicate the basis of the wage rate. In *Somsak v. Criton Technologies/Heath Tecna, Inc.*, 113 Wn. App. 84, 92, 52 P.3d 43 (2002), this court held that an unappealed department order is res judicata “as to the issues encompassed within the terms of the order, absent fraud.” It held that

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the factual basis for a wage rate is not encompassed within the terms of a payment order that does not disclose that factual basis.³

We agree that if the department could not recover overpayments made under nonfinal orders that did not adjudicate facts a recipient was required to appeal, then RCW 51.32.240(1) *would* be rendered meaningless. But because it is only final orders adjudicating the claimed error that are excluded from the right to recoup overpayments, subsection (1) is not rendered meaningless at all. The board's decision in *In re Anita Bordua*, No. 93 1851, 1994 WL 364993 (Wash. Bd. Indus. Ins. Appeals May 2, 1994) is also distinguishable as involving a nonfinal order that was legitimately subject to recoupment for overpayment.

While the board has expertise in dealing with workmen's compensation matters, its decisions in *Veliz* and *Lloyd D. Johnson* are not entitled to deference where they fail to consider RCW 51.32.240 in its entirety and fail to make a distinction between final orders adjudicating a matter, on the one hand, and nonfinal orders or orders that do not adjudicate that matter, on the other.

³ Notably, while rejecting Ms. Johnson's appeal because her wage rate had not been adjudicated by a final order, the board's decision observed, "Had the issue of the basis of the time-loss compensation rate been squarely before the Department in any of the orders issued prior to August 1985, there might have been some merit to Ms. Johnson's contention." *Johnson*, 1987 WL 61380, at *2.

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Attorney Fees

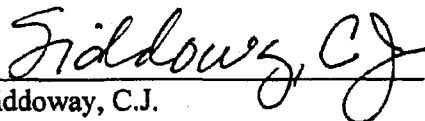
Mr. Birrueta requests attorney fees and costs under RAP 18.1 and RCW

51.52.130. RAP 18.1 permits recovery of reasonable attorney fees or expenses on review if applicable law grants that right. RCW 51.52.130 provides, in relevant part:

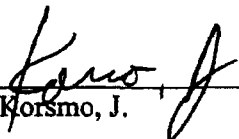
If, on appeal to the superior or appellate court from the decision and order of the board . . . a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court.

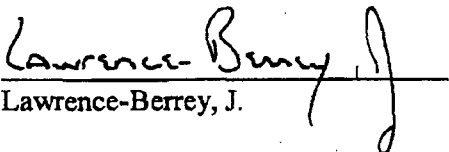
Since the department was the appealing party and Mr. Birrueta's right to relief is sustained, his request for attorney fees is granted, subject to compliance with RAP 18.1(d).

Affirmed.


Siddoway, C.J.

WE CONCUR:


Kiorsmo, J.


Lawrence-Berrey, J.

APPENDIX B

FILED
JULY 30, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

JOSÉ L. BIRRUETA,

Respondent,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Appellant.

No. 32210-6-III

ORDER DENYING MOTION
FOR RECONSIDERATION

THE COURT has considered Appellant's motion for reconsideration, and is of the opinion the motion should be denied. Therefore,

IT IS ORDERED, the motion for reconsideration of this court's decision of July 9, 2015, is hereby denied.

DATED: July 30, 2015

PANEL: Judges Siddoway, Korsmo, Lawrence-Berrey

FOR THE COURT:


LAUREL H. SIDDOWAY, Chief Judge

APPENDIX C

RCW 51.32.240

Erroneous payments — Payments induced by willful misrepresentation — Adjustment for self-insurer's failure to pay benefits — Recoupment of overpayments by self-insurer — Penalty — Appeal — Enforcement of orders.

(1)(a) Whenever any payment of benefits under this title is made because of clerical error, mistake of identity, innocent misrepresentation by or on behalf of the recipient thereof mistakenly acted upon, or any other circumstance of a similar nature, all not induced by willful misrepresentation, the recipient thereof shall repay it and recoupment may be made from any future payments due to the recipient on any claim with the state fund or self-insurer, as the case may be. The department or self-insurer, as the case may be, must make claim for such repayment or recoupment within one year of the making of any such payment or it will be deemed any claim therefor has been waived.

(b) Except as provided in subsections (3), (4), and (5) of this section, the department may only assess an overpayment of benefits because of adjudicator error when the order upon which the overpayment is based is not yet final as provided in RCW 51.52.050 and 51.52.060. "Adjudicator error" includes the failure to consider information in the claim file, failure to secure adequate information, or an error in judgment.

(c) The director, pursuant to rules adopted in accordance with the procedures provided in the administrative procedure act, chapter 34.05 RCW, may exercise his or her discretion to waive, in whole or in part, the amount of any such timely claim where the recovery would be against equity and good conscience.

(2) Whenever the department or self-insurer fails to pay benefits because of clerical error, mistake of identity, or innocent misrepresentation, all not induced by recipient willful misrepresentation, the recipient may request an adjustment of benefits to be paid from the state fund or by the self-insurer, as the case may be, subject to the following:

(a) The recipient must request an adjustment in benefits within one year from the date of the incorrect payment or it will be deemed any claim therefore has been waived.

(b) The recipient may not seek an adjustment of benefits because of adjudicator error. Adjustments due to adjudicator error are addressed by the filing of a written request for reconsideration with the department of labor and industries or an appeal with the board of industrial insurance appeals within sixty days from the date the order is communicated as provided in RCW 51.52.050. "Adjudicator error" includes the failure to consider information in the claim file, failure to secure adequate information, or an error in judgment.

(3) Whenever the department issues an order rejecting a claim for benefits paid pursuant to RCW 51.32.190 or 51.32.210, after payment for temporary disability benefits has been paid by a self-insurer pursuant to RCW 51.32.190(3) or by the department pursuant to RCW 51.32.210, the recipient thereof shall repay such benefits and recoupment may be made from any future payments due to the recipient on any claim with the state fund or self-insurer, as the case may be. The director, under rules adopted in accordance with the procedures provided in the administrative procedure act, chapter 34.05 RCW, may exercise discretion to waive, in whole or in part, the amount of any such payments where the recovery would be against equity and good conscience.

(4) Whenever any payment of benefits under this title has been made pursuant to an adjudication by the department or by order of the board or any court and timely appeal therefrom has been made where the final decision is that any such payment was made pursuant to an erroneous adjudication, the recipient thereof shall repay it and recoupment may be made from any future payments due to the recipient on any claim whether state fund or self-insured.

(a) The director, pursuant to rules adopted in accordance with the procedures provided in the administrative procedure act, chapter 34.05 RCW, may exercise discretion to waive, in whole or in part, the amount of any such payments where the recovery would be against equity and good conscience. However, if the director waives in whole or in part any such payments due a self-insurer, the self-insurer shall be reimbursed the amount waived from the self-insured employer overpayment reimbursement fund.

(b) The department shall collect information regarding self-insured claim overpayments resulting from final decisions of the board and the

courts, and recoup such overpayments on behalf of the self-insurer from any open, new, or reopened state fund or self-insured claims. The department shall forward the amounts collected to the self-insurer to whom the payment is owed. The department may provide information as needed to any self-insurers from whom payments may be collected on behalf of the department or another self-insurer. Notwithstanding RCW 51.32.040, any self-insurer requested by the department to forward payments to the department pursuant to this subsection shall pay the department directly. The department shall credit the amounts recovered to the appropriate fund, or forward amounts collected to the appropriate self-insurer, as the case may be.

(c) If a self-insurer is not fully reimbursed within twenty-four months of the first attempt at recovery through the collection process pursuant to this subsection and by means of processes pursuant to subsection (6) of this section, the self-insurer shall be reimbursed for the remainder of the amount due from the self-insured employer overpayment reimbursement fund.

(d) For purposes of this subsection, "recipient" does not include health service providers whose treatment or services were authorized by the department or self-insurer.

(e) The department or self-insurer shall first attempt recovery of overpayments for health services from any entity that provided health insurance to the worker to the extent that the health insurance entity would have provided health insurance benefits but for workers' compensation coverage.

(5)(a) Whenever any payment of benefits under this title has been induced by willful misrepresentation the recipient thereof shall repay any such payment together with a penalty of fifty percent of the total of any such payments and the amount of such total sum may be recouped from any future payments due to the recipient on any claim with the state fund or self-insurer against whom the willful misrepresentation was committed, as the case may be, and the amount of such penalty shall be placed in the supplemental pension fund. Such repayment or recoupment must be demanded or ordered within three years of the discovery of the willful misrepresentation.

(b) For purposes of this subsection (5), it is willful misrepresentation

for a person to obtain payments or other benefits under this title in an amount greater than that to which the person otherwise would be entitled. Willful misrepresentation includes:

(i) Willful false statement; or

(ii) Willful misrepresentation, omission, or concealment of any material fact.

(c) For purposes of this subsection (5), "willful" means a conscious or deliberate false statement, misrepresentation, omission, or concealment of a material fact with the specific intent of obtaining, continuing, or increasing benefits under this title.

(d) For purposes of this subsection (5), failure to disclose a work-type activity must be willful in order for a misrepresentation to have occurred.

(e) For purposes of this subsection (5), a material fact is one which would result in additional, increased, or continued benefits, including but not limited to facts about physical restrictions, or work-type activities which either result in wages or income or would be reasonably expected to do so. Wages or income include the receipt of any goods or services. For a work-type activity to be reasonably expected to result in wages or income, a pattern of repeated activity must exist. For those activities that would reasonably be expected to result in wages or produce income, but for which actual wage or income information cannot be reasonably determined, the department shall impute wages pursuant to RCW 51.08.178(4).

(6) The worker, beneficiary, or other person affected thereby shall have the right to contest an order assessing an overpayment pursuant to this section in the same manner and to the same extent as provided under RCW 51.52.050 and 51.52.060. In the event such an order becomes final under chapter 51.52 RCW and notwithstanding the provisions of subsections (1) through (5) of this section, the director, director's designee, or self-insurer may file with the clerk in any county within the state a warrant in the amount of the sum representing the unpaid overpayment and/or penalty plus interest accruing from the date the order became final. The clerk of the county in which the warrant is filed shall immediately designate a superior court cause number for such warrant and the clerk shall cause to be entered in the judgment docket under the superior court

cause number assigned to the warrant, the name of the worker, beneficiary, or other person mentioned in the warrant, the amount of the unpaid overpayment and/or penalty plus interest accrued, and the date the warrant was filed. The amount of the warrant as docketed shall become a lien upon the title to and interest in all real and personal property of the worker, beneficiary, or other person against whom the warrant is issued, the same as a judgment in a civil case docketed in the office of such clerk. The sheriff shall then proceed in the same manner and with like effect as prescribed by law with respect to execution or other process issued against rights or property upon judgment in the superior court. Such warrant so docketed shall be sufficient to support the issuance of writs of garnishment in favor of the department or self-insurer in the manner provided by law in the case of judgment, wholly or partially unsatisfied. The clerk of the court shall be entitled to a filing fee under RCW 36.18.012(10), which shall be added to the amount of the warrant. A copy of such warrant shall be mailed to the worker, beneficiary, or other person within three days of filing with the clerk.

The director, director's designee, or self-insurer may issue to any person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state, a notice to withhold and deliver property of any kind if there is reason to believe that there is in the possession of such person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state, property that is due, owing, or belonging to any worker, beneficiary, or other person upon whom a warrant has been served for payments due the department or self-insurer. The notice and order to withhold and deliver shall be served by a method for which receipt can be confirmed or tracked accompanied by an affidavit of service by mailing or served by the sheriff of the county, or by the sheriff's deputy, or by any authorized representative of the director, director's designee, or self-insurer. Any person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state upon whom service has been made shall answer the notice within twenty days exclusive of the day of service, under oath and in writing, and shall make true answers to the matters inquired or in the notice and order to withhold and deliver. In the event there is in the possession of the party named and served with such notice and order, any property that may be subject to the claim of the department or self-insurer, such property shall be delivered forthwith to the director, the director's authorized representative, or self-insurer upon demand. If the party served and named in the notice and order fails to

answer the notice and order within the time prescribed in this section, the court may, after the time to answer such order has expired, render judgment by default against the party named in the notice for the full amount, plus costs, claimed by the director, director's designee, or self-insurer in the notice. In the event that a notice to withhold and deliver is served upon an employer and the property found to be subject thereto is wages, the employer may assert in the answer all exemptions provided for by chapter 6.27 RCW to which the wage earner may be entitled.

This subsection shall only apply to orders assessing an overpayment which are issued on or after July 28, 1991: PROVIDED, That this subsection shall apply retroactively to all orders assessing an overpayment resulting from fraud, civil or criminal.

(7) Orders assessing an overpayment which are issued on or after July 28, 1991, shall include a conspicuous notice of the collection methods available to the department or self-insurer.

[2011 c 290 § 6; 2008 c 280 § 2; 2004 c 243 § 7; 2001 c 146 § 10. Prior: 1999 c 396 § 1; 1999 c 119 § 1; 1991 c 88 § 1; 1986 c 54 § 1; 1975 1st ex.s. c 224 § 13.]

No. _____

**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND
INDUSTRIES,

Petitioner,

v.

JOSE L. BIRRUETA,

Respondent.

CERTIFICATE OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department of Labor & Industries Petition for Review with Appendices and this Certificate Service in the below-described manner:

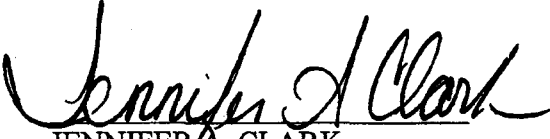
via E-filing to:

Renee S. Townsley
Administrator/Clerk
Court of Appeals, Division III
500 N. Cedar Street
Spokane, WA 99201

via First Class United States Mail, Postage Prepaid to:

Michael Connell
Smart Connell Childers & Verhulp
PO Box 228
Yakima, WA 98907-0228

DATED this 27th day of August, 2015, Seattle, Washington.


JENNIFER A. CLARK
Legal Assistant