No. 92215-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES OF THE

STATE OF WASHINGTON,

Petitioner,

v.

JOSE L. BIRRUETA,

Respondent.

RESPONDENT'S ANSWER TO MEMORANDUM OF AMICI CURIAE

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I. ARGUMENT

The AWB and WSIA's memorandum relies upon an incomplete and inaccurate statutory construction analysis regarding RCW 51.32.240. Their argument relies on an assumption that RCW 51.32.240(1)(a) and (1)(b) are entirely separate provisions without any interplay. It also ignores the existence of the overarching finality provisions RCW 51.52.050/060When the interplay between RCW 51.32.240(1)(a) and (1)(b) and the finality provisions of RCW 51.52.050/060 are considered the correctness of the court of appeals decision is clear.

A. FINALITY OF ORDERS UNDER RCW 51.52.050/060

RCW 51.52.050/060 provides that if any Department order is not protested or appealed within 60 days of communication the order "shall" become final and binding on all parties upon expiration of the 60 day period. The statute provides that the finality provisions apply to "any order, decision, or award," and does not provide for any exceptions to the finality provision for any type of order, decision or award that is not protested or appealed. *Id.*

This Court has addressed the fact that the finality provisions of RCW 51.52.050/060 apply to all Department orders without exception in the case of Marley v. Dept. of Labor & Indus., 125 Wn.2d 533, 542 (1994). The Court explained that "the doctrine of claim preclusion applies to a final

judgment by the Department as it would to an un-appealed order of a trial court. An order of judgment resting upon a finding, or findings, of fact becomes a complete and final adjudication, binding on both the department and the claimant unless such action. . . . is set aside upon appeal or is vacated for fraud or something of like nature." *Id.* pg. 537-38 (emphasis added). The court continued and noted that "[a]n order from the Department is void only when the Department lacks personal or subject matter jurisdiction." *Id.* (emphasis added). The court further explained that even if the Department order is based on a clear error of law it becomes a final adjudication of the issue involved if the order is not timely protested or appealed. *Id.* pg. 538.

B. STATUTORY CONSTRUCTION

1. Legislative Actions in Amending RCW 51.32.240 in 2004

AWB & WSIA argue that subsections (1)(a) and (1)(b) are completely separate provisions with no interplay between them. However, this ignores the legislative history regarding the creation of those subsections. In 2004, the legislature made the amendments to RCW 51.32.240, and added language about adjudicator error. The legislature took what had previously been RCW 51.32.240(1) (a single paragraph without any subparts) and divided it into subparagraphs and also added language about adjudicator error. The legislature took the language about

overpayments because of innocent misrepresentations, clerical errors, etc. contained in paragraph 1 of the earlier version and put that language into subparagraph (1)(a) unchanged in any relevant way in the 2004 version.[1] The legislature took the remainder of the earlier version of paragraph 1, which dealt with the authority of the director of the Department to waive overpayments, and put it unchanged into subparagraph 1(c) in the 2004 version. The legislature also created subparagraph 1(b) in 2004 and added the language regarding adjudicator error.

AWB & WSIA's contention is that subparagraph 1(b) contains a separate standalone class of payments called "adjudicator error" that is unrelated in any way to the classes of payments in subparagraph 1(a) such as those caused by innocent misrepresentation. However, such an analysis is inconsistent with the fact that the legislature placed the language regarding both innocent misrepresentation and adjudicator error within separate but equal level subparagraphs of paragraph 1 in the 2004 version. Had the legislature intended adjudicator error in subparagraph 1(b) to be an entirely separate category without any interplay with innocent misrepresentation or the other categories in subparagraph 1(a) then the legislature would have put adjudicator error in a separate numbered

[1] The only change in the language was the changing of the work "fraud" to the phrase "willful misrepresentation," but that change has no relevance to the issues in this case.

paragraph, such as they did with willful misrepresentation, in (5), rather than placing adjudicator error in subparagraph 1(b), which is a subparagraph on the same paragraph level as paragraph 1(a) in which it made note of classes such as clerical error and innocent misrepresentation. The legislature did not put "adjudicator error" in a separate paragraph because it did not intend to create a completely separate class of payment/overpayment that had no interplay with the classes noted in 1(a).

2. Examine the Whole Statute & All Statutes Relating to the Same Subject

AWB & WSIA's argument ignores the fundamental principle of statutory construction that when construing a statute the court examines the entire statute and all statutes relating to the same subject matter. State v. Monfort, 179 Wn.2d 122, 130 (2013). RCW 51.52.050/060 both provide that Department orders are final and binding if not protested or appealed with 60 days of communication. There is nothing in either of those statutes that provides any exceptions to the finality provisions in them. Nor, is there even a hint that there may be some exceptions listed elsewhere in RCW 51. Rather they establish a universal finality of all Department orders that are not protested or appealed. Any exception to those finality provisions would therefore have to be explicitly stated, and could not simply be implied.

Looking at RCW 51.32.240 itself as a whole is also instructive. Subparagraph 1(a) does not contain any language indicating that overpayments resulting from innocent misrepresentation, or any other type of overpayment listed in subsection 1(a) for that matter, are an exception to the finality provisions of RCW 51.52.050/060. There is therefore nothing in subsection 1(a) which would support an exception from the generally applicable finality provisions of RCW 51.52.050/060.

Conversely, subparagraph 1(b) does provide a specific exception from the finality provisions of RCW 51.52.050/060. However, the exception is not for overpayments resulting from innocent misrepresentations or any other type of overpayment listed in subparagraph 1(a) which have become embodied in Department orders which are final and binding. Subsection 1(b) states that, "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 with the overpayment is based is not yet final as provided in RCW 51.52.050 and 51.52.060." (emphasis added). RCW 51.32.240(1)(b) only excepts from the finality provisions of RCW 51.52.050/060 overpayments created because of the specific reasons listed in (3), (4), and (5) of RCW 51.32.240. These types of payments are: 1) payments made in a claim which is ultimately rejected as a claim not allowable under RCW 51; 2)

payments made pursuant to an adjudication by the Department or by Board order which is later determined to be incorrect after a timely protest of appeal of the payment by a party; or 3) payments induced by willful misrepresentation. Of those three types of overpayments only those in paragraph (5) would involve situations in which a final and binding order could have been issued.

The legislature has therefore explicitly and expressly limited the exceptions to the finality provisions of RCW 51.52.050/060 to a limited number of situations, and overpayments created by innocent misrepresentation, or any other type listed in subsection 1(a) are not included in the listed exceptions to the finality provisions. This Court has held that in statutes containing categories "the expression of one is the exclusion of the other. 'Legislative inclusion of certain items in a category implies that other items not in that category are intended to be excluded.'" Landmark v. Development, Inc. v. City of Roy, 138 Wn.2d 561, 571 (1999) (citations omitted). The exclusion of overpayments resulting from innocent misrepresentation or other reasons listed in subsection 1(a) from the list of causes for overpayments that are excepted from finality provisions of RCW 51.52.050/060 means that it was the intention of the legislature to not include overpayments caused by innocent misrepresentation in the types of overpayments excepted from the finality provisions of RCW 51.52.050/060

when those overpayment are the result of an adjudication made by the Department.

Further, the fact that the legislature referenced subsections (3), (4), and (5) of RCW 51.32.240 in connection with adjudicator error and the finality provisions of RCW 51.52.050/060 in subsection (1)(b) of RCW 51.32.240 reaffirms what was noted above about subparagraph 1(b) not creating a separate standalone class that is completely separate from any other class of payment or overpayment listed in other subsections of RCW 51.32.240. Rather, it reaffirms that the generally applicable finality provisions of RCW 51.52.050/060 apply in all classes of overpayments in RCW 51.32.240, except those under (3), (4), and (5) which were specifically listed as exceptions in subsection 1(b).

When the Department issued an order establishing Mr. Birrueta's wage rate they made an adjudicative decision, and any error in the order became adjudicator error, and the Department order underlying that overpayment is final and binding pursuant to RCW 51.52.050/060. Consequently, by the terms of RCW 51.32.240 (1)(a) & (b) the Department is without authority to change Mr. Birrueta's marital status and is without authority to issue an overpayment resulting from that innocent misrepresentation since the underlying order is final and binding.

3. The Court of Appeals Decision Does Not Render RCW 51.32.240(1)(a) Meaningless

AWB & WSIA argue that the court of appeals decision renders RCW 51.32.240(1)(a) meaningless, and undermines public policy. This is an argument without any real basis. The statute would continue to have the same meaning it has always had, and would continue to allow the Department to recover overpayments not the result of an adjudicative decision encompassed in a final and binding Department order. To the contrary, to interpret the statute as AWB & WSIA asks would render RCW 51.32.240(1)(b) and RCW 51.52.050/060 meaningless.

C. The Matthews Case is Distinguishable From the Case at Bar

Matthews v. Department of Labor & Industries, 171 Wn. App. 477, 482-84 (2012) is distinguishable from the case at bar. First, it involved mainly a question jurisdiction. The Department had assessed an overpayment against Mr. Matthews alleging that she had engaged in willful misrepresentation under RCW 51.32.240(5) because she had continue to receive time loss compensation payments while having returned to work for a period of time. Matthews v. Department of Labor & Industries, 171 Wn. App. 477. The Board of Industrial Insurance Appeals [the Board] concluded that the Department had not met its burden of showing that Ms. Matthews had engaged in willful misrepresentation, but concluded that

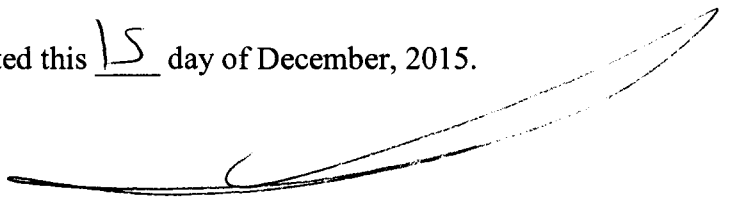
there was an overpayment since the overpayment had been caused by an innocent misrepresentation of Ms. Matthews. *Id.* pg. 489-493. Ms. Matthews argued that the Board was without jurisdiction to address the issue of innocent misrepresentation under RCW 51.32.240(1)(a) since the Department order on appeal had only addressed the issue of willful misrepresentation under subsection (5). The court of appeals upheld the decision of the Board and the Superior Court holding that there was jurisdiction to address the issue of innocent misrepresentation.

Second, while the court held that the Department could recover the overpayment from Ms. Matthews, the decision contains no discussion, analysis or even reference to the provisions of RCW 51.32.240(1)(b), or RCW 51.52.050/060. Nor, was there any discussion of the issue of finality of Department orders. One reading the decision is unable to discern whether or not the issue of finality of the orders in which the time loss payments were made was even an issue before the court and considered by the court since it is not addressed at all, let alone in a substantive way. As a result, the *Matthews* decision is distinguishable from the case at bar because the court did not address the question which is at the core of the case at bar, which is the finality of Department orders.

II. CONCLUSION

The Department is without authority to change a final and binding wage rate order when the order establishing that wage rate is final and binding under RCW 51.52.050/060, and they are therefore without authority to issue the order they did in Mr. Birrueta's case. The petition for review should be denied.

Respectfully submitted this 15 day of December, 2015.



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DEPARTMENT OF LABOR & INDUSTRIES, Petitioner, vs. JOSE BIRRUETA Respondent	)	**CERTIFICATE OF SERVICE**

STATE OF WASHINGTON)
) ss.
County of Yakima)

I, Susan Little, do hereby certify that I am an employee of Michael V. Connell, attorney for the Respondent. That I am a citizen of the United States and competent to be a witness herein. That on the 15th day of December, 2015, I sent the Respondent's Answer to Memorandum of Amici Curiae, via United States Mail at Kennewick, Washington, first class postage prepaid, or in the manner otherwise indicated below, addressed as follows:

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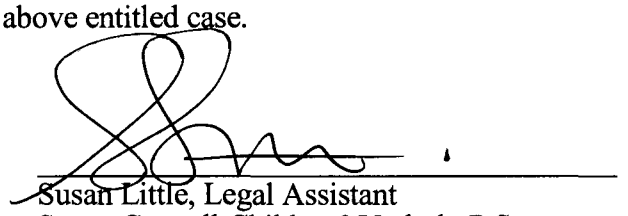
In an envelope containing the true and correct copy of the following documents: Respondent's Answer to Memorandum of Amici Curiae and Certificate of Service in the above entitled case.



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