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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 330940 & 331431

**COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON**

Department of Labor and Industries

Of the State of Washington,

Respondent,

v.

Blanca Ortiz, et al,

Appellant.

APPELLANT'S BRIEF

Jeffrey Schwab,
WSBA No. 24702

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COMES NOW, the appellant, BLANCA ORTIZ, by and through her attorneys of record, CALBOM & SCHWWAB, P.S.C., per JEFFREY SCHWAB, and files this brief of Appellant.

A. ASSIGNMENT OF ERROR

The Appellant seeks review of an order of Superior Court issued in Benton County on January 7, 2015. The order of the Superior Court overturned a decision of the Board of Industrial Insurance Appeals. The Board of Industrial Insurance Appeals had found that the Department was obligated to repay the self-insured employer \$237,149.28 as an overpayment of time loss compensation after having placed Ms. Ortiz on permanent total disability, or pension, and thereafter grant second injury fund relief to the employer. The Department appealed to the Superior Court of Benton County.

The Superior Court reversed the Board of Industrial Insurance Appeals' determination and decreed that the employer, Universal Frozen Foods, was in a better position to discover the overpayment. Based upon this finding, the Superior Court ruled that Universal Frozen Foods should be the party to collect the overpayment from the injured worker, Ms. Ortiz.

The Appellant believes that the Superior Court erred when it concluded that the Department is not the proper party to repay Universal Frozen Foods for any overpayment created from Ms. Ortiz's simultaneous receipt of temporary total disability payments, or time loss compensation, and permanent total disability payments, or pension.

B. STATEMENT OF THE CASE

The Appellant, Blanca Ortiz, was injured in the course of employment for Universal Frozen Foods on May 13, 1988. Her claim was allowed and ultimately closed on August 3, 2010 without further award for time loss or permanent partial disability.

On May 12, 2010 the Department issued an order which terminated time loss and closed the claim. Ms. Ortiz timely protested that order, which was affirmed by the Department. That order, dated August 3, 2010, was appealed by Ms. Ortiz to the Board of Industrial Insurance Appeals. Ms. Ortiz did not receive payment for time loss compensation, temporary total disability, after May 2, 2010.

The appeal to the Department's order of August 3, 2010 was granted and the Department, through the office of the Attorney General, did not participate in the proceedings to defend its order. On June 6, 2011, the Board entered an Order on Agreement of Parties with factual

stipulations which placed Ms. Ortiz on permanent total disability, pension, effective October 1, 2002 due to the combined effects of preexisting mental health impairment with physical and mental health impairments proximately caused by the industrial injury.

On July 6, 2011, the Department issued an order giving effect to the Board Order on Agreement of Parties. Thereafter, on July 7, 2011, the Department issued an order finding that the employer was entitled to Second Injury Fund Relief.

The employer submitted a request for an overpayment order to the Department on February 14, 2012. The Department responded with an overpayment order on March 14, 2012 indicating it could only go back one year from the date of the employer's request for recovery of any amount of duplicated benefits between temporary total disability and permanent total disability. The employer time appealed the Department's order.

Ms. Ortiz has aligned herself with the employer's right to recovery of any amount of double recovery to which the employer would be legally entitled. Ms. Ortiz has always recognized that she is not entitled to a windfall of combined temporary total disability and permanent total disability for the same period. Instead, Ms. Ortiz simply has asked

throughout these appeals that the employer recover the amount to which they are legally entitled and that such recovery be made from the Department within the limits of their legal authority, and that she not be obligated beyond that for which there is legal entitlement. In fact, Ms. Ortiz's pension payments have been withheld by the Department for the purpose of making payment to the employer for more than a year, without benefit of an order from the Department authorizing the withholding of the entirety of each pension check. Yet, she has not complained, understanding the pendency of the appeal process, in the absence of an order specifying the withholding.

On March 5, 2014, the Department issued an order regarding the overpayment finding that the overpayment was comprised of both a double recovery and a finding for a portion of the overpayment value that Ms. Ortiz was able to work. This order is now on appeal with the Board of Industrial Insurance Appeals as it appears that the overpayment value was miscalculated because there was never a finding that Ms. Ortiz was able to work. While this order is not before this Court, the value of the overpayment is and it appears that the value of the overpayment of \$237,149.28 was miscalculated and the actual value is substantially less.

Because Ms. Ortiz is aligned with the employer insofar as she does not dispute the fact that for a period of time she received payment for both temporary total disability and permanent total disability, she does not argue against the employer's right to collect for such overpayment, within the limits allowed under the law.

Ms. Ortiz does argue that the Department is the party responsible for repayment, that there is no authority for a civil action against her by the employer outside the parameters of the Industrial Insurance Act, and that the Department has the authority and the means to repay the employer beyond recovery from her pension payments alone.

C. SUMMARY OF ARGUMENT

Ms. Ortiz maintains that recovery of overpayments not received through willful misrepresentation, and not created by receipt of Social Security benefits, are controlled by RCW 51.32.240. Because the overpayment was created with the collaborative Order on Agreement of Parties, willful misrepresentation is not at issue. Because the order on appeal directs a finding of overpayment based upon combined time loss and pension, it is patent that it is not created by the receipt of Social Security benefits. Therefore, RCW 51.32.240 is controlling and both the employer, and Ms. Ortiz can obtain relief therefrom.

D. ARGUMENT

Let us begin with a reading of the statute. RCW 51.32.240

provide, in relevant part:

“(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 therefore has been waived.

...(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.

...(4)(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.

As we begin the process of reviewing the length, and breadth of RCW 51.32.240, we would take a moment to remind the court that by statute and case law, Title 51 is to be liberally construed in favor of the injured worker.

RCW 51.12.010 states:

“This title shall be liberally construed for the purpose of reducing to a minimum the suffering **and economic loss** arising from injuries and/or death occurring in the course of employment.” (*Emphasis Added*)

In the legion of cases wherein there has been an attempt to interpret terms or provisions of the act, the courts have repeatedly stated that:

“The guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered employees injured in their employment with doubts resolved in favor of the worker. *See Michaels v. CH2M Hill,*

Inc., 171 Wn.2d 587, 257 P.3d 532 (2011).
See also *Cockle v. Dep't of Labor & Indus.*,
142 Wn.3d 801, 16 P.3d 583 (2001);
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624.”

In the case *Glacier NW Inc. v. Walker*, 151 Wash. App. 389, 212 P.3d 587 (2009), the court staid that whenever there is a need to interpret the Industrial Insurance Act, the court must resolve all doubts in the worker’s favor.

Similarly, in the case of *Harry v. Buse Timber & Sales Inc.*, 166 Wn.2d p. 1, 201, P.3d 1011 (2009), the court said that any doubts and ambiguities in the language of the Industrial Insurance Act must be resolved in favor of the injured worker in order to minimize the suffering and economic loss that may result from work related injuries.

In *Lewis v. Simpson Timber*, 145 Wash. App. 302, 189 P.3d 178 (2008), published with some modifications at 144 Wash. App. 1028, the court states that all doubts about the meaning of the Industrial Insurance Act must be resolved in favor of workers.

Courts have further stated that where reasonable minds can differ over the meaning of the Industrial Insurance Act's provisions, the court must resolve all doubts in the injured worker's favor. *See Tomlinson v. Puget Sound Freight Lines Inc.*, 140 Wash. App. 845, 166 P.3d, 1276 (2007) review granted 163 Wn.2d 1039, 187 P.3d 271, affirmed 166 Wn.2d 105, 206 P.3d 657.

Furthermore, where there is a question of legislative intent, the courts have ruled that the plain language of the statute is the foremost source for understanding the legislature's intent and that no part of a statute should be interpreted such that it would render any other part meaningless. *See Oestreich v. Department of Labor and Industries*, 64 Wn.App. 165, 822 P.2d 1264 (1992), *citing Stone v. Chelan Cy. Sheriff's Dept.*, 110 Wash.2d 806, 810, 756 P.2d 736 (1988).

Here the Superior Court felt that the burden of the overpayment falls directly and exclusively to the injured worker and that the employer's only recourse would be to recover any overpayment in a civil action directly against the injured worker, Ms. Ortiz.

Ms. Ortiz argues with the employer to the extent the employer seeks repayment of any overpayment amount not induced by willful misrepresentation from the Department. RCW 51.32.240 is silent as to

whether a self-insured employer, not fully compensated for an overpayment recovery, make seek the balance of such recovery in a civil claim against the injured worker. Instead, the statute clearly states three components important to Ms. Ortiz: first, that the recovery “may” be taken from the benefits payable to Ms. Ortiz from pension benefits; second, that the Department has a time limit of twenty-four months to recover the full amount of the overpayment from the injured worker, no more; and third, that any balance remaining on the overpayment amount to the self-insurer “shall” be paid “from the self-insured employer overpayment reimbursement fund.”

The use of the term “may” earlier in the statute makes sense when other parts of the statute are considered which give authority to the Director of the Department to waive collection of the overpayment when doing so would be “against equity and good conscience”. RCW 51.32.240(4)(a). In this case, the Director has not exercised that authority, but this section explains why it is not mandatory that the recovery be made from claimant payments, for doing so would eviscerate the authority of the Director to grant equitable relief to an injured worker.

But what is clear is that where this authority is not exercised by the Director, the Department is limited to collecting the overpayment

from the injured worker for no more than 24 months, no matter the amount of the overpayment. This is mandatory language.

What is also mandatory is that if the overpayment has not been fully reimbursed from the injured worker's withheld benefits, then the Department must repay the balance, not from the injured worker's future benefits after the 24 month period, but the balance must be paid from the self-insure employer overpayment reimbursement fund. This is the clear intention of the legislature, clear because the language is unambiguous.

Finally, whether the amount of the claim for the entire amount of the overlapping benefits resulting in an overpayment is in any part waived by the one year time limit is for this Court to decide. There has been another order issued that is not part of this appeal that may more appropriately deal with that question as it purports to establish the amount based upon terms which were never agreed to as between the employer and Ms. Ortiz; namely, that for part of the overpayment she was able to work. As previously stated, Ms. Ortiz has never opposed the employer's right to obtain redress for any overpayment to which the employer is legally entitled, so long as it is obtained under the appropriate statute. The claimant would oppose any overpayment amount which does not conform with the proper calculation as authorized by

statute. This is part of the argument between the employer and the Department under this appeal, but it is also part of the problem with the order not part of this appeal that is currently before the Board. Ms. Ortiz only argues for statutory conformity when the calculation is made.

Finally, the only means of obtaining satisfaction for the employer is under RCW 51.32.240. That is, an overpayment can only be calculated based upon this statute. Failure to make a timely claim for overpayment results in waiver of collection of a dual recovery. RCW 51.32.240(1). Similarly, if a timely claim for an overpayment is made, then redress is made possible only through either full repayment by the injured worker over twenty-four months, or repayment from the self-insured employer overpayment reimbursement fund. There is no statutory authority under the Industrial Insurance Act for an overpayment waived under this statute to be recoverable through a private civil action as Superior Court suggested. This would result in self-insured employers facing the likelihood of not recovering overpayments against judgment proof injured people who by definition are prevented from working and are receiving permanent total disability, pension, payments. This seems an especially onerous outcome in cases, such as this, where the injured

worker has cooperated with the employer, and with the Department, to ensure that the most fair outcome is achieved.

E. CONCLUSION

The Board of Industrial Insurance Appeals has determined that the Department should reimburse the employer for the amount of the overpayment. Ms. Ortiz agrees with the Board. The correct amount is in dispute under a separate order not before this Court, but she agrees with the Board's ruling on this point.

Ms. Ortiz also argues that the Department is limited to a recovery period not to exceed 24 months. Ms. Ortiz has not received pension payments since the overpayment order was issued. To date, she still has not received pension payments, even in the absence of an order from the Department specifically describing the overpayment recovery from her pension payments. In other words, she has cooperated with both the employer and with the Department to do all she can to facilitate a fair outcome to all parties.

Finally, Ms. Ortiz argues that the period of recovery is statutorily limited to a period not to exceed twenty-four months, after which, her pension payments should resume. She argues with the employer that the employer should receive reimbursement of the statutorily allowed

overpayment amount and that the balance of the recovery should be obtained by the employer from the Department's self-insured overpayment reimbursement fund.

We ask the Court of Appeals to reverse the Superior Court and remand this matter to the Department of Labor and Industries with an order that says they shall, under RCW 51.32.240, reimburse the overpayment to the employer from the combination of pension payments to Ms. Ortiz for a twenty-four month period and to thereafter reimburse the balance from the self-insured overpayment reimbursement fund.

Respectfully submitted this 13th day of May, 2015.

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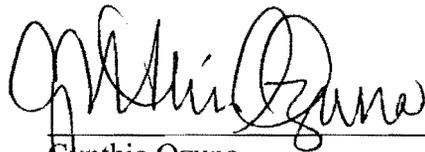
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