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Case No. 330940 & 331431

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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

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BLANCA ORTIZ AND UNIVERSAL FROZEN FOODS,

Appellants

v.

DEPARTMENT OF LABOR AND INDUSTRIES  
OF THE STATE OF WASHINGTON

Respondent

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**APPELLANT BLANCA ORTIZ REPLY BRIEF**

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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 reply brief of Appellant.

## **A. ARGUMENT**

### **I. NEW ISSUES ON APPEAL**

It is important for the Court to know that the Department of Labor and Industries, hereafter referred to as the Department, has never before raised the issue of standing on the part of Ms. Ortiz. Let us begin with a reading of RAP 2.5(a) which states:

**Errors Raised for First Time on Review. The appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: (1) lack of jurisdiction, (2) failure to establish facts upon which relief can be granted, and (3) manifest error affecting a constitutional right. A party or the court may raise at any time the question of appellate court jurisdiction. A party may present a ground for affirming a trial court decision which was not present to the trial court if the record has been sufficiently**

**developed to fairly consider the ground. A party may raise a claim of error which was not raised by the party in the trial court if another party on the same side of the case has raised the claim of error in the trial court.**

The issue of standing was raised neither by the Department, nor by the Employer, at the Board of Industrial Insurance Appeals or at Superior Court. As such, the Department raises this issue for the first time in its brief to this Court. RAP 2.5(a) is discretionary with this Court as to whether the Court will find a bar to raising a new issue on appeal. Roberson v. Perez, 156 Wn.2d 33, 123 P.3d 844 (2005). “In general, issues not raised in the trial court may not be raised on appeal. See RAP 2.5(a) (an ‘appellate court may refuse to review any claim of error which was not raised in the trial court.’) However, by using the term ‘may,’ RAP 2.5(a) is written in discretionary, rather than mandatory terms.” Roberson v. Perez, 156 Wn.2d 33, 123 P.3d 844,848 (2005). *Citing State v. Ford*, 137 Wash.2d 472, 477, 484-85, 973 P.2d 452 (1999). Because Ms. Ortiz has steadily maintained the same argument throughout this appeal, there is no reason why the Department could not have raised the issue of standing either at the Board of Industrial Insurance Appeals (Board), or at Superior

Court. Because the Department essentially waived the argument of standing, this Court should use its discretionary authority and reject the Department's attempt to argue standing at this late hour. Doing so does not overly prejudice the Department as they are still entitled to make the same arguments they have always made at both the Board and Superior Court.

There are some exceptions when new issues can be raised directly with the appellate courts. One such exception is where "the asserted error concerns the trial court's authority to act". Cole v. Harveyland, LLC, 163 Wn.App. 199, 206, 258 P.3d 70 (2011). Here, there is no such assertion by the Department.

Another exception exists where there would be "manifest error affecting a constitutional right". State v. Warren, 134 WnApp. 44, 57, 138 P.3d 1081 (2006). The Department has not alleged such a constitutional issue.

Another exception occurs when the allegation is that a party failed "to establish facts upon which relief can be granted", where the court would examine the record to establish the sufficiency of the evidence. Roberson v. Perez, 156 Wn.2d 33, 123 P.3d 844 (2005), *citing* State v. Hickman, 135 Wash.2d 97,103, n.3, 954 P.2d 900 (1998). The parties

stipulated to the facts at both the Board and those stipulated facts were part of the record before the Superior Court and also this Court. Therefore, by stipulation the facts are sufficient for this Court to determine the issues raised by the parties. The time to raise the issue of standing was earlier in the trial process, either at the Board or at Superior Court, not at the Court of Appeals. Moreover, there is no doubt that the ruling at the Board and Superior Court have a real pecuniary impact upon the clamant, as discussed below. For these reasons, this exception does not apply.

Finally, the Department lacks the opportunity to raise the issue of standing at this late hour because it failed to do so at the Board, where the matter was decided based upon stipulated facts. “Unlike the permissive language in RAP 2.5(a), RCW 49.17.150 mandates that *‘[n]o objection that has not been urged Before the board shall be considered by the court,’* except in the case of extraordinary circumstances. (Emphasis added.) There are no claims of extraordinary circumstances in this case. Thus, a court may only address issues raised Before the Board.”

Department of Labor and Industries v. National Security Consultants, Inc., 112 WnApp. 34, 37, 47 P.3d 960 (2002). A statute similar to the one cited in this case exists for cases involving injured workers. Specifically, that statute is RCW 51.52.115, which in relevant part states “Upon appeals to

the superior court only such issues of law or fact may be raised as were properly included in the notice of appeal to the board, or in the complete record of the proceedings before the board.” RCW 51.52.115. As this Court can see, there is no basis in an industrial insurance claim for allowing the Department to raise the new issue of standing before this Court when the Department did not raise the issue before the Board, notwithstanding the same failure to raise the issue in Superior Court. For this reason as well, the Department’s argument for lack of standing must be rejected by this Court.

## **II. SUBSTANTIVE REASONS WHY MS. ORTIZ HAS STANDING**

The Department argues that Ms. Ortiz lacks standing for the following reasons:

- 1) Her rights were not affected by the Superior Court’s disposition; Department Brief at 8, 28;
- 2) She admits in her brief that the question of the collection being limited to 24 months is not properly before the Court; Department Brief at 28;
- 3) The Department, Board, and Superior Court never addressed this collection issue; Department Brief at 28;

- 4) The collection issue was no raised in the petition for review;  
Department Brief at 28;
- 5) The collection issue was not raised in the Superior Court  
appeal; Department Brief at 28;
- 6) Ms. Ortiz was not aggrieved by the Superior Court's decision;  
Department Brief at 28;
- 7) She is wrong that the overpayment should come out of the  
overpayment reimbursement fund as that fund only applies  
when there has been an appeal of an erroneous adjudication;  
Department Brief at 8.

These arguments by the Department will be addressed in turn.

**A. Effect Upon Ms. Ortiz's Rights**

The Department makes essentially the same argument concerning the rights of Ms. Ortiz on two occasions, stating that her rights were not affected by the Superior Court's disposition, and again, that she was not aggrieved by the Superior Court's decision.

The Superior Court's Finding of Fact 1.10 (clerk's papers 0-000000243) states: "There were two opportunities to discover the overpayment problem created by the settlement agreement: when Ms. Ortiz and Universal Frozen Foods entered into the settlement

agreement without the Department's participation, and when the Department began making pension payments from the second injury fund. Universal Frozen Foods, as the payor of time loss compensation, is in a better position to know when a settlement agreement between an employee and a self-insured employer creates an overpayment. Universal Frozen Foods—and not the Department – should be the party to try to collect any overpayment created by its settlement.”

(Clerk's papers 0-00000243) (Emphasis added). This finding by the Court clearly states that the employer should seek reimbursement of the overpayment directly from the injured worker. This clearly aggrieves the injured worker, in particular given her argument that she is entitled to relief and protection from payment out of the self-insured overpayment fund after paying the overpayment for two years, if the collection of the overpayment has not been satisfied.

Ms. Ortiz also argues that she is aggrieved by the Court's Conclusion of Law 2.2 which states: “No statute authorizes the Department to reimburse a self-insured employer's overpayment of time loss compensation resulting from the self-insured employer's agreement to back-date a pension paid out of the second injury fund. The Board incorrectly relied on RCW 51.32.240 in concluding

otherwise.” (clerk’s papers 0-000000243). Again and for the same reason as this directly affects the pecuniary interests of Ms. Ortiz by precluding her protection and relief from the self-insured overpayment reimbursement fund, her rights are significantly aggrieved by the Court’s decision. The same could be said of the summary conclusions of law 2.5 and 2.6, and Judgment 3.1 and 3.2 which implicate the aforementioned. (clerk’s papers 0-000000244).

**B. She Admits Collection Limitation Not Before This Court**

The Department argues that Ms. Ortiz made an admission that she is not properly before this court. Ms. Ortiz has never once made such an admission. Not at the Board, not at Superior Court, and not before this Court. This is factually incorrect.

Throughout this appeal, Ms. Ortiz has been aligned with the employer on the question of whether there is an overpayment. In fact, in briefing before the Board, the employer and Ms. Ortiz collaborated on the employer’s brief to the Board to include the very argument she has made before the Superior Court and this Court. In her appeal to the Superior Court to which the Department apparently refers, she writes “Again, the claimant has consistently aligned herself with the employer insofar as both recognizing that there is a double recovery of

time loss and pension benefits and that the employer is entitled to an adjudication on the amount that is recoverable by statute.” (Clerks papers 0-000000194).

As to the argument that she made some admission that she is not properly before this Court, she wrote in her brief to Superior Court “Because the Department has not yet, in fact, attempted to collect any overpayment amount authorized by statute for recovery, this Court does not need to determine the amount to be recovered from this fund for the benefit of the employer. This court does not, in other words, need to do the math. This Court only needs to find that once the overpayment amount is determined consistent with the applicable overpayment law, that to the extent such amount is not collectable from the claimant within the period provided by statute from her pension benefits, then these overpayment statutes would apply and no civil judgment would accrued to the claimant for future recovery. The self-insured employer, meanwhile, should be made whole.” (clerk’s papers 0-000000194). There is just no way that this can be construed as an admission by Ms. Ortiz that she lacks standing, that the issue she wishes the Court to consider were waived at either the Superior Court level, or at the Board level when the issue of the self-insured

overpayment reimbursement fund was first raised as it was properly done. All Ms. Ortiz said here was that the Court did not need to do a mathematical calculation on the amount of the overpayment but that after 24 months, the employer should be made whole from the overpayment reimbursement fund.

**C. The Department, Board and Superior Court Never Addressed the Collection Issue, Issue Not Raised in Petition for Review, Issue Not Raised at Superior Court**

As stated previously when addressing the aggrievment to Ms. Ortiz of the Superior Court judgment, there are several Findings of Fact, Conclusions of Law, and Judgment paragraphs from Superior Court which clearly implicate the collection of the overpayment. The Department did not address the issue because it denied the request for overpayment by the employer. (Clerk's papers (clerk's papers 0-000000044). Why would the Department address the collection issue when they have denied the overpayment request in the first place? In the Proposed Decision and Order, the Board did not address the collection issue one way or another, it was completely silent. ((clerk's papers 0-000000046-47).

Because the Department lost at the Board on the Proposed Decision and Order, appropriately it was the Department who filed the Petition for Review. However, the Assistant Attorney General did address collection of the overpayment when he wrote: “If there is an appropriate means to pursue reimbursement of the overpayment for the employer that resulted from the Agreement of Parties, it is under RCW 51.32.240(1)(a), and not RCW 51.32.240(4)(b).” (Clerk’s papers 0-000000022). And the Department continued in their argument regarding collection but clearly the Department was addressing the manner of collection in their Petition to Review. Following their Petition for Review, the full Board issued an order denying review. (Clerk’s papers 0-000000015).

To allege that the issue of collection was not raised at Superior Court requires one to ignore the trial court brief of Ms. Ortiz to Superior Court. This has been the heart of the argument by Ms. Ortiz, namely, her right to have relief via the application of the self-insured reimbursement fund. The only way one can argue that Ms. Ortiz did not make this argument is to not read her Superior Court Trial Brief and to have completely forgotten the oral argument made at court.

#### **D. She is Wrong About the Overpayment Statute**

This may be perhaps the most interesting argument by the Department in that they offer this argument without citation to any authority whatsoever. There is no case law on the topic of the application of the self-insured overpayment reimbursement fund. The legislative history is equally bereft of any discussion on the topic. All there is, is the plain language of the statute itself.

The Industrial Insurance Act provides for collection for overpayments based upon multiple possibilities. Generally, these are for an overpayment of Social Security benefits (RCW 51.32.220), willful misrepresentation (RCW 51.32.240), or some kind of error in the adjudication. The salient paragraph for Ms. Ortiz is paragraph 4 of RCW 51.32.240 which requires an erroneous adjudication. That's all. In other words, the statute does not permit access to the self-insured overpayment relief fund in overpayment cases of Social Security benefits or willful misrepresentation, formerly called fraud. But it allows for access to this fund in all other situations. No party alleges the overpayment is based on a Social Security payment. No party alleges overpayment based on willful misrepresentation. The overpayment exists because there was an innocent, non-willful, error

in how the time loss compensation and the pension benefits were paid. The order which gave rise to this appeal denied the employer's request for an overpayment order. That was reversed by Superior Court. This fact is an adjudication error which states that an overpayment in fact exists. The statute says that the error can be effectuated by the Department, the Board, or by a Court. That is precisely what happened here. The Department has been withholding all of Ms. Ortiz's pension payments for a very long time without issuing an order and without complaint by Ms. Ortiz who understands that there is an overpayment. But to allege, as the Department, that the self-insured overpayment statute does not apply flies in the face of the plain language of the statute, and flies in the face of the liberal construction statute and case law cited in Mr. Ortiz's brief.

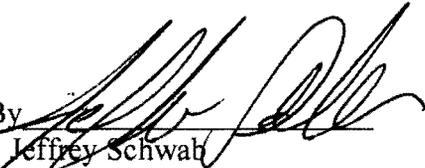
**B. CONCLUSION**

For the foregoing reasons, Ms. Ortiz argues that she has standing and that she is entitled to the application of the self-insured overpayment reimbursement fund under RCW 51.32.240(4)(c).

Respectfully submitted this 8<sup>th</sup> day of September, 2015.

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By

  
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BLANCA ORTIZ

**CERTIFICATE OF SERVICE**

I certify that I caused to be mailed or delivered on  
the 8th day of September 2015, the following document:

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