

No. 33303-5

Superior Court No. 13-2-50218-9

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

ALONZO VELIZ, individually,

Appellant

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent

FILED

AUG 17 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

BRIEF OF APPELLANT

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III. INTRODUCTION

This appeal involves worker's compensation benefits which are governed by the Industrial Insurance Act (Act), Title 51.32 RCW. The sole issue on appeal centers on whether the trial court erred when it determined the Department of Labor & Industries (Department) has the authority to alter or amend an injured worker's marital status on the date of injury when that same marital status issue had been previously adjudicated with no protest or appeal filed within 60 days.

The factual details of the injury and type of benefits paid are not in dispute. However, Mr. Alonso Veliz and the Department disagree as to how the law, specifically *RCW 51.32.240(1)*¹ applies to the particular facts of this case.

IV. FACTS AND PROCEDURAL BACKGROUND

Mr. Veliz worked for 3 Rivers Potato Services, Inc. in Pasco in its warehouse. (CP 78, 116) He suffered an on-the-job-injury on October 27, 2007. (CABR 8/9/12 Tr². at 33) He was taken to

¹ RCW 51.32.240 will be specifically analyzed below. In general, Title 51.32 RCW governs a worker's right to and amount of compensation.

² CABR refers to the Certified Administrative Board Record. An original hearing was held on August 9, 2012 where testimony was taken and recorded by a certified

Lourdes Medical Center (the hospital) for treatment. (CP 116) He was given a claim form to complete regarding his industrial injury. Because he is monolingual in Spanish and the accident form was in English someone filled it out for him. (CABR Tr. at 33) The claim form, in box #10, asked for marital status. (CP 116) Mr. Veliz thinks he may have told the person assisting him that he was married. Although no marriage certificate existed at that time he considered himself married since he'd been with Marisol Vallarta Martinez for 14 years and they had four children together. (CABR 8/9/12 Tr. at 17, 31-33; CP 116)

Both Mr. Veliz and Ms. Martinez considered themselves a married couple and held themselves out as such both in Mexico, where they were born and the United States. (CABR 8/9/12 Tr. at 31-32) This belief is common in the Mexican culture where many people can't afford to get married and/or don't consider a "piece of paper" to have any significance in regard to marriage. (CABR 8/9/12 Tr. at 18, 32) Mr. Veliz testified that "once he started living with my wife [Marisol Martinez] and had my children . . . I consider myself married." (CABR 8/9/12 Tr. at 33-34) Mr. Veliz and Ms. Martinez

court reporter. Tr. refers to the transcript of that hearing followed by the page number where the testimony is located.

later learned a marriage certificate is important in the United States because it gives each person certain rights. For this reason they were legally married in 2011. (CABR Tr. at 31; Ex 1 at 2)

Shortly after his injury Mr. Veliz filed a claim for benefits with the Department, which was accepted and benefits paid based on the assumption he was married and had three children. (CP 81; Ex. 1 - March 4, 2013 Decision and Order at page 2)³ The Department order that granted the benefits was dated January 8, 2008. (CP 117) In capital letters at the bottom of the order is the following statement: "THIS ORDER BECOMES FINAL 60 DAYS FROM THE DATE IT IS COMMUNICATED TO YOU UNLESS YOU . . . FILE A WRITTEN REQUEST FOR RECONSIDERATION . . . [OR] FILE AN APPEAL . . ." (CP 117) No protest or appeal was filed by either party. As a result, Mr. Veliz was adjudicated "married" by the Department in its January 8, 2008 Notice of Decision⁴, which became a final order

³ The Board's March 4, 2013 Decision and Order, which is the order being considered on appeal, is attached as Exhibit 1. For ease of reference all citations to this order will be designated as (Ex. 1 at __ (page number)).

⁴ CP 117-118

pursuant to RCW 51.52.050⁵ when neither party protested or appealed the decision.

Mr. Veliz's work-related injury did not improve⁶ and on July 1, 2011 the Department placed him on the pension rolls as a permanently and totally disabled worker effective October 7, 2009. (Ex. 1 at 2) In connection with the pension paperwork he completed Mr. Veliz informed the Department that he was not legally married by United States standards at the time of the industrial injury. (Ex. 1 at 2) Citing RCW 51.32.240(1)(a) (based on innocent misrepresentation) the Department immediately changed his marital status to single and recalculated the wages for his worker's compensation benefits. It ordered the changes were effective as of October 7, 2009, which was nearly two years prior. (Ex. 1 at 1) This action resulted in an assessment against Mr. Veliz for overpayment.

Mr. Veliz appealed this "innocent misrepresentation" decision to the Board, which affirmed the Department. (Ex. 1 at 1, 5) The Board determined Mr. Veliz had indeed made an innocent mistake

⁵ In relevant part RCW 51.52.050 sets forth the rule that no order in a worker's compensation proceeding is final until 60 days elapsed since the order was communicated to the parties with no protest or appeal filed.

⁶ CP 81

regarding his marital status when the accident report was filled out. (Ex. 1 at 1) The Board's decision drew a dissent, in which member Frank Fennerty, Jr., citing *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 886 P.2d 189 (1994), opined that: "a Department order that is not protested or appealed within sixty days becomes final even if the Department order is in error." (Ex. 1 at 5) In his estimation, the Department's use of RCW 51.32.240 "to avoid the res judicata effect of the Department [January 8, 2008] wage order [was] misplaced." (Ex.1 at 5)

Mr. Veliz appealed the Board decision to the Franklin County superior court. (CP 121-122) The Department filed a motion for summary judgment, which was granted. (CP 10-13) Without any discussion⁷ the trial court affirmed the Board's March 4, 2013 Decision and Order. (Ex. 1) Mr. Veliz filed a timely Notice of Appeal. (CP 8-9)

V. ASSIGNMENT OF ERROR

The trial court erred when it granted the Department's summary judgment motion, determining RCW 51.32.240(1)(a) established the Department's authority to alter the marital status of Mr. Veliz at the time of the industrial injury based on his innocent misrepresentation of his marital status.

⁷ CP 10-11

VI. ISSUE RELATED TO THE ASSIGNMENT OF ERROR

Did the trial court commit an error of law when it interpreted RCW 51.32.240(1)(a) as granting the Department authority to alter or amend Mr. Veliz's marital status when his marital status had been previously adjudicated on January 8, 2008 with no protest or appeal taken?

VII. ARGUMENT

A. Standard of review

A trial court's summary judgment decision is reviewed de novo. *Seybold v. Neu*, 105 Wn. App. 666, 675, 19 P.3d 1068 (2001). In reviewing an order granting summary judgment, the appellate court engages in the same examination as did the trial court, considering all facts and reasonable inferences in the light most favorable to the nonmoving party, here Mr. Veliz. *Kahn v. Salerno*, 90 Wn. App. 110, 117, 951 P.2d 321 (1998). Summary judgment is appropriate only if the record before the court demonstrates there is no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. CR 56(c); *Jones v. Allstate*, 146 Wn.2d 291, 300-301, 45 P.3d 1068 (2002). Additionally, the de novo standard of review applies because the trial court's decision

involved the interpretation of a statute. *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 583, 925 P.2d 624 (1996).

B. Analysis

Mr. Veliz contends the trial court committed reversible error when it granted the Department's motion for summary judgment, which had the effect of affirming the March 4, 2013 order of the Board of Industrial Insurance (Board). The Department will argue the trial court decision is correct because Mr. Veliz made an *innocent misrepresentation* of his marital status when he filled out his initial claim form thus RCW 51.32.240(1)(a)⁸ applies, which gives the Department authority to change Mr. Veliz's marital status even though a final and binding order that established his wages for the purpose of calculating his worker's compensation benefits was entered years earlier in 2008. The Department's position is erroneous and reversal of the trial court's summary judgment order is required.

⁸ RCW 51.32.240(1)(a) provides in part: "[w]henever any payment of benefits under this title is made because of clerical error, mistake of identity, *innocent representation 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 the recipient . . ." (emphasis added)

Recent case law from this division, *Birrueta v. Dep't of Labor & Indus.*, ___ P.3d ___ 2015 WL 4136726, July 9, 2015,⁹ presents a comprehensive analysis of RCW 51.32.240(1)(a) and (b)¹⁰ the latter of which applies to final and binding Department orders based on *adjudicator error*. According to the statute: "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). The distinction between RCW 51.32.240(1)(a) and (b) controls the outcome of Mr. Veliz's case pursuant to the holding in *Birrueta*.

The facts of *Birrueta* are *very* similar to those of Mr. Veliz's case. Mr. Birrueta, who is monolingual in Spanish, was injured while working. He was taken to the hospital where someone (not identified) completed for him patient information on an apparently Department-supplied worker's compensation claim form. On the completed form Mr. Birrueta's patient information section specified

⁹ The case is attached to Appellant's brief as Exhibit 2.

¹⁰ RCW 51.32.240(1)(b) provides in relevant part: "[e]xcept as provided in subsections (3),(4), and (5) of this section, the department may only assess an overpayment of benefits because of adjudicator when the order upon which the overpayment is based *is not yet final* as provided in RCW 51.52.050 and 51.52.060." (Emphasis added.)

that he was married and had one child. Neither of those facts was true but Mr. Birrueta later testified he didn't even remember filling out the form in the hospital because he was drifting in and out of consciousness. Because the Department did not verify his marital status it entered an order in September 2008 which calculated and paid time-loss benefits based on the information supplied on the claim form. The order contained language in prominent text that specified the order would become final in 60 days unless he filed a request for reconsideration or an appeal as set forth in RCW 51.52.050. Mr. Birrueta initially protested the order but soon dismissed the appeal. Thereafter the order became final and binding after 60 days. Approximately three years later the Department determined Mr. Birrueta was totally and permanently disabled worker and placed him on the pension rolls. He was required to fill out a questionnaire in order to make the change. One of the questions asked about his marital status at the time of the industrial injury. Mr. Birrueta answered that he was single. The Department then issued an order assessing him with an overpayment based on its decision that Mr. Birrueta had *innocently misrepresented* his marital status on the initial claim form. Additionally, the Department issued an order changing Mr. Birrueta's marital status from married to single and

changed his pension benefits accordingly. He appealed these orders to the Board arguing the September 2008 wage order was final and binding thus the Department lacked authority to assess an overpayment or change his marital status. Mr. Birrueta's appealed the Board order to the superior court where it was determined that RCW 51.32.240 did not authorize the Department to assess overpayments founded on a final adjudication. This division of the Court of Appeals affirmed the trial court after conducting: (1) a plain language analysis; (2) a legislative history analysis; and (3) its own analysis of significant Board decisions. This court determined RCW 51.32.240(1)(b) and *not* RCW 51.32.240(1)(a) applied under the specific facts of the case.

The facts in the *Birrueta* case nearly mirror the facts underlying Mr. Veliz's appeal and under the principle of stare decisis¹¹ this court should apply the *Birrueta* holding to his appeal. If it does so, RCW 51.32.240(1)(b) will apply due to the Department's adjudicator error in failing to inquire or independently research Mr. Veliz's marital status at the time of his industrial injury. Because

¹¹ Stare decisis (the doctrine of legal precedent) generally requires that a court follow earlier judicial decisions when the same points of law arise again in litigation. BLACK'S LAW DICTIONARY at 1443 (8th ed.2004). See also *In re Pers. Restraint of LaChapelle*, 153 Wn.2d 1, 5, 100 P.3d 805 (2004).

pursuant to *Birrueta* RCW 51.32.240(1)(a) does not apply to Mr. Veliz's case and the Department had no authority to change his marital status once its January 8, 2008 order became final and binding 60 days after it was communicated to the parties because no protest or appeal was taken by either party.

VIII. CONCLUSION

The Act is remedial in nature and must be liberally interpreted in favor of injured workers, with all doubts resolved in their favor. See, *Dennis v. Dep't of Labor & Indus.*, 109 Wn.2d 467, 470, 745 P.2d 1295 (1987); RCW 51.12.010;¹² see also, *Clauson*, supra; *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 129, 913 P.2d 402, review denied, 130 Wn.2d 1009 (1996).

Mr. Veliz is an injured worker deserving of the protections the Act provides. As set forth above, the *Birrueta* holding is controlling precedent and applies to the resolution of Mr. Veliz's case. Mr. Veliz respectfully requests this court reverse the trial court's March 3, 2015 order, which granted the Department's motion for summary judgment. Mr. Veliz additionally requests this court remand his case

¹² 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."

back to the Board with instructions to reverse its March 4, 2013 Decision and Order, which determined the Department had the authority to change Mr. Veliz's marital status based on his innocent representation (RCW 51.32.240(1)(a) and take all further appropriate action resulting therefrom.

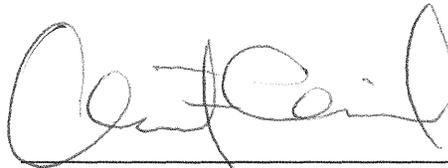
IX. ATTORNEY FEES

If successful in his appeal, Mr. Veliz respectfully requests an award of attorney fees pursuant to RAP 18.1, RCW 51.52.130¹³ and *Brand v. Dep't of Labor and Indus.*, 139 Wn.2d 659, 989 P.2d 1111 (1999). In determining whether to grant an attorney fee request this court is to look to both the statutory scheme and the historically liberal interpretation of the Industrial Insurance Act in favor of the injured worker. Additionally, it is vital to recognize that the purpose behind the statutory attorney fees award is to ensure adequate representation for the injured worker who is forced to appeal from

¹³ The relevant portion of RCW 51.52.130(1) provides: "If, on appeal to the superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary ... a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court."

Department rulings in order to obtain just compensation for their claim. *Id.* at 667-70.

Respectfully submitted this 14th day of August, 2015



#34077

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: ALONSO VELIZ) DOCKET NO. 11 20348
2 CLAIM NO. AG-93574) DECISION AND ORDER
3

4 APPEARANCES:

5 Claimant, Alonso Veliz, by
6 Smart, Connell, Childers & Verhulp, P.S., per
7 Darrell K. Smart

MAR - 7 2013

8 Employer, 3 Rivers Potato Service, Inc., by
9 Washington State Farm Bureau #00081 & #10670

10 Department of Labor and Industries, by
11 The Office of the Attorney General, per
12 Bryan Ovens, Assistant

13 The claimant, Alonso Veliz, filed an appeal with the Board of Industrial Insurance Appeals on
14 September 21, 2011, from an order of the Department of Labor and Industries dated August 8,
15 2011. In this order, the Department established Mr. Veliz's compensation rate based on being
16 married on the date of injury or disease manifestation. This action was taken due to information
17 supplied by Mr. Veliz on the Report of Accident. On July 6, 2011, Mr. Veliz informed the
18 Department the information was incorrect. Effective October 7, 2009, the Department changed the
19 marital status on which compensation was established to single. The action was taken in
20 accordance with RCW 51.32.240(1). The Department order is **AFFIRMED**.

21 DECISION

22 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
23 review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and
24 Order issued on November 9, 2012, in which the industrial appeals judge reversed and remanded
25 the Department order dated August 8, 2011. The sole issue presented in this appeal is whether the
26 application of RCW 51.32.240(1) provides the Department the authority to change Mr. Veliz's
27 marital status. We conclude that the statute provides the Department the authority to change what
28 would otherwise be considered a final determination.

29 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
30 no prejudicial error was committed. The rulings are affirmed.

31
32 EXHIBIT 1

3.4.13

1 Mr. Veliz sustained an industrial injury on October 27, 2007, and the claim was allowed by
2 the Department. Mr. Veliz stated on his Application for Benefits that he was married. Based on the
3 Application for Benefits the Department issued an order on January 8, 2008, in which it established
4 Mr. Veliz's compensation rate considering him to be married with three children. This order was
5 never protested or appealed. Mr. Veliz was eventually found to be permanently and totally disabled
6 in a Proposed Decision and Order dated January 13, 2011. We denied review and the Department
7 issued a ministerial order on July 1, 2011, in which it placed Mr. Veliz on a pension effective
8 October 7, 2009.

9 Mr. Veliz completed paperwork for the Department before he was placed on a pension in
10 which he indicated that he was not married at the time of his industrial injury. It is not disputed that
11 the Application for Benefits listed Mr. Veliz as being married. He had been living with his wife since
12 1998. He has limited ability to speak English and he testified that he did not fill out the application.
13 He and his wife always considered themselves married though they did not have a formal
14 ceremony until January 2011.

15 Mr. Veliz's position is that the order setting his time-loss compensation benefits rate has
16 become final and RCW 51.32.240(1) does not apply. He cites *Marley v. Department of Labor &*
17 *Indus.*, 125 Wn.2d 533 (1994) in support of his argument that once the January 8, 2008 order
18 became final, the Department lacked authority to change his marital status. In *Marley*, the court
19 stated that "an unappealed final order from the Department precludes both parties from rearguing
20 the same claim" and "the failure to appeal an order, even one containing a clear error of law, turns
21 the order into a final adjudication, precluding any reargument of the same claim." *Marley*
22 at 537-538.

23 The Department's position is that it can use RCW 51.32.240(1) to change a claimant's
24 marital status. This statute allows the Department to recoup benefits that were paid due to clerical
25 error; mistake of identity; innocent misrepresentation by or on behalf of the recipient mistakenly
26 acted on; or other circumstance of a similar nature not induced by willful misrepresentation. It
27 specifically deals with the recoupment of benefits. The record establishes that the misstatement of
28 Mr. Veliz's marital status on the Application for Benefits was an innocent misrepresentation.

29 Once the misrepresentation has been established, RCW 51.32.240(1) provides relief from
30 the res judicata application of an otherwise final determination and allows the Department to recoup
31 benefits that had been overpaid. A attendant to the authority to recoup benefits must be the ability to
32

1 correct the underlying determination. Otherwise, the Department may be placed in the
2 unreasonable position of having to continue overpaying benefits based on an innocent
3 misrepresentation or the belief that RCW 51.32.240(1) only allows recoupment and does not allow
4 a correction of the erroneous basis for the payments. Application of the provisions of
5 RCW 51.32.240(1) must be construed to allow the Department to correct the underlying
6 determination that leads to an overpayment.

7 Consistent with our interpretation, we have previously relied on the statute to set a new
8 compensation rate. In *In re Anita F. Bordua*, Dckt. No. 93 1851 (May 2, 1994) the Department
9 attempted to recoup an overpayment due to a miscalculation of Ms. Bordua's wage rate and to set
10 a new rate. We found that the Department could recalculate the wage rate for future benefits even
11 when the original order setting the rate had become final. In that decision we quoted from our
12 decision in *In re Teresa Johnson*, BIIA Dec., 85 3229 (1987), and stated:

13 To hold that the principle of res judicata prevents the Department from
14 correcting an inaccurate rate of compensation if not corrected within
15 sixty days of the date of an order paying time-loss compensation would,
16 we feel, render the overpayment statute meaningless. RCW 51.32.240(1) expressly permits the recoupment of overpayments
17 made 'within one year' of the making of the payment. This clearly
18 contemplates an underlying authority to revise an order of payment
19 which would otherwise be considered final 60 days after the date it was
20 communicated to a party.

21 *Johnson*, at 5.

22 We also allowed the use of subsection (2) of the statute to allow an injured worker's claim to
23 be allowed even after sixty days had elapsed from the date the Department mistakenly rejected the
24 claim. In *Judy A. Clauser*, Dckt. No. 01 10451 (August 2, 2002). In that appeal Ms. Clauser filed
25 two claims with the same self-insured employer. The employer requested that the Department
26 reject one of the claims because the two claims were identical. The Department rejected the wrong
27 claim. Neither Ms. Clauser nor her employer noticed the error and neither protested or appealed it
28 within sixty days.

29 The employer continued to pay Ms. Clauser benefits on the rejected claim. A little over one
30 year later the employer's representative noticed the error and requested that the Department
31 correct its mistake. The Department corrected the error and reversed the rejection order and
32 allowed the claim. The employer protested and the Department found that it did not have
jurisdiction because the rejection had become final and binding. Ms. Clauser appeared and we

1 found that RCW 52.32.240(2) should be used to correct the Department's clerical mistake and
2 reversed the order so that the claim would be allowed.

3 We also acknowledged that RCW 51.32.240 can abrogate the res judicata effect of a
4 Department order in *In re Jorge Perez-Rodriguez*, BIIA Dec., 06 18718 (2008). We see no reason
5 in this appeal to forego the reasoning we followed in those cases cited above. The Department has
6 the ability to change Mr. Veliz's marital status that was originally based on an innocent
7 misrepresentation. *Marley* does not limit us under these circumstances where the Legislature has
8 given the Department the ability to take corrective action when the requirements of RCW 51.32.240
9 are met such as they are in Mr. Veliz's case.

10 FINDINGS OF FACT

- 11 1. On April 26, 2012, an industrial appeals judge certified that the parties
12 agreed to include the Jurisdictional History in the Board record solely for
13 jurisdictional purposes.
- 14 2. On October 27, 2007, the claimant, Alonso Veliz, sustained an industrial
15 injury. On or about November 1, 2007, an unknown person assisted
16 Mr. Veliz in completing a report of industrial injury. Mr. Veliz reads and
17 speaks little English. The report of industrial injury shows Mr. Veliz to be
18 married with three children.
- 19 3. On January 8, 2008, the Department issued an order in which it
20 established a wage for the job of injury, and reflected Mr. Veliz's status
21 to be married with three children. The January 8, 2008 order was
22 neither protested nor appealed, and became final.
- 23 4. On July 6, 2011, Alonso Veliz advised the Department that he was not
24 married on the date of his industrial injury in 2007.
- 25 5. Mr. Veliz's marital status as reflected on the report of injury from
26 November 1, 2007, and on which the Department relied in issuing the
27 January 8, 2008 order establishing a wage for his job of injury was the
28 result of an innocent misrepresentation from Mr. Veliz or one acting on
29 his behalf.

30 CONCLUSIONS OF LAW

- 31 1. Based on the record, the Board of Industrial Insurance Appeals has
32 jurisdiction over the parties to and the subject matter of this appeal.
2. As provided by RCW 51.32.240(1), the Department of Labor and
Industries is authorized to correct the marital status of Mr. Veliz for
purposes of determining wage of job-of-injury compensation because
the earlier information provided by Mr. Veliz or one acting on his behalf
was the result of innocent misrepresentation

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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

EXHIBIT 2

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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.

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.

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

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:

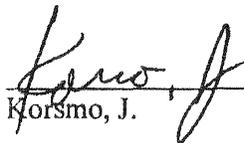
If, on appeal to the superior or appellate court from the decision and order of the board . . . a party other than the worker or beneficiary is the appealing party and the worker's or beneficiary's right to relief is sustained, a reasonable fee for the services of the worker's or beneficiary's attorney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

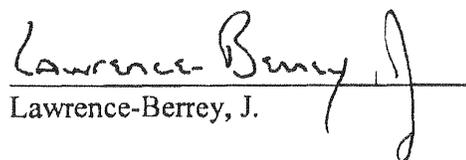
Since the department was the appealing party and Mr. Birrueta's right to relief is sustained, his request for attorney fees is granted, subject to compliance with RAP 18.1(d).

Affirmed.


Siddoway, C.J.

WE CONCUR:


Korsmo, J.


Lawrence-Berrey, J.