

FILED

DEC 29, 2016

Court of Appeals
Division III
State of Washington

NO. 33303-5-III

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

ALONSO VELIZ,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Respondent.

**AMENDED BRIEF OF RESPONDENT
DEPARTMENT OF LABOR AND INDUSTRIES**

ROBERT W. FERGUSON
Attorney General

Paul Weideman
Assistant Attorney General
WSBA No. 42254
Office Id. No. 91018
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

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I. INTRODUCTION

Alonso Veliz conceded at superior court that he innocently misrepresented his marital status to the Department of Labor & Industries. RP 13. *Birrueta v. Department of Labor & Industries*, 186 Wn.2d 537, 379 P.3d 120 (2016), authorizes the Department to correct a worker's marital status if there is an innocent misrepresentation. *Birrueta* resolves this case.

Veliz seeks to evade both his dispositive concession and his previous request that the Court apply *Birrueta* as "controlling precedent" (App. Br. 11). But Veliz should be held to his earlier positions, which he has no principled basis for disclaiming.

Birrueta is legally indistinguishable. Veliz strains to distinguish it by arguing that the Department committed "adjudicator error" when it did not request his marriage certificate. But it is not error for the Department to believe a worker's certified statement about marital status. Indeed, *Birrueta* rejected the identical argument, holding that it is not "adjudicator error" for the Department to rely on "the worker's undisputed assertions about facts within the worker's particular knowledge, such as marital status at the time of injury." *Birrueta*, 186 Wn.2d at 553.

This Court should apply *Birrueta* and affirm.

II. ISSUE

The *Birrueta* Court held that RCW 51.32.240(1)(a) authorizes the Department to correct a worker's marital status when the worker or another person on the worker's behalf innocently misrepresented the worker's marital status when applying for benefits. Veliz conceded at superior court that he innocently misrepresented his marital status when he applied for benefits (RP 13). Must this Court apply *Birrueta* and affirm?

III. STATEMENT OF THE CASE

A. **When Veliz Applied for Workers' Compensation Benefits in 2007, He Stated on the Application for Benefits That He Was Married, Which Was Not True**

In 2007, Veliz injured his knee at work and filed a workers' compensation claim. *See* Ex. 3; BR Veliz 33.¹ On the report of industrial injury, he stated that he was married and that his spouse was "Marisol." Ex. 3. He did not fill out the report, but he signed it, certifying that the statements were "true to the best of my knowledge and belief." BR Veliz 32-33; Ex. 3. Veliz is from Mexico and speaks little English. BR Veliz 32, 38; BR Garcia 12.

¹ The certified appeal board record is cited as "BR." Witness testimony from the August 9, 2012, hearing before the Board is cited by the witness's name and page number. The parts of the August 9, 2012, record that do not consist of witness testimony are cited as "BR (Aug. 9, 2012)" followed by the page number.

It is now undisputed that Veliz was not legally married on the date of his work injury.² See BR 6, 13, 74; BR Veliz 39; RP 5, 11, 13.

Although Veliz has lived with Marisol Vallarta Martinez since about 1998, they did not legally marry until January 2011, at a ceremony in Pasco. BR Vallarta 17, 20-21, 28; BR Veliz 31, 39-40; *see also* BR 13. Before they married, they considered themselves husband and wife. See BR Vallarta 18-19, 25; BR Veliz 31-32. They married because their attorney told them that they would have additional rights as a married couple. BR Vallarta 19, 25; BR Veliz 31.

B. The Department Relied on Veliz's Statement That He Was Married in Order to Calculate His Workers' Compensation Benefits

The Department allowed Veliz's workers' compensation claim. See Ex. 1; BR Veliz 38. As the parties stipulated at the administrative hearing, the Department typically relies on a worker's representations about marital status in the report of industrial injury to calculate benefits. BR (Aug. 9, 2012) 41-42.

² Veliz admits that he was not legally married at the time of injury. See BR 6, 13; RP 11, 13. That he "considered himself married" from the time he had lived with his partner does not matter. App. Br. 2. Washington does not recognize common law marriage. *In re Marriage of Pennington*, 142 Wn.2d 592, 600, 14 P.3d 764 (2000). He admitted in his appellant's brief that he made an "innocent misrepresentation of his marital status." App. Br. 5; *see also* RP 13 (admitting innocent misrepresentation). So under *Birrueta*, the Department may correct the mistaken marital status in its records to set his wage rate and pay benefits at the correct rate. 186 Wn.2d at 554.

Consistent with this practice, the Department issued a wage order in January 2008, stating that Veliz was married. Ex. 1. Veliz concedes that “[t]he Department relied upon the accident report completed by Mr. Veliz and issued the [wage order].” BR 16.^{3,4} The Department sent a Spanish translation to Veliz, which informed him that his compensation rate was based on his status as “married” (“casado”). Ex. 2; BR Garcia 13. No party protested or appealed that order. BR (Aug. 9, 2012) 16.

The Department paid Veliz time loss compensation benefits “pretty continuously” after his work injury. *See* BR Veliz 38. Because his compensation rate was based on his status as a married worker, he received more compensation than he would have as a single worker. *See* RCW 51.32.060(1), .090(1).

³ That the Department relied on Veliz’s representation in the report of injury to issue the wage order is also consistent with the language in the August 8, 2011 order on appeal. The order on appeal states that the Department established Veliz’s compensation rate “due to the information supplied by the claimant on the [report of accident].” BR 100; *see also* BR 50. This order was not admitted into evidence; however, the order’s language appears in the Board’s jurisdictional history, which the parties stipulated to determine whether the Board had authority to consider the appeal. *See* BR 93, 99-100. The facts section in this brief also includes some procedural facts from the jurisdictional history. *See* BR 99-100.

⁴ Veliz’s concession that the Department relied on the report of accident misstates the date of the wage order as January 2, 2008. *See* BR 16. The correct date of the order is January 8, 2008. Ex. 1. But it is clear from his petition for review that Veliz’s references to the January 2, 2008, order refer to the January 8, 2008 wage order. BR 13, 16, 17

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

In 2011, the Department determined that Veliz was permanently and totally disabled, and it placed him on pension effective October 7, 2009. *See* BR 99. At that time, Veliz advised the Department for the first time that he was not married at the time of his 2007 work injury. BR 6. He has conceded that he innocently misrepresented his marital status at the time of injury. RP 13.

In response to this new information, the Department issued an order stating that, effective October 7, 2009, it was changing the marital status upon which Veliz's compensation was established from married to single. *See* BR 3, 6, 100. The effect of this order was that Veliz's pension benefits would be based on his status as a single worker. *See* BR 3, 6, 100. Although RCW 51.32.240(1)(a) authorizes the Department to recoup overpaid benefits within a year of payment, the Department did not seek to recoup any overpaid benefits to Veliz.

D. Veliz Conceded at Superior Court That He Innocently Misrepresented His Marital Status, and The Board and Superior Court Affirmed the Department's Authority to Correct Veliz's Marital Status

Veliz appealed the order changing his marital status to the Board. *See* BR 3. He argued that because no party had appealed the 2008 wage

order within 60 days, as RCW 51.52.060 requires, that order stating that he was married was final and binding and the Department could not change his marital status. BR 13. The Board rejected that argument and affirmed. BR 3-9.

Veliz appealed to superior court, and the parties filed cross-motions for summary judgment. CP 36-71, 121-22. During argument on the motion, Veliz conceded that he was not married at the time of injury and that he had innocently misrepresented his marital status:

THE COURT: He wasn't married, was he?

.....

[VELIZ'S COUNSEL]: He was not married.

THE COURT: So why is that not untrue?

[VELIZ'S COUNSEL]: Because his perception is that he was married.

THE COURT: So it was a mistaken perception on his part.

[VELIZ'S COUNSEL]: It was a mistaken perception.

THE COURT: *So wouldn't that be an innocent misrepresentation?*

[VELIZ'S COUNSEL]: *Yes. But I mean, certainly if you want to characterize it as such it would be an innocent misrepresentation.* But you don't get to undo a final and binding order under Subsection 1B.

RP 13-14 (emphasis added); *see also* RP 11. The superior court affirmed.

CP 10-13.

E. *Birrueta* Involves the Same Legal Issue and Veliz Asked This Court to Apply *Birrueta* As “Controlling Precedent” When That Decision Was in His Favor at the Court of Appeals

Veliz appealed to the Court of Appeals. CP 5-6. While his appeal was pending, the Court of Appeals decided *Birrueta v. Department of Labor & Industries*, 188 Wn. App. 831, 355 P.3d 320 (2015), *rev'd*, 186 Wn.2d 537, 379 P.3d 120 (2016). In *Birrueta*, as in this case, there was a final and binding wage order stating that the worker was married at the time of injury. *See id.* at 833-35. And, like in this case, when the Department placed the worker on pension, the worker in *Birrueta* told the Department for the first time that he was single at the time of injury. *Id.* at 835. So, like in this case, the Department issued an order changing the worker’s marital status. *Id.*⁵

The Court of Appeals held that the Department did not have the authority under RCW 51.32.240(1)(a) to recoup benefits that it overpaid to a worker who had innocently misrepresented his marital status. *Id.* at 836-39. The Department petitioned for review of the court’s decision.

⁵ Unlike in this case, the Department in *Birrueta* also issued an order recouping benefits that had been overpaid to the worker. 188 Wn. App. at 835. Here, the Department only issued an order changing the worker’s marital status. It did not issue a recoupment order.

In his appellant's brief, Veliz called *Birrueta* "controlling precedent" and argued that "[t]he facts in the *Birrueta* case nearly mirror the facts underlying Mr. Veliz's appeal and under the principle of stare decisis this court should apply the *Birrueta* holding to his appeal." App. Br. 10, 11 (footnote omitted). After Veliz filed his appellant's brief, this Court stayed the appeal until the Supreme Court decided *Birrueta*. Clerk's Ruling (Sept. 25, 2015).

F. The Supreme Court Held in *Birrueta* That the Department Could Change a Worker's Marital Status When the Worker Had Innocently Misrepresented His Marital Status, Even if There Was a Final Wage Order

In a unanimous opinion, the Supreme Court reversed the Court of Appeals. *Birrueta*, 186 Wn.2d at 540. The Court held that the Department had the authority under RCW 51.32.240(1)(a) to recoup benefits that it overpaid to a worker who had innocently misrepresented his marital status. *Id.* at 544, 554. It further held that "the Department's order changing *Birrueta*'s marital status for compensation purposes was within its implied authority as a necessary incident to recoupment pursuant to subsection (1)(a)." *Id.* at 553. The effect of this correction is that it allows the Department to change the wage rate for payment of future benefits to ensure that the Department pays the worker the pension benefits he or she is statutorily entitled to rather than having to continuously overpay and

then recoup the overpaid benefits for the rest of the worker's life. *See id.* at 553-54. After the mandate in *Birrueta*, this Court lifted the stay.

IV. STANDARD OF REVIEW

In workers' compensation cases, the ordinary civil standard of review applies. RCW 51.52.140; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). The appellate court reviews the trial court's decision, not the Board's decision, and the Administrative Procedure Act does not apply. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009).

The appellate court reviews a summary judgment order de novo. *Bennerstrom v. Dep't of Labor & Indus.*, 120 Wn. App. 853, 858, 86 P.3d 826 (2004). Summary judgment is proper if no genuine issue exists as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

V. ARGUMENT

A. **Because Veliz Innocently Misrepresented His Marital Status When He Applied for Benefits, *Birrueta* Explicitly Authorizes the Department to Correct His Marital Status**

Veliz has no principled basis to abandon his request that this Court "apply the *Birrueta* holding to his appeal" simply because the *Birrueta* holding is no longer in his favor. App. Br. 10. He conceded in his original

brief that the facts in *Birrueta* “nearly mirror” the facts in his case (App. Br. 10), and the only relevant facts are identical.

Because *Birrueta* is directly on point and resolves this case, the Department agrees with Veliz’s request in his original brief that “this court should apply the *Birrueta* holding to his appeal.” App. Br. 10. That is because the undisputed relevant facts are identical in both cases: the worker stated that he was married on the report of injury; the Department relied on that representation to issue a wage order stating the worker was married, which was not appealed; the worker’s representation about his marital status was not true; and that representation was innocent, not willful. Under these facts, *Birrueta* authorizes the Department to correct the marital status to ensure that the correct amount of benefits is paid, just as the Department did in the *Birrueta* case.

In *Birrueta*, the Court affirmed that the plain language of RCW 51.32.240(1)(a) allows the Department to seek correction of erroneous payments based on clerical errors, mistakes of identity, and innocent

misrepresentations within one year of the payment.⁶ 186 Wn.2d at 555. *Birrueta* also affirmed the specific Department action at issue here, holding that RCW 51.32.240(1)(a) allowed the Department to change the marital status “as a necessary incident to recoupment pursuant to subsection (1)(a).” *Id.* at 553. Otherwise, as the Court explained, without the ability to correct marital status, the Department would have to continually overpay and then recoup a worker’s pension benefits for the rest of the worker’s life. *Id.* at 553-54. The Court observed that it was implausible that the Legislature intended such an administratively burdensome outcome, especially where it had the potential to significantly burden workers who received pension benefits. *Id.*

An individual’s intent or belief in providing an incorrect fact does not affect whether the individual innocently misrepresented the fact, and Veliz is wrong to imply otherwise. Supp. Br. 5 (claiming that Veliz “answered truthfully regarding his marital status” because he believed he was married). An “innocent misrepresentation” is “[a] false statement that the speaker or writer does not know is false; a misrepresentation that,

⁶ RCW 51.32.240(1)(a) states, “Whenever any payment of benefits under this title is made because of clerical error, mistake of identity, *innocent misrepresentation by or on behalf of the recipient thereof mistakenly acted upon*, or any other circumstance of a similar nature, all not induced by willful misrepresentation, *the recipient thereof shall repay it* and recoupment may be made from any future payments due to the recipient on any claim with the state fund or self-insurer, as the case may be. The department or self-insurer, as the case may be, must make claim for such repayment or recoupment within one year of the making of any such payment or it will be deemed any claim therefor has been waived.” (Emphasis added).

though false, was not made fraudulently.” *Black’s Law Dictionary* 1152 (10th ed. 2014). That describes what happened here: Veliz certified a statement about his report of injury that was false, and he did not know it was false (and did not make the statement fraudulently) because he believed that his long-term relationship meant that he was married. It was, in his words, an “honest mistake.” BR 74; *see also* RP 6 (“He simply represented what he believed to be true.”). It does not matter that he and his partner had a “steadfast and long-held belief that they were married” Supp. Br. 4. That only means that his was an innocent, not a willful, misrepresentation. *Compare* RCW 51.32.240(1)(a) (innocent misrepresentation) with RCW 51.32.240(5) (willful misrepresentation).

Veliz innocently misrepresented his marital status, as he conceded at superior court. RP 13; *see also* App. Br. 5. Veliz cannot escape the stare decisis effect of *Birrueta*, now that the decision is no longer in his favor, by ignoring his concession at superior court. RP 13. It is undisputed that he was not married at the time of injury, and he agrees that his belief that he was married was based on a “mistaken perception.” RP 13; *see* BR 6, 13; BR Veliz 39; RP 5, 11, 13. This is an “innocent misrepresentation” that allows the Department to correct the marital status.

B. Veliz Has Waived Any Argument that the Department Committed Adjudicator Error, But Even if He Has Preserved This Argument, the Department Did Not Commit Adjudicator Error When It Relied on His Statement That He Was Married

Veliz has waived any argument that the Department committed “adjudicator error.”⁷ He suggests that the Department committed adjudicator error because it “failed to inquire or independently research Veliz’s marital status at the time of his industrial injury” and “failed to request proof of marriage” from him. App. Br. 10; Supp. Br. 10. This Court should decline to reach these arguments because Veliz did not assert them in his petition for review to the Board. *See* BR 12-19; RCW 51.52.104; *Leuluaialii v. Dep’t of Labor & Indus.*, 169 Wn. App. 672, 684, 279 P.3d 515 (2012) (worker waived argument that the Department did not serve the attending physician because the argument was not included in the petition for review); *Allan v. Dep’t of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (1992). RCW 51.52.104 provides that a petition “shall set forth in detail the grounds therefor and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein.” In any case, the

⁷ If the Department makes an “adjudicator error,” its recoupment powers are limited to 60 days under RCW 51.32.240(1)(b). *Birrueta*, 186 Wn.2d at 544. “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).

Department did not commit adjudicator error when it relied on his statement that he was married at the time of injury.

Consistent with its regular practice, the Department relied on Veliz's representation that he was married to issue the 2008 wage order. *Birrueta* rejected an identical argument that reliance on such a representation was adjudicator error because "[i]t is not adjudicator error for the Department to rely on information in a claim file based on the worker's undisputed assertions about facts within the worker's particular knowledge, such as marital status at the time of injury." *Birrueta*, 186 Wn.2d at 553. Rather, as *Birrueta* explained, an "adjudicator error" is "an error attributable to an adjudicator's misinterpretation of the law or failure to properly apply the law to the facts in the claim file." *Id.* at 544. Here, the facts in the report of injury showed that Veliz was married. The Department properly applied these facts to issue the wage order. Like in *Birrueta*, in this case, "the Department correctly applied the law to the information before it." *Id.* at 553. This case cannot be distinguished from *Birrueta* on the basis of adjudicator error.

This Court should also disregard Veliz's sweeping and unsupported factual assertions that the Department routinely "does not require proof of marriage" at the time of injury but has an "unyielding practice" of requesting "tangible proof of marriage" before providing

pension benefits. *See* Supp. Br. 8-9. Veliz makes these assertions with no citation to the record, in violation of RAP 10.3(a)(6), and nothing in the record supports them.

Such arguments also ignore that the Department did require “proof of marriage” at the time of Veliz’s injury. It asked Veliz whether he was married, and he said yes. The Department is required to administer benefits in a timely manner, and it has no reason to disbelieve a worker’s certified statement about marital status on the report of injury, as the Court in *Birrueta* recognized. As Veliz correctly observes, “no rule or regulation . . . requires [the Department] to request a marriage certificate during the initial determination of claimant qualifications for worker[s]’ compensation benefits” Supp. Br. 8. The Department may obtain evidence in other ways, as it did here by asking Veliz to certify his marital status.

None of the reasons that Veliz gives for why a “trained Department claim manager” should have questioned his certified statement that he was married as “factually insufficient” has any merit. Supp. Br. 9-10. He suggests that because the Department knew he was a non-English speaker from Mexico, a country that he asserts has “definite and well-known cultural differences regarding the status of marriage” when compared to the United States, the Department should have

requested a marriage certificate to confirm his marital status. Supp. 8-9. But the parties stipulated that the Department typically relies on a worker's statement about marital status on the report of injury to pay benefits (BR (Aug. 9, 2012) 41-42), and it would be discriminatory to single out non-English speakers from Mexico and require them to furnish additional proof of marriage. Although Veliz testified that he was in pain when he filled out the report of injury, the Department had no way of knowing that, and Veliz never contacted the Department to correct the error at a later date. Nor does it matter that the report of injury was completed by someone else since the Department can correct innocent misrepresentations "made on behalf of a worker."

As in *Birrueta*, the reason that the Department included an incorrect marital status in the wage order is because Veliz told the Department he was married. When a worker is overpaid solely because of the worker's innocent misrepresentation of his marital status, the Department can issue an order correcting the marital status under RCW 51.32.240(1)(a). *Birrueta*, 186 Wn.2d at 544. That is what the Department did here.

In his opening brief, Veliz decided as a strategic matter to rely solely on the Court of Appeals decision in *Birrueta*. He should not be allowed to raise new arguments now. *See Cowiche Canyon Conservancy*

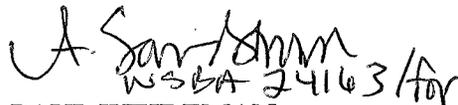
v. *Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (court does not consider arguments raised for the first time in the reply brief).

VI. CONCLUSION

Birrueta resolves this case. As *Birrueta* held, when a worker innocently misrepresents his marital status, the Department can later correct the marital status under RCW 51.32.240(1)(a). The Department corrected Veliz's marital status after it learned he stated incorrectly he was married. *Birrueta* authorizes the change, and this Court should affirm.

RESPECTFULLY SUBMITTED this ____ day of December,
2016.

ROBERT W. FERGUSON
Attorney General

A. San / JMM
WSBA 24163 / AT

PAUL WEIDEMAN
Assistant Attorney General
WSBA No. 42254
Office Id. No. 91018
800 Fifth Ave., Suite 2000
Seattle, WA 98104
(206) 389-3820

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DEPARTMENT OF LABOR AND
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CERTIFICATE OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on December 29, 2016, she caused to be served the Amended Brief of Respondent Department of Labor and Industries and this Certificate of Service in the below-described manner:

Via E-filing to:

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

Via First Class United States Mail, Postage Prepaid to:

Darrell Smart
Smart, Connell, Childers & Verhulp, P.S.
PO Box 228
Yakima, WA 98907

Signed this 29th day of December, 2016, in Seattle, Washington by:


EILEEN T. WEST
Legal Assistant
Office of the Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7740