No. 92215-2

FILED
JUNE 09, 2014
Court of Appeals
Division III
State of Washington

NO. 32210-6-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

JOSÉ L. BIRRUETA,

Respondent,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF WASHINGTON,

Appellant.

BRIEF OF APPELLANT DEPARTMENT OF LABOR AND INDUSTRIES

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I. INTRODUCTION

This case involves the Department of Labor and Industries' ability to correct information that it relied on to pay workers' compensation benefits to an injured worker when the Department learns that the worker misrepresented that information on the application for benefits.

In 2004, José Birrueta, or someone on his behalf, stated on his application for workers' compensation benefits that he was married. This was not true. The misrepresentation caused the Department to issue several wage orders, including an otherwise final December 17, 2008 wage order, stating that Birrueta was married. As a result, Birrueta received more benefits than he was entitled to receive.

In 2011, Birrueta informed the Department for the first time that he was single when he was injured. The Department issued an order under RCW 51.32.240(1) changing Birrueta's marital status from married to single to ensure that he would receive the correct amount of pension benefits in the future. The Department also ordered him to repay $100 in time loss benefits that it overpaid during the six weeks before Birrueta's placement on pension. Consistent with RCW 51.32.240(1)'s one-year recoupment period, the Department did not seek to recoup benefits that it overpaid to Birrueta in previous years.

RCW 51.32.240(1)(a) requires workers to repay, and authorizes the Department to recoup, overpaid benefits that result from innocent misrepresentation. As the Board of Industrial Insurance Appeals has repeatedly decided, RCW 51.32.240(1)(a) also authorizes the Department to correct the misrepresented fact that causes the overpayments even if that fact appears in an otherwise final order.

Under RCW 51.32.240(1)(a), the Department had authority to change Birrueta's marital status from married to single. The superior court erred when it concluded that the Department could neither change Birrueta's marital status nor recoup benefits based on his misrepresented marital status. Accordingly, this Court should reverse.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in entering finding of fact 6. The December 17, 2008 order is not final and binding as to Birrueta's marital status because RCW 51.32.240(1)(a) creates an exception to finality in the case of innocent misrepresentation.

2. The superior court erred in entering finding of fact 2, which adopted the Board's finding of fact 3 that the December 17, 2008 order became final. The December 17, 2008 order is not final as to Birrueta's marital status because RCW 51.32.240(1)(a) creates an exception to finality in the case of innocent misrepresentation.

3. The superior court erred in concluding that the Department was without authority to issue the March 24, 2011 overpayment order, which was affirmed in the June 7, 2011, order.

4. The superior court erred in concluding that the Department was without authority to issue the June 2, 2011 order changing Birrueta's marital status from married to single.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Does RCW 51.32.240(1)(a) authorize the Department to correct a worker's marital status where the worker innocently misrepresented his marital status when applying for benefits, the Department relied on the misrepresentation, and the alternative is to continue overpaying benefits for the life of the pension?

2. When the worker has misrepresented his marital status and the Department has relied on that misrepresentation in calculating benefits, may the Department subsequently issue an order assessing an overpayment of benefits under RCW 51.32.240(1)(a), which provides that a worker "shall repay" an overpayment?

IV. STATEMENT OF THE CASE

A. Although Birrueta Was Not Married At The Time Of His 2004 Work Injury, His Application For Workers' Compensation Benefits Stated That He Was Married

In 2004, Birrueta injured his back at work and filed a workers' compensation claim. Exs. 1, 15; BR 147.[1] He was 20 years old. *See* Ex. 1. His application for benefits stated that he was married and listed his wife's name as "Graciela." Ex. 1; BR 147. The application also stated that he had a 3-month-old child named Araceli. Ex. 1. Birrueta signed the

[1] The record from the Board is paginated separately from the clerk's papers. The Board record consists of the certified appeal board record, which is cited as "BR," the transcript of the summary judgment argument, and 22 exhibits that were admitted into evidence. *See* BR 21-23.

The exhibit numbers in this brief refer to the admitted exhibits, and not to the exhibit numbers that the parties used when they attached documents to their summary judgment motions.

application directly underneath a statement that read, "I declare that these statements are true to the best of knowledge and belief." Exs. 1, 15.

It is now undisputed that Birrueta was not married when he was injured at work. *See* BR 28; CP 7. In a 2012 declaration, Birrueta explained that he cannot read or write English. Ex. 15. He did not fill out the application for benefits and it was not his handwriting on the application. Ex. 15. He acknowledged that his signature appears on the application although he does not remember signing it. Ex. 15.

Birrueta's declaration stated that he was "unconscious much of the time" when he was taken to the emergency room after his work injury. Ex. 15. He did "not remember much of what was said to me, or of what I said to anyone in the hospital or the ambulance on the way to the hospital." Ex. 15. He recalled that someone in the ambulance asked him whether he had family in the area. Ex. 15. He responded that he had a sister named Graciela, and he "might have mentioned my niece Araceli, who is the daughter of Graciela." Ex. 15.

B. The Department Relied On Birrueta's Statement That He Was Married In Order To Calculate His Workers' Compensation Benefits

The Department allowed Birrueta's workers' compensation claim. *See* BR 147; *see* Exs. 2, 4, 8, 9. The Department provided benefits, including time loss compensation benefits to replace Birrueta's lost wages

while he was unable to work. *See* BR 147; *see* Exs. 8, 9, 17. A married worker receives a higher percentage of his or her wages in workers' compensation benefits, including time loss and pension benefits, than an unmarried worker. *See* RCW 51.32.060, .090.

Over the next four years, the Department issued several orders regarding Birrueta's wages at the time of injury. *See* Exs. 2, 4, 17, 18, 20. All of these orders stated that Birrueta was married. *See* Exs. 2, 17, 18. Although Birrueta protested several of these orders, none of these protests informed the Department that his marital status was incorrect. *See* Exs. 3, 5, 19, 21.

On November 23, 2004, the Department issued an interlocutory order paying time loss benefits that listed Birrueta's marital status as "married." Ex. 17; BR 147. On August 18, 2005, the Department issued a wage order in English and Spanish that established Birrueta's wages at the time of injury. Ex. 18; BR 147. That order stated that he was married ("casado") with no children.[2] Ex. 18; BR 147. Birrueta filed a pro se protest of the wage order, but again his protest did not inform the Department that he was not married. Ex. 19; BR 147.

On January 16, 2008, the Department issued an order affirming the August 18, 2005 wage order. Ex. 20; BR 147. Birrueta, through his

[2] It is not clear from the record why the child that Birrueta listed on the application for benefits was not included in the wage order.

attorney, protested that order, noting that employment security records had been requested "to determine if the current time loss rate is accurate." Ex. 21; BR 147. The protest did not state that Birrueta was single. *See* Ex. 21.

On September 24, 2008, the Department issued a new wage order that corrected and superseded the January 16, 2008, and August 18, 2005, wage orders. Ex. 2; BR 147. The order stated that Birrueta's compensation rate was based on his status as married with no children. Ex. 2; BR 147. Birrueta protested the September 24, 2008 wage order. Ex. 3; BR 148. Again, the protest did not state that Birrueta was single. *See* Ex. 3.

On December 17, 2008, the Department issued an order affirming the September 24, 2008 wage order. Ex. 4; BR 148. Birrueta protested that order, which was forwarded to the Board. Exs. 5-6. As with all of his other protests, this protest did not state that he was single. *See* Ex. 5. Eventually, Birrueta dismissed this appeal. Ex. 7.

C. In 2011, Birrueta Informed The Department That He Was Single At The Time Of Injury And The Department Issued Orders Under RCW 51.32.240(1)(a) Changing His Marital Status And Assessing An Overpayment

On January 31, 2011, the Department issued an order stating that Birrueta was totally and permanently disabled and would be placed on pension effective March 16, 2011. Ex. 8; BR 148. Birrueta was required

to submit a pension benefits questionnaire. BR 148; *see* Ex. 14. On the questionnaire, he stated that he was not married at the time his injury. Ex. 14; BR 148. This was the first time the Department was notified that he was not married at the time of injury. BR 148.

On March 24, 2011, the Department issued an order assessing an overpayment of $100.86 for time loss benefits paid from February 3, 2011, (the day after it received the questionnaire) to March 15, 2011 (the day before he was placed on pension) because Birrueta had innocently misrepresented his marital status. Ex. 9; *see also* Exs. 8, 11, 12. Birrueta protested this order, which the Department affirmed on June 7, 2011.[3] Exs. 10, 12.

On June 2, 2011, the Department issued an order changing Birrueta's marital status from married to single:

> The department established this worker's compensation rate based upon being married on the date of injury or disease manifestation. This action was taken due to information supplied by the worker on the Report of Accident.
>
> On 02/02/11 the worker informed the Department that information was incorrect.
>
> Effective 02/03/11, the Department is changing the marital status upon which compensation is established to

[3] From 2004 to 2011, Birrueta likely received considerably more than $100.86 in overpaid time loss benefits. The Department limited its recoupment to the benefits it had overpaid in the six weeks before placing Birrueta on pension. *See* Ex. 9. This is consistent with RCW 51.32.240(1)(a), which limits the Department's recoupment powers to one year from the date of the overpayment in cases of innocent misrepresentation.

> single. This action is taken in accordance with RCW 51.32.240(1).
>
> The worker misrepresented his marital status on the Report of Accident and did not inform the department of his true marital status until the pension benefit questionnaire was received on 2/02/11.

Ex. 11.

D. The Board Affirmed The Department's Authority To Change The Incorrect Marital Status Under RCW 51.32.240(1) But The Superior Court Reversed

Birrueta appealed the June 2, 2011 order changing his marital status and the June 7, 2011 overpayment order to the Board. Ex. 13.

The industrial appeals judge issued a proposed decision and order granting summary judgment to the Department. BR 19-30. The hearing judge found that Birrueta or someone on his behalf had innocently misrepresented his marital status on the application for benefits and that the Department relied on this misrepresented information when it issued the December 17, 2008 wage order. BR 28.

The hearing judge concluded that RCW 51.32.240(1) authorized the Department to correct a worker's marital status "so long as earlier information provided by the recipient, or one acting on the recipient's behalf, was the result of innocent misrepresentation." BR 28. The hearing judge observed that he could find "no authority standing for the proposition that a claims adjudicator for the Department cannot rely upon the information in a notice of injury, absent some extraordinary reason for

not relying upon that information." BR 27. Accordingly, the hearing judge affirmed both orders. BR 29.

Birrueta petitioned for review to the three-member Board. BR 8-14. In his petition, he did not contest the hearing judge's finding that he or someone on his behalf had innocently misrepresented his marital status on the application for benefits. *See* BR 8-9, 28. He also did not contest the finding that the Department relied upon that misrepresentation when it issued the December 17, 2008 order. BR 8-9, 28. Those factual findings are therefore verities on appeal.[4] Rather, he argued that because the December 17, 2008 wage order was final and binding, the Department lacked authority to change his marital status or to issue an overpayment based on an incorrect marital status. *See* BR 9-13. The Board denied his petition and adopted the hearing judge's proposed decision as its final decision and order. BR 5.

Birrueta appealed to superior court. CP 53-54. The superior court reversed the Board, concluding that the Department did not have the authority to issue the June 2, 2011 order changing Birrueta's marital status

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[4] Under RCW 51.52.104, a party waives any objections not set forth in a petition for review: "Such petition for review 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." *See Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (1992). It is uncontested, therefore, that Birrueta innocently misrepresented his marital status and that the Department relied on this misrepresentation when it issued the December 17, 2008 order. *See* BR 8-9, 28.

or the June 7, 2011 overpayment order. CP 8. The superior court adopted the Board's findings that Birrueta or someone on his behalf had innocently misrepresented his marital status on the application for benefits and that the Department relied on that misrepresentation when it issued the December 17, 2008 order. CP 7; BR 28.

The Department appeals. CP 5.

V. SUMMARY OF THE ARGUMENT

The Department properly changed Birrueta's marital status and assessed an overpayment after it discovered the misrepresentation. A Department order is generally final and binding on all parties if no party appeals the order within 60 days of communication and if the Department does not modify, reverse, hold in abeyance, or change the order. The Legislature, however, has explicitly mandated that a worker must repay benefits when the worker's innocent misrepresentation causes the worker to be overpaid, as long as the Department makes a timely claim for repayment. RCW 51.32.240(1)(a). This is a limited exception to finality that prevents the Department from making erroneous payments once it discovers an innocent misrepresentation.[5]

[5] A different subsection of the statute acts as a limited exception to finality in the case of underpaid benefits that result from clerical error, mistake of identity, and innocent misrepresentation. *See* RCW 51.32.240(2). Because this case involves an overpayment of benefits, RCW 51.32.240(1)(a) applies.

As the Board has repeatedly recognized, RCW 51.32.240(1)(a) also allows the Department to issue an order correcting the innocently misrepresented fact in order to ensure that future benefits are paid at the correct rate. This is true even if the innocently misrepresented fact appears in an order that would otherwise be final and binding. Once the Department learns that a worker has innocently misrepresented his or her marital status, RCW 51.32.240(1)(a) permits the Department to issue a new order correcting this information.

The Department correctly changed Birrueta's marital status under RCW 51.32.240(1)(a). The superior court's ruling in this case would require the Department to overpay benefits each month and, at the same time, to assess overpayments on a monthly basis, potentially for decades, rather than fixing the problem once and for all. This is not what the Legislature intended when it enacted RCW 51.32.240.

VI. STANDARD OF REVIEW

In an appeal from a superior court's decision in an industrial insurance case, 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). This Court reviews the decision of the trial court rather than the Board's decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009); RCW 51.52.140. This

Court limits its review to "examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings." *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999) (quoting *Young v. Dep't of Labor & Indus.*, 81 Wn. App. 123, 128, 913 P.2d 402 (1996)).

Statutory interpretation is a question of law reviewed de novo. *Kustura v. Dep't of Labor & Indus.*, 169 Wn.2d 81, 87, 233 P.3d 853 (2010). The Department's interpretation of the Industrial Insurance Act is entitled to deference because the Department is the executive agency charged with administering the Act. *Dep't of Labor & Indus. v. Slaugh*, 177 Wn. App. 439, 452, 312 P.3d 676 (2013), *review denied*, 321 P.3d 1206 (2014). The Board's interpretation of the Act is also entitled to "great deference." *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991).

VII. ARGUMENT

Under RCW 51.32.240(1)(a), the Department has authority to correct erroneous information that appears in otherwise final and binding orders if the erroneous information results from the worker's innocent misrepresentation. This is a limited exception to the principle of res judicata. The Department properly exercised this authority when it changed Birrueta's

marital status to single based on his innocent misrepresentation that he was married at the time of injury. This change ensures that Birrueta will receive future monthly pension benefits at the correct rate, and it ensures that the Department will not be required to overpay him each month and then recoup each monthly overpayment for the remainder of his life.

A. RCW 51.32.240(1)(a) Is A Limited Exception To Res Judicata That Authorizes The Department To Recoup Overpaid Benefits That Occur As A Result Of A Worker's Innocent Misrepresentation

The plain language of RCW 51.32.240(1)(a) explicitly authorizes the Department to recoup overpayments caused by innocent misrepresentations in otherwise final orders. Unlike in the case of "adjudicator error," the Legislature has not limited the Department's authority in cases of innocent misrepresentation to non-final orders. The trial court erred in holding otherwise.

The goal of statutory interpretation is to discern and implement the Legislature's intent. *Ellensburg Cement Prods., Inc. v. Kittitas Cnty.*, 179 Wn.2d 737, 743, 317 P.3d 1037 (2014). If the plain language of the statute is unambiguous, the Court's inquiry is at an end. *Manary v. Anderson*, 176 Wn.2d 342, 352, 292 P.3d 96 (2013). When construing a statute, this Court examines the whole statute and considers the entire sequence of all statutes relating to the same subject matter. *State v.*

Monfort, 179 Wn. 2d 122, 130, 312 P.3d 637 (2013); *see also Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.2d 1020 (2007) (when determining a statute's plain meaning, the court considers the context of the statute in which the provision is found and all related provisions).

RCW 51.32.240(1)(a) makes clear that a worker "shall repay" overpaid benefits in certain circumstances even if the order causing the overpayment is final. One such circumstance is when the worker's innocent misrepresentation causes the overpayment:

> 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.

RCW 51.32.240(1)(a) (emphases added). Therefore, under RCW 51.32.240(1)(a), a worker's repayment of overpaid benefits is mandatory ("shall repay") if the Department makes a timely claim for repayment. *See* RCW 51.32.240(1)(a).

By enacting RCW 51.32.240(1)(a), the Legislature has created a limited exception to res judicata that allows the Department to recoup

overpaid benefits that occur as a result of a worker's innocent misrepresentation even when the order overpaying benefits is otherwise final. *See Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (1997) (plurality opinion). Generally, res judicata effect is given to final Department orders that are not protested or appealed within 60 days of communication. *See* RCW 51.52.050(1), .060(1); *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 538, 886 P.2d 189 (1994). The Department may modify, reverse, hold in abeyance, or change any order within the time limited for appeal, or within 30 days after receiving a notice of appeal. RCW 51.52.060(4). Once the 60-day appeal period expires and the order becomes final, it cannot be appealed. *Shafer v. Dep't of Labor & Indus.*, 166 Wn.2d 710, 717, 213 P.3d 591 (2009).

The language of RCW 51.32.240 in its entirety supports the Department's authority to recoup overpayments in otherwise final orders in cases of innocent misrepresentation. RCW 51.32.240(1)(a) does not mention finality and does not limit repayment or recoupment of overpaid benefits to non-final orders. This contrasts with overpayments that occur when the Department makes an "adjudicator error" as defined by RCW 51.32.240(1)(b). In cases of "adjudicator error," the Department can assess overpayments *only* if the order causing the overpayment is not yet final:

> Except as provided in subsections (3), (4), and (5) of this section, the department may only assess an overpayment of benefits because of adjudicator error *when the order upon which the overpayment is based is not yet final as provided in RCW 51.52.050 and 51.52.060.* "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) (emphasis added).[6]

Thus, the statutory scheme explicitly distinguishes between overpayments resulting from clerical error, mistake of identity, or innocent misrepresentation and overpayments resulting from adjudicator errors. In the case of the former, the worker must repay the benefits if the Department makes a timely claim within one year of the payment, regardless of whether the order causing the overpayment is final. RCW 51.32.240(1)(a). Res judicata does not prevent recoupment in these circumstances. But in the case of adjudicator error, res judicata prevents recoupment if the order causing the overpayment is not yet final. RCW 51.32.240(1)(b).

Where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent. *Guillen v. Contreras*, 169 Wn. 2d 769, 776-77, 238 P.3d

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[6] Subsections (3), (4), and (5) of RCW 51.32.240 are not applicable in this case. Subsection (3) authorizes recoupment of benefits paid before a claim rejection order; subsection (4) authorizes recoupment of benefits paid pursuant to adjudication by the Department later determined erroneous in an appeal; and subsection (5) authorizes recoupment of benefits "induced by willful misrepresentation."

1168 (2010). A court presumes that differences between two similar statutes are intentional by the Legislature. *See Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791 (1998).

If the Legislature meant to limit the worker's repayment obligations in cases of innocent misrepresentation to non-final orders, it would have said so, as it chose to do in the case of "adjudicator errors." *See* RCW 51.32.240(1)(a), (b). It did not. Repayment is mandatory upon the Department's timely claim, which can occur up to a year after the erroneous payment. RCW 51.32.240(1)(a). By authorizing a claim period of one year, which is longer than the 60-day appeal period, the Legislature implicitly recognized that the Department may seek repayment or recoupment with regard to orders that have otherwise become final after 60 days. *See Weyerhaeuser Co. v. Bradshaw*, 82 Wn. App. 277, 282, 918 P.2d 933 (1996) (the Legislature has given the Department broad recoupment powers).

The trial court erred by refusing to allow the Department to recoup the overpayment. Here, the Department assessed an overpayment of $100.86 for the period from February 3, 2011, to March 15, 2011, based on Birrueta's innocently misrepresented marital status. Exs. 9, 12. Birrueta does not dispute that he or someone on his behalf innocently misrepresented his marital status or that the Department relied on this

misrepresentation. *See* BR 8-13, 28. Birrueta did not correct this misrepresentation until 2011 despite protesting several orders that gave him the opportunity to do so. Because the Department's claim for repayment was timely under RCW 51.32.240(1)(a), its June 7, 2011 overpayment order should be affirmed.

B. RCW 51.32.240(1) Authorizes The Department To Correct An Underlying Factual Error, Such As An Incorrect Marital Status, In An Otherwise Final Order Where The Factual Error Results From The Worker's Innocent Misrepresentation

The Department and taxpayers are not forever bound by misrepresented facts on a claim application. The Legislature recognized this principle when it enacted RCW 51.32.240(1), which not only gives the Department authority to recoup overpaid benefits in the past year, but to correct the misrepresented fact that is the source of the overpayments. The trial court erred when it concluded otherwise.

The Industrial Insurance Act's statutory scheme supports the conclusion that res judicata does not preclude the Department from correcting misrepresented facts that result in overpayments. This Court must read statutes together as a unified whole with the goal of a harmonious statutory scheme that maintains the integrity of the specific statutes. *Hallauer v. Spectrum Props, Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001). To the extent that the statutes conflict, the more specific statute

controls. *Kustura*, 169 Wn.2d at 88 (quoting *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm'n*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994)). ("A specific statute will supersede a general one when both apply.").

The overpayment statute (RCW 51.32.240(1)(a)) and the appeal statutes (RCW 51.52.050(1), .060(1)) may be read harmoniously to mean that unappealed orders are final and binding unless the criteria in RCW 51.32.240 are met. In this situation, RCW 51.32.240(1)(a) is the more specific statute because it applies to the circumstances in which an erroneous payment may be corrected (e.g. mistake, error, misrepresentation) while the appeals statutes (RCW 51.52.050(1), .060(1)) apply broadly to all Department orders.[7] Applying RCW 51.32.240(1)(a)'s limited exception to finality means that previously issued orders with misrepresented facts are not final as to those misrepresented facts.

When innocent misrepresentation results in the overpayment of benefits, it is the misrepresented fact that causes the overpayment. In RCW 51.32.240(1)(a), the Legislature mandated that the worker repay and the Department recoup overpaid benefits based on misrepresented facts.

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[7] Note that the Department cannot change final wage orders for mistakes involving adjudicator error. "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). No "adjudicator error" is involved here as the Department was supplied the incorrect information by Birrueta and did not know it was incorrect until Birrueta informed it of the error.

By requiring recoupment and repayment, the Legislature also intended that the misrepresented fact that caused the overpayment be negated.

Overpayments do not happen in vacuums. They are based on incorrect factual information, here acquired because of innocent misrepresentation. RCW 51.32.240(1)(a) recognizes this and allows the Department to correct the overpayment and the underlying assumption that leads to the overpayment so that the worker does not receive payments to which he or she is not entitled. This maintains the integrity of the appeal and overpayment statutes and ensures that a worker does not profit from a misrepresentation simply because the misrepresentation passes undetected for 60 days.

Although the statutory language in RCW 51.32.240(1)(a) does not specifically state that the Department can correct the misrepresented fact that causes the overpayment, reading the appeals statutes to trump the overpayment statute would violate the well-established canon that specific statutes control over general ones. *See Kustura*, 169 Wn.2d at 88. Such an interpretation would be absurd and would seriously undermine the Legislature's intent that innocent misrepresentations should be corrected when discovered. It would mean that the Department could not correct the underlying problem that the overpayment statute was enacted to address. The misrepresented fact would endure despite its discovery and, as

discussed below, the Department's sole remedy would be to monitor and collect the overpayments that would necessarily issue because the Department could not correct the underlying problem. That is not what the Legislature intended when it mandated that workers repay and that the Department recoup benefits paid because of a worker's innocent misrepresentation.

C. The Board Has Repeatedly Decided That RCW 51.32.240(1) Authorizes The Department To Correct Misrepresented Facts In Otherwise Final Orders, Including A Worker's Innocently Misrepresented Marital Status

The Board has repeatedly stated that RCW 51.32.240(1) authorizes the Department to correct misrepresented facts in orders that would otherwise be final when the misrepresented facts result in overpayments. *See In re Lloyd Johnson*, Nos. 12 15248 & 12 18850, 2013 WL 3636375 at *2 (Wash. Bd. Ind. Ins. App. April 11, 2013); *In re Robert Hickle*, No. 11 23444, 2013 WL 3185981 at *4 (Wash. Bd. Ind. Ins. App. March 26, 2013); *In re Alonso Veliz*, No. 11 20348, 2013 WL 3185978 at *1 (Wash. Bd. Ind. Ins. App. March 4, 2013). These decisions are entitled to "great deference." *Tri*, 117 Wn.2d at 138.

RCW 51.32.240 provides the authority to revise the factual information in an order that would otherwise be final 60 days after communication to a party. *See Veliz*, 2013 WL 3185978 at *1. In *Veliz*,

like in this case, the Board considered whether RCW 51.32.240(1) provided the Department with authority to change a worker's marital status when the worker's application for benefits stated, incorrectly, that he was married at the time of injury. *Veliz*, 2013 WL 3185978 at *1. The Board concluded that the Department had authority under the statute to change the worker's marital status because it was "attendant" to the authority to recoup:

> Once the misrepresentation has been established, 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. *Attendant to the authority to recoup benefits must be the ability to correct the underlying determination.*

Veliz, 2013 WL 3185978 at *2 (emphasis added). The Board reasoned that the Department had the authority to correct the underlying determination because otherwise the Department would have to continually overpay and then recoup benefits:

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

Veliz, 2013 WL 3185978 at *2.[8] The Board correctly recognized that the Department is not forever bound by a worker's misrepresented marital status in an application for benefits.

Subsequent Board decisions have confirmed the Department's ability to change a worker's marital status when the worker innocently misrepresents that status in the claim application. *Lloyd Johnson*, 2013 WL 3636375 at *2 (holding that where worker innocently misrepresented marital status, "RCW 51.32.240 authorized the corrective action taken by the Department that ensured that Mr. Johnson did not receive benefits in excess of his entitlement."); *Hickle*, 2013 WL 3185981 at *4 (observing that the finality of a wage order "would not have precluded the Department from changing [the worker's] marital status based on the provisions of RCW 51.32.240(1)."); *accord In re Teresa Johnson*, No. 06 10641, 1987 WL 61380 (Wash. Bd. Indus. Ins. App. August 26, 1987) ("RCW 51.32.240(1) expressly permits the recoupment of overpayments made 'within one year' of the making of the payment. This clearly contemplates an underlying authority to revise an order of payment which would otherwise be considered final 60 days after the date it was communicated to a party.").

[8] Veliz has appealed the Board's decision to superior court. His appeal is pending.

Here, the Department did not know that Birrueta was single at the time of injury until he completed the pension benefits questionnaire seven years later. BR 148. The Department reasonably relied on his statement that he was married in the report of injury. *See, e.g., In re Donald Mott*, No. 01 11553, 2002 WL 1400040 at *2 (Wash. Bd. Ind. Ins. App. April 24, 2002) (Department "had a right" to rely on worker's statement of marital status in application for benefits). In Birrueta's multiple protests to wage orders, he never corrected this misrepresentation.

It is now undisputed that that Birrueta innocently misrepresented his marital status. *See* BR 8-14, 28. Consistent with the Board's decisions, the Department properly acted on this information and issued the June 2, 2011 order correcting Birrueta's marital status to single at the time of injury. This is exactly the type of situation contemplated by *Veliz*, *Hickle,* and *Lloyd Johnson.* The June 2, 2011 order corrects Birrueta's innocent misrepresentation and prevents the Department from being in the "unreasonable position of having to continue overpaying benefits based on an innocent misrepresentation." *Veliz*, 2013 WL 3185978 at *2 (emphasis added). It ensures that Birrueta does not receive future benefits "in excess of his entitlement." *Lloyd Johnson*, 2013 WL 3636375 at *2.

D. Birrueta's Interpretation Of RCW 51.32.240(1) Would Result In Absurd Consequences

Assuming for the sake of argument that RCW 51.32.240(1)(a) does not allow the Department to correct a worker's innocently misrepresented marital status, an absurd result would occur. Each month, the Department would have to pay Birrueta more pension benefits than he would be entitled to as a single worker at the time of injury. Then, every month, or at least annually under RCW 51.32.240(1), the Department would have to issue an overpayment order to recoup the benefits that it overpaid to Birrueta because of the innocent misrepresentation. This would have to occur for the life of the pension, which in this case could be several decades since Birrueta is 30 years old. *See* Ex. 1. This is an illogical interpretation of the statute. The Legislature could not have intended such a result. This Court does not construe statutes in a manner that results in unlikely, absurd, or strained consequences. *Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 620-21, 285 P.3d 187 (2012), *review denied*, 176 Wn.2d 1021 (2013).

The reasonable reading, as the Board noted in *Veliz*, supports the Department's ability to use RCW 51.32.240(1) to not only assess overpayments for past periods, but also to avoid the need to assess them into the future. It is administratively burdensome for the Department to

issue and recoup overpayments on a monthly basis for the life of a pensioned worker. Continual overpayment orders are also burdensome on workers as they will be faced with the choice of either repaying money that they have already spent or having future time loss or pension payments reduced to allow the Department to recoup the money that the workers are not entitled to.

Under the plain language of RCW 51.32.240(1)(a), the worker "shall repay" benefits induced by innocent misrepresentation. The Department has a year to claim repayment from the date the benefit is paid. RCW 51.32.240(1)(a). This plain language must be followed. *See Manary*, 176 Wn.2d at 352.

The Industrial Insurance Act is interpreted to reduce "suffering and economic loss" caused by job injuries if a statute is ambiguous.[9] RCW 51.12.010. Although not ambiguous here, application of this principle favors the Department's and Board's interpretation. As noted, repayment is mandatory and RCW 51.32.240(1)(a) would require the issuance of continual overpayment orders. Requiring a worker to live under the burden of continual overpayment orders would cause economic loss. It is reasonable to believe that workers may immediately spend money they

[9] The statute here is not ambiguous. There is only one reasonable interpretation of the statute and that is that the overpayment should be corrected. It is unreasonable to interpret the statute otherwise.

receive. If the Department were forced to continually issue overpayment orders rather than to correct the misrepresented fact once and for all, workers would face the continuous hardship of repaying money they may have spent. Preventing this unnecessary cycle prevents this unnecessary hardship.

The Department is permitted to prevent continuous overpayments under RCW 51.32.240(1), as it did here by issuing the new wage order. *See, e.g., Veliz*, 2013 WL 3185978 at *2; *accord In re Anita Bordua*, No. 93 1851, 1994 WL 364993 (Wash. Bd. Ind. Ins. App. May 2, 1994) (rejecting argument that RCW 51.32.240(1) only allowed the Department to recoup overpayments but not to recalculate the wage rate for future benefits, noting that "[t]here is no precedential bar to the recomputation of future benefits").

Sound policy reasons support the Department's ability to prevent future erroneous payments upon discovery of innocent misrepresentation. The Department has a fiduciary duty to administer funds for the benefit of employers and injured workers as a whole, and in accordance with industrial insurance law. *See Hadley v. Dep't of Labor & Indus.*, 116 Wn.2d 897, 900, 810 P.2d 500 (1991) (noting role of Department as trustee of industrial insurance funds); 6A Washington Practice: Washington Pattern Jury Instructions 155.04 (6th ed. 2012); *Parks v.*

Dep't of Labor & Indus., 46 Wn.2d 895, 897, 286 P.2d 104 (1955) (jury instruction regarding trustee role of Department properly explained that Department's role as trustee is to pay claims "in accordance with the law governing such payments"). A trustee owes to the beneficiaries of the trust "the highest degree of good faith, care, loyalty, and integrity." *Allard v. Pac. Nat'l Bank*, 99 Wn.2d 394, 403, 663 P.2d 104 (1983). The Department's role as trustee of limited taxpayer funds is inconsistent with the Department overpaying a worker after discovery of innocent misrepresentation.

VIII. CONCLUSION

A worker cannot profit from his or her innocent misrepresentation. For that reason, the Legislature requires the worker to repay benefits obtained from the misrepresentation, even if the order containing the misrepresentation is otherwise final. Additionally, under RCW 51.32.240(1)(a), the Department can issue an order correcting the misrepresented fact. This ensures that the worker receives the benefits that he or she is entitled to and that the Department avoids a costly cycle of overpayment and recoupment for the life of a pensioned worker.

Birrueta told the Department that he was married at the time of his work injury when he was not. This was an innocent mistake that the Department properly and permanently remedied under RCW

51.32.240(1)(a) when it issued an order changing Birrueta's marital status to single and an order assessing a $100.68 overpayment. Because the superior court incorrectly concluded that the Department did not have authority to enter these orders, this Court should reverse the superior court.

RESPECTFULLY SUBMITTED this 9th day of June, 2014.

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COURT OF APPEALS FOR DIVISION III
THE STATE OF WASHINGTON

JOSE L. BIRRUETA, Respondent, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, Appellant.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on June 9, 2014, she caused to be served the Brief of Appellant Department of Labor and Industries and this Certificate of Service in the below-described manner:

Via E-Filing to:

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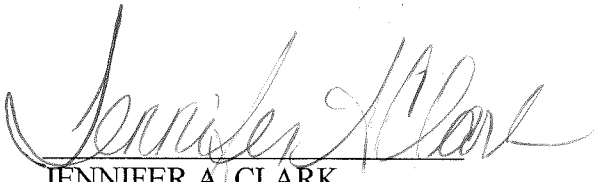
Signed this 9th day of June, 2014, in Seattle, Washington by:



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