

65403-9

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NO. 65403-9

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

DAKARAI A. PEARSON,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON,

Appellant.

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Dakarai A. Pearson raises a new argument in his brief of respondent, seeking for the first time to invoke the deadline in RCW 51.32.240(2)(a). This Court should decline to consider the argument because of Mr. Pearson's failure to raise it in his petition for review to the Board of Industrial Insurance Appeals, pursuant to RCW 51.52.104 and WAC 263-12-145(3), or in superior court.

Moreover, the new argument lacks merit because the clerical error and innocent misrepresentation provisions of RCW 51.32.240(2)(a) are mutually exclusive of the adjudicator error provision of RCW 51.32.240(2)(b), which here by its plain language applies. Both RCW 51.32.240(2) and the Industrial Insurance Act as a whole support the conclusion here that the Department of Labor and Industries' final wage order is adjudicator error, which Mr. Pearson needed to protest or appeal within 60 days of its communication. This, Mr. Pearson failed to do.

While Mr. Pearson alleges CR 60 permits relief from final orders of the Department, Board, and courts in workers' compensation cases, this is not so. CR 60 provides a limited exception to finality of court and Board orders, but it does not extend the statutory time limit for filing a protest or appeal of an order of the Department. CR 60 does not here afford relief to Mr. Pearson, nor can relief in inherent equity lie, because

Mr. Pearson slumbered on his right to timely challenge the Department's order for an error known to him.

II. ARGUMENT

A. **Mr. Pearson May Not Raise a New Argument Not Made to or Considered by the Board or the Superior Court that He Timely Requested Adjustment Under RCW 51.32.240(2)**

Mr. Pearson, for the first time, argues he timely requested adjustment of his wage rate under RCW 51.32.240(2). Respondent's Brief (RB) at 12-20. Mr. Pearson acknowledges he "has not previously discussed" this issue. RB at 12 n.2. Mr. Pearson may not raise, and this Court should decline to consider, this new argument. *See* RCW 51.52.104; WAC 263-12-145(3).

Pursuant to RCW 51.52.104, judicial review is not available unless a petition is filed first with the Board, to provide administrative exhaustion and an opportunity for correcting errors administratively. A petition to the Board "*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* herein." RCW 51.52.104 (emphasis added); *see also* WAC 263-12-145(3). Under WAC 263-12-145(4), the Board can remand for further hearings based on a petition for review. As such, a petition for review is an essential tool for correcting errors at the Board before a claim reaches the courts. The Board cannot act to correct

errors which may have been made by its industrial appeals judge if the requirements of RCW 51.52.104 and WAC 263-12-145(3) are not met.

The waiver of issues not raised in the petition to the Board extends to judicial review. RCW 51.52.115 (in judicial review, “only such issues of law . . . may be raised as were properly included in the notice of appeal to the board, or in the complete record of the proceedings before the board”). In *Garrett Freightlines, Inc. v. Department of Labor and Industries*, 45 Wn. App. 335, 725 P.2d 463 (1986), this Court found that the worker waived his claim that his back condition was an occupational disease when he failed to challenge, in his petition for review to the Board, the findings and conclusions related to his occupational disease, as opposed to injury, theory. *Id.* at 346. In *Homemakers Upjohn v. Russell*, this Court again made it clear that when a party petitions for review, the party waives all objections not clearly set forth in the petition. 33 Wn. App. 777, 781, 658 P.2d 27 (1983); *see also Allan v. Dep’t of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (1992) (“Notwithstanding the merits of her petition, Allan waived this objection because it was not set out in her petition for review of the ruling of the Industrial Appeals Judge as required by RCW 51.52.104.”).

Here, Mr. Pearson did not argue either to the Board or in the superior court that he satisfied the requirements of RCW 51.32.240(2).

While Mr. Pearson alleges the record is sufficiently developed for this Court to consider the new issue, for the Court to do so would contravene RCWs 51.52.104 and .115. The issue in the administrative appeal, as framed by the litigation scheduling order, was “Whether claimant’s untimely protest of a December 12, 2006 Department order should be excused due to misrepresentation by the employer.” Certified Appeal Board Record (CABR) at 34. In his trial brief before the Board, Mr. Pearson alleged entitlement to relief only under CR 60(b)(1) and/or (11) or in equity. CABR at 44-45. The Board judge then issued a proposed decision that rejected Mr. Pearson’s contention that Department orders not appealed within 60 days of communication may be set aside under CR 60(b) and affirmed the Department orders on appeal. CABR at 12-16. Mr. Pearson petitioned the three-member Board for review, seeking relief only under CR 60(b)(1) and/or (11) or in equity. CABR at 3-8. He included no argument in his petition regarding RCW 51.32.240. *See Id.*

Mr. Pearson’s failure to argue in his petition to the Board that RCW 51.32.240(2) entitles him to relief is important here because, had the Board agreed, neither the Board nor courts would be called to decide whether relief under CR 60 or in equity applied. The Board has power to grant statutory relief. The course of this case might have differed, had Mr. Pearson not waived his statutory argument. But he did waive his

statutory argument by not raising it in his petition to the Board, and this Court should thus decline to consider the waived argument now.

B. Even if This Court Considers Mr. Pearson's New RCW 51.32.240 Argument, It is Without Merit Because the Department's Error was "Adjudicator Error" and the Industrial Insurance Act as a Whole Requires Protest or Appeal Within 60 Days

In any event, Mr. Pearson's new argument for statutory relief lacks merit. Mr. Pearson argues that under RCW 51.32.240(2)(a) he had one year to challenge the Department's final wage order because of either the Department's alleged clerical error or the employer's innocent misrepresentation. RB at 12-20. Mr. Pearson's argument fails because RCW 51.32.240(2)(b), addressing circumstances of "adjudicator error," acts as a limitation on subsection (2)(a), and triggers a 60-day appeal period. Indeed, the Industrial Insurance Act viewed in its entirety shows the 60-day appeal period in RCWs 51.52.050 and .060, not the one-year period under RCW 51.32.240(2)(a), controls here.

RCW 51.32.240(2)(a) permits correction of underpayments within one year only for "fail[ure] to pay benefits because of clerical error, mistake of identity, or innocent misrepresentation." However, the "recipient may *not* seek an adjustment of benefits because of *adjudicator* error." RCW 51.32.240(2)(b) (emphasis added). Thus, failures to pay due to clerical error, mistake of identity, or innocent misrepresentation, on the

one hand, and adjudicator error, on the other, are mutually exclusive. Under the plain statutory language, RCW 51.32.240(2)(b) is a limitation on the one-year correction period of subsection (2)(a). Errors in adjudication *must* be corrected by filing a protest or appeal within 60 days from the date the order was communicated as provided in RCW 51.52.050. RCW 51.32.240(2)(b).

As Mr. Pearson identifies, “adjudicator error” arises in any of three ways: (1) failure to consider information in the claim file; (2) failure to secure adequate information; or (3) an error in judgment. RB at 14; RCW 51.32.240(2)(b). The Department considered all information in the claim file, including the employer’s response of “none paid” for housing, when issuing the final wage order.¹ See CABR, Exhibit 1 at 55-57. By the time of its final wage order, the Department had adequate information to have made the correct decision regarding Mr. Pearson’s wages at time of injury. See CABR, Exhibit 1 at 6-32, 108-14. However, contrary to Mr. Pearson’s assertion, RB at 16, the Department *erred in judgment*.

The Department’s final wage order is “adjudicator error” within the meaning of RCW 51.32.240(2)(b) because it resolved a perceived dispute in fact as to whether Mr. Pearson’s employer paid for his housing. The Department agrees with Mr. Pearson that, as an abstraction, to

¹ There is no basis in the record or in law for Mr. Pearson’s allegation at RB 14-15 that the claims manager committed fraud.

exercise judgment is to exercise discretion, and that a decision by the Department to include employer-provided housing in date of injury wages is not discretionary under RCW 51.08.178. RB at 16. But the claims manager *perceived* a factual conflict for resolution concerning whether Mr. Pearson's employer paid for his housing—i.e., a situation requiring exercise of *discretion*—regardless of whether such conflict was actually present. Mr. Pearson's employer stated “none paid” for housing, while Mr. Pearson said his employer paid for it, and leading up to the final wage order, the claims manager talked repeatedly to Mr. Pearson about this.² CABR, Exhibit 1 at 30-31, 6-9; CABR, Testimony Vaughn, Tr. 8/5/08, at 31. With seemingly contradictory information presented as to whether the employer paid for housing, the final wage order was a product of “judgment,” and thus “adjudicator error” which must have been challenged within 60 days of communication.

Mr. Pearson argues the Department's final wage order is a “clerical error.” RB at 17 (“The only possible way this error could have been made . . . is that when the December order was drafted, the claims manager failed to type in the new information.”).³ Even aside from adjudicator

² The claims manager apparently failed to realize the employer representatives' confusion in responding to the Department's inquiries.

³ The non-discretionary nature of including employer-provided housing in date of injury wages does not make all wage calculation or other benefits errors clerical. A

error being mutually exclusive of clerical error, the final wage order was not a clerical error. The claims manager repeatedly told Mr. Pearson that his employer reported “none paid” for housing. CABR, Testimony Vaughn, Tr. 8/5/08, at 31 (“We talk[ed] several times a week on that.”). As Mr. Pearson noted, the claims manager asked Mr. Pearson to submit documentation of his employer in fact paying for housing. RB at 44 (citing CABR, Exhibit 1 at 110, 112). This shows the claims manager believed there was a dispute of fact to resolve and that the content of the Department’s final wage order was intentional, not that the final wage order omitted employer-provided housing through clerical error.

Not just RCW 51.32.240(2)(b), but also the overall statutory scheme requires Mr. Pearson to protest or appeal the final wage order within 60 days of communication. *See State ex rel. Peninsula Neighborhood Ass’n v. Dep’t of Transp.*, 142 Wn.2d 328, 342, 12 P.3d 134 (2000) (“Statutes are to be read together, whenever possible, to achieve a harmonious total statutory scheme.”). Two provisions of the Industrial Insurance Act establish the time period within which a Department order may be contested. RCW 51.52.050 imposes a 60-day limit on requests for reconsideration—i.e., protests—or appeals. RCW 51.52.060 imposes the same 60-day limitation on appeals to the Board from Department orders.

dispute in fact as to whether the benefit is provided requires exercising judgment in making the wage calculation.

Through these sections, the Legislature provided that erroneous orders of the Department must be challenged within 60 days of communication or the order becomes final. RCW 51.32.240(2)(b) refers to RCW 51.52.050. Read as a whole, especially where Mr. Pearson knew the Department's final wage order was in error and why, the Act requires him to have timely protested or appealed.⁴ To permit challenge of known error outside the 60-day challenge period contradicts overall legislative intent.

C. CR 60 is a Limited Exception to Finality of Only Court and Board Orders in Workers' Compensation Cases, But Not Department Orders

By failing to distinguish between relief from final orders of the *courts or Board* and final *Department* orders, Mr. Pearson mischaracterizes the Department's argument regarding applicability of CR 60 in workers' compensation cases. Mr. Pearson argues "the entire point of CR 60 is to provide a remedy against final orders when allowing a final order to stand would be unjust." RB at 22. CR 60 may provide relief from final orders of the courts or Board in workers' compensation cases.

⁴ RCW 51.52.050(1) states: "such final order, decision, or award 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 . . ." RCW 51.52.060(1)(a) states: "Except as otherwise specifically provided in this section, a worker . . . aggrieved by an order, decision, or award of the department must, before he or she appeals to the courts, file with the board and the director, by mail or personally, within sixty days from the day on which a copy of the order, decision, or award was communicated to such person, a notice of appeal to the board."

However, no authority permits use of CR 60 to challenge a *Department* order that has not been timely protested or appealed.⁵

Mr. Pearson argues that because of RCW 51.52.140 and WAC 263-12-125, CR 60 applies to permit setting aside final Department orders. RB at 22-23. Mr. Pearson is wrong. CR 60(b) may relieve a party from a “final judgment, order, or proceeding.” But the Civil Rules apply to proceedings in *courts*. CR 1 states: “These rules govern the procedure in the superior court in all suits of a civil nature.” While RCW 51.52.140 and WAC 263-12-125 extend applicability of CR 60 to Board proceedings *on timely appeal from Department orders*,⁶ no statute or regulation brings in the Civil Rules in general, nor CR 60 in specific, to the Department’s *ex parte* claim adjudication. RCW 51.52.140 does not allow for application of CR 60 to unappealed⁷ and therefore final *Department* decisions because those decisions are not “appeals.”

⁵ As the Department noted in its Brief of Appellant, AB at 20, a court’s order in an industrial insurance claim may be corrected under CR 60. *See Shum v. Dep’t of Labor & Indus.*, 63 Wn. App. 405, 408, 819 P.2d 399 (1991) (motion to superior court to correct the court’s own earlier decision in the case). As the Department also noted, AB at 21-22, CR 60 may apply to Board orders issued upon timely appeals from Department orders. RCW 51.52.140; WAC 263-12-125.

⁶ The provision in RCW 51.52.140 regarding the practice in civil cases applies only to court and Board procedure after the appeal has been properly taken. *Vasquez v. Dep’t of Labor & Indus.*, 44 Wn. App. 379, 383, 722 P.2d 854 (1986); *Diehl v. W. Wash. Growth Mgmt. Hrgs. Bd.*, 153 Wn.2d 207, 216, 103 P.3d 193 (2004) (citing *Vasquez* approvingly); *Dep’t of Labor & Indus. v. Cook*, 44 Wn.2d 671, 676, 269 P.2d 962 (1954) (superseded by statute on other grounds).

⁷ Untimely appeal from a Department order constitutes a non-appeal. *Marley v. Dep’t of Labor & Indus.*, 125 Wn.2d 533, 537-39, 886 P.2d 189 (1994) (Department order not appealed within 60 days is final and *res judicata*). The Department in this brief

“Statutes must be construed so that all the language is given effect and no portion is rendered meaningless or superfluous.” *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002). RCW 51.52.140 states: “*Except as otherwise provided in this chapter*, the practice in civil cases shall apply to appeals prescribed in this chapter.” (Emphasis added). WAC 263-12-125 states: “*Insofar as applicable, and not in conflict with these rules*, the statutes and rules regarding procedures in civil cases in the superior courts of this state shall be followed.” (Emphasis added). Mr. Pearson fails to quote the italicized words. To apply CR 60 to unappealed Department orders would provide otherwise from, and conflict with, RCWs 51.52.050, .060, and 51.32.240(2)(b). Indeed, RCW 51.04.010 abolishes “all jurisdiction of the courts of the state over such causes” except as provided in Title 51 RCW. The elaborate scheme of the Title 51 RCW precludes application of CR 60 to unappealed *Department* orders.

In the context pertinent to this case, RCW 51.32.240 takes the place of CR 60, affording only limited relief from otherwise final orders in certain circumstances, which here do not apply, *see* Section II.B above. Several of the circumstances in RCW 51.32.240 are covered in CR 60 (e.g., fraud, clerical error, mistakes). RCW 51.32.240 is the sole pertinent basis for correcting erroneous but unappealed *Department* orders.

refers to a Department order not protested or appealed within 60 days of communication, pursuant to RCWs 51.52.050 and .060, as an “unappealed” Department order.

Mr. Pearson argues by analogy to CR 37(b) and RCW 51.52.100 that CR 60(b) somehow applies to an unappealed Department order. RB at 23-24. This again fails to recognize the distinction between inapplicability of CR 60 to final orders of the Department, and final orders of the courts or Board. Mr. Pearson's analogy is unpersuasive. RCW 51.52.100 has meaning because RCW 51.52.140 and WAC 263-12-125 would otherwise bring in contempt powers in appeals at the Board, *but for* RCW 51.52.100.

Addressing the one year timeliness requirement of CR 60(b)(1), Mr. Pearson claims absurdity of needing to go to the courts within one year of the Department order. RB at 25-26. But, even if CR 60 applied to unappealed Department orders, which the Department does not concede, Mr. Pearson would bring a motion under the rule *to the Department*. The rule permits a court to set aside only *its own* decision, not that of another court. *See Wright & Miller & Kane, Federal Practice and Procedure: Civil 2d* § 2865 at 377 (discussing federal counterpart to CR 60).⁸ For this same reason of self-correction, a party seeking CR 60 relief from a final Board order brings such CR 60 motion to the Board.⁹ If CR 60 were to apply to the Department, the need to bring a CR 60 motion to the Department for

⁸ *See also* RAP 7.2(e) (which contemplates that movants for relief from a superior court judgment first file such motion in superior court).

⁹ The courts would, upon timely appeal of the Board's CR 60 ruling, exercise appellate jurisdiction to review the Board's CR 60 ruling, applying the pertinent limits on courts' appellate jurisdiction. A court could not provide CR 60 relief from a final Board decision except through appellate review of the Board's CR 60 ruling.

relief from a final Department order would be further supported by the need for the Department to exercise original jurisdiction in workers' compensation claims. The Board's and the courts' role is limited to reviewing Department decisions. *Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 661-62, 879 P.2d 326 (1994).¹⁰ Mr. Pearson's absurdity suggestion is thus based on false assumptions. But even if CR 60 relief were available, Mr. Pearson did not request CR 60 relief in *any forum* until more than one year from the final wage order. See CABR at 44-45.

No authority extends CR 60 relief to decisions of the Department. One plurality opinion noted in dictum that if the widow had timely appealed the Department order to the Board, she could have pursued a CR 60 remedy from the Board's order, because the Board had adopted the Civil Rules. *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 172, 937 P.2d 565 (1997) (plurality opinion). The plurality, upon the widow's contention she was entitled to CR 60 relief from the untimely appealed *Department* order, denied both equitable and CR 60 relief because she did not pursue it within a reasonable time. *Id.* at 177 n.7. A subsequent Court of Appeals opinion described, again in dictum, the *Kingery* plurality as having concluded that "CR 60 and/or 'the court's equitable powers'"

¹⁰ The Board and superior court would then have power to set aside the Department's CR 60 decision only on a showing of abuse of discretion by the Department. See *Pybas v. Paolino*, 73 Wn. App. 393, 399, 869 P.2d 427 (1994) (CR 60 decision reviewed for manifest abuse of discretion).

permit grant of relief under appropriate circumstances. *Dep't of Labor & Indus. v. Fields Corp.*, 112 Wn. App. 450, 459, 45 P.3d 1121 (2002) (internal quotation omitted). However, this description of *Kingery* is loose language because the *Kingery* plurality does not support the premise that an unappealed *Department order* can be revived under CR 60. The *Fields Corporation* Court appeared to affirm the trial court's grant of equitable relief exclusively under courts' inherent authority, not CR 60. *See Id.* at 455.

Law and public policy (*see* AB at 29) support the conclusion that CR 60 is a limited exception to finality of only court and Board orders in workers' compensation cases, but not Department orders.¹¹

¹¹ Mr. Pearson contends the Department "cites no authority that a claimant's knowledge of a mistake somehow defeats his request to have the error fixed." RB at 28. Yet, Mr. Pearson then proceeds to discuss one such case cited by the Department, AB at 36-37, in support of this very proposition: *State v. Santos*, 104 Wn.2d 142, 145, 702 P.2d 1179 (1985).

Mr. Pearson also argues the Department "does not otherwise [apart from absence of relief for mistake, given knowledge of the error] attack the Superior Court's findings that Mr. Pearson is alternatively entitled to relief under CR 60(b)(1) for irregularity in computing Mr. Pearson's time loss compensation rate, and CR 60(b)(11) for the Department's substantial deviation from the 'proper mode of proceeding' under RCW 51.08.178." RB at 30 (internal footnote omitted). This is not so. The Department raised timeliness arguments with respect to relief under CR 60(b)(1), and argued that CR 60(b)(11) relief is appropriate only for irregularities extraneous to the action of the court or for questions concerning regularities of the court's proceedings, citing *In re Marriage of Knutson*, 114 Wn. App. 866, 873, 60 P.3d 681 (2003). AB at 35-36. The calculation of wages is not extraneous to the Department's adjudication of Mr. Pearson's claim and the Department's actions were regular, even if its order was erroneous. Also, contrary to Mr. Pearson's contention, RB at 31, the superior court's order does not specify whether the ruling on "irregularity" is under CR 60(b)(1) or another provision, e.g., (11). CP at 5.

In any event, the Department's broader argument is that CR 60 relief never applies to unappealed Department orders.

D. Extraordinary Equitable Relief Is Not Warranted in This Case, Because Mr. Pearson Knew His Right to Challenge the Wage Order But Took No Diligent Steps to Exercise that Right

As the Department argued in its opening brief at AB 38-39, this Court should not consider the superior court's oral ruling suggesting relief under inherent equitable authority because the oral ruling is inconsistent with the written order. In any event, the record presents no extraordinary circumstances to warrant equitable relief in this case.

The record does not support apparent findings by the superior court in its oral ruling of potential lost mail and Mr. Pearson's alleged reliance on his attorney. VRP at 7-8; CP at 21. Mr. Pearson does not argue otherwise.¹² Mr. Pearson instead argues he is entitled to equitable relief, pointing out he supplied information he had, attempted to get records from third parties, and retained counsel weeks but not months or years too late to timely protest or appeal the final wage order. RB at 43-46.¹³

¹² Not only does the record not support the superior court's oral ruling, but the ruling does not comport with summary judgment standards, since the court drew inferences in Mr. Pearson's favor when granting *his* motion. In suggesting the possibility, in the alternative, of remanding for a determination of inherent equitable relief, RB at 35, Mr. Pearson implicitly acknowledges the court's problematic oral ruling. Remand for a further ruling is unnecessary because no facts are in dispute, and the law does not support equitable relief when the party knows a decision is in error and has capacity to timely challenge it. The Department's cross motion for summary judgment should, as a matter of law, have been granted. This Court should so conclude.

¹³ Separate from his "diligence" argument, Mr. Pearson argues he is entitled to equitable relief because the Department committed "misconduct." RB at 35. At all prior points, Mr. Pearson has argued only that the Department erred, not that it (as opposed to the *employer*) committed misconduct, so this argument is waived. *See* section II.A above. In any event, no facts support that the Department committed misconduct. The Department has no duty to secure information from third parties, i.e., the apartment

Mr. Pearson argues that the Department's analysis of case law on equitable relief in workers' compensation cases is incomplete. RB at 36-43. He urges this Court to follow a purported "intensional" (i.e., criteria-based) approach that *Kingery* allegedly supports. Case law does not support the approach urged by Mr. Pearson or his version of the rule for equitable relief. A majority of justices in *Kingery* concluded that equity relief is not limited to only cases where the worker is incompetent¹⁴ or illiterate.¹⁵ However, extraordinary circumstances must exist, and Mr. Pearson must prove he diligently pursued his rights. See *Kustura v. Dep't of Labor & Indus.*, 142 Wn. App. 655, 673, 175 P.3d 1117 (2008) (the workers "cite no extraordinary circumstances preventing them from . . . timely challenging [the orders]"), *aff'd*, 169 Wn.2d 81, 233 P.3d 853 (2010); *Fields Corp.*, 112 Wn. App. at 459-60 (citing *Kingery*).

Extraordinary circumstances do not exist here, and Mr. Pearson failed to show he was diligent. Unlike the claimants in all other industrial insurance cases where equitable relief was granted, Mr. Pearson knew the Department's order was in error and that he had a right to challenge it

complex, to sort out conflicting reports by claimants and employers. Parties aggrieved by a Department order can timely file a protest or appeal without supporting evidence. There is no requirement that Mr. Pearson possess any particular documentation in order to protest or appeal the final wage order.

¹⁴ See *Ames v. Dep't of Labor & Indus.*, 176 Wash. 509, 514, 30 P.2d 239 (1934).

¹⁵ See *Rodriguez v. Dep't of Labor & Indus.*, 85 Wn.2d 949, 953-55, 540 P.2d 1359 (1975).

within 60 days. It is a “universal maxim that ignorance of the law excuses no one.” *Leschner v. Dep’t of Labor & Indus.*, 27 Wn.2d 911, 926, 185 P.2d 113 (1947) (rejecting claimant’s argument for equitable relief from claim-filing deadline).

Mr. Pearson argues the overall rule¹⁶ supported by case law is that inherent equitable relief may be awarded based on what the claimants do “*after* their claim has become time-barred.” RB at 43 (emphasis in original). Mr. Pearson is incorrect. Instead, at least one rule shown in each of the four published appellate decisions in which inherent equitable relief was granted in an industrial insurance case is that parties must take reasonably available steps *when they know the Department’s order is incorrect*. This, Mr. Pearson failed to do.

In *Ames*, the claimant could not understand he was aggrieved by the Department’s order because he was mentally incompetent and physically confined in a mental institution when the Department sent the order to him at his home address despite knowing of his commitment. *See* 176 Wash. at 510. While the superior court had adjudged the claimant insane and committed him to the hospital before the Department issued its order, no guardian was ever appointed. *Id.* Six days after the court lifted

¹⁶ Because circumstances justifying relief must be shown, *Fields Corp.*, 112 Wn. App. at 459-60, it is not clear that an “intensional” (i.e., criteria-based) rule for inherent equitable relief can be distilled from the limited case law. Just what amounts to such circumstances varies depending on the unique facts of each case.

the declaration of incapacity, the claimant, with aid of an attorney, filed challenge of the Department order. *Id.* at 511. The Department denied the petition because the statute of limitations had run. *Id.* at 512. The Court permitted challenge of the order under broad principles of equity. *Id.* at 514. The Court noted that during the statutory challenge period, “The claimant was in no condition to be heard or to give testimony”; indeed, the Department knew him to be insane. *Id.* While the Court did not specifically comment on the promptness of the claimant’s petition after removal of his legal incapacity, he took action in mere days.

In *Rodriguez*, the claimant was an extreme illiterate who spoke only Spanish, and at the time of the Department order closing his claim, the interpreter who aided him with past translations was hospitalized, and the claimant’s mother also fell ill and he drove out of state to see her for several months. 85 Wn.2d at 950. Within one month of his return, he obtained translation of the closing order and promptly appealed. *Id.* The Court noted that the translation upon his return is when he “for the first time learned his claim had been closed.” *Id.* The claimant thus took action promptly after learning the Department’s order was in error.

In *Rabey v. Department of Labor and Industries*, the Court excused a survivor’s failure to timely apply for benefits when she was “devastated” and struggled with day to day responsibilities following the death of her

husband, who worked for the same employer. 101 Wn. App. 390, 392, 3 P.3d 217 (2000). Mrs. Rabey timely approached her employer's human resource manager to ask about filing a claim; the manager stated she would follow up with Mrs. Rabey if she had a viable claim, but the manager then failed to follow up. *Id.* This led Mrs. Rabey to reasonably believe she had no claim. *Id.* at 398. Because Mrs. Rabey at first understood she did not have a viable claim, she did not know her failure to file was in error.¹⁷ When advised after the claim filing deadline of its viability, Mrs. Rabey immediately filed a claim, thereby demonstrating her diligence. *Id.* at 393.

Fields Corporation involved an employer who was awarded equitable relief from its failure to challenge a Department order that allowed an injury claim when it was "impossible" for the employer to have known during the statutory challenge period for such order that it was incorrect. *See* 112 Wn. App. at 453-54. A worker filed an industrial insurance claim for pain in his elbows and shoulders attributed to driving a company truck. *Id.* at 453. This claim was allowed. *Id.* While this claim

¹⁷ *Ames, Rodriguez, and Fields Corporation* involve situations where a party was excused under courts' inherent equitable authority from failing to timely appeal a Department order. The *Rabey* Court excused failure to comply with a statutory claim filing deadline. Mrs. Rabey did not receive any orders of the Department that she failed to challenge; indeed, she timely challenged the Department's order determining it could not award benefits because of the one-year claim filing deadline for survivors of industrially injured workers.

was open, the same worker filed a second claim alleging pain in his left shoulder from “a self-arrested fall and a board falling on his left shoulder while he was unloading a truck.” *Id.* The Department also allowed this second claim. The employer did not protest or appeal this allowance order in the 60-day period “because it ‘had no information on which to do so.’” *Id.* (internal citation to record omitted).

It is inaccurate to say the employer in *Fields Corporation* “was actively pursuing the information needed to successfully challenge the Department order,” as Mr. Pearson puts it. RB at 43. Rather, the employer did not know until too late that the Department order was in error; as the parties stipulated, it was *impossible* for the employer to know until it obtained records containing new diagnoses and opinions long after the statutory protest or appeal period from the allowance order for the second claim that the claim was actually a continuation and possible aggravation of the preexisting shoulder condition. 112 Wn. App. at 454.¹⁸

¹⁸ Mr. Pearson argues incorrectly that the Department attacks the *Fields Corporation* Court’s distillation of *Kingery* as it pertains to courts’ *inherent equitable authority*. RB at 39. Rather, the Department cautioned that the *Fields Corporation* opinion contains loose language with respect to *Kingery*’s alleged support that *CR 60* may provide relief from unappealed Department orders. AB at 28. This, *Kingery* does not support.

The Department also noted *Fields Corporation* is distinguishable from the present case because *res judicata* was there used offensively. AB at 47. Mr. Pearson’s discussion of offensive versus defensive use of *res judicata*—saying both uses “keep a party from having money to which the party is legally entitled,” RB at 39—saps the distinction of all meaning.

These cases granted equitable relief when a party learned too late that he or she should file a claim or appeal, and then took diligent steps to exercise that right. No authority grants extraordinary relief to claimants who slumbered on their rights.¹⁹

The *Kingery* Court declined to award equitable relief. The widow in *Kingery* lacked any evidence until long after the statutory appeal period for the Department order rejecting her claim for survivor's benefits that her husband's industrial injury caused his death. *See* 132 Wn.2d at 165-66 (plurality opinion). Mr. Kingery was found dead near the wheels of his road grader with massive head, neck, and chest injuries. *Id.* at 165. Mrs. Kingery filed a claim for survivor benefits. *Id.* Twelve days later, the coroner concluded Mr. Kingery died of a heart attack, with the head, neck, and chest injuries occurring post-mortem when he fell out of the grader. *Id.* The Department then denied the claim. *Id.* at 166. Mrs. Kingery timely requested reconsideration, but when the Department affirmed its earlier decision she did not appeal. *Id.*

For various reasons, it took years for Mrs. Kingery to obtain a copy of the autopsy report. *Id.* at 166-67. 15 months after she eventually

¹⁹ This conclusion based on inherent equitable authority cases is consistent with the approach courts take under CR 60. If the party knows of error, the party must timely appeal. *Bjurstrom v. Campbell*, 27 Wn. App. 449, 450, 618 P.2d 533 (1980). A mistaken order is only a "mistake" for purposes of CR 60(b)(1) when the party did not and could not reasonably know the order was a mistake at the time of the decision.

obtained a copy of the autopsy report, Mrs. Kingery asked the coroner to reopen investigation of the cause of Mr. Kingery's death, which the coroner promptly did. *Id.* at 167. New medical examiners reviewed records and concluded Mr. Kingery died due to his head, neck, and chest injuries, not the heart attack. *Id.* The coroner corrected the death certificate to reflect that Mr. Kingery died due to industrial injury. *Id.* Thus, this official correction is when Mrs. Kingery first had anything more than her speculative and subjective belief in support of her claim for benefits. Three months after learning the new autopsy results, Mrs. Kingery reapplied for benefits. *Id.*

Had Mrs. Kingery promptly requested reopening the investigation of her husband's cause of death when she obtained the autopsy report, instead of waiting 15 months, or promptly appealed the Department's order when she learned the coroner reversed his opinion, it is possible the Court would have granted Mrs. Kingery equitable relief. *See Id.* at 176-77 (plurality opinion), 178 (Madsen, J., concurring).²⁰ Mrs. Kingery's delay showed lack of diligence, and the Court thus declined to extend her relief. *Id.* at 176-77 (plurality opinion), 178 (Madsen, J., concurring).

²⁰ The plurality also noted, however, that Mrs. Kingery inadequately explained her eight-year delay in challenging the Department's affirmation order, as she could have secured another expert to review records in challenge of the initial autopsy findings, 132Wn.2d at 176-77, and the facts did not necessarily support that she could not for years obtain a copy of the autopsy report. Ms. Kingery believed all along that she had a valid claim, which suggests she should have appealed in order to diligently protect her rights.

In *Harman v. Department of Labor and Industries*, 111 Wn. App. 920, 47 P.3d 169 (2002), *review denied*, 147 Wn.2d 1025 (2002), the Court reversed the superior court's grant of equitable relief, describing *Rabey* as an application of equity to a "narrow set of facts in order to avoid a harsh consequence that was not caused by any lack of diligence on the part of the Rabey family." *Id.* at 926. This implies Mrs. Harman was denied relief because she knew she must timely submit a claim, having been told the examination in her employer's health clinic was not a claim for benefits, but that a claim form was available through her employer, the health clinic, a physician, or the Department. *Id.* at 922-23. *Harman* also supports that special circumstances must justify relief. *Id.* at 926.

In *Kustura*, this Court declined to extend equitable relief to two limited English proficiency workers who were available and mentally and physically competent when they received the Department orders. 142 Wn. App. at 672-73. Both workers "were represented by counsel and/or had access to interpreters" at the time of the Department orders, *Id.* at 673 n.20, thus giving rise to inference they understood they should challenge the decisions. No "extraordinary circumstances" prevented them from challenging the orders. *Id.* at 673.

Mr. Pearson knew all along that the Department's final wage order was in error. He knew that at time of injury he received housing and meal

cards provided by his employer. He timely and properly challenged the Department's initial wage order for the same error as in the final wage order. CABR, Exhibit 1 at 6-8. Leading up to the final wage order, Mr. Pearson repeatedly told the Department its initial decision was in error. CABR, Testimony Pearson, Tr. 8/5/08, at 18-19; CABR, Testimony Vaughn, Tr. 8/5/08, at 31. Mr. Pearson understood his rights and could competently handle his affairs.

It was not impossible for Mr. Pearson to have timely protested or appealed.²¹ Mr. Pearson did not need to obtain any additional documentation; he needed only to submit a writing expressing disagreement with the final wage order, as he had previously done upon the Department's issuance of an initial wage order. *See* CABR, Exhibit 1 at 6-8. Mr. Pearson states: "Delay occurred in communicating the protest because [Mr. Pearson's counsel] did not receive Mr. Pearson's authenticated power-of-attorney until after 60 days had passed." RB at 9. Mr. Pearson did not cite to the record in support of a missing power-of-attorney document, as opposed to the notice of representation, nor does the record support this. In any event, not timely submitting a power-of-

²¹ Mr. Pearson re-characterizes the inquiry, alleging it would have been impossible for him to have obtained supporting records on his own during the protest or appeal period. RB at 45. There is no support for it being "impossible" for Mr. Pearson to have obtained records; in any event, Mr. Pearson could have protested or appealed without possessing any new records.

attorney document tends to show that Mr. Pearson slumbered on his rights and cannot have expected anyone to have taken action on his behalf. Mr. Pearson can and should have timely protested or appealed on his own, or sooner and properly retained counsel to act for him.

Extraordinary circumstances do not exist to excuse Mr. Pearson's failure to timely protest or appeal the final wage order in this case. Diligence requires him to have done so. Equitable relief is not warranted.

III. CONCLUSION

This Court should reverse the superior court's summary judgment for Mr. Pearson and remand this case with direction for the superior court to enter an order granting the Department's summary judgment motion.

RESPECTFULLY SUBMITTED this 4th day of March, 2011.

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