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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioner,

v.

JOSE BIRRUETA,

Respondent.

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Washington State Supreme Court

NOV - 5 2015 *h h*

Ronald R. Carpenter
Clerk

MEMORANDUM OF AMICI CURIAE
ASSOCIATION OF WASHINGTON BUSINESS
WASHINGTON SELF-INSURERS ASSOCIATION
SUPPORTING PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals, in a published decision, has held the Department of Labor & Industries’ (“L&I”) statutory right to recover an overpayment from an industrial insurance claimant caused by the claimant’s innocent misrepresentation is limited to the 60-day period before L&I’s formal order containing the overpayment becomes final. *Birrueta v. Dept. of Labor & Indus.*, ___ Wn. App. ___, ___ P.3d ___ (Jul. 9, 2015). This holding is despite RCW 51.32.240(1)(a), which unambiguously provides one year from the date of an overpayment for L&I or a self-insured employer to claim recoupment of the overpayment.

Rather, the Court of Appeals holding is based on its interpretation of RCW 51.32.240(1)(b) describing the wholly separate instances whereby an overpayment may arise due to “adjudicator error,” that is, an error on the part of the individual examining the claim for L&I or the self-insured employer. Erroneously viewing the case as controlled by .240(1)(b) rather than .240(1)(a), the Court of Appeals proceeded with a likewise erroneous and misguided gloss on the legislative history of section .240, dismissed

very recent contrary holdings of the Board of Industrial Insurance Appeals, and developed a split with Division Two on an identical issue.

These significant legal errors amount to a judicial rewrite of the deliberately crafted statutory scheme for recovering overpaid benefits in the workers' compensation system. The Court of Appeals' decision has significant negative policy implications for the system, and detrimental cost and competitiveness implications for employers and employees covered by Washington's State Fund or self-insurance. These are matters of substantial public importance. Amici therefore urge review under RAP 13.4(b)(4).¹

II. IDENTITY AND INTEREST OF AMICI CURIAE

A. The Association of Washington Business

The Association of Washington Business ("AWB") is the state's largest general business membership organization and represents over 7,900 businesses from every industry sector and geographical region of the state. AWB member businesses range from large to small and collectively employ over 750,000 people in Washington. AWB is an umbrella organization which also represents over 100 local and regional

¹ While not discussed herein, Amici also support L&I's argument that review is independently appropriate under RAP 13.4(b)(2) because Division Three's holding in this matter clearly conflicts with the result in Division Two's *Mathews v. Department of Labor & Industries*, 171 Wn. App. 477, 288 P.3d 630 (2012) (allowing recoupment of overpayment under one-year statute of limitation of section .240(1)(a)).

chambers of commerce and professional associations. AWB frequently appears in this and other courts as amicus curiae on issues of substantial interest to its statewide membership. AWB members are covered under the state's workers' compensation laws, either as employers who obtain industrial insurance through the state fund or who self-insure. Judicial interpretation and application of the laws related to workers' compensation, especially when they impact the costs of industrial insurance coverage, are of fundamental interest to these employers.

B. The Washington Self-Insurers Association

The Washington Self-Insurers Association ("WSIA") is a non-profit business association that represents the interests of the approximately 365 public and private sector employers who self-insure for workers compensation in Washington. WSIA members include cities and counties, public utility districts and hospitals, public schools, charities, and many of the large, iconic Washington-based companies who do business here and around the world. Self-insured employers cover approximately one-third of Washington's workforce, approximately 800,000 employees, and pays approximately 60 percent, or \$53 billion, of Washington's annual payroll. Self-insured employers pay workers' compensation benefits directly from their general assets and pay an administrative assessment to L&I. They operate under the same laws and rules that apply to L&I.

Accordingly, judicial treatment of the system's overpayment recoupment statute is of significant interest to the self-insured community.

III. ISSUES OF CONCERN TO AMICI CURIAE

Does RCW 51.32.240(1)(a) provide L&I or a self-insured employer one year from the date of an overpayment of benefits caused by the innocent misrepresentation of a claimant in which to make a claim for recoupment of the overpaid benefits? *Cf. Pet. for Review* at 2 (Issues 1-2).

IV. STATEMENT OF THE CASE²

V. REASONS TO ACCEPT REVIEW

A. THE COURT OF APPEALS DECISION SUBVERTS THE STATUTORY RIGHT TO RECOVER OVERPAYMENTS

In its petition, L&I points out, and this court should readily apprehend, the public policy that underlies the statutory right to recover workers' compensation benefits that were overpaid.

From the insurer's perspective, the policy is obviously two-fold: to prevent unjust enrichment by a claimant who obtains benefits to which he or she is not actually entitled, and to protect the workers' compensation state fund and self-insured employers by ensuring benefit payments are

² For brevity's sake, AWB and WSIA adopt, as if set forth herein, the Statement of the Case provided by L&I in its *Petition for Review* at pages 3-5.

not made under erroneous pretense. From the claimant's perspective, there is an interest in the ability to claim that benefit payments have been erroneously underpaid. Finally, both sides of the system have an interest in ultimate finality – a statute of limitations beyond which past benefit amounts are deemed settled regardless.

These purposes are accomplished through a deliberately balanced statutory scheme. RCW 51.32.240 lays out the timelines and circumstances by which overpaid benefits may be recouped or underpaid benefits may be claimed and recouped. Although it received extremely short shrift (really, no shrift) from the Court of Appeals, this matter involves just one component of that scheme:

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). Here, the claimant's initial certified statement on his application for benefits that he was married when in fact he was not married has been deemed an "innocent misrepresentation." Although he received enhanced benefits due to this misrepresentation for many years,

when it was eventually made clear that he is not, in fact, married, L&I corrected his marital status and benefit amounts on a go-forward basis, and assessed a graciously lenient overpayment. As it was for the Board of Industrial Insurance Appeals, this should have been the end of the matter.

However, the trial court and now Court of Appeals decision has thoroughly frustrated the legislative purpose underlying section .240 generally and .240(1)(a) specifically. By collapsing subsection .240(1)(a) into .240(1)(b), the Court of Appeals has announced the novel proposition that a claimant's misrepresentation is actually an error of the individual adjudicating the claim, if the claims examiner relied upon the misrepresentation in the course of adjudication. Since a recovery of an overpayment caused by adjudicator error is limited by subsection .240(1)(b) to sixty days from the date of the order containing the overpayment (during which time the order is not final and subject to appeal), so then is recovery from an overpayment caused by a non-willful misrepresentation also limited in effect to sixty days from the date of the order. This renders subsection .240(1)(a) entirely superfluous, and undermines the public policy allowing up to a year to collect on an overpayment caused by misrepresentation.

L&I's petition vividly demonstrates the fact that applying the Court of Appeals' misapprehension of the statute to the facts here results

in the workers' compensation system owing the claimant benefits calculated inaccurately on the basis of a fact everyone knows to be erroneous, in this instance for life, as the system has awarded this claimant a lifetime pension.

L&I also points out that applying the Court of Appeals' rationale system-wide, the State Fund and its taxpayers, as well as self-insured employers, will be on the hook for substantial overpayment amounts if they calculate the system's wage replacement benefits on the basis of misrepresentations by the claimant and do not detect the misrepresentation within sixty days of setting the calculation. In a state where correctly calculating wages for purposes of disability benefits uniquely involves a determination of marital status and number, if any, of dependents, sixty days will not always be sufficient to uncover a claimant's misrepresentation of marital status, number of children, or other facts which may result in an overpayment to his or her advantage. That's why the Legislature provided up to one year in such circumstances.

B. THE COURT OF APPEALS DECISION ADVERSELY AFFECTS COSTS AND COMPETITIVENESS FOR WASHINGTON EMPLOYERS CONTRARY TO LEGISLATIVE INTENT.

The State Fund and self-insured employer community cares about the system because they are the principal funders of it. Employers pay

either into the state fund through a payroll tax calculated on the basis of risk classification and claims experience³ or directly out of their general assets if self-insured.⁴ Employees of State Fund employers also pay into the system an amount that is roughly 25 percent of the total premium in a given year to cover the system's health care coverage.⁵

Washington's workers' compensation system pays the highest aggregate benefit payments of any workers' compensation system in the nation.⁶ Workers' compensation taxes are among a Washington employer's largest individual items of overhead, and policies that affect the cost of the system are therefore a fundamental economic concern and affect the ability of Washington employers to compete in a global marketplace.

Costs matter deeply in workers' compensation, and benefit costs are by and large taxed directly to (or paid directly by) individual employers. When a claimant's misrepresentation results in an erroneous overpayment of benefits, the Legislature has appropriately provided a vehicle, subject to an ultimate time restriction, for L&I or the self-insured

³ RCW 51.16.035.

⁴ RCW 51.14.010(2); .020(1). Self-insured employers also pay an annual administrative assessment to L&I. RCW 51.44.150.

⁵ Employees pay premiums through a payroll deduction for the medical aid fund, RCW 51.16.140, and the supplemental pension fund, RCW 51.32.073. At the same time, many employers pay the employee portion of premium as a fringe benefit, either voluntarily or through collective bargaining.

⁶ Washington Alliance for a Competitive Economy (WashACE), *2016 Competitiveness Redbook: Key Indicators of Washington State's Business Climate* Table 26 (2015).

employer to recover the overpayment, rather than pass along the higher cost of the erroneously calculated benefits to the employer. Because the Court of Appeals has weakened this statutory recovery system by collapsing the time periods to make such a recovery, in a way that will greatly increase costs for L&I, its taxpayers, and self-insured employers, this a matter of substantial public interest.

VI. CONCLUSION

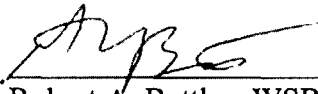
State Fund and self-insured workers' compensation claims examiners should be able to rely on the truthfulness of workers' compensation claimants about the details affecting their entitlement to benefits. When a mistake in calculation arises because of a claimant's misrepresentation, determined to be innocent, the Legislature has provided one year in which to detect the mistake and assert a claim for recovery of the overpayment. RCW 51.32.240(1)(a) is unambiguous on this point. In contrast with Division Two's decision in *Matthews*, the Court of Appeals here failed to give effect to this plain statement of legislative intent on a matter of substantial public interest.

This court should grant review.

Respectfully submitted this 26th day of October, 2015.

ASSOCIATION OF
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WASHINGTON SELF-INSURERS
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CERTIFICATE OF SERVICE

I reside in the State of Washington, am over the age of eighteen, and not a party to this action. My business address is 1414 Cherry St SE, Olympia, Washington 98501. On October 26th, 2015, I served the following:

MOTION TO SUBMIT AMICI CURIAE MEMORANDUM OF THE ASSOCIATION OF WASHINGTON BUSINESS AND WASHINGTON SELF-INSURERS ASSOCIATION SUPPORTING THE PETITION FOR REVIEW; and

AMICI CURIAE MEMORANDUM OF THE ASSOCIATION OF WASHINGTON BUSINESS AND WASHINGTON SELF-INSURERS ASSOCIATION SUPPORTING THE PETITION FOR REVIEW

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I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.

Executed on this 26th day of October, 2015, at Olympia, Washington.

A handwritten signature in black ink, appearing to read "Connie Grande", written in a cursive style.

Connie Grande

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Subject: Department of Labor and Industries vs. Birrueta - Supreme Court Case No. 92215-2
Importance: High

Dear Clerk:

Please find attached for filing in the above-referenced matter, electronic copies of the following documents:

- Motion for Leave to file Memorandum of Amici Curiae of AWB and WSIA
- Memorandum of Amici Curiae of AWB and WSIA
- Declaration of Service

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