No. 32210-6-III

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

DEPARTMENT OF LABOR AND INDUSTRIES OF THE

STATE OF WASHINGTON,

Appellant

v.

JOSE L. BIRRUETA,

Respondent

BRIEF OF RESPONDENT

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Is the Department bound by the finality provisions of RCW 51.52.050 & RCW 51.52.060, or does RCW 51.32.240(1) create an exception to those provisions for the Department?

IV. ARGUMENT

A. FINALITY OF DEPARTMENT ORDRES UNDER RCW 51.52.050

RCW 51.52.050 provides that if a Department order is not protested or appealed within 60 days of communication the order "shall" become final and binding on all parties upon expiration of the 60 day period. RCW 51.52.050 provides that:

> [w]henever the department has made any order, decision, or award, it shall promptly serve the worker, beneficiary, employer, or other person affected thereby, with a copy thereof by mail. . . . . The copy, in case the same is a final order, decision, or award, shall bear on the same side of the same page on which is found the amount of the award, a statement, set in black faced type of at least ten point body or size, that 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 of labor and industries, Olympia, or an appeal is filed with the board of industrial insurance appeals, Olympia.

(emphasis added) (portion of the statute regarding electronic communication of Department orders omitted). The statute provides

that the finality provisions apply to "any order, decision, or award," and provides for no exception to the finality provision for any type of order, decision or award other that is not protested or appealed. *Id.*

The Washington State Supreme Court has addressed the fact that the finality provisions of RCW 51.52.050 & 51.52.060 apply to all Department orders without exception in the seminal case of Marley v. Dept. of Labor & Indus., 125 Wn.2d 533, 542 (1994). In *Marley*, Ms. Marley sought to file a claim for widow's pension benefits after her husband was killed while in the course of employment. *Id.* Ms. Marley had been separated from her husband at the time of his death for more than two years, but Mr. Marley had continued to pay child support payments to their children. *Id.* Ms. Marley sought to have a Department order denying her claim for widow pension benefits set aside because she felt the facts of her case established as a matter of law that she was entitled to widow's pension benefits, and that consequently the Department order denying he claim was in error as a matter of law.

The *Marley* court explained that "the doctrine of claim preclusion applies to a final judgment by the Department as it would to an unappealed order of a trial court. An order of judgment resting upon a finding, or findings, of fact becomes a complete and

final adjudication, binding on both the department and the claimant unless such action. . . . is set aside upon appeal or is vacated for fraud or something of like nature." *Id.* pg. 537-38 (emphasis added). The court continued and noted that "[a]n order from the Department is void only when the Department lacks personal or subject matter jurisdiction." *Id.* The court further explained that even if the Department order is based on a clear error or law it become a final adjudication of the issue involved if the order is not timely protested for appealed. *Id.* pg. 538.B. Analysis

B. STATUTORY CONSTRUCTION

The Plain Meaning of the Statute

The Department argues that 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." Brief of Appellant, pg. 13. However, the Department fails to provide any citation to actual wording in subsection 1(a) that states the Department is not bound by the finality provisions of RCW 51.52.050 & 51.52.060 merely because an overpayment is the result of innocent misrepresentation. Further, as will be discussed below RCW 51.32.240(1)(b) explicitly states that overpayments cannot be

sought when there is a final and binding order underlying the payment made as a result of an innocent misrepresentation.

Legislative Actions in Amending Statute

The placement of the language regarding adjudicator error within RCW 51.32.240 as a whole is instructive in considering legislative intent. When the legislature made the amendments to RCW 51.32.240 in 2004, which added the language about adjudicator error they took what was paragraph 1 of RCW 51.32.240 and divided it into three subparagraphs. The legislature took the language about overpayments because of innocent misrepresentations, clerical errors, etc. contained in paragraph 1 of the 2001 version and put that language into subparagraph (1)(a) unchanged in any relevant way.[1] The legislature took the remainder of the 2001 version of paragraph 1, which dealt with the authority of the director of the Department to waive overpayments, and put it unchanged into subparagraph 1(c) in the 2004 version. The legislature created subparagraph 1(b) in 2004 and added the language regarding adjudicator error.

[1] The only change in the language was the changing of the work "fraud" to the phrase "willful misrepresentation," but that change has no relevance to the issues in this case.

The Department's contention is that subparagraph 1(b) contains a separate standalone class of payments called "adjudicator error" that is unrelated in any way to payments caused by innocent misrepresentation, clerical error, or any other basis of an overpayment in subsection 1(a). However, that argument is inconsistent with the fact that the legislature placed the language regarding both innocent misrepresentation and adjudicator error both within separate but equal level subparagraphs of paragraph 1. Had the legislature intended adjudicator error to be an entirely separate category, such as willful misrepresentation, then the legislature would have put it in a separate paragraph such as they did with willful misrepresentation by placing it in paragraph 5 rather than placing it as a subparagraph of equal level and clerical error and innocent misrepresentation. The legislature did not put "adjudicator error in a separate paragraph because it did not intend to create a completely separate class of payment. This will be seen in even greater detail below.

Examine the Whole Statute & All Statutes Relating to the Same Subject

The Department correctly points out that when construing a statute the court examines the entire statute and all statutes relating to the same subject matter. State v. Monfort, 179 Wn.2d 122, 130 (2013). It is first important to note that RCW 51.52.050 and 51.52.060 both provide that Department orders are final and binding if not protested or appealed with 60 days of communication. There is nothing in either of those statutes that provides any exceptions to the finality provisions in them. Nor, is there even a generic signal that there may be some exceptions listed elswere, such as language stating that orders are final, unless stated otherwise in other sections of RCW 51. Rather the statutes establish a universal finality of all Department orders that are not protested or appealed. Any exception to those finality provisions would therefore have to be explicitly stated, and could not simply be implied as the Department seems to argue.

Looking at RCW 51.32.240 itself as a whole is also instructive. Subparagraph 1(a) does not contain any language indicating that overpayments resulting from innocent misrepresentation, or any other type of overpayment listed subsection 1(a) for that matter, is

excepted from the finality provisions of RCW 51.52.050 or 51.52.060. There is therefore nothing in subsection 1(a) which would support an exception from the generally applicable finality provisions of RCW 51.52.050 and 51.52.060. The subparagraph is written under the assumption that there is no final and binding order.

Subparagraph 1(b) does provide a specific exception from the finality provisions of RCW 51.52.050 and 51.52.060, however, not for overpayments resulting from innocent misrepresentations or any other type of overpayment listed in subparagraph 1(a) which have become embodied in Department orders which are final and binding. RCW 51.32.240(1)(b) only excepts from the finality provisions of RCW 51.52.050 & RCW 51.52.060 overpayments created because of the specific reasons listed in (3), (4), and (5) of RCW 51.32.240[2]. These types of payments include the following: 1) payments made in a claim which is ultimately rejected as a claim not allowable under RCW 51; 2) payments made pursuant to an adjudication by the Department or by Board order which is later determined to be incorrect after a timely protest of appeal of the payment by a party; or 3) payments induced

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by willful misrepresentation. Of those three types of overpayments only those in paragraph (5) would involve situations in which a final and binding order could have been issued. Subsection 1(b) states that, "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 with the overpayment is based is not yet final as provided in RCW 51.52.050 and 51.52.060." (emphasis added)

The legislature has therefore explicitly and expressly limited the exceptions to the finality provisions of RCW 51.52.050 and 51.52.060 to a limited number of situations, and overpayments created by innocent misrepresentation or the other causes listed in subsection 1(a) are not included in the listed exceptions to the finality provisions. The Washington Supreme Court has held that in statutes containing categories "the expression of one is the exclusion of the other. 'Legislative inclusion of certain items in a category implies that other items not in that category are intended to be excluded.'" Landmark v. Development, Inc. v. City of Roy, 138 Wn.2d 561, 571 (1999) (citations omitted). The exclusion of overpayments resulting from innocent misrepresentation or other reasons listed in subsection 1(a) from the list of causes for overpayments that are

excepted from finality provisions means that it was the intention of the legislature to not include overpayments caused by innocent misrepresentation in the types of overpayments excepted from the finality provisions of RCW 51.52.050 & 51.52.060. As a result rather than RCW 51.32.240(1) creating an exception to the finality provisions for overpayments resulting from innocent misrepresentations that have been embodied in a Department order, it expressly reaffirms that the finality provisions do apply.

Further, the fact that the legislature referenced subsection (3), (4), and (5) in connection with adjudicator error reaffirms what was noted above about subparagraph 1(b) not creating a separate standalone class of possible overpayments caused by adjudicator error, but rather was reaffirming that the generally applicable finality provisions of RCW 51.52.050 & 51.52.060 applied in all classes of overpayments in RCW 51.32.240, except those under (3), (4), and (5)pursuant to subsection 1(b).

Mr. Birrueta's overpayment of benefits resulted from an innocent misrepresentation, and the Department order underlying that overpayment is final and binding pursuant to RCW 51.52.050 & RCW 51.52.060. Consequently, by the terms of RCW 51.32.240(1)(a) & (b) the Department is without authority to change

Mr. Birrueta's marital status and without authority to issue an overpayment resulting from that innocent misrepresentation since the underlying order is final and binding.

C. PUBLIC POLICY/DEPARTMENT DUTY AS TRUSTEE

The Department argues that sound public policy supports their being exempted from the finality provisions of RCW 51.52.050 & 51.52.060 because they are the trustees of the funds collected from workers and employers under RCW 51 for purposes of administering those funds, and that they therefore have a fiduciary duty to administer those funds. Brief of Appellant, pg. 27. However, they do not provide any citation to support the argument that a trustee is somehow exempt from applicable law in carrying out their duties.

The Department seems to assert that the only way they could fully perform their fiduciary duty is to be exempted from the finality provisions in RCW 51.52.050 & 51.52.060. However, this argument assumes that the Department is powerless to avoid situations such as those in the case at bar, and has no way to avoid the overpayment of benefits in situations such as those in the case at bar.

What ultimately prompted the discovery of the incorrect marital status was the request of the Department for a confirmation of Mr. Birrueta's marital status and a copy of Mr. Birueta's marriage certificate on the pension benefits questionnaire. Exhibit 14.

The Department could have just as easily asked for a copy of Mr. Birueta's marriage certificate at the very beginning of the claim when it issued the initial wage order. In fact, one wonders why they did not do so given that the handwriting on the accident report was clearly not that of Mr. Birrueta. Exhibit 1. Had they fulfilled their fiduciary obligation more fully at the beginning and sought documentation of Mr. Birrueta's marital status by requesting a copy of the marriage certificate then the entire situation could have been avoided.

It is likely that the Department would respond to the above by stating they have a duty to promptly administer benefits in claims, and that they could not wait until they received the marriage certificate before issuing payment of benefits. While they do have a duty to promptly administer claims they could easily have done that by issuing payment of time loss on an interlocutory basis based on the information they had on file while they gathered additional information just like they initially did when they issued the November

23, 2004 interlocutory wage rate order and time loss payment order. Exhibit 17. Rather than doing that they chose to take action on the information they had and chose to adjudicate the issue of Mr. Birrueta wage rate and marital status by issuing an order addressing those issues.

D. ABSURD RESULTS

The Department argues that if the superior court's decision that the marital status of Mr. Birrueta cannot be changed is upheld that an absurd result will follow because the Department would then have to continually asses overpayments against Mr. Birruieta at least once a year to collect the overpayments resulting from the incorrect marital status. Brief of Appellant, pg. 25-26.

This argument is logically flawed because it erroneously presupposes that the Department has the authority to assess such ongoing overpayments independent of a change to the underlying wage rate order establishing the marital status. However, the Department can only have a right to assess an overpayment if it has a right to change the marital status. The Department's argument essentially puts the cart (the right to assess the overpayments) before the horse (right to change of marital status). In short, without

the right to change the marital status the Department has not right to assess any overpayments.

This argument of the Department, as well as the tenor of the Department's brief as a whole hints at the suggestion that the Department's position should be adopted because it would somehow be unfair for the Department to be bound by the final and binding wage order which they issued. However, this argument is not persuasive. As the Board pointed out in a case cited by the Department themselves which will be discussed in more detail below: "[w]e do not believe that mistake of law or an argument based on fundamental fairness ("equitable considerations" is an appropriate ground to remove the res judicata effect" of an order that had become final and binding. In Re Jorge-Perez Rodriguez, BIIA 06-18718 (2008).

The Department chose to adjudicate Mr. Birrueta's marital status when they issued the wage rate order. They chose to rely on the information they had on file, and based on that information made a determination regarding Mr. Birrueta's marital status despite the fact they had not requested a marriage certificate from him, and despite the fact that the hand writing on the accident report listing him as married was clearly not Mr. Birrueta's hand writing. As noted

in RCW 51.32.240(1)(b) adjudicator error includes the "failure to consider information in the claim file, failure to secure adequate information, or an error in judgment." The fact that the Department failed to consider the fact that hand writing on the accident report was not that of Mr. Birrueta, and despite the fact that they had not sought a copy of the marriage certificate the Department issued an order determining Mr. Birrueta's marital status for compensation purposes. When they did so they adjudicated that issue and are bound by the final and binding order resulting from their adjudication. RCW 51.32.240(1)(b); RCW 51.52.050; RCW 51.52.060.

E. BOARD CASES

The Department cites to several cases decided by the Board as supporting the Department's position. They also cite to the *Weyerhauser v. Tri* case and state that the Board's interpretation of the Industrial Insurance Act is entitled to "great deference." Appeallant's Brief, pg. 12; Weyerhauser v. Tri, 117 Wn.2d 128 (1991).

In relation to the persuasiveness of the Board's decisions the *Weyerhauser* court also made it clear that the Board's interpretation of the Act was not binding on the court. *Id.* The court

of appeals has reiterated this principle as follows: "The BIIA publishes its significant decisions and makes them available to the public. RCW 51.52.160. These decisions are nonbinding, but persuasive authority for this court." O'Keefe v. Labor & Indus., 126 Wn. App. 760, 766 (2005). In reference to the distinction between a "significant decision" published pursuant to RCW 51.52.160 and other decisions and orders issued by the Board, the court of appeals seems to have signaled a distinction between the Board's significant decisions and non-significant decisions. In footnote 3 of O'Keefe v. Labor & Indus., *126 Wn. App. 760* (2005) the court of appeals refused to consider two non-significant decisions and orders of the Board that had been cited by the parties, while the court did cite to and consider some "significant decisions" of the Board. The Board has held that it considers its non-significant decisions and orders to be equally as authoritative and binding on itself as its significant decisions. In Re Diane K. Deridder, BIIA 98-22312 (2000); In Re Robert Coulter, BIIA 88-2662 (1989). The *O'Keefe* court did not address these Board decisions holding both significant and non-significant board decisions to be of equal weight to the Board.

Turning to the Board cases cited by the Department, it is interesting that one of the cases cited by the Department in support

of their position is the case of In Re Robert Hinckle, BIIA 11-23444 (2013) (non-significant decision), which comes to internally inconsistent conclusions regarding the binding effect of final and binding Department orders depending on which party is seeking relief from the binding order. In the *Hinckle* case Mr. Hinckle was married at the time of his injury on October 3, 2005, and he correctly marked that he was married on his accident report. However, after his injury his marriage was terminated by judicial decree on January 29, 2007. *Id.* The Department issued a wage rate order on September 23, 2009 establishing his marital status for purposes of compensation as married at the time of injury.[3] That order was then affirmed on April 25, 2011 and was not protested by anyone. *Id.* It therefore became a final and binding order. *Id.* On July 10, 2011, Mr. Hinkle filled out a pension benefits questionnaire, and accidently marked that he was not married at the time of injury. *Id.* The Department then issued an order on August 8, 2011, relying on 51.32.240(1)(a), in which the Department changed Mr. Hinkle's marital status for purposes of compensation effective February 22, 2011. *Id.* Mr. Hinkle did not protest or appeal that order changing

[3] Per RCW 51.32.060 marital status for purposes of benefits is based on marital status at the time of injury.

his marital status, but the self-insured employer did protest it by requesting that the effective date of the change be moved to an earlier date. *Id.*

In the employer's appeal, Mr. Hinkle argued that the August 8, 2011 order changing his marital status should be set aside entirely because the April 25, 2011 wage rate order had become final and binding and was res judicata as to his marital status for purposes of compensation. The Board held that they could not grant Mr. Hinkle the relief requested, setting aside the August 8, 2011 order changing his marital status, because he had not protested or appealed the August 8 order changing his marital status (only the employer had appealed). Having denied Mr. Hinkle relief from the change of marital status resulting from his clerical error in filling out his pension benefits questionnaire because that order was final and binding as to him because only the employer had appealed it, the Board turned around and held that the Department was <u>not</u> bound by the final and binding wage rate order dated April 25, 2011, and that the Department had authority to issue the order changing Mr. Hinckle's marital status. *Id.* The Board offered no explanation for this glaring inconsistency in holding that Mr. Hinckle was bound by the finality (as to him) of the order changing his marital status which resulted from his clerical

error, one of the basis for an overpayment listed in RCW 51.32.240(1), but that the Department was not bound by the final and binding wage order and could set it aside because of that same clerical error.

The Board's holding in *Hinckle* results in a rule that says if you are an injured worker you are bound by final orders, but if you are the Department you are not bound by final orders. The Board created a one way door escaping the finality provisions of RCW 51.52.050 & 51.52.060 that only opens in favor of the Department. The Department is asking this court to sanction this unequal treatment of injured workers and the Department. Such unequal treatment is not in accordance with equality under the law, nor with the long standing maxim that the Industrial Insurance Act is to be liberally interpreted in favor of injured workers. Johnson v. Weyerhaeuser Co, 134 Wn. 2d 795 (1998).

The Department also relies upon the cases of In Re Teresa Johnson, BIIA 06-10641 (1987) (significant decision) and In Re Anita Bordua, BIIA 93-1851 (1994) (non-significant decision). These are cases that the Board later cites to in support of their decisions in the cases of In Re Lloyd Johnson, BIIA 12-15248 (2013) (non-significant decision) and In Re Alonzo Veliz, BIIA 11-20348 (2013) (tentative

significant decision[4], which are also cases that the Department cites to in support of their position.

What is striking about the *T. Johnson* and the *Bordau* cases is that in both of those cases there was no final and binding wage rate order issued by the Department when the order changing the wage rate was issued. *Id.* The Department has made a calculation of the wage rate, and had started making payments based on that wage rate calculation, but they had not embodied that calculation in a wage rate order yet. Rather the orders that had been issued and which were final and binding in those cases were merely payment orders, which while they listed the amount of the monthly wage rate that the compensation rate was based on, they did not outline the details of the underlying basis for that wage rate. Consequently, when the wage order with the revised information in it was issued by the Department in the *T. Johnson* and *Bordua* cases they were not setting aside a previously final and binding wage rate order. In fact, the issue in those cases was not the Department's authority to issue the wage rate order with the revised information in it, but rather whether it could assess an overpayment for benefits paid under the

[4] A tentative significant decision is one which the Board has indicated it will likely designate as a significant decision, but which has not yet been designated as a significant decision.

old incorrect rate when those benefits had been paid via final and binding payment orders. This is a critical distinction because a payment order does not adjudicate the basis of the wage rate used to calculate the rate of benefits in a claim. Somsak v. Criton Tech./Health Tecna, 113 Wn. App. 84 (2002); In Re Edwin G. Thygesen, BIIA 91-15212 (1993) (non-significant decision); In Re Louise J. Scheeler, 89-0609 (1990) (significant decision) The finality of the wage rate was not at issue in the *T. Johnson* and *Bordua* cases, and therefore they are distinguishable from the case at bar and are not really supportive of the Department action in the case at bar.

The Board itself even recognized this distinction in the *T. Johnson* case, although they seem to have forgotten about the distinction they themselves pointed out in that case when they issued subsequent decisions discussed below. In the *T.* Johnson case the Board pointed out that there was no final and binding wage rate order at issue in that case, but that if there had been a final and binding

wage rate order issued prior to the order changing the wage rate that might have made a difference in the Board's analysis.[5]

The Board also relies on the case of In Re Lloyd D. Johnson, BIIA 12-15248 & 12-18850 (2013) (non-significant decision). This case is factually analogous to the case at bar, and the Board does hold that the Department was not bound by the final and binding wage rate order previously issued. However, any credible rationale for the Board's decision is lacking. They offer no explanation as to why the finality provisions of RCW 51.52.050 & 51.52.060 do not apply to final and binding wage rate orders other than to cite to the *T. Johnson* & *Bordoa* cases, which as outlined above are factually different in a significant way from the case at bar and from the *L. Jonhson* case in that there was no final and binding wage order that had been issued in either of those decisions. The Board was also are completely silent on the existence, meaning, and application of RCW 51.32.240(1)(b) in their discussion in the *Johnson* case.

The Board also cites to In Re Alonzo Veliz, BIIA 11-20348 (2013) (tentative significant decision). Again they offer no credible

[5] The Board's headnotes for the *T. Johnson* case indicate that a final and binding wage rate order had been issued, but a review of the facts actually laid out in the case and the discussion in the decision itself show that there was no final and binding wage rate order issued previously.

explanation as to why the finality provisions of RCW 51.52.050 & 51.52.060 do not apply. Like in the *L. Johnson* case they cite to the *T.Johnson* & *Bordoa* cases but do not even recognize the critical factual distinction that there was no final and binding wage rate order in those cases. They are also again completely silent on the application of RCW 51.32.240(1)(b). From their discussion of the case you would never know that subsection even exists. Their analysis fails to employ the basic principles of statutory construction outlined above.

In their decision in the *Veliz* case the Board cites to the case of In Re Judy A. Clauser, BIIA 01-10451 (2002) (non-significant decision) *Clauser* dealt with the application of RCW 51.32.240(2) rather than subsection (1), but that distinction is likely of little significance since the provisions seems to mirror one another fairly closely. But, here again, the Board is silent on the application of subsection 2(b), which is the analogous provision to subsection 1(b). Nor does the Board really provide any credible explanation that for why the finality provisions should not apply. This case while supportive of the Department's position ultimately is wrongly decided by the Board despite the natural sympathy that one feels for the injured worker in the *Clauser* case.

Finally with regard to the *Veliz* decision, the Board also cites to the case of In Re Jorge C. Perez-Rodriguez, BIIA 06-18718 (2008) (non-significant). This case is factually irrelevant to the case at bar and has nothing to do with whether or not the Department is bound by the finality provisions of RCW 51.52.050 & 51.52.060.

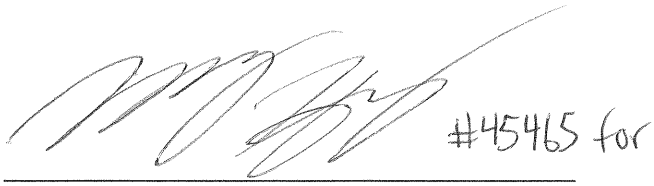
F. ATTORNEY FEES & EXPENSES

Mr. Birrueta requests attorney fees and costs in this matter pursuant to RCW 51.52.130 and RAP 18.1.

V. CONCLUSION

RCW 51.52.050 & 51.52.060 both provide for finality of Department orders, and provide no exceptions to those finality provisions. RCW 51.32.240(1) does not provide an exception to the finality provisions of RCW 51.52.050 & 51.52.060 for final and binding orders that have been issued based on incorrect information that was provided as an innocent misrepresentation. The Department is without authority to set aside the final and binding wage rate order in this case which established Mr. Birrueta's marital status for compensation purposes. The judgment of the superior court should be affirmed.

Respectfully submitted this 9 day of July, 2014



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STATE OF WASHINGTON

JOSE L. BIRRUETA)
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vs.)
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DEPARTMENT OF LABOR AND INDUSTRIES,)
)
Appellant.)
)

CERTIFICATE OF SERVICE

STATE OF WASHINGTON)
) ss.
County of Benton)

I, Lucia B. Villa, do hereby certify that I am an employee of Michael V. Connell, attorney for the Respondent. That I am a citizen of the United States and competent to be a witness herein. That on the 9 day of July, 2014, I sent the Brief of Respondent, via United States Mail at Kennewick, Washington, first class postage prepaid, or in the manner otherwise indicated below, addressed as follows:

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In an envelope containing the true and correct copy of the following documents: Brief of Respondent and Certificate of Service in the above entitled case.

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