

NO. 42642-1-II

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

**CHARLES J. NAKANO,
Appellant,**

v.

**STATE OF WASHINGTON DEPT OF L&I,
Respondent.**

REPLY BRIEF OF APPELLANT

**Jack W. Hanemann
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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. The February 5, 2010 Fraud Order Was Timely
Protested by Mr. Nakano Because There is Not
“Substantial Evidence” to Support a Finding that
the Order was Received Before February 12, 2010 1

 a. The Mail Procedures in Mr. Hanemann’s
 Office Show that the Order was Not
 Received Before February 12, 2010. 1

 b. Mr. Parascondola’s Testimony Shows that the Order
 was Not Received Before February 12, 2010 2

II. If the Protest was Not Timely, Equitable Relief is Appropriate
in the Present Case 3

 a. Mr. Nakano is Entitled to Equitable Relief
 Because of the Department’s Misconduct
 and Misrepresentations. 5

 b. Mr. Nakano is Entitled to Equitable Relief
 Because Equitable Estoppel Dictates that the
 Court Stay the Fraud Order 8

III. Conclusion 11

TABLE OF AUTHORITIES

Case law

| | |
|--|----|
| <i>Ames v. Department of Labor & Industries,</i> 176 Wash. 509, 513, 30 P.2d 239 (1934) | 9 |
| <i>Kingery v. Department of Labor & Industries,</i> 132 Wn.2d 162, 178, 937 P. 2d 565 (1997) | 9 |
| <i>Wilbur v. Department of Labor & Industries,</i> 553, 556, 686 P.2d 509, 512 (1984) | 9 |
| <i>Kramarevcky v. Department of Social & Health Services,</i> 122 Wash.2d 738, 743, 863 P.2d 535 (1993) | 10 |

Statutes

| | |
|---------------------|----|
| RCW 51.12.010 | 11 |
|---------------------|----|

- I. **The February 5, 2010 Fraud Order Was Timely Protested by Mr. Nakano Because There is Not “Substantial Evidence” to Support a Finding that the Order was Received Before February 12, 2010.**
 - a. **The Mail Procedures in Mr. Hanemann’s Office Show that the Order was Not Received Before February 12, 2010.**

The Order must have been received on or after February 12, 2010.

Ms. Neill testified that it was not uncommon for Labor & Industries mail to be received more than 5 days after the date printed on the Order. She estimated it happens at least once every 1-2 months. (TR 32)

If an Order was received on February 8th, 9th, 10th, or 11th 2010 it would have been date stamped because Ms. Neil trained the new receptionist and was personally present on February 8th, 10th, and 11th when the mail was delivered to the law firm and on February 9th, 2010 another member of the law firm was personally present to oversee this process. If the Order was received on February 12th, 13th, or 15th it may not have been date stamped because the new receptionist did make some mistakes when she first started. Therefore, the Order must have been received on or after February 12, 2010.

b. Mr. Parascondola's Testimony Shows that the Order was Not Received Before February 12, 2010.

The Respondent argues that the Order must have been received before February 10, 2010 because Mr. Parascondola told Mr. Gruse that the Order has a notation that says "cc'd to the client on February 10th" however, after making that statement Mr. Parascondola immediately called Mr. Gruse back and informed Mr. Gruse that Mr. Parascondola was referring to an incorrect document regarding the "cc" when he made that statement. (TR 82) Mr. Parascondola testified that the first date that he is sure that he had received the Order was February 15, 2010. (TR 80) Reinforcing this argument is the fact that Mr. Parascondola had a system for "tickling" (setting reminders) items for review 30 days from the date of receipt and he had tickled the date of March 15, 2010 for the reminder.

Additionally, Mr. Parascondola testified that he had a conversation with Mr. Nakano at 5:14 p.m. on February 10, 2010 well after the daily mail arrived, and that they did not discuss the fraud Order. (TR 64) In questioning about this February 10, 2010 conversation, when Mr. Parascondola was asked, "If you had been aware of a or had received a fraud Order dated February 5, 2010, would you have mentioned it or noted it in your notes in your conversation to Mr. Nakano?" He answered, "Definitely, definitely". (TR 64) It is inconceivable that, *if* the February

5, 2010 fraud Order for almost \$1,000,000.00 had been received on or before February 10, 2010 Mr. Parascondola, who spoke to Mr. Nakano after 5pm that day, would not have mentioned it to Charles Nakano in their phone conversation.

There is not substantial evidence to show that the Order was received before February 12, 2010 and therefore, the Order was timely protested.

II. If the Protest was Not Timely, Equitable Relief is Appropriate in the Present Case

Equitable relief is appropriate in the present case to relieve the Defendant of the strict 60-day time limit. The court in *Ames* avoided the strict 60-day time limit for filing an appeal and held that, “Certainly the department, like the courts, must consider equitable rules in all proper cases.” *Ames v. Department of Labor & Indus.*, 176 Wash. 509, 513, 30 P.2d 239 (1934). The court held that “The general policy of our laws is to protect those who are unable to protect themselves, and equitable doctrines grew naturally out of the humane desire to relieve under special circumstances from the harshness of strict legal rules.” *Id.* The court further held that, “In enacting this statute, the Legislature must have had in mind that equity would relieve in all proper cases from the hardships

which otherwise would occur in enforcing the strict letter of the statute.”

Id. At 514. “We are convinced that the Legislature never intended to deny this equitable right and certainly, in the absence of a clear showing of a legislative intent to so deny equitable rights which existed at common law, we must hold that it has not done so.” *Id.*

While the court in *Kingery* held 5-4 that the claimant failed to diligently pursue her rights by waiting 8 years to appeal the Department’s denial Order, a 5-4 majority of the court also held that “the court’s equitable powers are not limited to cases where it is shown that the claimant is essentially incompetent.” *Kingery v Department of Labor & Industries* 132 Wn 2d 162, 178, 937 P. 2d 565 (1997). Justice Madsen, while concurring with the majority that the claimant in *Kingery* failed to diligently pursue her rights, stated, “I agree with Justice Alexander that the court’s equitable powers are not limited to cases where it is shown that the claimant is essentially incompetent.” Therefore, the majority of the court including Justices Alexander, Johnson, Sanders, Smith, and Madsen held that “the court’s equitable powers are not limited to cases where it is shown that the claimant is essentially incompetent.”

The present case is distinguishable from *Kingery* in the fact that while the party in *Kingery* waited eight years to appeal the department’s

Order, Mr. Nakano waited, at most, 62 days; although we contend that the Order was protested within 60 days of receipt of the Order and was therefore timely protested.

In *Wilbur v. Dep't of Labor & Indus.*, 38 Wash. App. 553, 556, 686 P.2d 509, 512 (1984) on the issue of untimely filing, the court found that the Department of Labor and Industries was not required to reject the party's untimely filing if "his untimely filing is excused by some recognizable rule of law or equity".

a. Mr. Nakano is Entitled to Equitable Relief Because of the Department's Misconduct and Misrepresentations.

The Department committed misconduct when it promised Mr. Parascondola that it would stay the superseding fraud Order pending the outcome of the criminal case and then failed to stay the Order. Mr. Gruse admits that he told Mr. Parascondola that after the issuance of the superseding Order (February 5, 2010), the case would be stayed pending the **outcome** of the criminal case. (TR 114, emphasis added) This is in addition to the stay of the October 6, 2009 Order which Mr. Gruse and Mr. Parascondola discussed in early January 2010. (TR 115-116) Mr. Gruse testified that after issuing the fraud Order on October 6, 2009, he stayed that Order pending the filing of criminal charges. (TR 113) Mr. Gruse

further testified that once criminal charges were filed he issued an updated Order and stayed the case pending the outcome of the criminal matter:

- A. If we - - if the issue of the willful misrepresentation goes forward as a civil matter, there is nothing to preclude the claimant from being compelled to testify. And if he or she does testify at the civil proceeding, that can be used at a criminal trial if the charges are later filed. Whereas if we allow for the charges to be filed or a decision to as to whether they'll be filed, if we allow for that to occur, then we can either affirm our Order or in this case correct and supersede it, and we can ask for a stay pending the outcome of the criminal matter. And that's exactly what went on here.
(TR 114)

Mr. Gruse uses the word "we" several times in the above passage to refer to himself, the Department of Labor and Industries, and their actions when he said, "if we allow for charges to be filed, if we allow for that to occur, then we can either affirm our Order or in this case correct and supersede it..." This makes it very clear that with his use of the word "we", Mr. Gruse is referring to himself and the Department of Labor and Industries because they are the only parties that can affirm an Order or correct and supersede an Order. He goes on to finish that answer by saying, "...and we can ask for a stay pending the outcome of the criminal matter. And that's exactly what went on here". With this answer Mr. Gruse is affirming the testimony of Mr. Parascondola that he, Mr. Gruse, told Mr. Parascondola that Mr. Gruse would stay the fraud Order pending the outcome of the criminal matter.

Respondents have gone to great lengths to attempt to distinguish that Mr. Gruse only intended to stay the fraud Order pending the **filing** of criminal charges, but above in his testimony Mr. Gruse unequivocally states that he intended to stay the superseding fraud Order pending the **outcome** of the criminal matter. And he goes so far as to state that, “that’s exactly what went on here”. This is a direct admission by Mr. Gruse that he agreed to stay the superseding Order, pending the **outcome** of the criminal case.

Additionally, Mr. Gruse makes reference to the fact that his actions are to “protect the rights of his client, or Mr. Nakano in this case, from being compelled to testify at the Board”. (TR 116) This assertion is nonsensical and absurd when applied to Mr. Gruse’s stated testimony that he intended to stay the fraud Order only until the filing of criminal charges. After filing of criminal charges is precisely the time when an accused individual needs the protection from being compelled to testify. But Mr. Gruse would have us believe that he never intended to protect Mr. Nakano from being compelled to testify after the filing of charges against him, only before charges were filed. But, Mr. Gruse’s prior testimony about protecting Mr. Nakano from being compelled to testify makes abundant sense when applied to the fact that he intended to stay the fraud

Order pending the outcome of the criminal case. If Mr. Gruse's goal was to protect Mr. Nakano's rights, as he stated it was, it is imminently more likely that Mr. Gruse intended to stay the fraud Order pending the outcome of the criminal case in order to protect Mr. Nakano from being compelled to testify; just as he told Mr. Parascondola that he would.

Mr. Gruse conveyed to Mr. Parascondola that the case would be stayed pending the outcome of the criminal matter and Mr. Parascondola reasonably relied on this statement in believing that the case was being held in abeyance until the criminal matter was resolved. It is therefore disingenuous and deceptive for Mr. Gruse and the Department of Labor and Industries to turn around and claim that time ran out to protest the Order when Mr. Parascondola reasonably believed from Mr. Gruse that the case was being held in abeyance pending the outcome of the criminal case. These misrepresentations amount to misconduct on the part of the Department and as such Mr. Nakano is entitled to equitable relief.

b. Mr. Nakano is Entitled to Equitable Relief Because Equitable Estoppel Dictates that the Court Stay the Fraud Order.

Equitable estoppel is based on the view that "a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably

and in good faith relied thereon”. *Kramarevcky v. Dep't of Soc. & Health Servs.*, 122 Wash.2d 738, 743, 863 P.2d 535 (1993). Equitable estoppel has the effect of precluding one party from offering an explanation or defense that he or she would otherwise be able to assert. *Colonial Imports, Inc. v. Carlton Nw., Inc.*, 121 Wash. 2d 726, 735, 853 P.2d 913, 918 (1993).

Equitable estoppel requires three elements: “(1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission.” *Kramarevcky*, 122 Wash.2d at 743. Equitable estoppel against the government is not favored. *Id.* at 743-744. Consequently, when a party asserts the doctrine against the government, two additional requirements must be met: equitable estoppel must be necessary to prevent a manifest injustice, and the exercise of governmental functions must not be impaired as a result of the estoppel. *Id.* at 744.

In the present case Mr. Gruse told Mr. Parascondola that Mr. Gruse would stay the fraud Order pending the outcome of the criminal matter as discussed above. (TR 114) This statement is inconsistent with his current

testimony that he did not agree to stay the fraud Order pending the outcome of the criminal case. Mr. Parascondola waited to protest the fraud Order because of Mr. Gruse's promise to stay the Order. In fact, Mr. Gruse testified that in their conversation on April 13, 2010 Mr. Parascondola became upset and immediately questioned Mr. Gruse about his promise to stay the Order pending the outcome of the criminal case. (TR 124-125) Mr. Parascondola filed the protest of the Order the very next day. Mr. Parascondola had relied on this statement and promise from Mr. Gruse and had not protested the Order due to Mr. Gruse's promise. Because of the reliance on the promise to stay the Order, and the subsequent delay in filing the protest, the Department found that the protest was not timely and dismissed Mr. Nakano's significant claim of nearly \$1,000,000.00.

In the present case, equitable estoppel is necessary to prevent a manifest injustice. If Mr. Gruse's misrepresentation is allowed to stand, Mr. Nakano's claim could be dismissed and his only means of recovery for the significant workplace injuries that he suffered and the required medical treatment will be eliminated. Finally, the exercise of governmental functions will not be impaired as a result of the estoppel in this case. The Department of Labor and Industries has a duty to provide coverage for

workplace injuries and Mr. Nakano was critically injured when a machine he was working on rolled over crushing his pelvis and legs. There is no prejudice or impairment caused by a finding that Mr. Nakano is entitled to equitable relief from the harshness of a strict interpretation of this rule.

RCW 51.12.010 States:

This title shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from the injuries and/or death occurring in the course of employment. (Emphasis added)

As the Court in *Ames* ruled, “The general policy of our laws is to protect those who are unable to protect themselves, and equitable doctrines grew naturally out of the humane desire to relieve under special circumstances from the harshness of strict legal rules.” *Ames v.*

Department of Labor & Indus., 176 Wash. 509, 513, 30 P.2d 239 (1934)

Therefore, the Court should stay the fraud Order.

III. Conclusion

In keeping with the evidence above, it is apparent that the fraud Order dated February 5, 2010 was not received at Mr. Hanemann’s law office until February 12, 2010 at the earliest and more likely February 15, 2010. As stated by the Respondent in their brief, “if he received the February 5, 2010 Order on or after Friday February 12, 2010, then his

protest of that Order would be timely, and the February 5, 2010 Order would not be final and binding.” (BR 4) Therefore, the protest was timely and the Order is not final and binding.

Mr. Nakano should be given his day in court. This is a very significant claim of nearly \$1,000,000.00. There is not substantial evidence in this record to support the Findings of Facts.

In addition, principles of fairness and equity should dictate that Mr. Nakano’s protest should be granted. Equitable relief is appropriate in the present case because of the Department’s Misconduct and Misrepresentations. Additionally, the Doctrine of Equitable Estoppel dictates that the Court set aside the fraud Order as well.

For these reasons this court should reverse the trial court’s determination and rule that the protest received on April 13, 2010 was timely and Mr. Nakano be given his in day court.

Dated this 6th day of April, 2012.


for Jack W. Hanemann
Attorney for Appellant
WSBA #6609

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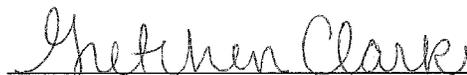
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