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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY  _____
DEPUTY

No. 47695-9-II

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

VAIL, CROSS & ASSOCIATES,

Appellant,

v.

THE DEPARTMENT OF LABOR AND INDUSTRIES OF
THE STATE OF WASHINGTON,

Respondent,

APPELLANT'S OPENING BRIEF

Dorian D.N. Whitford, WSBA# 43351
Vail, Cross-Euteneier & Associates
819 Martin Luther King Jr. Way
P.O. Box 5707
Tacoma, WA 98415-0707
(253) 383-8770
Attorney for Appellant

ORIGINAL

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I. INTRODUCTION

Comes now the Appellant, Vail, Cross & Associates, per Dorian D.N. Whitford, and hereby offers this brief in support of its appeal.

This case originates under RCW Title 51, the Industrial Insurance Act from an Administrative Law Review appeal from an April 4, 2013 Order of the Board of Industrial Insurance Appeals (“the Board”) which adopted a February 1, 2013 Proposed Decision and Order which affirmed a Department of Labor and Industries (“the Department”) order which closed Josh Glatt’s workers’ compensation claim with a permanent partial disability award of category 2 for mental health on July 12, 2011.

The Appellant represented Mr. Glatt in his appeal of the Department’s closing order before the Board and expended significant costs advanced on his behalf for the relief he sought of increased benefits under his claim, including a determination that he was permanently totally disabled. The Appellant also represented Mr. Glatt initially in his appeal of the Board’s April 4, 2013 order, which kept his claim closed and affirmed the Department’s order, to Superior Court.

Prior to the case being tried, Mr. Glatt terminated the Appellant and sought to independently settle his claim to get some money. After Appellant was terminated, on or about February 19, 2014, it filed a notice of intent to

apply for attorney's fees and costs for the many years of work it had done representing Mr. Glatt, should he ultimately be successful in obtaining additional relief in the appeal to Superior Court.

An agreement was reached between Mr. Glatt and the Department which was memorialized in a judgment on March 4, 2014. Mr. Glatt was unrepresented by counsel at this time. The judgment's stipulation provided for the segregation, or denial of responsibility under the industrial injury claim, of several conditions, a period of temporary total disability, a period of employability, a permanent partial disability determination of category 2 for the low back, a prior judgment against Mr. Glatt being satisfied, and adopted the remaining findings of fact and conclusions of law by the Board and kept the claim closed.

This resulted in a one-time monetary payment in the amount of \$8469.03 for an increase in the permanent partial disability award and a one-time monetary payment of time-loss compensation in the amount of \$3941.46. Also included in this agreement, was that each party shall bear their own costs and attorney fees in this appeal. This resulted in Appellant, and Mr. Glatt, from being able to realize the benefits under RCW 51.52.130.

RCW 51.52.130 provides for attorney fees and costs to injured workers from the Department who are successful in obtaining additional benefits on appeal to superior court.

Appellant moved to vacate the agreed judgment under CR 60 and for attorney fees and costs under RCW 51.52.130. The Department responded in opposition. Following oral argument, ultimately the Court found that Appellant lacked standing under RCW 51.52.130 to apply for fees and entered judgment concluding that CR 60 relief was not warranted. Appellant appeals.

II. ASSIGNMENTS OF ERROR

- A. The Superior Court erred in holding that Vail, Cross & Associates lacks standing to vacate the order under CR 60.
- B. The Superior Court erred in holding that CR 60 relief is not warranted under CR 60(b)(4) because there has been no misrepresentation of an existing fact.
- C. The Superior Court erred in holding that CR 60 relief is not warranted under CR 60(b)(5) because this Court had personal jurisdiction and subject matter jurisdiction over the parties in interest and therefore the judgment is not void.
- D. The Superior Court erred in holding that CR 60 relief is not warranted under CR 60(b)(11) because there can be no injustice when the Vail Firm does not have any right independent of its former client to bring a claim for attorney fees and costs.

III. ISSUES

Whether the Superior Court erred in holding that Appellant lacks standing to vacate the order under CR 60 or RCW 51.52.130?

Whether the Superior Court erred in holding that CR 60 relief was not warranted?

IV. STATEMENT OF THE CASE

On November 2, 2007, Josh Glatt was injured while working at Gensco. CP at 24. His claim was allowed and benefits were provided. *Id.* The Department closed his claim on July 12, 2011 with a permanent partial disability award of category 2 for mental health impairment. *Id.* This indicated Mr. Glatt was dealing with permanent mental health issues and difficulties caused in part by his industrial injury.

Appellants represented Mr. Glatt at the time and with his permission, appealed the closure of his claim to the Board seeking additional time-loss compensation from February 2, 2011 up to July 12, 2011 and permanent total disability as of that date, or alternatively for an increased permanent partial disability award. CP 19; 5/15/15 Judgment on Appeal. Significant costs were expended in litigation at the Board by Appellants on Mr. Glatt's behalf in the effort to obtain him additional benefits. 5/15/15 Verbatim Report of Proceedings at 12-3.

After the Board affirmed the Department's closure of Mr. Glatt's claim on April 4, 2013, with his permission, Appellants further appealed to Superior Court on April 30, 2013. CP at 2; 5/15/15 Judgment on Appeal at 2. Mr. Glatt contacted the Assistant Attorney General assigned to the case

before the trial occurred to discuss ending Appellant's representation of him. CP at 35. The AAG informed Mr. Glatt that he could not discuss anything with him because he was represented and was instructed to contact Appellant.

Mr. Glatt sent a letter to Appellant terminating its representation of him effective January 15, 2014. CP at 12. Thereafter, Appellants filed a notice of withdrawal on February 7, 2014 and a notice of intent to apply for attorney's fees and costs under RCW 51.52.130 in the event Mr. Glatt obtains additional benefits in his appeal on February 20, 2014. CP at 2; 14-5.

Without Appellants being aware, Mr. Glatt and the Department reached an agreement that was entered as a stipulation and agreed judgment on March 4, 2014. CP at 18-22. Mr. Glatt was unrepresented at the time he entered into the agreement and signed the judgment pro se. *Id.* The judgement provided that several low back conditions would be denied under his claim, he would receive a little more than a couple months of time-loss compensation, he would be denied a little more than a couple months of time-loss compensation, he would receive an increase permanent partial disability award for his low back condition accepted under the claim of category 2, a prior judgment against him would be satisfied and adopted the remaining findings and conclusions of the Board. *Id.* The judgment also

provided that each party shall bear their own costs and attorney fees in this appeal. *Id.*

The Department issued ministerial orders pursuant to the judgment which provided two one-time monetary payments to Mr. Glatt of \$8469.03 for the increased permanent partial disability award and \$3941.46 for the time-loss compensation. CP at 40; 49.

On or about February 27, 2014, Appellants moved to vacate the agreed judgment under CR 60 and RCW 51.52.130 for attorney fees and costs. CP at 1-8. The Department opposed and following oral argument, the Honorable Stanley J. Rumbaugh denied Appellant's motion. Appellant has appealed this decision to the Washington State Court of Appeals, Division Two.

V. STANDARD OF REVIEW

The standard of review on a motion under CR 60 is abuse of discretion. *Gustafson v. Gustafson*, 54 Wn. App. 66, 69-70, 772 P.2d 1031 (1989). The trial court has discretion to decide a CR 60 motion and its decision should not be overturned on appeal unless the discretion has been abused. *Martin v. Pickering*, 85 Wn.2d 241, 533 P.2d 380 (1975). A denial of a motion under CR 60 to vacate a judgment will be overturned based on an abuse of discretion. *See Id.*

A trial court abuses its discretion in ruling on a motion to vacate if the court exercised its discretion on untenable grounds or untenable reasons. *Mitchell v. Washington State Institute of Public Policy*, 153 Wn. App. 803, 822, 225 P.3d 280 (2009).

VI. ARGUMENT

A. Introduction.

As this case ultimately arises under the Industrial Insurance Act, which was established to protect and provide benefits for injured workers, it is important to consider the underlying purpose of the Act. It has been held for many years that the courts and the Board are committed to the rule that the Act is remedial in nature and its beneficial purpose should be liberally construed in favor of the beneficiaries. *Wilber v. Dep't of Labor and Indus.*, 61 Wn.2d 439, 446, 378 P.2d 684 (1963); *Hastings v. Dep't of Labor and Indus.*, 24 Wn.2d 1, 163 P.2d 142 (1945); *Nelson v. Dep't of Labor and Indus.*, 9 Wn.2d 621, 115 P.2d 1014 (1941); *Hilding v. Dep't of Labor and Indus.*, 162 Wash. 168, 298 P. 321 (1931).

Furthermore, RCW 51.04.010 declares that “sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault.” Similarly, RCW 51.12.010 indicates that the Act “shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from

injuries and/or death occurring in the course of employment.” Thus, any doubts that arise when interpreting or applying the Act must be resolved in favor of the worker. *Clauson v. Dep’t of Labor and Indus.*, 130 Wn.2d 580, 584, 925 P.2d 624 (1996).

When considering Mr. Glatt’s agreement while he was unrepresented it is important to keep these purposes of the Act in mind.

B. Background on RCW 51.52.130

It is well established that where an injured worker prevails in Superior Court through reversal or modification of an adverse decision by the Board, he is entitled to an award of attorney fees and costs of medical witnesses to be payable by the Department under RCW 51.52.130. *Carnation Co. Inc. v. Hill*, 115 Wn.2d 184, 187-88, 796 P.2d 416, 418 (1990).

The *Carnation* court stated that the statute “allows an award of attorney fees only if the decision and order of the [Board] is reversed or modified resulting in additional benefits for the employee.” *Id.* “The very purpose of allowing an attorney’s fee in industrial accident cases primarily was designed to guarantee the injured workman adequate legal representation in presenting his claim on appeal without the incurring of legal expense or diminution of his award if ultimately granted for purpose of paying his counsel. *Brand v. Dep’t of Labor & Indus.*, 139 Wn.2d 659,

667-68, 989 P.2d 1111 (1999). The *Brand* Court also noted that the underlying purpose of the Act was to be considered when calculating attorney fees. *Id.* at 669.

RCW 51.52.130 provides that if, on appeal to superior or appellate court from the decision and order of the board, said decision and order is reversed or modified and additional relief is granted to a worker or beneficiary...a reasonable fee for the services of the worker's or beneficiary's attorney shall be fixed by the court...If in a worker or beneficiary appeal the decision and order of the board is reversed or modified and if the accident fund or medical aid fund is affected by the litigation...the attorney's fee fixed by the court, for services before the court only, and the fees of medical and other witnesses and the costs shall be payable out of the administrative fund of the department.

Therefore, under the terms of the statute, when an injured worker appeals and obtains additional relief from a decision of the Board, its attorney fee shall be fixed as well as fees of its witnesses and these costs shall be payable by the department.

C. CR 60(b)

CR 60(b) provides that on motion and upon such terms that are just, the court may relieve a party or the party's legal representative from a final judgment, or proceeding for the following reasons:

(4) Fraud, misrepresentation, or other misconduct of an adverse party;

(5) The judgement is void;

(11) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time and for reasons (1), (2), of (3) not more than 1 year after the judgment, order, or proceeding was entered or taken.

1. Appellant Had Standing to Bring Its Motion Under CR 60

Appellant's motion sought to relieve Mr. Glatt, as well as itself as his former legal representative, from the judgment per the terms of CR 60(b).

Under RCW 51.52.130, Appellants have a right to be paid for attorney's fees, court costs, and expert witness fees from the Department of Labor and Industries. In *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 989 P.2d 1111 (1999), the Court made no negative mention of the fact that a prior attorney received attorney's fees under the statute and in fact remanded the matter for written findings explaining the basis of the fees approved.

The very purpose of RCW 51.52.130 of allowing attorney fees is to ensure adequate representation without incurring the legal expense or reduction of award if ultimately granted to pay his attorney. *See Harbor Plywood Corp. v. Dep't of Labor & Indus.*, 48 Wn.2d 553, 559, 295 P.2d 310, 314 (1956). RCW 51.52.130 is also mandatory and states that the attorney fee “shall be fixed by the court”. The attorney would be the vehicle to bring the information to the court for the fixing of such a fee. As such, Appellant has standing to bring its motion. Its motion was to relieve Mr. Glatt from the judgment improperly entered against him as described below.

2. Relief Should Have Been Granted Under CR 60(b)(4)

Under CR 60(b)(4), the fraudulent conduct or misrepresentation must cause the entry of the judgment such that the party was prevented from fully and fairly presenting its case. *Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526, 532 (1990).

In this case, Mr. Glatt and the Department entered into the agreed order which foreclosed the right for the Appellant, and Mr. Glatt, to receive attorney’s fees and costs which are mandatory under RCW 51.52.130 with the added language that each party would bear its own costs and attorney fees in the appeal. This was done with the knowledge that Appellant had previously filed its notice of intent to apply for attorney fees and costs under

RCW 51.52.130 in the event that there was increased benefits obtained as a result of the appeal.

It is not clear that Mr. Glatt, an injured worker in the State of Washington with permanent mental health impairments was aware of, could comprehend, and understood the ramifications of adding this language in the order. By doing so, both Mr. Glatt and Appellants are precluded from realizing the legislature's clearly articulated policy under RCW 51.52.130 of providing injured worker's attorney fees and witness costs associated with obtaining benefits which were wrongfully denied by the Department.

Appellant was not given any notice that this agreement was being entered into. What results to Mr. Glatt from this language in the judgment, which circumvents RCW 51.52.130, is that he is responsible for paying the significant witnesses costs which the Act instructs should be paid by the Department in this situation where increased benefits were obtained as a result of an appeal to superior court. Appellant is seeking to have these costs and fees provided by the Department as the Legislature has instructed as a benefit to Mr. Glatt under RCW 51.52.130. The Court's failure to provide this relief was an abuse of discretion contrary to the clear mandate of RCW 51.52.130 and the policy of the Act.

3. Relief Should Have Been Granted Under CR 60(b)(5)

A court enters a void order only when it does not have personal jurisdiction over the parties or subject matter jurisdiction over a claim. *Trinity Universal Ins. Co. of Kansas v. Ohio Cas. Ins. Co.*, 176 Wn. App. 185, 198, 312 P.3d 976 (2013). Lack of jurisdiction has been conclusively held to void a tribunal's orders. *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 543, 886 P.2d 189 (1994).

Here, the Act does not allow for an injured worker to waive benefits. RCW 51.04.060 states, "No employer or worker shall exempt himself or herself from the burden or waive the benefits of this title by any contract, agreement, rule or regulation, and any such contract, agreement, rule or regulation shall be pro tanto void." Thus, the agreement by Mr. Glatt to waive the benefits provided in the Act under RCW 51.52.130 are to his detriment. This portion of the agreement is void. This is what the legislature sought to avoid with RCW 51.04.060. As such, the Court cannot have subject matter jurisdiction to enter the portion of the order which is void as a waiver of benefits.

As this language in the judgment clearly circumvents RCW 51.52.130 which provides mandatory attorney fees and costs to an injured worker who successfully appeals to superior court and obtains increased benefits, this portion of the judgment should be rendered void because it is

a waiver of benefits under the Act. The Court abused its discretion in denying the CR 60 motion under CR 60(b)(5).

4. Relief Should Have Been Granted Under CR 60(b)(11)

Relief from the operation of the judgment should also be granted in the interests of justice. The Court abused its discretion in failing to grant relief on this basis as well.

Mr. Glatt has permanent mental health impairment, which at a minimum, has been rated as a category 2 impairment of WAC 296-20-340. He terminated the Appellant who had been representing him for five years, and sought to independently obtain a one-time monetary settlement out of his appeal. However, in doing so he undermined his own claim for future security without the assistance of representation. With the information that Mr. Glatt had mental health problems, he should not have been able to enter into the agreed judgment. It does not serve the underlying purposes of the Act to protect injured workers from undue economic harm to allow him to do so. Especially, in light of his mental health problems.

In allowing Mr. Glatt to enter into the stipulation that he would bear his own costs and attorney fees he ends up in the precise situation that the legislature was trying to avoid with RCW 51.52.130, he is turned upside

down by hiring a lawyer to represent him in his claim for benefits under the Act. *See* 5/15/15 Verbatim Report of Proceedings at 15; *Brand supra*.

Injustice to Appellants also results from the Court's abuse of discretion in not granting its CR 60 motion. Under RCW 51.52.130, appellant's have a right to attorney fees and costs for its work on Mr. Glatt's case and in appealing it to Superior Court where the Board's decision was modified and additional relief was granted. The agreed judgment between Mr. Glatt and the Department, while modifying the Board's decision and providing additional benefits to Mr. Glatt, forecloses the Appellant's right to obtain attorney fees and costs expended on Mr. Glatt's behalf. This results in the agreed judgment not being in Mr. Glatt's favor and not benefitting him.

Relief from the judgment should be granted because ultimately it was not in Mr. Glatt's favor and was entered by him pro se without the benefit of representation when he has permanent mental health impairments which indicate that the judgment should not be held against him. At a minimum, Appellants should be allowed to seek attorney fees and witness' costs expended in this matter for Mr. Glatt's benefit. If this materially destroys the agreed judgment of the parties, the entire judgment should be vacated such that Mr. Glatt can obtain representation such that he can understand and comprehend any agreed judgment and resulting

ramifications he enters into. This is paramount for justice considering his permanent mental health impairment.

VII. CONCLUSION

The Court abused its discretion in denying Appellant's motion to vacate the judgment under CR 60 and RCW 51.52.130 for untenable reasons. Appellant's had standing to bring the motion and given the foregoing reasons, as well as Mr. Glatt's permanent mental health impairments, relief from the judgment should have been granted.

The Appellant further requests attorney's fees pursuant to RCW 51.52.130.

Dated this 30th day of October, 2015.

Respectfully submitted,

VAIL, CROSS-EUTENEIER and
ASSOCIATES

By: 

DORIAN D.N. WHITFORD
WSBA No. 43351
Attorney for Appellant

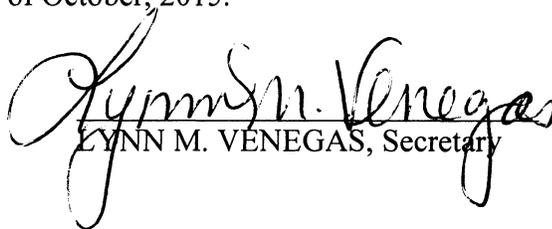
CERTIFICATE OF MAILING

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 30th day of October, 2015, the document to which this certificate is attached, Appellant's Opening Brief, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

Lionel Greaves, IV
Office of the Attorney General
P.O. Box 2317
Tacoma, WA 98401

DATED this 30th day of October, 2015.


LYNN M. VENEGAS, Secretary

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