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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 REPLY BRIEF

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**I. ARGUMENT IN RESPONSE TO THE RESPONDENT,
DEPARTMENT OF LABOR AND INDUSTRIES**

The Department argues that Vail/Cross does not have standing to bring this appeal for the Superior Court's denial of its CR 60 motion to vacate the judgment entered below in this matter because it was not a party below and because RCW 51.52.130 does not give an attorney an independent right to seek statutory attorney fees.

A. Vail/Cross Has Standing Under CR 60(b)

Pursuant to CR 60(e), application for vacation of judgment may be made by motion and supported by the affidavit of the applicant. Such a motion may be made to relieve a party or the party's legal representative from a final judgment and shall be made not more than one year after the judgment was entered. CR 60(b). The plain language of CR 60 does not require a party to bring the motion, rather it states an applicant may bring the motion. This is precisely what Vail/Cross did. As an applicant it petitioned the Superior Court to vacate the judgment to relieve a party, Mr. Glatt, and itself, as his former legal representative, of the judgment. This occurred after Vail/Cross filed its notice regarding attorney fees.

B. Vail/Cross Has Standing Under RCW 51.52.130

Pursuant to RCW 51.52.130, if on appeal to superior court of a decision and order of the Board of Industrial Insurance Appeals (Board), the decision and order is modified and additional relief is granted to a worker, a reasonable fee for the services of the worker's attorney shall be fixed by the court. Additionally, in cases where 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. RCW 51.52.130.

The plain language of this statute provides that if on appeal to superior court additional relief is granted, then the court shall set a reasonable fee for the services of the worker's attorney. In this case, there was an appeal by Mr. Glatt, through Vail/Cross, and ultimately a settlement was reached which provided additional relief to Mr. Glatt. As such, Vail/Cross has standing, which concerns its interest, as well as Mr. Glatt's, in attorney fees and costs incurred in the matter by Mr. Glatt pursuant to this statute.

C. The Department is Incorrect That Mr. Glatt Did Not Prevail

The Department argues that Mr. Glatt did not prevail in his appeal and as such, there would be no statutory attorney fees under RCW 51.52.130. Mr. Glatt did prevail as he successfully obtained additional

relief which was more than he obtained pursuant to the Board's order on appeal.

In *Andersen v. Gold Seal Vineyards, Inc.*, 81 Wn2d 863, 505 P.2d 790 (1973), the high court reasoned that a party prevails when no affirmative judgment has been entered against it. In *Boeing Co. v. Lee*, 102 Wn. App. 552, 8 P.3d 1064 (2000), the court held that when an employer filed an appeal and then dismissed the appeal before trial, attorney fees were authorized under RCW 51.52.130. Thus, the statute does not require that the appeal go through a trial and reach a judgment in order for the injured worker to prevail. Here, as Mr. Glatt successfully obtained additional benefits in superior court, he has prevailed and RCW 51.52.130's attorneys' fees and costs are triggered and apply.

D. A Question of Subject Matter Jurisdiction Cannot be Waived

The Department argues that the newly raised argument concerning the voidness of the judgment due to lack of subject matter jurisdiction should not be considered is incorrect. A question of subject matter jurisdiction may never be waived and can be raised for the first time on appeal. *In re Marriage of McDermott*, 175 Wn. App. 467, 479, 307 P.3d 717 (2013).

Here, the issue regarding whether the Court has subject matter jurisdiction to enter the judgment which includes a waiver of benefits is

properly before this court. Benefits under the Industrial Insurance Act cannot be waived by an injured worker pursuant to RCW 51.04.060, the portion of the judgment which includes a waiver of benefits under RCW 51.52.130 is therefore void. *See* Vail Brief at 13-4. This should properly be address by the Court as well as the other issues raised in the opening brief.

II. CONCLUSION

The Court below abused its discretion in denying Vail/Cross' motion to vacate the judgment under CR 60 and RCW 51.52.130 for untenable reasons. Vail/Cross had standing to bring the motion and given the foregoing reasons, as well as those in the opening brief, relief from the judgment should have been granted.

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

Dated this 3rd day of February, 2016.

Respectfully submitted,

VAIL, CROSS-EUTENEIER and
ASSOCIATES

By: _____


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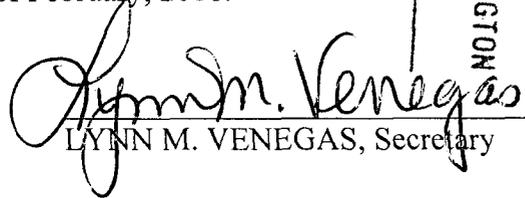
CERTIFICATE OF MAILING

SIGNED at Tacoma, Washington.

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, hereby certifies that on the 3rd day of February, 2016, the document to which this certificate is attached, Appellant's Reply Brief, was placed in the U.S. Mail, postage prepaid, and addressed to Respondent's counsel as follows:

James P. Mills
Assistant Attorney General
P.O. Box 2317
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DATED this 3rd day of February, 2016.


LYNN M. VENEGAS, Secretary

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