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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 32210-6-III

**COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON**

JOSÉ L. BIRRUETA,

Respondent,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF
WASHINGTON,

Appellant.

**DEPARTMENT OF LABOR AND INDUSTRIES
REPLY BRIEF**

ROBERT W. FERGUSON
Attorney General

Paul Weideman
Assistant Attorney General
WSBA No. 42254
Office Id. No. 91018
800 Fifth Avenue, Suite 2000
Seattle, WA 98104
(206) 389-3820

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I. INTRODUCTION

The Department of Labor and Industries is not forever bound to overpay workers' compensation benefits to a worker who has misrepresented his or her marital status. The Legislature has explicitly mandated that a worker "shall repay" overpaid workers' compensation benefits when the worker's innocent misrepresentation causes the overpayment as long as the Department makes a timely claim for repayment. RCW 51.32.240(1)(a). And, as the Board of Industrial Insurance Appeals has repeatedly determined, RCW 51.32.240(1)(a) allows the Department to correct the misrepresented fact that caused the overpayment.

The general appeals statutes, RCW 51.52.050(1) and RCW 51.52.060(1), do not, contrary to Birrueta's arguments, obviate RCW 51.32.240(1)(a)'s requirements. RCW 51.32.240(1)(a) is an exception to finality in the case of a worker's innocent misrepresentation. This was reinforced by the 2004 amendments to the statute, which contrary to Birrueta's arguments, show the Legislature's intent to correct innocent misrepresentations.

The Department properly assessed an overpayment and changed Birrueta's marital status in this case. This court should reverse.

II. ARGUMENT

A. **The Plain Language of RCW 51.32.240(1)(a) Makes Clear That It Is a Limited Exception to the Finality Provisions in RCW 51.32.050(1) and RCW 51.32.060(1)**

When a worker has misrepresented facts used to obtain benefits, as in this case, RCW 51.32.240 allows the Department to recoup the benefits within one year of payment and to correct the underlying factual error. The plain language of RCW 51.32.240(1)(a) mandates that a worker “shall repay” overpaid benefits that occur because of a worker’s innocent misrepresentation if the Department makes a claim for repayment within one year of the overpayment. RCW 51.32.240(1)(a) is not limited to situations when the order causing the overpayment is not yet final.¹ Rather, it applies up to one year after the overpayment whether or not the order causing the overpayment is final. In this case, RCW 51.32.240(1)(a) authorized the Department to order Birrueta to repay benefits that he was not entitled to and to change his marital status in order to prevent future overpayments.

¹ RCW 51.32.240(1)(a) provides that “[w]henver 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) controls this case, not the finality provisions in RCW 51.52.050(1) and RCW 51.52.060(1).² Birrueta relies on the finality language in these two appeal statutes to argue that the Department is “without authority to issue an overpayment resulting from that innocent misrepresentation since the underlying order is final and binding.” *See* Resp’t’s Br. 10. He contends that these statutes “establish a universal finality of all Department orders that are not protested or appealed” because neither statute “provides any exceptions to the finality provisions in them.” Resp’t’s Br. 6.

Birrueta’s arguments fail to recognize that the court reads statutes in order to give effect to all statutory language and to achieve a harmonious statutory scheme that maintains the integrity of the respective statutes. *See Hallauer v. Spectrum Props., Inc.*, 143 Wn.2d 126, 146, 18 P.3d 540 (2001); *Mason v. Georgia-Pac. Corp.*, 166 Wn. App. 859, 864, 271 P.3d 381, *review denied*, 174 Wn.2d 1015 (2012). RCW 51.32.240(1)(a), RCW 51.52.050(1), and RCW 51.52.060(1) may be read harmoniously to mean that unappealed orders are final and binding unless

² RCW 51.52.060(1)(a) states that a person aggrieved by a Department order must “file with the board and the director, by mail or personally, within sixty days from the day on which a copy of the order, decision, or award was communicated to such person, a notice of appeal to the board.”

RCW 51.52.050(1) states that an “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.”

the criteria in RCW 51.32.240 are met. This harmonious reading gives effect to all the statutory language, maintaining the integrity of the statutes.

Birrueta's interpretation violates these well-established canons of statutory construction. Under his interpretation, if the order causing an overpayment is not protested or appealed within 60 days and therefore becomes final, the Department cannot order repayment once it discovers the innocent misrepresentation. But such an argument does not give effect to all of RCW 51.32.240(1)(a)'s language; rather, it would render meaningless the Legislature's decision to allow one year (rather than 60 days) for the Department to order the worker to repay the benefits.

Instead, RCW 51.32.240(1)(a) applies whether or not the order causing the overpayment is final. It unambiguously applies "[w]henver any payment of benefits" is made for any of the three enumerated reasons, including innocent misrepresentation. Birrueta argues, without citation to authority, that RCW 51.32.240(1)(a) "is written under the assumption that there is no final and binding order." Resp't's Br. 7. But the plain, unambiguous language of the statute applies to "*any* payment of benefits" regardless of whether the order causing the overpayment is final. RCW 51.32.240(1)(a) (emphasis added). Whenever "any payment of benefits" is made due to the worker's innocent misrepresentation, the worker "shall

repay” it. RCW 51.32.240(1)(a). There is no basis in the statutory language for assuming, as Birrueta does, that the statute applies only when there is no final and binding order. This is especially true when the next subsection in the statute, RCW 51.32.240(1)(b), limits the Department’s overpayment powers to non-final orders in the case of adjudicator errors.

Further, RCW 51.32.240 controls because it is more specific than the general appeals statutes. “A specific statute will supersede a general one when both apply.” *Kustura v. Dep’t of Labor & Indus.*, 169 Wn.2d 81, 88, 233 P.3d 853 (2010) (quoting *Waste Mgmt. of Seattle, Inc. v. Utils. & Transp. Comm’n*, 123 Wn.2d 621, 630, 869 P.2d 1034 (1994)).

As Birrueta correctly observes, the finality provisions of RCW 51.52.050 and RCW 51.52.060 apply generally to “any order, decision, or award” by the Department. Resp’t’s Br. 2. In contrast, RCW 51.32.240(1)(a) is a specific statute that controls in a narrow set of factual circumstances—i.e. when the Department pays a worker excessive benefits for one of three reasons (clerical error, mistaken identity, innocent misrepresentation). In such a case, the Department has one year from the overpayment of benefits to take action. RCW 51.32.240(1)(a). As the more specific statute, RCW 51.32.240(1)(a) controls.

It is not necessary, as Birrueta implies, for the general statute to include a “generic signal that there may be some exceptions listed

els[e]where” (such as “unless stated otherwise”) to signal the Legislature’s intent that the specific statute should control over the general statute. Resp’t’s Br. 6. He cites no authority for this proposition and it should be rejected. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (court does not consider unsupported arguments). His argument also disregards the rule that the Court must harmonize and give meaning to all statutory language, even where no such “generic signal[s]” appear in the relevant statutes. *See Hallauer*, 143 Wn.2d at 146 (court must harmonize language).

Contrary to Birrueta’s arguments, *Marley v. Department of Labor & Industries*, 125 Wn.2d 533, 534, 886 P.2d 189 (1994), did not state that “the finality provisions of RCW 51.52.050 & 51.52.060 apply to all Department orders *without exception*.” Resp’t’s Br. 2 (emphasis added). *Marley* recognizes that final administrative orders, like judgments, have preclusive effect. *Marley*, 125 Wn.2d at 537. *Marley* recognizes, however, that an order may be set aside under certain circumstances, such as fraud or “something of like nature.” *Id.* (quoting *LeBire v. Dep’t of Labor & Indus.*, 14 Wn.2d 407, 415, 128 P.2d 308 (1942)). RCW 51.32.240 is a legislative designation of circumstances in which an order is not given preclusive effect. RCW 51.32.240(1)(a) provides a limited exception to finality. *Marley*, which did not, nor need to, address RCW

51.32.240, does not purport to render RCW 51.32.240's language meaningless.

B. The Legislature Has Limited the Department's Assessment Powers When an Adjudicator Error Is the Cause of the Overpayment, but the Legislature Has Imposed No Such Limitation When the Worker Misrepresents Facts

The Legislature knows how to limit a worker's repayment obligations and the Department's overpayment powers to non-final orders. The Legislature did so when it enacted RCW 51.32.240(1)(b), which includes specific language limiting the Department's actions when the Department commits an adjudicator error. Birrueta in essence asks this Court to read similar limiting language into RCW 51.32.240(1)(a). But courts do not add words to an unambiguous statute when the Legislature has chosen not to include that language. *State v. Delgado*, 148 Wn.2d 723, 727, 63 P.3d 792 (2003).

It is clear from RCW 51.32.240(1) as a whole that the Legislature limited the Department's overpayment powers resulting from adjudicator errors to non-final orders but gave the Department broader powers in cases of innocent misrepresentation:

(1)(a) 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.

(b) 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 which the overpayment is based *is not yet final as provided in RCW 51.52.050 and 51.52.060*. “Adjudicator error” includes the failure to consider information in the claim file, failure to secure adequate information, or an error in judgment.

(c) The director, pursuant to rules adopted in accordance with the procedures provided in the administrative procedure act, chapter 34.05 RCW, may exercise his or her discretion to waive, in whole or in part, the amount of any such timely claim where the recovery would be against equity and good conscience.

RCW 51.32.240(1). Where the Legislature uses certain statutory language in one instance and different language in another, there is a difference in legislative intent. *Guillen v. Contreras*, 169 Wn.2d 769, 776-77, 238 P.3d 1168 (2010). A court presumes that differences between two similar statutes are intentional by the Legislature. *See Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791 (1998).

There is a common sense reason why the Legislature treats an overpayment caused by a Department error differently from an overpayment caused by a worker’s misrepresentation. An error by the

Department is within its control, but a worker's misrepresentation is not. If the Department fails to consider information in the claim file or to secure adequate information, or if it makes an error in judgment with the information that it has, then it should correct the error within the usual 60-day period or live with the consequences. *See* RCW 51.32.240(1)(b). In contrast, it may be months or years before the Department learns that the worker misrepresented important facts, as occurred here. The Legislature recognized this and gave the Department additional time to address the misrepresentation.

Birrueta is incorrect when he states that "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 innocent misrepresentation." Resp't's Br. 3-4. By its plain terms, RCW 51.32.240(1)(b) does not refer to innocent misrepresentation at all. It refers to "adjudicator error." Thus, in cases of "adjudicator error," the Legislature has limited the Department's ability to address overpayments because of adjudicator error to non-final orders. This contrasts with RCW 51.32.240(1)(a), which contains no such language.

C. The Legislature's 2004 Amendments to RCW 51.32.240 Did Not Signal an Intent to Limit Repayment and Recoupment In Cases of Innocent Misrepresentation to Non-Final Orders

The 2004 amendments to RCW 51.32.240 show that the Legislature designed RCW 51.32.240 to allow the Department to address overpayment of benefits caused by misrepresentation. Birrueta argues that RCW 51.32.240(1)(a)'s overpayment provisions are limited to non-final orders because "the legislature placed the language regarding both innocent misrepresentation and adjudicator error both within separate but equal level subparagraphs of paragraph 1." Resp't's Br. 5. He misreads the statute and misapprehends the effect of the 2004 amendments.

Before 2004, RCW 51.32.240(1) did not expressly include any limitations on the Department's ability to address overpaid benefits that resulted from its own adjudicator error:

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 fraud, 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. The director, pursuant to rules adopted in accordance with the procedures provided in the administrative procedure act, chapter 34.05 RCW, may exercise his discretion to waive, in whole or in part,

the amount of any such timely claim where the recovery would be against equity and good conscience.

Laws of 2001, ch. 146, § 10.

In 2004, the Legislature added a new subsection addressing the Department's powers regarding "adjudicator error." Laws of 2004, ch. 243, § 7. Unlike in the case of innocent misrepresentation, which the Legislature re-codified as subsection (1)(a), the Legislature limited the Department's powers in the case of its adjudicator errors to situations when the order causing the overpayment was not yet final:

(b) 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 which the overpayment is based *is not yet final as provided in RCW 51.52.050 and 51.52.060*. "Adjudicator error" includes the failure to consider information in the claim file, failure to secure adequate information, or an error in judgment.

RCW 51.52.240(1)(b) (emphasis added); Laws of 2004, ch. 243, § 7. Thus, the Legislature included the "not yet final" language only in subsection (1)(b), not in subsection (1)(a). Laws of 2004, ch. 243, § 7. This signaled a legislative intent to treat the two situations differently, not the same.

The 2004 amendment signaled a clear legislative intent to limit the Department's overpayment powers in cases of adjudicator error, but not in cases of a worker's innocent misrepresentation. Birrueta draws the

opposite conclusion, suggesting that the “not yet final” language in RCW 51.32.240(1)(b) also applies to cases of innocent misrepresentation under RCW 51.32.240(1)(a) because the “legislature placed the language regarding both innocent misrepresentation and adjudicator error both within separate but equal subparagraph levels of level 1.” Resp’t’s Br. 5. Thus, he asserts that “[h]ad the legislature intended adjudicator error to be an entirely separate category, then the legislature would have put it in a separate paragraph such as [it] did with willful misrepresentation.” Resp’t’s Br. 5.

These arguments are inconsistent with the clear statutory language that treats adjudicator errors differently from innocent misrepresentations. No authority supports Birrueta’s novel argument that the Legislature’s inclusion of language in one subparagraph means that that language also applies to all of the other subparagraphs.

Birrueta is also incorrect that subsections (3), (4), and (5) of RCW 51.32.240 contain the only exceptions to the finality of unappealed Department orders. *See* Resp’t’s Br. 7-9. Those subsections include specific types of errors that are exempt from the requirement of a non-final

order and that do not apply here.³ Reading the statute as a whole, RCW 51.32.240(1)(a) allows the Department to address overpayments that result from a misrepresented fact in an otherwise final order.

D. Birrueta Has Waived Any Argument that the Department Committed Adjudicator Error, but Even if He Has Preserved This Argument, the Department Did Not Commit Adjudicator Error When It Relied on His Statement That He Was Married

Whether there was adjudicator error is not before this Court because Birrueta has waived this argument. Birrueta suggests that the Department committed adjudicator error by failing to consider the fact that the handwriting on the accident report was not his and by failing to request a marriage certificate. Resp't's Br. 13-14. This Court should decline to reach this argument because Birrueta did not assert it in his petition for review to the Board. *See* RCW 51.52.104; BR 8-13. In any case, the Department did not commit adjudicator error when it relied on his statement that he was married at the time of injury.

In his petition for review to the Board, Birrueta did not assert that the Department committed an adjudicator error when it relied on his statement that he was married in the application for benefits. *See* BR 8-13. He did not argue that the Department should have obtained a marriage

³ Subsection (3) authorizes recoupment of benefits paid before a claim rejection order; subsection (4) authorizes recoupment of benefits paid pursuant to adjudication by the Department later determined erroneous in an appeal; and subsection (5) authorizes recoupment of benefits "induced by willful misrepresentation."

certificate or more carefully scrutinized the handwriting on the application in order to determine whether the signature and handwriting were different. *See* BR 8-13. Under RCW 51.52.104, a party waives any objections not set forth in a petition for review: “Such petition for review shall set forth in detail the grounds therefor and the party or parties filing the same shall be deemed to have waived all objections or irregularities not specifically set forth therein.” *See Allan v. Dep’t of Labor & Indus.*, 66 Wn. App. 415, 422, 832 P.2d 489 (1992). Birrueta has thus waived the argument that the Department committed adjudicator error.

In any case, the Department did not commit adjudicator error when it relied on Birrueta’s declaration about his marital status. *See* Ex. 1. “Adjudicator error” includes “the failure to consider information in the claim file, failure to secure adequate information, or an error in judgment.” RCW 51.32.240(1)(b). Birrueta does not argue that the Department failed to consider information in the claim file; indeed, he notes that the Department “rel[ie]d on the information [it] had on file.” *See* Resp’t’s Br. 13. Nor does he appear to argue that the Department committed an error of judgment. Instead, he appears to argue that the Department did not secure adequate information. *See* Resp’t’s Br. 13-14.

The Department did not fail to secure adequate information about Birrueta’s marital status. It proactively sought this information from

Birrueta himself. It asked him to certify whether he was married or single in the application for benefits. *See* Ex. 1. Birrueta signed the application for benefits underneath a certification that the information, including the statement that he was married, was true to the best of his knowledge and belief. Ex. 1. This was an adequate investigation of Birrueta's marital status, and it was reasonable for the Department to rely on Birrueta's certification in order to issue a wage order stating that he was married. *See, e.g., In re Donald Mott*, No. 01 11553, 2002 WL 1400040 at *1 (Wash. Bd. Ind. Ins. App. April 24, 2002) (the Department is entitled to rely on a worker's representations in an application for benefits).

Birrueta faults the Department for electing not to disregard his certified statement that he was married. Instead, he suggests that the Department should have sought to corroborate his statement by obtaining a marriage certificate. Resp't's Br. 13-14. But the Department, which is required to administer benefits in a timely manner, had no reason to disbelieve his certified statement that he was married. He asserts that "the hand writing on the accident report listing him as married was clearly not Mr. Birrueta's hand writing." Resp't's Br. 13. That is far from clear by looking at the report of injury.⁴ *See* Ex. 1. Moreover, workers often have assistance from others in preparing applications for benefits. In any case,

⁴ The pre-printed word "married" was circled on the report of injury. Ex. 1. It was not written by hand.

the industrial appeals judge correctly rejected this argument because no authority supports disregarding certified information in a claimant's application for benefits:

This Industrial Appeals Judge can find no authority standing for the proposition that a claims adjudicator for the Department cannot rely upon the information in a notice of injury, absent some extraordinary reason for not relying upon that information. The fact that the handwriting on that form (Exhibit No. 1) may be different or look different than the signature on that form is simply not such an extraordinary reason justifying additional investigation.

BR 27. For this reason, the Department did not commit an adjudicator error or violate any fiduciary duty when it accepted his response that he was married.

The Department's wage rate order stated the Department's belief that Birrueta was married. Ex. 2; *see also* Ex. 4; BR 148. He does not dispute that he received such an order. *See* Exs. 3, 5. In fact, Birrueta protested orders stating that he was married, including the wage rate order, on three separate occasions. Exs. 3, 18-21; BR 147. In each of these protests, he failed to mention that he was not married. Birrueta perpetuated the error by neglecting to tell the Department about it when provided the opportunity. It was only when he wanted to receive pension benefits that he told the Department the truth. BR 148; *see* Ex. 14. The Department did not fail to obtain adequate information about Birrueta's

marital status because of its actions. It asked Birrueta whether he was married, and he responded yes. *See* Ex. 1. The Department was entitled to trust Birrueta's response in the application for benefits and to issue a wage order on this basis. Therefore, the Department's ability to assess an overpayment was not limited under RCW 51.32.240(1)(b) to the 60-day appeal period.

E. The Board Has Repeatedly Decided That RCW 51.32.240(1)(a) Authorizes the Department To Assess Overpayments and To Correct Misrepresented Facts in Otherwise Final Orders

As discussed extensively in the Department's opening brief, Board decisions that are entitled to great deference hold that RCW 51.32.240(1)(a) allows the Department both to recoup overpaid benefits and to correct the misrepresented fact that causes the overpayment in an otherwise final order to prevent future overpayments. Contrary to Birrueta's arguments, these Board decisions are well-reasoned and should be followed.

As a preliminary matter, this Court can consider both the Board's significant and non-significant decisions as persuasive authority. Birrueta is incorrect that the Court of Appeals refused to consider two non-significant decisions in *O'Keefe v. Department of Labor & Industries*, 126 Wn. App. 760, 767 n.3, 109 P.3d 484 (2005). Resp't's Br. 15. Footnote 3 of the *O'Keefe* opinion states only that the parties cited two Board

decisions “but the Board did not designate them as significant decisions.” *O’Keefe*, 126 Wn. App. at 767 n.3. It does not state that the Court of Appeals refused to consider those decisions.

Appellate courts often cite and discuss non-significant Board decisions as persuasive authority to support their legal analysis. For example, in a recent case, the Court of Appeals cited and discussed the Board’s application of the multiple proximate cause doctrine from two non-significant decisions. *See Dep’t of Labor & Indus. v. Shirley*, 171 Wn. App. 870, 888-91, 288 P.3d 390 (2012), *review denied*, 177 Wn.2d 1006 (2013) (citing *In re David Killian*, No. 06 17478, 2007 WL 4986270 (Wash. Bd. Indus. Ins. Appeals Nov. 20, 2007), and *In re Bobbie Thomas*, Nos. 04 17345 & 04 17536, 2006 WL 2989442 (Wash. Bd. Indus. Ins. Appeals May 17, 2006). In another case, the Court reviewed two non-significant Board decisions regarding second injury fund relief. *Puget Sound Energy, Inc. v. Lee*, 149 Wn. App. 866, 890, 205 P.3d 979 (2009) (citing *In re Marlene Olsen*, No. 06 16795, 2007 WL 4986259 (Wash. Bd. Indus. Ins. Appeals November 13, 2007), and *In re Thomas Williams*, No.

00 11219, 2001 WL 1755668 (Wash. Bd. Indus. Ins. Appeals December 20, 2001).⁵

Birrueta does not dispute that several Board decisions support the Department's position in this case. *See* Resp't's Br. 15-23. But he attacks the Board's rationale in these cases, arguing for instance that one Board case was "wrongly decided," that another lacked "any credible rationale," and that another lacked "a credible explanation" as to why the finality provisions of RCW 51.52.050 and RCW 51.52.060 do not apply to cases in which a worker innocently misrepresents his or her marital status. Resp't's Br. 21-22.

Contrary to these assertions, the Board has explained in a tentative significant decision that *res judicata* did not prevent the Department from changing the worker's marital status because it was "attendant" to the authority to recoup:

Once the misrepresentation has been established, RCW 51.32.240(1) provides relief from the *res judicata* application of an otherwise final determination and allows the Department to recoup benefits that had been overpaid. Attendant to the authority to recoup benefits must be the ability to correct the underlying determination. Otherwise, the Department may be placed in the unreasonable position

⁵ Additionally, the Board considers all of its opinions, whether significant or not. *See, e.g., In re Jornada Roofing I, Inc.*, No. 08 W1050, 2010 WL 1170616 (Wash. Bd. Ind. Ins. Appeals Jan. 27, 2010) (quoting *In re Dianne DeRidder*, No. 98 22312, 2000 WL 1011049 (Wash. Bd. Ind. Ins. Appeals May 30, 2000) (the Board was bound by a "duty of consistency" to follow prior decisions, whether designated significant or not, unless articulable reasons existed for not doing so).

of having to continue overpaying benefits based on an innocent misrepresentation or the belief that RCW 51.32.240(1) only allows recoupment and does not allow a correction of the erroneous basis for the payments. Application of the provisions of RCW 51.32.240(1) must be construed to allow the Department to correct the underlying determination that leads to an overpayment.

In re Alonso Veliz, No. 11 20348, 2013 WL 3185978 at *2 (Wash. Bd. Ind. Ins. App. March 4, 2013). The Board has re-affirmed its holding in *Veliz* in several subsequent decisions. *In re Luis Rios*, No. 13 15937, 2014 WL 3853588 at *2 (Wash. Bd. Ind. Ins. App. July 28, 2014); *In re Lloyd Johnson*, Nos. 12 15248 & 12 18850, 2013 WL 3636375 at *2 (Wash. Bd. Ind. Ins. App. April 11, 2013); *In re Robert Hickle*, No. 11 23444, 2013 WL 3185981 at *4 (Wash. Bd. Ind. Ins. App. March 26, 2013).

The rationale in *Veliz* is supported by the Legislature's intent to require repayment in the case of a worker's innocent misrepresentation. Applying RCW 51.32.240(1)(a)'s limited exception to finality means that previously issued orders with misrepresented facts are not final as to those misrepresented facts. By requiring recoupment and repayment, the Legislature also intended that the misrepresented fact that caused the overpayment be negated.

Birrueta discusses the Board's *Hickle* decision and its unique procedural history at length, asserting that it is internally inconsistent and that "it 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.” Resp’t’s Br. 18. This argument disregards that there is a separate subsection of RCW 51.32.240 that provides recourse to a worker who innocently misrepresents his or her marital status, resulting in underpaid benefits. *See* RCW 51.32.240(2).

Further, the *Hickle* decision is not internally inconsistent. There, the Department issued a wage order, which became final, stating that the worker was married at the time of injury. *Hickle*, 2013 WL 3185981 at *2. This was true, but the worker mistakenly stated on the pension benefits questionnaire that he was not married at the time of injury. *Hickle*, 2013 WL 3185981 at *3. Therefore, like in this case, the Department issued an order under RCW 51.32.240(1) changing the worker’s marital status from married to single at the time of injury. *Hickle*, 2013 WL 3185981 at *3. The worker, however, did not appeal this order; only the employer appealed. *Hickle*, 2013 WL 3185981 at *3. *Hickle* does not treat the worker and the Department differently; it merely stands for the well-established proposition that a party cannot obtain affirmative relief that it did not seek. *See Hickle*, 2013 WL 3185981 at *4 (citing *Brakus v. Dep’t of Labor & Indus.*, 48 Wn.2d 218, 292 P.2d 865 (1956)).

Birrueta attempts to distinguish two other Board cases, *In re Teresa Johnson*, No. 06 10641, 1987 WL 61380 (Wash. Bd. Indus. Ins. App. Aug. 26, 1987), and *In re Anita Bordua*, No. 93 1851, 1994 WL 364993 (Wash. Bd. Ind. Ins. App. May 2, 1994), on the grounds that those cases did not involve a final and binding wage order. Resp't's Br. 19-20. He states this is a critical distinction because a payment order, unlike a wage order, does not adjudicate the basis of a wage rate. Resp't's Br. 20.

This argument neglects several other Board cases, notably *Veliz*, *Lloyd Johnson*, *Hickle*, and *Rios*, that authorize the setting aside of otherwise final and binding wage orders because of the worker's innocent misrepresentation. That *Teresa Johnson* and *Bordua* did not involve wage orders is immaterial. These two cases recognize that the Legislature gave authority to the Department under RCW 51.32.240(1) to revise orders that were otherwise final in the case of clerical error, mistake of identity, or innocent misrepresentation. See *Bordua*, 1994 WL 364993 at *2-3; *Teresa Johnson*, 1987 WL 61380 at *2-3.

F. Birrueta's Interpretation of RCW 51.32.240(1) Would Result in Absurd Consequences

RCW 51.32.240(1)(a) allows for recoupment of overpayments made in final orders, and consistent with that power is the ability to correct the underlying factual error. *Veliz*, 2013 WL 3185978 at *2. If not, the

absurd result would occur of the Department having to wait for the overpayment of benefits to Birrueta to occur each month and then to recoup each overpaid benefit after it occurs. Birrueta contends that this analysis is logically flawed because it presupposes the Department's authority to assess overpayments, which he believes the Department may not do in the case of a final order. *See* Resp't's Br. 12. Birrueta does not otherwise contest that the Department may correct the underlying factual error.

His argument renders the plain language of RCW 51.32.240(1)(a) meaningless. The statute does not state that a worker need not repay overpaid benefits if the misrepresented fact appears in an otherwise final order. It states that the worker "shall repay" "*any* payment of benefits" without qualification other than the Department's timely claim for repayment. RCW 51.32.240(1)(a) (emphasis added). It does not limit the Department's authority to act to those situations where the underlying wage rate order is not final and binding. Had the Legislature wanted to limit the Department's authority in this way, it would have stated as such, as it did in RCW 51.32.240(1)(b). It did not.

The power to assess the overpayment gives the Department the power to correct the underlying factual error because the effect of RCW 51.32.240 is to render previously issued orders with misrepresented facts

not final as to those misrepresented facts. If the Department is unable to correct the misrepresented fact, it would be forced to engage in a costly cycle of overpayment and recoument for the life of a pensioned worker. Such a result would impose a hardship on workers who could be in a cycle of spending the overpaid benefits and then having to repay them after the money is gone. This is contrary to RCW 51.04.010's mandate of "sure and certain" relief. It is also inconsistent with RCW 51.32.240's purpose in remediating overpayments and ensuring a fiscally sound industrial insurance system.

The same would be true if the worker's innocent misrepresentation resulted in a final order resulting in an underpayment of benefits. A worker requesting an adjustment of benefits under RCW 51.32.240(2) should not have to wait for the Department to correct the underpayment on a yearly basis rather than correcting the error once and for all. The Legislature has authorized the Department to correct the misrepresented fact.

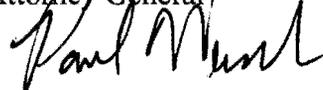
III. CONCLUSION

RCW 51.32.240(1)(a) represents the legislative decision to prevent a worker from profiting from his or her misrepresentation. The trial court

erred by not giving this statute effect.⁶ To recover past benefits made because of Birrueta's misrepresentation and to prevent future overpayments, the Department properly changed his marital status and recouped incorrectly paid benefits. The Department asks the Court to reverse the trial court.

RESPECTFULLY SUBMITTED this 10th day of September, 2014.

ROBERT W. FERGUSON
Attorney General



PAUL WEIDEMAN
Assistant Attorney General
WSBA No. 42254
Office Id. No. 91018
800 Fifth Ave., Suite 2000
Seattle, WA 98104
(206) 389-3820

⁶ Because Birrueta should not prevail in this appeal, he is not entitled to attorney fees.

FILED

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 32210-6-III

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

JOSE L. BIRRUETA,

Respondent,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Appellant.

CERTIFICATE OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on September 10, 2014, she caused to be served the Department of Labor & Industries Reply Brief and this Certificate of Service in the below-described manner:

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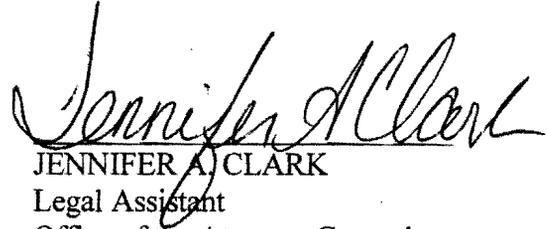
Michael Connell
Smart Connell Childers & Verhulp
PO Box 228
Yakima, WA 98907

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ORIGINAL

Signed this 10th day of September, 2014, in Seattle, Washington by:

A handwritten signature in cursive script that reads "Jennifer A. Clark". The signature is written in black ink and is positioned above the printed name.

JENNIFER A. CLARK

Legal Assistant

Office of the Attorney General

800 Fifth Avenue, Suite 2000

Seattle, WA 98104-3188

(206) 464-7740