

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Mar 11, 2016, 1:47 pm
BY RONALD R. CARPENTER
CLERK



NO. 92215-2

RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

JOSÉ BIRRUETA,

Respondent,

v.

DEPARTMENT OF LABOR & INDUSTRIES OF THE STATE OF
WASHINGTON,

Petitioner.

**DEPARTMENT OF LABOR & INDUSTRIES
SUPPLEMENTAL BRIEF**

ROBERT W. FERGUSON
Attorney General

Anastasia Sandstrom
Senior Counsel
WSBA No. 24163
Office Id. No. 91018
800 Fifth Ave., Ste. 2000
Seattle, WA 98104
(206) 464-7740

Paul Weideman
Assistant Attorney General
WSBA No. 42254
Office Id. No. 91018
800 Fifth Ave., Ste. 2000
Seattle, WA 98104
(206) 464-7740

FILED AS
ATTACHMENT TO EMAIL



ORIGINAL

TABLE OF CONTENTS

I. INTRODUCTION.....1

II. ISSUES.....2

III. STATEMENT OF THE CASE3

 A. When Birrueta Applied for Workers’ Compensation Benefits in 2004, He Said That He Was Married, Which Was Not True.....3

 B. The Department Relied on Birrueta’s Statement That He Was Married To Calculate His Workers’ Compensation Benefits3

 C. When Birrueta Informed the Department in 2011 That He Was Single at the Time of Injury, the Department Issued Orders Under RCW 51.32.240(1)(a) Assessing an Overpayment and Changing His Marital Status in Its Orders.....4

 D. The Board Affirmed the Department’s Authority To Assess an Overpayment and Change the Incorrect Marital Status Under RCW 51.32.240(1), But the Superior Court and Court of Appeals Reversed4

IV. ARGUMENT5

 A. RCW 51.32.240 Allows for Recovery of Overpayments and Underpayments for Clerical Errors, Mistakes of Identity, and Innocent Misrepresentations.....7

 B. Subsection (1)(b) Reinforces Subsection (1)(a)’s One-Year Statute of Limitation10

 C. Because RCW 51.32.240(1)(a) Is Not Ambiguous, Resort to Legislative History Is Inappropriate, but That History Reinforces that the Department May Recoup Certain Overpayments Within One Year.....15

D.	RCW 51.32.240(1) Authorizes the Department To Correct an Underlying Factual Error, Such as an Incorrect Marital Status, in an Otherwise Final Order Where the Factual Error Results From the Worker’s Innocent Misrepresentation.....	17
V.	CONCLUSION	20

TABLE OF AUTHORITIES

Cases

<i>Cerrillo v. Esparza</i> , 158 Wn.2d 194, 142 P.3d 155 (2006).....	15
<i>Deal v. Dep't of Labor & Indus.</i> , 78 Wn.2d 537, 477 P.2d 175 (1970).....	16
<i>Gorre v. City of Tacoma</i> , 184 Wn.2d 30, 357 P.3d 625 (2015).....	14
<i>Guillen v. Contreras</i> , 169 Wn.2d 769, 238 P.3d 1168 (2010).....	12
<i>Hardy v. Claircom Commc'ns Grp., Inc.</i> , 86 Wn. App. 488, 937 P.2d 1128 (1997).....	15
<i>In re Alonso Veliz</i> , No. 11 20348, 2013 WL 3185978 (Wash. Bd. Ind. Ins. App. March 4, 2013).....	18, 19
<i>In re Estate of Black</i> , 153 Wn.2d 152, 102 P.3d 796 (2004).....	10
<i>In re Lloyd Johnson</i> , Nos. 12 15248 & 12 18850, 2013 WL 3636375 (Wash. Bd. Ind. Ins. App. April 11, 2013).....	18
<i>In re Robert Hickie</i> , No. 11 23444, 2013 WL 3185981 (Wash. Bd. Ind. Ins. App. March 26, 2013).....	18
<i>Kilian v. Atkinson</i> , 147 Wn.2d 16, 50 P.3d 638 (2002).....	15
<i>Kingery v. Dep't of Labor & Indus.</i> , 132 Wn.2d 162, 937 P.2d 565 (1997).....	8, 9

<i>Matthews v. Dep't of Labor & Indus.</i> , 171 Wn. App. 477, 288 P.3d 630 (2012).....	8
<i>Stuckey v. Dep't of Labor & Indus.</i> , 129 Wn.2d 289, 916 P.2d 399 (1996).....	16
<i>Weyerhaeuser Co. v. Tri</i> , 117 Wn.2d 128, 814 P.2d 629 (1991).....	18

Statutes

Laws of 1975, 1st Ex. Sess., ch. 224, § 13.....	16
Laws of 1999, ch. 396, § 1.....	16
Laws of 2004, ch. 243, § 7.....	16
RCW 51.04.010	5
RCW 51.12.010	15
RCW 51.32.060(1)(a)	4
RCW 51.32.060(1)(g)	4
RCW 51.32.090(1).....	4
RCW 51.32.210	14
RCW 51.32.240	passim
RCW 51.32.240(1).....	passim
RCW 51.32.240(1)(a)	passim
RCW 51.32.240(1)(b)	passim
RCW 51.32.240(2)(a)	passim
RCW 51.32.240(2)(b).....	10, 11, 17

RCW 51.32.240(3).....	10, 13, 14
RCW 51.32.240(4).....	10, 13, 14
RCW 51.32.240(5).....	10, 13
RCW 51.52.050	8, 9, 10, 13
RCW 51.52.050(1).....	4, 9
RCW 51.52.060	8, 9, 10, 13
RCW 51.52.060(1).....	4, 9
RCW 51.52.060(4)(a)	10

Other Authorities

Final B. Rep. on Engrossed Substitute H.B. 3188, 58th Leg., Reg. Sess. (Wash. 2004).....	17
---	----

I. INTRODUCTION

Because workers and the Department of Labor and Industries both may make inadvertent mistakes that result in either an underpayment or an overpayment of industrial insurance benefits, the Legislature allows the Department to correct errors made in otherwise final decisions in three narrow circumstances: clerical errors, mistakes of identity, and innocent misrepresentations. José Birrueta mistakenly told the Department that he was married, instead of single, which meant that the Department overpaid wage replacement benefits to him.

RCW 51.32.240(1)(a) authorizes the Department to recoup “*any payment of benefits*” overpaid because of clerical error, mistaken identity, or innocent misrepresentation by providing that “The department . . . 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.” Birrueta invites the Court to ignore the “any payment of benefits” and “within one year” language. This language cannot be ignored because it shows that the Legislature provided an exception to the general rule that Department orders become final after 60 days by giving the Department one year to claim repayment of “any” benefits erroneously paid due to clerical error, mistaken identity, or innocent misrepresentation.

This Court should give effect to the Legislature’s intent to recover monies paid in the common circumstances of clerical errors, mistaken identity, and innocent misrepresentation. The Court of Appeals’ ruling, if it stands, results in a lifetime of mistaken payments to a worker even if everyone, including the worker, knows them to be incorrect. Furthermore, the Court of Appeals’ ruling means that workers cannot challenge underpayments based on similar errors (*e.g.*, if Birrueta had accidentally said he was single when in fact he was married), so such workers will never get the amount they are owed despite everyone, including the Department, acknowledging that they should.

II. ISSUES

1. RCW 51.32.240(1)(a) allows the Department to recoup overpaid benefits for “any payment of benefits” made because of clerical error, mistake of identity, or innocent misrepresentation if recouped “within one year.” RCW 51.32.240(1)(b) limits the Department to assessing overpayments for “adjudicator errors” to decisions that have not yet become final. Does the limitation for overpayments based on “adjudicator error” also apply to overpayments caused by innocent misrepresentations when the Legislature has created a separate subsection allowing recoupment for payments made because of an innocent misrepresentation, clerical error, or mistaken identity?
2. Does RCW 51.32.240(1)(a) authorize the Department to correct a worker’s marital status in its orders where the worker innocently misrepresented his marital status and the alternative is to continue overpaying benefits for the life of the pension and then continually issuing recoupment orders to address the overpayments?

III. STATEMENT OF THE CASE

A. **When Birrueta Applied for Workers' Compensation Benefits in 2004, He Said That He Was Married, Which Was Not True**

In 2004, Birrueta injured his back at work and submitted an application for workers' compensation benefits that indicated that he was married. Ex. 1; BR 147. This was not true. CP 7; BR 28. He did not fill out the application, but he signed it underneath the statement, "I declare that these statements are true to the best of my knowledge and belief." Ex. 1.

Birrueta did not tell the Department he was single at the time of his injury until seven years later, in February 2011, when the Department awarded him a pension, when he acknowledged in a questionnaire that he was not married at that time. Exs. 8, 14, 19; BR 148.

B. **The Department Relied on Birrueta's Statement That He Was Married To Calculate His Workers' Compensation Benefits**

From 2005 to 2008, the Department issued several orders that addressed Birrueta's wages at the time of his injury. *See* Exs. 2, 4, 18, 20. All stated that he was married. *See* Exs. 2, 4, 18, 20. Birrueta protested these orders on various grounds, including through counsel, but did not state in any of his protests that he was single. *See* Exs. 3, 5, 19, 21.

Ultimately, the Department issued a wage order in September 2008 that incorporated Birrueta's misrepresentation, noting incorrectly that he was married. Ex. 2. The Department affirmed the wage order in December

2008. Ex. 4; BR 147-48. That order became final after Birrueta dismissed his appeal to the order. Ex. 7; RCW 51.52.050(1), .060(1). Again, Birrueta said nothing about the mistake before it became final.

C. When Birrueta Informed the Department in 2011 That He Was Single at the Time of Injury, the Department Issued Orders Under RCW 51.32.240(1)(a) Assessing an Overpayment and Changing His Marital Status in Its Orders

When the Department learned in February 2011 that Birrueta was single at the time of injury, it issued an order assessing an overpayment of \$100.86 for time loss benefits paid from February 3, 2011 (the day after it received the questionnaire) to March 15, 2011 (the day before he was placed on pension) because Birrueta had innocently misrepresented his marital status. Ex. 9; *see also* Exs. 8, 11, 12. Birrueta protested this order, which the Department affirmed.¹ Exs. 10, 12. The Department issued a separate order changing his marital status from married to single. Ex. 11.

D. The Board Affirmed the Department's Authority To Assess an Overpayment and Change the Incorrect Marital Status Under RCW 51.32.240(1), But the Superior Court and Court of Appeals Reversed

Birrueta appealed the order changing his marital status and the overpayment order to the Board of Industrial Insurance Appeals. Ex. 13;

¹ From 2004 to 2011, Birrueta received time loss benefits for periods when he could not work at a higher percentage of wages (65 percent) than he would have if the Department had known he was single (60 percent). *See* RCW 51.32.060(1)(a), (g), .090(1). He likely received considerably more than \$100.86 in overpaid time loss benefits over the course of the claim. The Department limited its recoupment to the benefits it had overpaid in the six weeks before placing Birrueta on pension rather than seeking repayment for one full year of benefits, as RCW 51.32.240(1)(a) authorizes. *See* Ex. 9.

BR 148-49. The Board granted summary judgment to the Department, allowing the Department to recoup the overpayment and change the marital status in its orders. BR 5, 28. The superior court reversed. CP 7-8.

The Department appealed to the Court of Appeals. CP 5. Pointing to the “any payment” and “within one year” language, the Department asserted that the superior court erred because RCW 51.32.240(1)(a) allowed the Department to claim an overpayment for “any payment” made because of innocent misrepresentation “within one year” of the payment, and to issue an order correcting the mistaken fact.

Division Three affirmed.

IV. ARGUMENT

Taxpayers should not be forever bound to overpay workers’ compensation benefits to a worker due to a mistake such as a clerical error, mistake of identity, or innocent misrepresentation. Neither should workers be forced to accept fewer benefits than are due based on these types of mistakes. The Department processes tens of thousands of workers’ compensation applications each year and must ensure that workers receive “sure and certain relief.” RCW 51.04.010. Given the volume of claims, it is natural that sometimes inadvertent mistakes occur such as clerical errors or workers mistakenly submitting incorrect information. Because of this, the Legislature allows a one-year remedy for

overpayments and underpayments based on clerical error, mistaken identity, or innocent misrepresentation. RCW 51.32.240(1)(a), (2)(a). Only if the Court excises the phrases “any payment of benefits” and “within one year” from the statute would Birrueta’s arguments stand.

Instead of applying the language allowing recoupment of “any payment of benefits” “within one year” the Court of Appeals mistakenly held that innocent misrepresentation was “adjudicator error,” which cannot be fixed once the decision becomes final (a decision becomes final 60 days after it was issued). The Court of Appeals’ mistake potentially impacts a multitude of cases at great financial cost and unfairness. It means that when a worker misstates, but does not willfully misrepresent, a fact on an application for benefits and receives greater benefits as a result, the worker will enjoy a windfall every time he or she is paid under the claim as long as the misstated fact is not discovered within 60 days. Conversely, if the Court of Appeals’ rationale were to hold, workers who were *underpaid* based on clerical errors, mistakes of identity, or innocent misrepresentations would have no recourse if the order underpaying benefits became final. Instead, the worker would continue to be underpaid for as long as the order remained in effect, potentially over a lifetime. This cannot be what the Legislature intended. This Court should affirm the Board, and reverse the trial court and Court of Appeals.

A. RCW 51.32.240 Allows for Recovery of Overpayments and Underpayments for Clerical Errors, Mistakes of Identity, and Innocent Misrepresentations

The Legislature recognizes that workers and the Department both may make mistakes that result in overpayments or underpayments. When a mistake occurs in a Department order for three narrow reasons—clerical errors, mistakes of identity, or innocent misrepresentations—RCW 51.32.240(1)(a) provides a one-year statute of limitation for the Department to recoup “any payment of benefits”:

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.

(Emphasis added.) Similarly, RCW 51.32.240(2)(a) allows the Department to pay the worker for underpaid benefits within one year for the same reasons.

There is no ambiguity in the terms “any payment of benefits” or “within one year.” RCW 51.32.240(1)(a) applies “[w]henver any payment of benefits” is made regardless of whether the order or payment

is final. It states unequivocally that a worker “shall repay” benefits overpaid due to a worker’s innocent misrepresentation, a clerical error, or a mistake of identity, if the Department claims the overpaid benefits “within one year” of payment. The only reasonable interpretation of this language is that the Department can seek the overpayment within a year when it discovers an innocent misrepresentation.

This Court recognized the recoupment ability in *Kingery*. *Kingery v. Dep’t of Labor & Indus.*, 132 Wn.2d 162, 171, 937 P.2d 565 (1997) (plurality opinion). It specifically noted the ability to recoup payments within one year:

[T]he only statutory authority the Department has under Title 51 to correct its own errors is RCW 51.32.240, which is not applicable here as it regards recoupment of payments made pursuant to erroneous orders under certain circumstances and only if corrected within one year of payment. RCW 51.32.240.

Id. (emphasis omitted). *Kingery* dealt with the finality of the Department’s orders, and it recognized that RCW 51.32.240 was an exception to the finality requirements of RCW 51.52.050 and .060. *Kingery*, 132 Wn.2d at 171; see *Matthews v. Dep’t of Labor & Indus.*, 171 Wn. App. 477, 483-85, 497-98, 288 P.3d 630 (2012) (Department could recoup payments in an order 11 months after payment because of innocent misrepresentation).

But the Court of Appeals and Birrueta believe that the Department

is limited to recouping or paying benefits only within 60 days of the Department order: the time period before an order is final under RCW 51.52.050 and .060. The Legislature, however, created a limited exception to the general rule that Department orders are final after 60 days when it enacted RCW 51.32.240. *See* RCW 51.52.050(1), .060(1); *Kingery*, 132 Wn.2d at 171. Birrueta does not acknowledge the “any payment” language or the one-year statute of limitation and presents no plausible reason for the Legislature to have included these provisions if it meant to limit the recoupment period to 60 days, the period when an order is not final.

Birrueta’s interpretation that subsection (1)(a) only applies to non-final payments gives no meaning to the statute. Two aspects of the statutory language are key here. First is the recoupment power for “any payment of benefits” for the specified categories, and second is that a claim may be made “within one year” of any payment. There is no limit to the type of payments, namely final or non-final, in the language “any payment of benefits.” It is correct that normally payments made in final orders cannot be changed under RCW 51.52.050 and .060 after 60 days, but the Legislature created a special carve out for “any payment” made due to clerical errors, mistaken identity, and innocent misrepresentation.²

² Although the statutes may be harmonized, to the extent that RCW 51.52.050 and .060 conflict with RCW 51.32.240, RCW 51.32.240 is the more specific statute because it addresses how to treat “any payment” due to clerical error, mistaken identity,

By using the word “any,” it did not limit recoupment to “non-final” payments as Birrueta argues. Birrueta gives no meaning to the phrases “any payment of benefits” and “within one year.”³

B. Subsection (1)(b) Reinforces Subsection (1)(a)’s One-Year Statute of Limitation

Broadly covering “any payment of benefits,” RCW 51.32.240(1)(a) does not mention finality and does not limit recoupment of overpaid benefits or payment of underpaid benefits to non-final orders. This contrasts with overpayments that occur when the Department makes an “adjudicator error” as defined by RCW 51.32.240(1)(b) where payments can only be recouped when the order is “not yet final”:

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 51.32.240(1)(b) (emphasis added); *see also* RCW 51.32.240(2)(b) (underpaid benefits not paid due to “adjudicator error.”). If the Legislature

and innocent misrepresentation. As the specific statute, it controls. *In re Estate of Black*, 153 Wn.2d 152, 164, 102 P.3d 796 (2004).

³ Additionally, RCW 51.52.060(4)(a) provides that the Department may “[m]odify, reverse, or change any order” during the time period an order is not final. Thus, there already is authority to change non-final orders. So Birrueta’s supposition that RCW 51.32.240(1)(a) gives authority to the Department that it did not already have within the 60 days is flawed. Instead, RCW 51.32.240 means what it says, that the Department may take action within one year.

meant to limit the worker's repayment obligations in cases of clerical error, mistaken identity, and innocent misrepresentation to non-final orders, it would have said so in subsection (1)(a), as it chose to do in subsection (1)(b). Also, it would have done so in subsection (2)(a) in the case of underpaid benefits, like it did in subsection (2)(b).

The Court of Appeals and Birrueta collapse the adjudicator error provision in subsection (1)(b) into the provision for clerical errors, mistakes of identity, and innocent misrepresentations under subsection (1)(a). But the fact that they are both in subsection (1) does not mean that the (1)(b) requirements apply to both subsections (a) and (b), as Birrueta suggests. Amicus Answer 3. This would give no meaning to the Legislature's provision of two different subsections.

It is only adjudicator error that must be corrected before the order becomes final in 60 days. Birrueta claims "any error" of the Department is adjudicator error. Amicus Answer 7. But this cannot be correct when the Legislature specified errors that could be subject to recoupment in subsection (1)(a). Further the Legislature specifically defined "adjudicator error" as including "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). It did not include clerical error, mistake of identity, or innocent misrepresentation in this list. Instead it created a separate

subsection that allows recoupment for these three narrow errors. The usage of different language in statutory provisions demonstrates a difference in legislative intent. *Guillen v. Contreras*, 169 Wn.2d 769, 776-77, 238 P.3d 1168 (2010).

The Court of Appeals believed that these could be adjudicator error because the definition of adjudicator error uses the term “includes” in its list of items that constitute adjudicator error. *Birrueta v. Dep’t of Labor & Indus.*, 188 Wn. App. 831, 838-39, 355 P.3d 320 (2015). While “includes” might be a broadening term, it must be read in context with the specific language of the statute, where the Legislature chose to specifically identify certain errors as correctable within one year—“clerical error, mistake of identity, innocent misrepresentation”—in one subsection and failed to include those specific errors in the section immediately following.

The Court of Appeals acknowledged that adjudicator errors can only be changed before the order is final, but erroneously concluded that “innocent misrepresentation” is included within the definition of adjudicator error, reasoning first that “willful misrepresentation” is adjudicator error, and then surmising that both willful and innocent misrepresentation must be treated the same. 188 Wn. App. at 838-39. The statute does not support this interpretation.

Both the Court of Appeals and *Birrueta* mistake the import of the

savings clause in RCW 51.32.240(1)(b). Pointing to the savings clause in (1)(b), Birrueta argues that the only exception to finality is in subsection (1)(b)'s reference to subsections (3), (4), and (5). Amicus Answer 5. Subsection (1)(b) provides, "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 RCW 51.52.060." RCW 51.32.240(1)(b) (emphasis added). The reason why the Legislature did not include subsection (1)(a) in the savings clause is that it did not regard clerical error, mistake of identity, and innocent misrepresentation to be "adjudicator error," as shown by the fact that it listed them in subsection (1)(a) and not as "adjudicator error" in subsection (1)(b). The sentence in subsection (1)(b) only applies to instances of adjudicator error contemplated by that subsection.

Contrary to the Court of Appeals' theory, the cross-reference to subsection (5), willful misrepresentation, in the savings clause does not mean that willful misrepresentation is adjudicator error. 188 Wn. App. at 838-39. A key component of the Court of Appeals' rationale finding that innocent misrepresentation is included within "adjudicator error" is its conclusion that willful misrepresentation is also "adjudicator error." 188 Wn. App. at 838-39. But the Court of Appeals was wrong that willful

misrepresentation is adjudicator error. The court reasoned that because willful misrepresentation and other specified circumstances were exempted from adjudicator errors subject to the 60-day limit in (1)(b), that this necessarily meant that those specified circumstances were adjudicator errors. The flaw in that reasoning is that it ignores the legislative definition of adjudicator error, the “any payment of benefits” language in (1)(a), and the fact that, like willful misrepresentation, the other circumstances listed as exempt from (1)(b) would be exempt even without their explicit exclusion.⁴ That these circumstances were explicitly excluded remains a legislative curiosity, but not proof that the Legislature intended the term “adjudicator error” to mean “any error.”

RCW 51.32.240(1)(a)’s one year requirement is not ambiguous. The savings clause in subsection (1)(b) is a little obscure in its purpose but it does not eliminate the meaning of subsection (1)(a). If the Court would consider the savings clause to be ambiguous, the result here would not change. In statutory interpretation, the primary objective is to give effect to the Legislature’s intent. *Gorre v. City of Tacoma*, 184 Wn.2d 30, 37, 357 P.3d 625 (2015). If the language regarding “any payment of benefits,”

⁴ Subsection 3 allows for temporary disability benefits, such as time loss, to be recouped if the time loss is paid before a claim was accepted. RCW 51.32.210 requires prompt payment of benefits while a claim is pending, and payment of such benefits is not adjudicator error. Subsection 4 specifically allows for recoupment in the case of erroneous adjudication and that language would control.

is construed to mean only non-final payments, then there is no effect to the word “any.” If recoupment can only occur for orders within 60 days, there is no effect to the one-year limitation. Although, the doctrine of liberal construction applies to workers’ compensation cases, it cannot produce a strained or unrealistic interpretation. RCW 51.12.010; *Kilian v. Atkinson*, 147 Wn.2d 16, 27, 50 P.3d 638 (2002). It would be strained or unrealistic to read out the “any payment of benefits” and “within one year” language. A savings clause cannot be read to destroy the meaning of a statute that contains it. *Hardy v. Claircom Commc'ns Grp., Inc.*, 86 Wn. App. 488, 496, 937 P.2d 1128 (1997). More significantly, while Birrueta’s interpretation would favor him, it would disfavor other workers who need to rely on subsection (2)(a)’s provision allowing recoupment of underpayments. A liberal construction produces a fair interpretation: when the worker or Department makes a mistake in three narrow circumstances, such mistakes can be corrected to benefit all.

C. Because RCW 51.32.240(1)(a) Is Not Ambiguous, Resort to Legislative History Is Inappropriate, but That History Reinforces that the Department May Recoup Certain Overpayments Within One Year

Resort to legislative history is not appropriate because RCW 51.32.240(1)(a)’s mandatory repayment provision is not ambiguous. *See Cerrillo v. Esparza*, 158 Wn.2d 194, 202, 142 P.3d 155 (2006) (legislative

history not considered for unambiguous statutes). Nevertheless, the legislative history shows that the Legislature intended to allow recoupment within one year in three narrow instances involved here.

Forty years ago, the Legislature enacted RCW 51.32.240 in direct response to *Deal*'s holding that, absent express statutory authority, the Department could not recoup benefits overpaid due to a mistake of fact. *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 298, 916 P.2d 399 (1996); *Deal v. Dep't of Labor & Indus.*, 78 Wn.2d 537, 540, 477 P.2d 175 (1970); Laws of 1975, 1st Ex. Sess., ch. 224, § 13. Not once in the 40 years since has the Legislature amended the language that a worker "shall repay" "any payment of benefits" that are overpaid due to an innocent misrepresentation if the Department claims repayment "within one year." Compare Laws of 1975, 1st Ex. Sess., ch. 224, § 13 with RCW 51.32.240(1)(a).

In 1999, the Legislature added the provisions about underpayments. Laws of 1999, ch. 396, § 1. In 2004, the Legislature amended the statute to add subsection (1)(b), which prevents recoupment for adjudicator errors after the order is final. Laws of 2004, ch. 243, § 7. The legislative history in 2004 reflects that the Legislature understood that under existing law mistakes because of clerical errors and other similar mistakes could be corrected within one year, but adjudicator errors could

not:

If benefits fail to be paid because of clerical error or other nonfraudulent mistakes, the claimant must seek an adjustment within one year of the incorrect payment. However, the claimant may not seek such an adjustment because of adjudicator errors.

Final B. Rep. on Engrossed Substitute H.B. 3188, at 1-2, 58th Leg., Reg. Sess. (Wash. 2004). Although the Legislature was addressing the underpayment provision in subsection (2)(a), it shows that the Legislature meant the one year provisions in RCW 51.32.240 regarding clerical errors, mistaken identity, and innocent misrepresentation to have effect.⁵

D. RCW 51.32.240(1) Authorizes the Department To Correct an Underlying Factual Error, Such as an Incorrect Marital Status, in an Otherwise Final Order Where the Factual Error Results From the Worker’s Innocent Misrepresentation

Although the Court of Appeals did not reach the issue, subsection (1)(a) also authorizes the Department to correct the misrepresented fact that causes overpayments. Otherwise, an absurd result would occur. Each month going forward, the Department would have to overpay pension

⁵ The Court of Appeals’ flawed premise that the adjudicator error provision in subsection (1)(b) applies to subsection (1)(a) taints its entire legislative history analysis. Without that premise, its legislative analysis does not make sense. For instance, the court speculates, without citing any supporting legislative document, that the 1999 addition of the adjudicator error provision in subsection (2)(b) “likely reflected the department’s concern” about “an onslaught of requests for increased benefits” from workers alleging that someone “once made a clerical error, mistake of identity, or innocent misrepresentation.” 188 Wn. App. at 842. But that assumes at the outset that adjudicator errors apply to these errors rather than to just those situations included in the definition of adjudicator error. The court never explains how it knows that the Department was concerned about an onslaught of requests alleging innocent misrepresentations rather than requests, for example, that it failed to consider information in the claim file.

benefits to Birrueta and then, at least annually under RCW 51.32.240(1)(a), issue an overpayment order to recoup the overpaid benefits. This would have to occur for the life of the pension, which will likely be several decades because Birrueta is 33. *See* Ex. 1.

The Board recognizes that RCW 51.32.240 provides the authority to revise the factual information in an order that would otherwise be final 60 days after communication to a party. *See In re Alonso Veliz*, No. 11 20348, 2013 WL 3185978 at *1 (Wash. Bd. Ind. Ins. App. March 4, 2013).⁶ The Board’s interpretation of the Industrial Insurance Act is entitled to “great deference.” *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991). In *Veliz*, like in this case, the Board considered whether RCW 51.32.240(1) provided the Department with authority to change a worker’s marital status when the worker’s application for benefits stated, incorrectly, that he was married at the time of injury. *Veliz*, 2013 WL 3185978 at *1. The Board concluded that the Department had authority under the statute to change 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.

⁶ *See also 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 Hickie*, No. 11 23444, 2013 WL 3185981 at *4 (Wash. Bd. Ind. Ins. App. March 26, 2013).

Attendant to the authority to recoup benefits must be the ability to correct the underlying determination.

Veliz, 2013 WL 3185978 at *2 (emphasis added). The Board reasoned that the Department had the authority to correct the underlying determination because otherwise the Department would have to continually overpay and then recoup benefits, which is illogical. *Veliz*, 2013 WL 3185978 at *2.⁷

The reasonable reading of RCW 51.32.240, as the Board noted in *Veliz*, supports the Department's ability to use RCW 51.32.240(1) to not only assess overpayments for past periods, but also to avoid the need to assess them into the future. It is administratively burdensome for the Department to issue and recoup overpayments on a monthly or yearly basis for the life of a pensioned worker. Continual overpayment orders are also burdensome on workers as they will be faced with the choice of either repaying money that they have already spent or having future time loss or pension payments reduced to allow the Department to recoup the money. If the Department were forced to continually issue overpayment orders rather than to correct the misrepresented fact once and for all, workers would face the continuous hardship of repaying money they may have spent. Preventing this cycle prevents this unnecessary hardship.

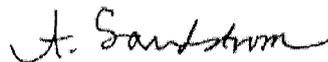
⁷ *Veliz* appealed to superior court, which affirmed the Board. His appeal is pending in the Court of Appeals.

V. CONCLUSION

While Birrueta would benefit from a decision that says that errors may not be corrected under subsection (1)(a) within a year, many other workers would not benefit from his proposed reading of the statute, since it would eviscerate the underpayment provisions in (2)(a). Because it is fiscally prudent not to perpetuate obvious errors caused by a worker's provision of incorrect information to the Department, the Legislature requires the worker to repay benefits obtained from the misrepresentation, even if the order containing the misrepresentation is otherwise final. This Court should reverse.

RESPECTFULLY SUBMITTED this 11th day of March 2016.

ROBERT W. FERGUSON
Attorney General



Anastasia Sandstrom, WSBA No. 24163
Paul Weideman, WSBA No. 42254
Office Id. No. 91018
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-7740

NO. 92215-2

SUPREME COURT OF THE STATE OF WASHINGTON

JOSE BIRRUETA,

Respondent,

v.

DEPARTMENT OF LABOR
AND INDUSTRIES OF THE STATE
OF WASHINGTON,

Petitioner.

CERTIFICATE OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the DEPARTMENT'S SUPPLEMENTAL BRIEF and this CERTIFICATE OF SERVICE in the below described manner:

Via Email filing to:

Ronald R. Carpenter
Supreme Court Clerk
Supreme Court
supreme@courts.wa.gov

Via First Class United States Mail, Postage Prepaid to:

Michael Connell
Smart Connell Childers & Verhulp
PO Box 228
Yakima, WA 98907-0228

Robert Battles
Association of WA Business
1414 Cherry Street SE
Olympia, WA 98507

Kristopher Tefft
WA Self-Insurers Association
1401 4th Avenue E., Suite 200
Olympia, WA 98506

RESPECTFULLY SUBMITTED this 11th day of March, 2016.



SHANA PACARRO-MULLER
Legal Assistant
Office of the Attorney General
Office Id. No. 91018
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(206) 464-5808

OFFICE RECEPTIONIST, CLERK

To: Pacarro-Muller, Shana (ATG)
Cc: Sandstrom, Anastasia (ATG); 'mconnell@smartandconnell.com'; 'bobb@awb.org'; 'kris.tefft@WSIAssn.org'
Subject: RE: Case No. 92215-2; Birrueta v. Department of Labor & Industries

Rec'd 3/11/2016

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Pacarro-Muller, Shana (ATG) [mailto:ShanaP@ATG.WA.GOV]
Sent: Friday, March 11, 2016 1:44 PM
To: OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>
Cc: Sandstrom, Anastasia (ATG) <AnaS@ATG.WA.GOV>; 'mconnell@smartandconnell.com' <mconnell@smartandconnell.com>; 'bobb@awb.org' <bobb@awb.org>; 'kris.tefft@WSIAssn.org' <kris.tefft@WSIAssn.org>
Subject: Case No. 92215-2; Birrueta v. Department of Labor & Industries

Case No. 92215-2
RE: Birrueta v. Department of Labor & Industries

Dear Mr. Carpenter:

Attached for filing is the Department's Supplemental Brief and Certificate of Service in the above referenced matter. Thank you,

Shana Pacarro-Muller
Legal Assistant Supervisor
Supporting Lisa Brock and Anastasia Sandstrom
Office of the Attorney General
Labor & Industries Division
800 Fifth Avenue, Ste. 2000
Seattle, WA 98104
Phone: (206) 464-5808
Fax: (206) 587-4290
shanap@atg.wa.gov

*This e-mail may contain confidential information which is legally privileged. If you have received this e-mail in error, please notify me by return e-mail and delete this message. Any disclosure, copying, distribution or other use of the contents of this information is prohibited.
Please print only when necessary.*