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No. 92215-2

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DEPARTMENT OF LABOR AND INDUSTRIES OF THE

STATE OF WASHINGTON,

Petitioner,

v.

JOSE L. BIRRUETA,

Respondent.

RESPONDENT'S BRIEF

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 ORIGINAL

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I. Statement of Issue

Is the Department bound by the finality provisions of RCW 51.52.050 & 51.52.060, or does RCW 51.32.240(1) create an exception to those finality provisions which allows the Department to modify the marital status of an injured worker for purposes of calculating benefits in the injured worker's claim?

II. Argument

A. Clarification of the Issue

The Department identifies two issues in their petition for review, but in reality there is a single issue in the case on review. That single issue is whether RCW 51.32.240(1) creates an exception to the finality provisions of RCW 51.52.050 & 51.52.060 which allows the Department to modify a final and binding order under those statutes which established Mr. Birrueta's marital status for purposes of calculating compensation in his claim. If there is no exception to the finality provisions of RCW 51.52.050 and 51.52.060 then there can be no right of the Department to assess an overpayment in this case. The right to assess an overpayment only comes into being if there is a change of marital status for purposes of

compensation in the claim. In other words, if the Department is without authority to modify the final and binding order establishing Mr. Birrueta's marital status then no overpayment exists for them to seek to recover. Conversely, if they do have authority to modify the final and binding order establishing the marital status then the Department does have authority to recover the overpayment.

B. Finality of Department Orders: RCW 51.52.050 & 51.52.060

RCW 51.52.050 provides that if a Department order is not protested or appealed within 60 days of communication, the order "shall" become final and binding on all parties upon expiration of the 60 day period. It provides that:

[w]henver the department has made any order, decision, or award, it shall promptly serve the worker, beneficiary, employer, or other person affected thereby, with a copy thereof by mail. . . . The copy, in case the same is a final order, decision, or award, shall bear on the same side of the same page on which is found the amount of the award, a statement, set in black faced type of at least ten point body or size, that such final 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.

(emphasis added) (portion of the statute regarding electronic communication of Department orders omitted). The statute provides that the finality provisions apply to “any order, decision, or award,” and provides for no exception to the finality provision for any type of order that is not protested or appealed. *Id.* No part of RCW 51.52.050 explicitly provides any exception to the finality provision in the statute. Nor, is there even a general statement that there could be exceptions to the finality provisions listed elsewhere within RCW 51. Rather, the finality provision is a broad statement regarding all Department orders, and is applicable to all parties – including the Department.

RCW 51.52.060 similarly provides that before “a worker, beneficiary, employer, health services provider, or other person aggrieved by an order, decision, or award of the department must, before he or she appeals to the courts, 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 51.52.060 likewise provides no explicit exception to the finality provisions it outlines, nor is there any general statement that there might be exceptions listed elsewhere within RCW 51. It, like RCW 51.52.050, is a broad statement regarding all Department orders, and is applicable to all parties – including the Department.

The Washington State Supreme Court has addressed the fact that the finality provisions of RCW 51.52.050 & 51.52.060 apply broadly to all Department orders with only two exceptions, neither of which is applicable in this case, in *Marley v. Dept. of Labor & Indus.*, 125 Wn.2d 533, 542 (1994). The *Marley* court explained that “the doctrine of claim preclusion applies to a final judgment by the Department as it would to an unappealed order of a trial court. An order of judgment resting upon a finding, or findings, of fact becomes a complete and final adjudication, binding on both the department and the claimant unless such action. . . . is set aside upon appeal or is vacated for fraud or something of like nature.” *Id.* pg. 537-38 (emphasis added). The court continued and noted that “[a]n order from the Department is void only when the Department lacks personal or subject matter jurisdiction.” *Id.* The court further explained that even if the Department order is based on a clear error of law it become a final adjudication of the issue involved if the order is not timely protested or appealed. *Id.* pg. 538. The only exceptions to the finality provisions of RCW 51.32.050 and 51.32.060 identified in the *Marley* case are orders which the Department was without jurisdiction to issue, or those issued because of fraud. Neither of those exceptions is applicable to the

case at bar.¹ RCW 51.52.050 & 51.52.060 therefore offer no basis to support the Department's position. As will be seen below, the text of RCW 51.32.240(1) likewise does not provide a basis to support the Department's position either. The Department seeks to circumvent the finality provisions of RCW 51.52.050 and 51.52.060, but provides no convincing authority to support their effort.

C. RCW 51.32.240(1)

The Department's entire position is premised upon two arguments: 1) that subsection (1)(a) somehow provides an implied exception to the finality provisions of RCW 51.52.050 & 51.52.060; and 2) that subsection (1)(a) and subsection (1)(b) are completely independent subsections with no overlap between them. However, a plain reading of the statute itself, and principles of statutory interpretation show that neither of those arguments hold up.

1. Subsection 1(a) Does Not Provide an Implied Exception to RCW 51.32.050 & RCW 51.52.060

¹ The tenor of the Department's Petition for Review gives the impression at times that this case involves an issue of fraud (willful misrepresentation), but the case at bar does not involve willful misrepresentation.

The Department argues that subsection (1)(a) contains an implied exception to the finality provisions of RCW 51.32.050 & RCW 51.52.060, but provides no argument to support the assertion. Nor, is there anything in the text of that subsection itself that would imply such an exception. Subsection(1)(a) does not mention the finality or non-finality of orders. Rather it is written with the assumption there is no operative Department order underlying the overpayment for which recovery is being sought. They addressed the issue of finality or non-finality of orders in subsection (1)(b). Further, even if there were some vague language that could be argued created an implied exception to the finality provisions, such an implied exception would not be sufficient given the broad and generally applicable language of RCW 51.32.050 & RCW 51.52.060.

2. Subsection 1(a) and 1(b) are Not Completely Independent Subsections

Subsections 1(a) and 1(b) read as follows:

(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.

Subsection 1(b) explicitly references other subsections of RCW 51.32.240 outside subsection 1(b) when discussing the fact that if there is an order under RCW 51.52.050 or RCW 51.52.060 that is the basis for an overpayment that the overpayment can only be assessed if that determinative order has not become final. Subsection 1(b) identifies only three specific subsections of RCW 51.32.240 which are exceptions to the finality provisions of RCW 51.52.050 and 51.52.060, and those subsections are (3), (4), and (5). In other words, subsection 1(b) explicitly states that the only time an overpayment can be assessed when there is a determinative order that is the basis for the overpayment, and that order has become final and binding is in the situations enumerated in subsections (3), (4), and (5).

This language establishes two important points which supports the court of appeals decision in the case at bar. First, that subsection 1(b) is not to be read in isolations of the other subsections of RCW 51.32.240.

Second, it explicitly identified the only subsections of RCW 51.32.240 which contain exceptions to the finality provisions of RCW 51.52.050 and RCW 51.52.060, and those subsections identified, and they do not include subsection 1(a). RCW 51.32.240(1)(b) therefore explicitly establishes that when an error caused by an innocent misrepresentation has become embodied in a determinative order that error is final and the order cannot be later changed by the Department. Any other interpretation would be inconsistent with RCW 51.52.050 & 51.52.060.

That RCW 51.32.204(1)(a) and (1)(b) are not completely independent and unrelated subsections is also seen by looking at principles of statutory construction and the legislative history regarding the statute. These issue are discussed in the Respondent's Court of Appeals Brief and in the Decision of the Court of Appeals and will not be repeated here. Respondents Brief, COA, pg. 3-10; *Birrueta v. DLI*, 188 Wn. App. 831, 839-43 (2015).

D. Leuluaialii & Callihan Are Not on Point

The Department cites to *Leuluaialii v. DLI*, 169 Wn. App. 672 (2012) and *Callihan v. DLI*, 10Wn. App. 153 (1973) in criticizing the analysis in the Court of Appeals decision. However, those cases are not on point, and are consequently not applicable to the case at bar. Both of those

cases dealt with a clerical error in a closing order regarding which part of the body was injured. In *Leuluaialii* the Department issued an order closing the injured worker's claim with a permanent partial disability of the right arm when it should have been an order closing the claim with a permanent partial disability of the right leg. *Id.* 768-679. The Department subsequently, after the incorrect closing order had become final, issued a new closing order with the correct body part listed. *Id.* The court held that not only did the department not have authority to issue the corrected closing order, but also held that RCW 51.32.240 did not even apply in the case because there was no overpayment or underpayment of benefits at issue. *Id.* 679-680. The court held that the Board of Industrial Insurance Appeals could correct the clerical error under CR 60, but not the Department. *Id.* Consequently, the *Leuluaialii* case is of no relevance to the case at bar since it was not decided under RCW 51.32.240. Further, even if it had any probative value it would be to establish that the Department did not have authority to correct a clerical error in a final and binding order which would not support the Department's argument.

In the *Callihan* case there were similar facts and the same outcome as in *Leuluaialii*. *Callihan* at 154-158. The court held that the Department did not have authority to correct a clerical error in an order that was final and binding. The only different between the two cases was

that in *Callihan* there was not even a reference to RCW 51.32.240. *Id.* Neither *Leuluaialii* nor *Callihan* provide any basis to support the Department's argument that they have authority to set aside a final and binding Department order establishing the marital status of an injury worker for purpose of calculating their benefit rate.

E. *Matthews* Is Not On Point

The Department also points to *Matthews v. DLI*, 171 Wn. App. 477 (2012) as a basis for their position that they have authority to be exempted from the finality provisions of RCW 51.52.050 & 51.52.060 in the case at bar. However, *Matthews* is distinguishable from the case at bar. First, *Matthews* involved a jurisdictional question. The Department had assessed an overpayment against Mr. Matthews alleging that she had engaged in willful misrepresentation under RCW 51.32.240(5) because she had continue to receive time loss compensation payments while having returned to work for a period of time. *Id.* 482-84. The Board of Industrial Insurance Appeals [the Board] concluded that the Department had not met its burden of showing that Ms. Matthews had engaged in willful misrepresentation, but that there was an overpayment caused by innocent misrepresentation of Ms. Matthews. *Id.* pg. 489-93. Ms. Matthews argued that the Board was without jurisdiction to address the

issue of innocent misrepresentation under RCW 51.32.240 (1)(a) since the Department order on appeal had only addressed the issue of willful misrepresentation under subsection (5). The court of appeals upheld the decision of the Board and the superior court holding that there was jurisdiction to address the issue of innocent misrepresentation. *Id.* Ms. Matthews did not contest the findings of the Board that she was overpaid time loss for the periods of time, so that issue became a verity on appeal. *Id.* 494. Because Ms. Matthews had not contested the findings regarding the overpayment the issue of the authority of the Department to recover an overpayment based on assumedly final and binding payment orders was not before the court.

The fact that the issue which is before the Court in the case at bar was not before the court of appeals in *Matthews* explains why there is no discussion, analysis, or even reference to the provisions of RCW 51.32.240(1)(b), RCW 51.52.050 and/or RCW 51.52.060 in the *Matthews* decision.

**F. The Court of Appeals Decision Does not Render
RCW 51.32.240(1)(a) Meaningless**

The Department argues that the court of appeals decision in the case at bar renders RCW 52.32.240(1)(a) meaningless. It argues that if the Department is not allowed to recover overpayments caused by an innocent misrepresentation even if the overpayment is based on a final and binding order that subsection (1)(a) would be rendered meaningless, and the one year limitation on recovery in subsection (1)(a) would likewise be rendered meaningless. This argument relies on the incorrect premise that the causes of overpayments listed in subsection (1)(a) cannot ever form the basis for an adjudicator error under subsection (1)(b). In other words, the Department's argument is that something that is an innocent misrepresentation can never form the basis for an adjudicator error. This of course is not correct.

The word "adjudicate" means "to settle judicially" or to "act as a judge." Webster's Ninth New Collegiate Dictionary (1991), pg. 56. Elsewhere it is defined as "to settle in the exercise of judicial authority. To determine finally. Synonymous with adjudge in its strictest sense." Black's Law Dictionary, 6th Ed (1990), pg. 42. In the context of a Department order the term "adjudicator error" means an erroneous adjudication by the Department adjudicator (claims manager) regarding an issue in the claim. The term "adjudicator error" itself says nothing about the cause of the error, but rather just signals that it is an error made by the

person adjudicating an issue in the claim. RCW 51.32.240(1)(b) also provides illumination about the meaning of adjudicator error in this context. It states that, “‘adjudicator error’ includes the failure to consider the information in the claim file, failure to secure adequate information, or an error in judgment.” The use of the term “includes” implies that the list is not a definitive or all-inclusive list, but rather solely an illustrative list of the types of actions that can cause adjudicator error. The way that the Department “adjudicates” or “settles” an issue in a claim is to embody that decision or adjudication in a determinative order. RCW 51.32.050 and 51.52.060. When they take adjudicatory action by issuing an order and they issue an order that contains an error then that is an adjudicator error—regardless of the cause. RCW 51.52.050 and 51.52.060 provides that such an order is final and binding on all parties, unless the Department was without jurisdiction to issue the order, or the order was induced by willful misrepresentation as defined in RCW 51.32.240(5).

Specifically, in the case at bar, the Department chose to make an adjudicatory decision about the marital status of Mr. Birrueta for purposes of calculating the benefits in his claim. They took the adjudicative action of issuing a determinative order in which they adjudicated his marital status for purpose of calculating benefits under his claim. That adjudication turned out to contain an error, and is therefore an adjudicator

error under RCW 51.32.240(1)(b). By its express language RCW 51.52.240(1)(b) precludes the Department from recovering an overpayment based on that adjudicator error.

Further, holding that an innocent misrepresentation is the cause of an adjudicator error and that consequently the Department cannot recover the overpayment in this case does not render RCW 51.32.240(1)(a) meaningless. RCW 51.32.240(1)(a) would still be fully applicable in cases where there was an innocent misrepresentation that the Department relied upon in paying benefits, but which they did not make the adjudicatory decision to incorporate into a determinative order. The Department frequently administers claims, and even pays time loss benefits, before they ever issue a determinative order establishing the wage rate and marital status for purpose of compensation in a claim. In such a situation, RCW 51.32.240(1)(a) would be fully operational and would have effect.

Additionally, even if the Department's argument that there is no overlap between subsection (1)(a) and subsection(1)(b) were accepted, in order for the Department to have the authority to take the action they took in this case it would also require reliance on another implicit assumption. That second implicit assumption is that an adjudicator error can never

have more than a single cause. This of course is not true. As with most things in life there is often more than one cause.

Even if it is accepted that an innocent misrepresentation incorporated into a determinative order by the Department is somehow not an adjudicator error, the question must still be answered whether there is another cause for the overpayment that is an adjudicator error. RCW 51.32.240(1)(b) specifically includes the examples of adjudicator error. As noted above, those examples are “failure to consider information in the claim file, failure to secure adequate information, or an error in judgment.” All of those describe the actions of the Department in this case. The Department issued the determinative order establishing Mr. Birrueta’s marital status based on a single piece of paper addressing that issue. That single piece of paper was the accident report, which was completed in a hospital, and which clearly was not written in the hand writing of Mr. Birrueta. Exhibit 1. They also clearly did not even review that document closely when issuing the order since that document indicates there was one child, but the wage rate order they issued indicates zero children. Exhibit 2. Such an action clearly describes a Department claims manager who took adjudicative action while failing to consider the information in the file, failing to secure adequate information, and who committed an error in judgment. Certainly those actions alone would constitute adjudicator

error. The question that one is left naturally asking is why did the Department never take the very simple step to clarify the issue by asking Mr. Birrueta the question directly until years later when he was found to be totally disabled?

III. Attorney Fees & Expenses

Mr. Birrueta requests attorney fees and costs in this matter pursuant to RCW 51.52.130 and RAP 18.1.

IV. Conclusion

The court of appeals decided this case correctly. RCW 51.32.240(1) does not contain any express or implied exception to the finality provisions of RCW 51.52.050 & 51.52.060 other than in cases of willful misrepresentation, and willful misrepresentation is not at issue in this case. The court of appeals decision is consistent with the plain meaning of RCW 51.32.240(1), and with basic principles of statutory construction. It is also consistent with the legislative history regarding the statute. The court of appeals decision does not render RCW 51.32.240(1)(a) meaningless. The Department was without authority to change Mr. Birrueta's marital status for purposes of calculating benefits in his claim, and is without authority to recover an overpayment in this case.

Respectfully submitted this 11 day of March, 2016.



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Attached for filing is the Respondent's Brief and Certificate of Mailing regarding:

Department fo Labor & Industries of the State of Washington, Petitioner, v. Jose L. Birrueta, Respondent.
Case No. 92215-2

Copies have been placed in the mail today to all parties pursuant to the certificate of Service.

Thank you for your time in this matter.

Susan Little

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