

Veliz, Alonso

DEPARTMENT

Authority to recoup overpayment of benefits – See also **SELF-INSURANCE** Authority to recoup overpayment of benefits

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RES JUDICATA

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**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: ALONSO VELIZ**) **DOCKET NO. 11 20348**
2)
3 **CLAIM NO. AG-93574**) **DECISION AND ORDER**

4 **APPEARANCES:**

5 Claimant, Alonso Veliz, by
6 Smart, Connell, Childers & Verhulp, P.S., per
7 Darrell K. Smart

8 Employer, 3 Rivers Potato Service, Inc., by
9 Washington State Farm Bureau #00081 & #10670

10 Department of Labor and Industries, by
11 The Office of the Attorney General, per
12 Bryan Ovens, Assistant

13 The claimant, Alonso Veliz, filed an appeal with the Board of Industrial Insurance Appeals on
14 September 21, 2011, from an order of the Department of Labor and Industries dated August 8,
15 2011. In this order, the Department established Mr. Veliz's compensation rate based on being
16 married on the date of injury or disease manifestation. This action was taken due to information
17 supplied by Mr. Veliz on the Report of Accident. On July 6, 2011, Mr. Veliz informed the
18 Department the information was incorrect. Effective October 7, 2009, the Department changed the
19 marital status on which compensation was established to single. The action was taken in
20 accordance with RCW 51.32.240(1). The Department order is **AFFIRMED**.

21 **DECISION**

22 As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for
23 review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and
24 Order issued on November 9, 2012, in which the industrial appeals judge reversed and remanded
25 the Department order dated August 8, 2011. The sole issue presented in this appeal is whether the
26 application of RCW 51.32.240(1) provides the Department the authority to change Mr. Veliz's
27 marital status. We conclude that the statute provides the Department the authority to change what
28 would otherwise be considered a final determination.

29 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
30 no prejudicial error was committed. The rulings are affirmed.

1 Mr. Veliz sustained an industrial injury on October 27, 2007, and the claim was allowed by
2 the Department. Mr. Veliz stated on his Application for Benefits that he was married. Based on the
3 Application for Benefits the Department issued an order on January 8, 2008, in which it established
4 Mr. Veliz's compensation rate considering him to be married with three children. This order was
5 never protested or appealed. Mr. Veliz was eventually found to be permanently and totally disabled
6 in a Proposed Decision and Order dated January 13, 2011. We denied review and the Department
7 issued a ministerial order on July 1, 2011, in which it placed Mr. Veliz on a pension effective
8 October 7, 2009.

9 Mr. Veliz completed paperwork for the Department before he was placed on a pension in
10 which he indicated that he was not married at the time of his industrial injury. It is not disputed that
11 the Application for Benefits listed Mr. Veliz as being married. He had been living with his wife since
12 1998. He has limited ability to speak English and he testified that he did not fill out the application.
13 He and his wife always considered themselves married though they did not have a formal
14 ceremony until January 2011.

15 Mr. Veliz's position is that the order setting his time-loss compensation benefits rate has
16 become final and RCW 51.32.240(1) does not apply. He cites *Marley v. Department of Labor &*
17 *Indus.*, 125 Wn.2d 533 (1994) in support of his argument that once the January 8, 2008 order
18 became final, the Department lacked authority to change his marital status. In *Marley*, the court
19 stated that "an unappealed final order from the Department precludes both parties from rearguing
20 the same claim" and "the failure to appeal an order, even one containing a clear error of law, turns
21 the order into a final adjudication, precluding any reargument of the same claim." *Marley*
22 at 537-538.

23 The Department's position is that it can use RCW 51.32.240(1) to change a claimant's
24 marital status. This statute allows the Department to recoup benefits that were paid due to clerical
25 error; mistake of identity; innocent misrepresentation by or on behalf of the recipient mistakenly
26 acted on; or other circumstance of a similar nature not induced by willful misrepresentation. It
27 specifically deals with the recoupment of benefits. The record establishes that the misstatement of
28 Mr. Veliz's marital status on the Application for Benefits was an innocent misrepresentation.

29 Once the misrepresentation has been established, RCW 51.32.240(1) provides relief from
30 the res judicata application of an otherwise final determination and allows the Department to recoup
31 benefits that had been overpaid. Attendant to the authority to recoup benefits must be the ability to
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1 correct the underlying determination. Otherwise, the Department may be placed in the
2 unreasonable position of having to continue overpaying benefits based on an innocent
3 misrepresentation or the belief that RCW 51.32.240(1) only allows recoupment and does not allow
4 a correction of the erroneous basis for the payments. Application of the provisions of
5 RCW 51.32.240(1) must be construed to allow the Department to correct the underlying
6 determination that leads to an overpayment.

7 Consistent with our interpretation, we have previously relied on the statute to set a new
8 compensation rate. In *In re Anita F. Bordua*, Dckt. No. 93 1851 (May 2, 1994) the Department
9 attempted to recoup an overpayment due to a miscalculation of Ms. Bordua's wage rate and to set
10 a new rate. We found that the Department could recalculate the wage rate for future benefits even
11 when the original order setting the rate had become final. In that decision we quoted from our
12 decision in *In re Teresa Johnson*, BIIA Dec., 85 3229 (1987), and stated:

13 To hold that the principle of res judicata prevents the Department from
14 correcting an inaccurate rate of compensation if not corrected within
15 sixty days of the date of an order paying time-loss compensation would,
16 we feel, render the overpayment statute meaningless. RCW 51.32.240(1) expressly permits the recoupment of overpayments
17 made 'within one year' of the making of the payment. This clearly
18 contemplates an underlying authority to revise an order of payment
which would otherwise be considered final 60 days after the date it was
communicated to a party.

19 *Johnson*, at 5.

20 We also allowed the use of subsection (2) of the statute to allow an injured worker's claim to
21 be allowed even after sixty days had elapsed from the date the Department mistakenly rejected the
22 claim. In *Judy A. Clauser*, Dckt. No. 01 10451 (August 2, 2002). In that appeal Ms. Clauser filed
23 two claims with the same self-insured employer. The employer requested that the Department
24 reject one of the claims because the two claims were identical. The Department rejected the wrong
25 claim. Neither Ms. Clauser nor her employer noticed the error and neither protested or appealed it
26 within sixty days.

27 The employer continued to pay Ms. Clauser benefits on the rejected claim. A little over one
28 year later the employer's representative noticed the error and requested that the Department
29 correct its mistake. The Department corrected the error and reversed the rejection order and
30 allowed the claim. The employer protested and the Department found that it did not have
31 jurisdiction because the rejection had become final and binding. Ms. Clauser appealed and we
32

1 found that RCW 52.32.240(2) should be used to correct the Department's clerical mistake and
2 reversed the order so that the claim would be allowed.

3 We also acknowledged that RCW 51.32.240 can abrogate the res judicata effect of a
4 Department order in *In re Jorge Perez-Rodriguez*, BIIA Dec., 06 18718 (2008). We see no reason
5 in this appeal to forego the reasoning we followed in those cases cited above. The Department has
6 the ability to change Mr. Veliz's marital status that was originally based on an innocent
7 misrepresentation. *Marley* does not limit us under these circumstances where the Legislature has
8 given the Department the ability to take corrective action when the requirements of RCW 51.32.240
9 are met such as they are in Mr. Veliz's case.

10 **FINDINGS OF FACT**

- 11 1. On April 26, 2012, an industrial appeals judge certified that the parties
12 agreed to include the Jurisdictional History in the Board record solely for
13 jurisdictional purposes.
- 14 2. On October 27, 2007, the claimant, Alonso Veliz, sustained an industrial
15 injury. On or about November 1, 2007, an unknown person assisted
16 Mr. Veliz in completing a report of industrial injury. Mr. Veliz reads and
17 speaks little English. The report of industrial injury shows Mr. Veliz to be
18 married with three children.
- 19 3. On January 8, 2008, the Department issued an order in which it
20 established a wage for the job of injury, and reflected Mr. Veliz's status
21 to be married with three children. The January 8, 2008 order was
22 neither protested nor appealed, and became final.
- 23 4. On July 6, 2011, Alonso Veliz advised the Department that he was not
24 married on the date of his industrial injury in 2007.
- 25 5. Mr. Veliz's marital status as reflected on the report of injury from
26 November 1, 2007, and on which the Department relied in issuing the
27 January 8, 2008 order establishing a wage for his job of injury was the
28 result of an innocent misrepresentation from Mr. Veliz or one acting on
29 his behalf.

30 **CONCLUSIONS OF LAW**

- 31 1. Based on the record, the Board of Industrial Insurance Appeals has
32 jurisdiction over the parties to and the subject matter of this appeal.
2. As provided by RCW 51.32.240(1), the Department of Labor and
Industries is authorized to correct the marital status of Mr. Veliz for
purposes of determining wage of job-of-injury compensation because
the earlier information provided by Mr. Veliz or one acting on his behalf
was the result of innocent misrepresentation.

1 3. The Department order dated August 8, 2011, is affirmed.
2 Dated: March 4, 2013.

3 BOARD OF INDUSTRIAL INSURANCE APPEALS

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6 /s/ _____
7 DAVID E. THREEDY Chairperson

8
9 /s/ _____
10 JACK S. ENG Member

11
12 **DISSENT**

13 I respectfully disagree with the majority's decision to recognize the long line of cases that
14 have followed the supreme court's decision in *Marley v. Department of Labor & Indus.*, 125 Wn.2d
15 533 (1994). Under that oft-quoted decision, a Department order that is not protested or appealed
16 within sixty days becomes final even if the Department order is in error. The attempt to use
17 RCW 51.32.240 to avoid the res judicata effect of the Department wage order in this appeal is
18 misplaced.

19 The supreme court in *Kingery vs. Department of Labor & Indus.*, 132 Wn.2d 162, 171 (1997)
20 specifically found that this statute can only be used to recoup benefits. The Department order on
21 appeal does not attempt to recoup benefits, only to change Mr. Veliz's wage rate based on an error
22 regarding his marital status. *Kingery* also points out that this statute is the only means the
23 Department has to correct an error and if the facts of an appeal do not lend themselves to the
24 utilization of RCW 51.32.240, as in this case, the Department has to live with its mistake.

25 I have no doubt that the Department would take the opposite stance if the circumstances
26 were reversed and an injured worker wanted to use RCW 51.32.240(2) to correct a Department
27 error to increase benefits. The Department would plead *Marley* and take the position that the
28 injured worker would be required to live with the error and it would be too late to correct the
29 Department action in the appellant's favor. We must be consistent in how we deal with these types
30 of cases.

1 Precedence is strongly in Mr. Veliz's favor. *Marley* is still "good law" and is followed by the
2 courts of Washington. We should also follow the precedence set by that case and reverse the
3 Department order and find that Mr. Veliz's marital status should remain the same as the
4 Department found in its final order dated January 8, 2008.

5 Dated: March 4, 2013.

6 BOARD OF INDUSTRIAL INSURANCE APPEALS

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9 /s/
10 FRANK E. FENNERTY, JR. Member