



Carving out an exception to final and binding department compensation orders in Washington

By Mary F. Hannon ■ August 1, 2017

On September 15, 2016, the Washington Supreme Court reversed the court of appeals in *Birrueta v. Department of Labor and Industries*,¹ and determined that the Department or self-insured employers may recoup overpaid benefits to an injured worker despite what appears to have been a final and binding compensation order in the event the order was based on clerical error, mistake of identity, innocent misrepresentation or “any other circumstance of a similar nature.”

The supreme court’s decision states that, pursuant to RCW 51.32.240(1) (a), the claim for repayment or recoupment must be made within one year of the date of the erroneous payment. The court distinguished between overpayments caused by innocent misrepresentation (or clerical error, mistake of identity, “or any other circumstance of a similar nature”) and overpayments caused by adjudicator error. In the latter scenario, the Department may only assess an overpayment of benefits when the relevant order is not yet final.

(Attorney Shawna Fruin discussed the Washington Court of Appeals decision in a previous blog, which can be found here: <http://rwwcomplaw.com/wa-appeals-holds-errors-to-60-day-protest-appeal-deadline/>)

Claimant Jose L. Birrueta was injured at work on August 31, 2004. Mr. Birrueta received assistance when completing a report of the industrial injury. In the report, he stated that he was married with one child. In fact, Mr. Birrueta was unmarried and had no children. These errors were attributed to a language barrier and the fact that Mr. Birrueta was in and out of consciousness at the time the report was filled out on his behalf.

Between 2004 and 2008, the Department issued multiple compensation orders that each stated Mr. Birrueta was married with no children at the time of his injury. The last compensation order became final on or about May 4, 2009. Over the ensuing years, Mr. Birrueta did not correct the Department’s mistaken belief that he was married at the time of his injury. In early 2011, the Department determined that Mr. Birrueta was permanently and totally disabled and entitled to a pension. Mr. Birrueta completed the required pension benefits questionnaire and stated that he was unmarried at the time of injury. The Department did not know Mr. Birrueta was unmarried until it received the completed pension questionnaire. After learning of Mr. Birrueta’s

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Washington Supreme Court reverses *Birrueta* (continued)

true marital status, the Department issued two orders: (1) an overpayment against Mr. Birrueta in the amount of \$100.86 based on the amount he was overpaid between the time the Department learned his true marital status and the time he was placed on pension; and (2) changing Mr. Birrueta's marital status for compensation purposes from married to unmarried effective the day after the Department learned his true marital status.

Mr. Birrueta appealed the Department orders, contending that the prior wage orders were final and binding on all parties, including the Department. The Board affirmed the Department's orders, finding that Mr. Birrueta innocently misrepresented his marital status when he applied for benefits and that the orders were authorized by RCW 51.32.240(1). Mr. Birrueta sought review in superior court, which reversed the Board's order and set aside the Department's orders as "null and void." The court of appeals affirmed.

In reversing the court of appeals, the Washington Supreme Court concluded that the Department's orders were timely and authorized in accordance with RCW 51.32.240(1)(a). According to the court, subsection (1)(a) of that statute applies to any order, temporary or binding, that results in an erroneous overpayment of benefits caused by an innocent misrepresentation (or clerical error, mistake of identity, "or any other circumstance of a similar nature"). The court further determined that subsection (1)(b) applies only to overpayments caused by adjudicator error. The court found that nothing in subsection (1)(a) indicates that it applies only to temporary orders. In reviewing the legislative history of RCW 51.32.240, the court noted that the statutory purpose was clear: "to provide the Department, self-insured employers, and workers with a procedure for correcting overpaid and underpaid benefits without undermining the appeals process or its purpose of providing sure and certain relief for workers."

The court determined that the Department's order assessing an overpayment against Mr. Birrueta was made within one year of the payments the Department sought to recoup and was therefore plainly authorized and timely pursuant to subsection (1)(a). The court further determined that the order changing Mr. Birrueta's marital status was within its implied authority as a necessary incident to recoupment pursuant to subsection (1)(a). To hold otherwise would be administratively burdensome and, more importantly, a hardship to Mr. Birrueta undercutting his right to sure and certain relief. The court held that the orders at issue were timely and within the Department's statutory authority.

More importantly, the court's holding allows the Department, self-insured employer or the worker to rectify an erroneous compensation order notwithstanding the apparent finality of the order, even if the 60-day appeal deadline has passed. Accordingly, *Birrueta* holds that when a wage order incorrectly states a worker's familial status based on innocent misrepresentation, the familial status (and resulting benefits payments) can

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be corrected despite the wage order appearing to be final. However, recovery of the overpayment is limited to one year from the making of the erroneous payment. Interestingly, the deadline is one year from the making of any such erroneous payment rather than one year from the date of the erroneous compensation order, suggesting that the aggrieved party can nevertheless seek to recoup benefits made within the past year despite the date the actual compensation order was issued.

The *Birrueta* decision highlights two important facets of administering workers' compensation claims. Primarily, ensuring accurate information obtained from the injured worker or his or her representative at the outset of an industrial claim is crucial and will avoid unnecessary complications down the road. However, the *Birrueta* decision allows for a reprieve despite the apparent finality of an erroneous compensation order.

Claims examiners will need to diligently ensure that once a discrepancy is discovered, a request for recoupment is immediately sought in order to recover as many erroneous payments as possible. Additionally, for claims involving total and permanent disability benefits, precision on the part of the claims examiner will prevent an inflated pension award.

The attorneys at Reinisch Wilson Weier are available to answer any questions about correcting compensation order errors or other claims issues. ■

¹ *Birrueta v. Dep't of Labor & Indus.*, 186 Wash. 2d 537 (2016).

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