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Supreme Court No. 100374-9
Court of Appeals No. 54884-4-II

Supreme Court of the State of Washington

William A. Boley,

Petitioner,

v.

Washington State Department of Labor & Industries,

Respondent.

Petition for Review

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1. Identity of Petitioner

William Boley, Respondent at the Court of Appeals, asks this Court to accept review of the Court of Appeals decision terminating review, specified below.

2. Court of Appeals Decision

Boley v. Dep't of Lab. & Indus., No. 54884-4-II (August 17, 2021) (unpublished). Boley filed a timely motion for reconsideration, which was denied by Order dated October 12, 2021. Copies of the Opinion and the Order are in the appendix.

3. Issues Presented for Review

1. In *Tobin v. Dep't of Lab. & Indus.*, this Court held that the Department cannot collect reimbursement for general damages such as pain and suffering. But the Court of Appeals has limited *Tobin* only to settlements which allocate a portion of the recovery to general damages. The result unfairly penalizes injured workers who are unable or unsuccessful in negotiating an allocation. **Should this Court replace the judicially-created settlement-allocation rule with a rule**

that provides a judicial allocation of general damages?

2. Under *Tobin*, the Department is not entitled to collect any portion of recovery that is attributable to general damages. By rejecting Boley's asserted allocation without a hearing, the Department has collected portions of Boley's recovery that were attributable to pain and suffering. **Was the superior court correct in remanding to the Department for an evidentiary hearing to determine pain and suffering?**

3. In the settlement-allocation cases, the Court of Appeals reasoned that without an allocation in the settlement, it could not be known what amount the third-party was paying for general damages. Here, the insurers tendered their policy limits without even considering the amount of general damages. **Are the settlement-allocation cases inapplicable when the injured worker has no person or entity with which to negotiate an allocation of general damages?**

4. Statement of the Case

4.1 Boley's life was forever changed when the vehicle in which he was riding with two co-workers was struck by a drunk driver at over 100 miles per hour.

William A. Boley sustained an industrial injury the morning of December 3, 2015, while riding as a passenger in the course of his employment with McMeekin Construction. CP 29, 320. Boley's employer, Jaymee McMeekin, was driving the large pickup truck, with his son, Jason McMeekin, in the front passenger seat and Boley in the back seat. CP 319. Boley was wearing a seat belt. CP 340.

The three were traveling southbound on Interstate 5 south of Chehalis when they were struck from behind by a vehicle driven by Casey Specht. CP 320. Specht was drunk and speeding down the Interstate at 117 miles per hour. CP 320, 339. Specht's car collided with the McMeekin truck at 109 miles per hour, sending the truck off the road and into a tree.

CP 320, 339. All three occupants of the truck were injured in the collision. CP 339.

Specht emerged from his vehicle unruly and belligerent, approached the totaled truck and started shoving Jason McMeekin and kicked the gravely injured Boley in the back. CP 320. Specht was eventually tased and restrained by Washington State troopers. CP 320.

Boley was in extreme pain and had to be flown to the hospital by helicopter. CP 320; *see* CP 270-71. He had lacerations in his small intestine and descending colon, which required immediate surgery to save his life. CP 320. After the abdominal surgery, he was immediately taken to another operating room for additional surgery to repair his fractured spine. CP 320. Multiple fractures required hardware to be placed on his spine from the L1 to L4 vertebrae. CP 320, 340. While recovering, Boley suffered a severe infection in his abdomen from the surgeries, requiring further

hospitalization. CP 340; *see* CP 272-73. About 18 months later, Boley returned for surgery to remove the hardware from his spine. CP 340.

Prior to the collision, Boley was a healthy and active 27-year-old working as a finish carpenter with McMeekin. CP 323, 340. Now he is scarred both physically and emotionally. CP 323. He suffers from depression and post-traumatic stress disorder. CP 323. He experiences constant pain and limited movement and physical capabilities. CP 324. Boley will never return to labor-intensive employment. CP 321.[1] His life will never be the same. CP 324; *see* CP 262-68, 275-83.

Boley's experienced personal injury attorneys have estimated his total damages as exceeding $5 Million, including general damages of $2.5 Million. CP 200, 342.

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[1] Boley's future employability was uncertain. CP 341. After the superior court appeal, the Department determined Boley is 100 percent disabled.

4.2 The Department paid benefits to Boley, but he also sought to recover from the drunk driver. Two insurers tendered policy limits and left the injured parties to battle among themselves. Boley settled his $5 Million claim for $637,500 of the UIM funds.

After the collision, the Department started paying Boley worker's compensation benefits. CP 302. The Department regularly corresponded with Boley's attorney regarding the amount of benefits paid and the Department's right to reimbursement from any recovery. CP 303. By June 2018, the Department asserted it had paid Boley benefits totaling $228,272.74. CP 435.

Boley and McMeekins sued Specht. CP 302. Specht's liability coverage, with National General Insurance Company, was limited to an aggregate total of $50,000. CP 60, 331. National General quickly offered its policy limits, which were insufficient to compensate any of the three claimants. CP 60.

Jaymee McMeekin sought recovery under the company's Underinsured Motorist coverage (UIM), with a policy limit of $1 Million. CP 60. The UIM insurer, Travelers Casualty Insurance Company of America, determined that all three occupants of the McMeekin truck were insureds under the policy. CP 60.

Travelers, without receiving any demands from the claimants and without conducting any discovery, could already tell the damages would exceed its policy limits. CP 60, 64. Travelers immediately tendered its policy limit of $1,000,000. CP 65. Travelers decided to deposit the funds with the court in an interpleader action, avoiding any conflicts of interest and leaving the claimants to negotiate among themselves how to divide the funds. CP 60, 61-62, 71, 74.

Travelers was dismissed from the interpleader action through a CR 2A stipulation in September 2016. CP 74, 89-90. The claimants dismissed Travelers from the interpleader action and released it from liability

beyond the tendered policy limits. CP 74. The claimants and Travelers did not settle the amount or character of each claimant's damages. CP 74. Avoiding that issue was why Travelers used the interpleader action. CP 61-62, 71.

With a total fund of only $1,050,000, it was impossible to make all the claimants whole from their injuries. CP 454-55. During the negotiations, Boley consistently asserted to the Department and to the other claimants that the available funds were insufficient to cover anything other than pain and suffering and would not make Boley whole. CP 61, 303.

The claimants eventually agreed to divide the funds, $38,000 to Jaymee McMeekin, $374,500 to Jason McMeekin, and $637,500 to Boley. CP 331. They signed a "Release and Settlement Agreement" in October 2017, in which the claimants released Specht and National General from all claims. CP 331. All of Boley's recovery was designated from the interpled

funds from Travelers. CP 331. Travelers was not a party to the agreement. *See* CP 60-61, 331-34. Only the three claimants and their attorneys negotiated the division of the funds, with some input from the Department. CP 40, 60-61.

4.3 When Boley had no other person or entity with which to negotiate an allocation of his pain and suffering, the Department unilaterally allocated pain and suffering, applied the statutory distribution formula, and demanded reimbursement of $125,000.

Prior to the settlement, Boley consistently insisted that his share of the limited insurance funds would all be for pain and suffering, because the funds were insufficient to fully compensate him for his pain and suffering, let alone his other damages. CP 61, 303, 327. The three claimants ultimately agreed, with the Department's approval, that they would each individually negotiate their pain and suffering allocations with the Department. CP 83-84, 460.

The Department informed Boley that it would not accept a 100 percent allocation to pain and suffering. CP 304, 327. Instead the Department offered to allocate one-third of Boley's settlement to pain and suffering, which, by the Department's calculation, would still allow it to fully satisfy its lien under the statutory distribution formula. CP 304, 327. Based on the Department's offer, Boley's attorney retained $125,000 of the settlement in trust in case the Department would not compromise its lien. CP 326.

After the settlement, Boley continued to insist that the Department waive its lien and allow a 100 percent allocation to pain and suffering. CP 305, 335, 337-38, 344. The Department issued a distribution order that allocated 50 percent of Boley's $637,000[2] recovery to pain and suffering and distributed the remainder under the statutory formula. CP 306, 346-

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[2] The Department, through a clerical error, dropped $500 of the settlement amount from its calculations.

48. Based on this allocation, the Department would have been fully reimbursed at $151,882.47, but the Department compromised this amount down to $125,000. CP 306, 348. Boley rejected this compromise and appealed the order. CP 344, 430-31.

The Department reached a separate agreement with Jason McMeekin, allocating 50 percent of his recovery to pain and suffering and another 10 percent to loss of consortium, compromising the Department's lien recovery down to $25,000. CP 330.

4.4 Boley appealed the Department's determination. The Board affirmed, but the superior court reversed and remanded for an evidentiary hearing on pain and suffering.

On appeal, Boley sought the opportunity to present evidence and witness testimony to establish that his recovery was entirely for pain and suffering. CP 440. The Department moved for summary judgment, arguing that because Boley's settlement did

not allocate any portion of the recovery to pain and suffering, the entire amount was subject to distribution under the statutory formula. CP 296-97.

The Department argued that even though this Court's decision in *Tobin v. Dep't of Lab. & Indus.*, 169 Wn.2d 396, 239 P.3d 544 (2010), prohibits the Department from collecting reimbursement from a recovery for general damages, later Court of Appeals decisions in *Davis v. Dep't of Lab. & Indus.*, 166 Wn. App. 494, 268 P.3d 1033 (2012), and *Jones v. City of Olympia*, 171 Wn. App. 614, 287 P.3d 687 (2012), limited the impact of *Tobin* to only settlements that expressly allocate a portion of the recovery to general damages. CP 296-97. The Department asserted that it would have voided a 100 percent pain and suffering settlement under RCW 51.24.090 because that would leave nothing for the Department to collect. CP 466. The Department argued that Boley's interest in being made whole "was immaterial." CP 299.

Boley responded by arguing that *Davis* and *Jones* did not apply because unlike the parties in those cases, Boley had no one to negotiate with on his allocation to pain and suffering because the insurance companies had tendered their policy limits without reviewing the injured parties' damage claims. CP 39-41, 61-62. Additionally, the funds available in settlement were insufficient to compensate Boley for his pain and suffering, let alone his other damages. CP 41. Boley argued that just as the Department could void a settlement and seek an allocation in court, Boley should also have an opportunity to challenge the Department's allocation in an adjudicative proceeding. CP 458-59.

The Industrial Appeals Judge granted the Department's motion and affirmed the distribution order. CP 22. The judge reasoned that because the settlement did not allocate general damages, the Department was required to adhere to the statutory

calculation and could not "retroactively guess" how much of the recovery was pain and suffering. CP 28. The judge reasoned that it was impossible to verify from the record that any part of the recovery was pain and suffering. CP 27. Finding no dispute that the settlement did not allocate pain and suffering, the judge granted summary judgment for the Department. CP 29.

Boley petitioned for review by the Board of Industrial Insurance Appeals, again seeking an opportunity to prove his pain and suffering. CP 13-14. The Board denied the petition and adopted the IAJ's proposed order as the Decision and Order of the Board. CP 12.

Boley sought judicial review in superior court. CP 1, 4. The superior court found that Boley had not had any opportunity to establish what portion of his recovery was pain and suffering. CP 498. The superior court concluded that there was a genuine issue of

material fact regarding the allocation and remanded to the Board for an evidentiary hearing to determine the allocation of pain and suffering. CP 498. The superior court commented, "the application of the statutory distribution scheme is unfair to Mr. Boley. When he has specials that are exceeding or approaching five hundred thousand, and the total award is only [$637,500], and he had to have surgery, given the injuries, that's a no-brainer to me, it's just completely unfair." RP 24.

4.5 The Court of Appeals reversed the superior court and affirmed the Department's distribution order because Boley's settlement did not allocate pain and suffering.

The Court of Appeals applied de novo review to the superior court's de novo review of the Board's summary judgment decision. Opinion at 6-7. The court applied the settlement-allocation line of cases to limit the effect of *Tobin* to only cases in which the amount of general damages is allocated in a settlement

agreement. Opinion at 8-9. The court reasoned that "the injured worker is in complete control of the settlement process and settlement terms in the third party suit; whereas the Department has no control, or even say, in that settlement process and terms." Opinion at 10 n.3.

The court held that because Boley "could have allocated an amount for pain and suffering damages in his third party settlement but failed to do so," his entire settlement was "subject to the statutory recovery and distribution as determined by the Department." Opinion at 11. The court vacated the superior court order and reinstated the Board's distribution order. Opinion at 11.

In a concurring opinion, Judge Maxa agreed with the court's application of case law but wrote separately "to highlight the fact that the applicable statutes and the controlling case law place injured workers attempting to settle third party claims in a difficult

situation." Opinion at 12 (Maxa, J., concurring). Judge Maxa highlighted the Department's veto power in RCW 51.24.090(1), which states that any third party settlement that would result in less than full recovery of the Department's lien is void unless approved by the Department. Opinion at 12 (Maxa, J., concurring). The result, Judge Maxa pointed out, is that the injured worker is entirely at the mercy of the Department: "Unless [the Department] agrees with the worker's proposed allocation, [the Department] can simply void the worker's settlement. And the statutes provide no mechanism for a judicial determination—either by an administrative law judge or by the superior court—of what constitutes a reasonable allocation to pain and suffering." Opinion at 12 (Maxa, J., concurring).

Thus, Judge Maxa concluded, even if Boley had allocated pain and suffering in a settlement agreement, the Department could have unilaterally imposed its own preferred allocation by voiding Boley's settlement

as insufficient. Opinion at 13 (Maxa, J., concurring). "This result seems unfair." Opinion at 13 (Maxa, J., concurring).

5. Argument

A petition for review should be accepted when the Court of Appeals decision conflicts with a decision of the Supreme Court or the Court of Appeals or if the case involves an issue of substantial public interest that should be determined by the Supreme Court. **RAP 13.4(b)**.

The Court of Appeals decision conflicts with this Court's decision in *Tobin* by allowing the Department to collect reimbursement from portions of Boley's recovery that, in fact, represent general damages. The settlement-allocation rule created by the Court of Appeals, combined with the Department's veto power, unfairly penalizes workers with grave injuries and insufficient third-party insurance to make them whole,

when it allows the Department to collect from the worker's already insufficient recovery. This unfairness is a matter of public interest that should be addressed by this Court.

5.1 The Court of Appeals decision conflicts with this Court's decision in *Tobin*.

The Court of Appeals decision, in applying the settlement-allocation line of cases, conflicts with this Court's decision in *Tobin* by allowing the Department to collect funds that, in fact, represented Boley's pain and suffering.

In *Tobin*, this Court interpreted the third party recovery statutes, chapter 51.24 RCW, and held that the "recovery" that is subject to "reimbursement" to the Department excludes noneconomic damages such as pain and suffering. ***Tobin v. Dep't of Lab. & Indus.***, 169 Wn.2d 396, 401-02, 239 P.3d 544 (2010). Because the Department does not pay out benefits for pain and suffering, it cannot be reimbursed from pain and

suffering. ***Id.*** at 402, 404. The fairness of limiting fund replenishment to those damage types that the fund actually paid out in benefits overrode concerns over the solvency of the fund. ***Id.*** at 404.

"Chapter 51.24 RCW does not authorize the Department to subject pain and suffering damages to its reimbursement calculation." ***Tobin***, 169 Wn.2d at 404. "The Department did not pay out benefits for pain and suffering; therefore it cannot be 'reimbursed' from amounts recovered for pain and suffering. We hold that an award for pain and suffering may not be used by the Department in its distribution calculation." ***Id.*** at 406-07.

Boley asserted continually that his third party recovery was only for pain and suffering. He estimated his pain and suffering at $2.5 Million, compared to the $1,050,000 that was available to divide among three injured parties. Given the insurance policy limits, there was no way for Boley to be made whole for his pain and

suffering, let alone for his economic damages. It was reasonable for Boley to insist that his $637,500 recovery was 100 percent for pain and suffering. When the Department demanded "reimbursement" of $125,000 out of Boley's already insufficient recovery, it necessarily sought to collect funds that, in fact, represented pain and suffering.

Under *Tobin*, the Department has no authority to collect pain and suffering. The Court of Appeals decision here conflicts with *Tobin* because it allows the Department to collect Boley's pain and suffering.

The Court of Appeals based its decision on the "settlement-allocation" line of cases: ***Jones v. City of Olympia***, 171 Wn. App. 614, 287 P.3d 687 (2012); ***Davis v. Dep't of Lab. & Indus.***, 166 Wn. App. 494, 268 P.3d 1033 (2012); ***Gersema v. Allstate Ins. Co.***, 127 Wn. App. 687, 112 P.3d 552 (2005); and ***Mills v. Dep't of Lab. & Indus.***, 72 Wn. App. 575, 865 P.2d 41 (1994). These cases hold, generally, that when a third-party

settlement does not allocate a specific amount to pain and suffering or loss of consortium, the Department is justified in applying its reimbursement formula to the entire settlement because it cannot determine from the record what portion should be beyond its reach. *See* ***Jones***, 171 Wn. App. at 624-29.

But the fact that a settlement does not specifically allocate damage types does not somehow transform the portion that is pain and suffering into a damage type that would be collectable. Pain and suffering damages are still excluded from the statutory definition of "recovery." This statutory interpretation remains true regardless of whether the pain and suffering has been allocated in a settlement.

It should not be enough for the Department to say, "I can't tell how much of this is pain and suffering," and then use the whole thing. Nor should it be enough for the Department to unilaterally say, "I think the pain and suffering was 50 percent," without

any recourse for the injured worker to demonstrate that it was more. If the record does not show how much is pain and suffering, the Department should first find the answer to that question before it can collect. The amount of pain and suffering is a material fact that must be determined before applying the distribution formula.

It is no excuse to say that the injured worker has complete control over the terms of the settlement to insert an allocation of pain and suffering. In practice, this is often not true. This case is a prime example.

Boley's recovery came entirely from the funds interpled by Travelers. Because the policy limits were insufficient to make any of the parties whole, Travelers could not participate in a division of the funds between the injured parties or in an allocation of their damages to pain and suffering because to do so would create conflicts of interest among its three insureds and subject Travelers to potential liability for bad faith

claims. Travelers could not approve a settlement that divided the funds or allocated specific amounts to pain and suffering. Boley had no power to compel Travelers to sign such a settlement.

Similarly, he had no power to compel the other injured parties, or the Department, to sign a settlement that allocated his pain and suffering. As explained in Judge Maxa's concurring opinion in this case, if an injured worker allocates the amount that he believes is reasonable but leaves the Department unable to fully recover its lien, the Department can void the settlement entirely under **RCW 51.24.090**.

Thus, the Department held all the power here. The other injured parties had an interest in making sure their settlement could not be voided. Boley had no power to compel them to agree to his allocation. The only way to secure their agreement was to get the Department to approve. The Department made it clear that it would not approve of a settlement that did not

satisfy its lien for reimbursement. Boley had no power to obtain a settlement that allocated his pain and suffering in any amount greater than what the Department would, in its own self-interest, approve.

Due to the power dynamics present in Boley's case, he had no opportunity to negotiate an allocation of his pain and suffering. The only way for him to get an allocation of his pain and suffering would have been to take the case to trial, at great expense to himself, further reducing his already inadequate net recovery. Boley should not be penalized for not having an allocation of pain and suffering in a settlement agreement when it was impossible to do so.

This Court has never addressed the settlement-allocation rule created by the Court of Appeals. *Tobin* did not address it because the settlement in *Tobin* included an allocation. There was no reason in that case to address what should happen if there was not an allocation. This case squarely presents that question.

The settlement-allocation rule conflicts with *Tobin* by allowing the Department to collect funds from pain and suffering, which it is not authorized to do. This Court should accept review, reject the settlement-allocation rule, and remand for an evidentiary hearing on pain and suffering.

5.2 The unfairness of the settlement-allocation rule and the Department's veto power is a matter of public interest.

The settlement-allocation rule created by the Court of Appeals, combined with the Department's veto power, unfairly penalizes workers with grave injuries and insufficient third-party insurance to make them whole, when it allows the Department to collect from the worker's already insufficient recovery. This unfairness is a matter of public interest that should be addressed by this Court.

As noted above, injured workers are not always able to allocate their pain and suffering damages in a settlement with a third party. The reasons can be

varied and are often beyond the injured worker's control. It can especially be expected in a case where the injuries are great and the third-party insurance inadequate to make the injured worker whole.

In such a case, like this one, a reasonable allocation of pain and suffering will be at or near 100 percent of the inadequate recovery. With such a large portion allocated to pain and suffering, the Department would be left with little to no reimbursement, triggering the Department's veto power under **RCW 51.24.090**. The Department would instead propose a smaller pain and suffering allocation that would allow it to be fully reimbursed.

Faced with this situation, the injured worker's only options under the current legal framework are either giving in to the Department's self-interested preference and losing some of the recovery, or taking the case to trial to get a reasonable allocation from a jury. In most cases, the additional litigation expenses

associated with trial would erase any benefit the worker could have realized from a lower reimbursement to the Department. Under the current legal framework, the worker is left with only one choice: give the Department what it wants.

This is fundamentally unfair. It adds insult to an already severe injury. Not only is the worker not being made whole by the inadequate insurance policy limits, but then the Department sweeps in to take away a substantial portion of the injured worker's already inadequate net recovery. This unfairness to the most severely injured workers is a matter of public interest that should be addressed by this Court.

The Department may say that the public interest is on its side—after all, the public has an interest in the solvency of the workers' compensation funds. *See* ***Tobin***, 169 Wn.2d at 403-04. The Department has also appealed to the purposes of the reimbursement statute recited in ***Gersema***, 127 Wn. App. at 693: to protect the

worker's compensation funds from being charged for damages caused by a third party and to prevent the worker from obtaining a double recovery. *Tobin* resolved the first concern against the Department: "We do not find concerns over solvency sufficient to upset our interpretation of the statute." ***Tobin***, 169 Wn.2d at 404. The second concern is not present in a case where the third party recovery was insufficient to make the injured worker whole. The injured worker cannot possibly double-recover when they have not been able to be made whole in the first place.

The settlement-allocation rule created by the Court of Appeals and never addressed by this Court, in combination with the Department's veto power over settlement allocations, has created a legal framework that is doing real and significant harm to injured workers like Boley who will never be made whole. This Court should not countenance a system that

balances the Department's budget on the shoulders of the most severely injured workers.

This case involves a matter of public interest that should be addressed by this Court. The Court should accept review, reject the settlement-allocation rule, and provide a mechanism for a judicial determination of a reasonable allocation of pain and suffering.

5.3 Boley requests an award of attorney's fees.

Under **RCW 51.52.130**, in an appeal to superior or appellate court from a decision of the Board, if the Board decision is reversed or modified and the accident fund or medical aid fund is affected by the litigation, the prevailing worker is entitled to an award of reasonable attorney's fees and litigation costs, payable out of the administrative fund of the Department, for all levels of the case (before the Department, the Board, and the courts). These elements will be met if Boley prevails in this case. *See* ***Tobin***, 169 Wn.2d at

406. If Tobin prevails, this Court should award Boley his reasonable attorney's fees and litigation costs at every level of this case.

6. Conclusion

The Department's disbursement order added insult to injury. Not only will Boley never be made whole, but he was ordered to pay a significant portion of his already inadequate recovery to the Department. The Court of Appeals decision conflicts with this Court's decision in *Tobin*. The settlement-allocation rule created by the Court of Appeals and never addressed in this Court, combined with the Department's ability to void settlements it does not like, creates an unjust and harmful legal framework that is a matter of public interest that should be addressed by this Court.

This Court should accept review, reject the settlement-allocation rule, reverse the Court of

Appeals, affirm the superior court, and provide a judicial mechanism for establishing a reasonable allocation of pain and suffering.

I certify that this document contains 4,688 words.

Submitted this 12th day of November, 2021.

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

WILLIAM BOLEY, Respondent, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Appellant.	No. 54884-4-II UNPUBLISHED OPINION

SUTTON, J. — William Boley was injured at work in a car accident with a third party motorist. He filed a workers' compensation claim with the Department of Labor and Industries (Department), and the claim was allowed. The Department asserted a statutory lien on any recovery Boley may receive from a third party. Boley filed claims against the third party motorist and his employer's underinsured motorist (UIM) carrier. Boley settled the third party claims without repaying the Department's lien or allocating pain and suffering damages in the settlement. The Department issued a distribution order allocating the settlement, and Boley appealed the order to the Board of Industrial Insurance Appeals (Board).

The Department filed a summary judgment motion before the Board, arguing it acted within its discretion by allocating the settlement as it did where there was no allocation in the settlement agreement. The Board granted the Department's motion. Boley appealed the Board's summary judgment order to the superior court. The court reversed and remanded to the Board for

a hearing to permit Boley to present evidence of his pain and suffering damages. The Department appeals the superior court's order.

The Department argues that the court's order is contrary to the distribution formula in RCW 51.24.060(1) and well-established case law that requires that the Department's lien be satisfied prior to the claimant receiving any amount of the settlement beyond that provided for in RCW 51.24.060(1)(b). Additionally, the Department states that the third party settlement must explicitly allocate pain and suffering damages, which Boley failed to do. Boley argues that he is entitled to present such evidence of his pain and suffering damages to the Board.

We agree with the Department and hold that, because the superior court's order is contrary to RCW 51.24.060(1) and well-established case law, the court erred. We vacate the superior court's order and reinstate the Department's distribution order.

FACTS

I. LEGAL BACKGROUND

Under the Industrial Insurance Act (IIA), Title 51 RCW, a worker injured in the course of their employment by a third party can sue the responsible third party and file a claim for workers' compensation benefits with the Department. If the Department allows the claim and pays industrial insurance benefits to the injured worker (claimant), the Department has a statutory lien on any recovery under RCW 51.24.030.

The Department must be notified by the claimant of any third party potential settlement and the Department's lien must be satisfied out of the settlement. RCW 51.24.030(2); RCW 51.24.060(1). The Department may not use settlement funds allocated to pain and suffering to satisfy its lien. *Tobin v. Dep't of Labor & Indus.*, 169 Wn.2d 396, 404, 239 P.3d 544 (2010). Any

allocation for the claimant's pain and suffering must be made in the settlement. RCW 51.24.060; *Jones v. City of Olympia*, 171 Wn. App. 614, 628-29, 287 P.3d 687 (2012). RCW 51.24.090(1) provides, "Any compromise or settlement of the third party cause of action by the injured worked or beneficiary which results in less than the entitlement under this title is void unless made with the written approval of the [D]epartment or self-insurer." After receiving a copy of the release and settlement, the Department issues a distribution order of the settlement funds under the formula in RCW 51.24.060(1).

II. BOLEY'S CLAIM AND THE DEPARTMENT'S LIEN

In December 2015, Boley was a passenger in a company vehicle that was rear-ended and sustained a serious on-the-job injury. Two other passengers also were injured. The injuries were caused by the negligence of the driver of the other vehicle.

Boley filed a workers' compensation claim for his injuries with the Department, and the Department allowed his claim. Boley later informed the Department that he was negotiating a settlement with the negligent driver's insurance company. The Department notified Boley's counsel that it was asserting a statutory lien on any potential recovery as required under RCW 51.24.030(2) and informed Boley's counsel of the amount it had paid on Boley's workers' compensation claim. Boley's counsel acknowledged that any third party recovery would be subject to the Department's statutory lien.

The at-fault driver's insurance company tendered the driver's policy limits of $50,000, and Boley's employer's UIM carrier tendered its $1,000,000 policy limits in an interpleader action involving Boley and the other two injured passengers. As a result, the UIM carrier was dismissed by the superior court from the proceedings. While the interpleader action was ongoing, Boley

attempted to negotiate a statutory lien settlement with the Department and asked the Department to waive its lien. He sent emails asking the Department to allocate the entirety of the settlement amount in the interpleader action to his pain and suffering damages, but the Department objected, and they did not reach an agreement.

Boley and the two other injured passengers reached a settlement as to the division of funds interpleaded into the court. Boley settled the interpleader action for $637,500. At the time of the agreement, Boley had received $179,588.49 in workers' compensation benefits from the Department. The settlement did not differentiate between general and special damages and was silent as to pain and suffering allocution. However, it did require Boley to satisfy any liens, including "all liens of workers' compensation insurance." Clerk's Papers (CP) at 331.

The Department issued an order, calculating the statutorily defined recovery and distribution of Boley's settlement by using $637,500 of the recovery according to RCW 51.24.060's distribution formula. Although Boley's settlement was silent on any pain and suffering, the Department apportioned $318,500 to Boley's pain and suffering damages, $106,586.11 to his attorney for fees and costs, $86,913.89 to Boley himself, and $125,000.00 to the Department for benefits paid.[1]

[1] Under RCW 51.24.060(1)(a)-(c), the recovery is divided and distributed in the following order: (1) attorney fees are paid, (2) twenty-five percent of the balance goes to the plaintiff employee or beneficiary, and (3) the Department "shall be paid the balance of the recovery made, but only to the extent necessary to reimburse [it] for benefits paid." Any remaining balance is paid to the employee or beneficiary. RCW 51.24.060(1)(d).

IV. Boley Appeals to the Board and the Superior Court

Boley appealed the Department's distribution order to the Board, arguing he should receive the full amount of the settlement funds because his pain and suffering damages far exceeded the amount of benefits he was able to obtain in the settlement. He asked that the Department waive its lien. The Department moved for summary judgment. An industrial appeals judge (IAJ) granted summary judgment to the Department, and issued a proposed decision and order affirming the Department's order. The IAJ determined that Boley's third party settlement agreement (1) did not differentiate between general and special damages, (2) provided no express allocation for pain and suffering, and (3) the Department properly used the full settlement amount as the recovery figure in its distribution formula.

Boley petitioned the full Board for review. The Board adopted the IAJ's proposed decision and order. The Board found that (1) Boley had filed a third party claim for his injury that settled for a lump sum amount, (2) the settlement did not allocate any amount to pain and suffering, and (3) the Department correctly allocated $318,500 to pain and suffering in its distribution formula.

Boley appealed to the superior court, reiterating his earlier argument that he should receive the entire amount of the settlement. He also argued that his pain and suffering damages could not have been designated in the settlement amount below because he was not provided the chance to present evidence to the Board of his pain and suffering. The Department disagreed, arguing that the entire recovery amount was subject to distribution, and that under the statute outlining the distribution formula, the industrial insurance fund was entitled to be repaid.

The superior court found that Boley had not been provided "an opportunity to establish what portion of his third party recovery should be allocated to damages for pain and suffering."

CP at 498. The court concluded that "[a] genuine issue of material fact exists regarding the portion of Mr. Boley's third party recovery that should have been allocated to damages for pain and suffering." CP at 498. The court reversed summary judgment for the Department, reversed the Board's final order, and remanded for an evidentiary hearing to permit Boley to present evidence of his damages for pain and suffering.

The Department appeals.

ANALYSIS

I. STANDARDS OF REVIEW

The IIA governs judicial review of workers' compensation determinations. *Rogers v. Dep't of Labor & Indus*., 151 Wn. App. 174, 179, 210 P.3d 355 (2009). Under the IIA, a worker aggrieved by the decision and order of the Board may appeal to the superior court. RCW 51.52.110. "The hearing in the superior court shall be de novo, but the court shall not receive evidence or testimony other than, or in addition to, that offered before the board or included in the [board] record." RCW 51.52.115. "[T]he findings and decision of the board shall be prima facie correct and the burden of proof shall be upon the party attacking the same." RCW 51.52.115. "If the court shall determine that the board has acted within its power and has correctly construed the law and found the facts, the decision of the board shall be confirmed; otherwise it shall be reversed or modified." RCW 51.52.115.

Generally, an appellate court's review of such a decision "'is limited to examination of the record to see whether substantial evidence supports the findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings.'" *Nelson v. Dep't of Labor & Indus.*, 198 Wn. App. 101, 109, 392 P.3d 1138 (2017) (internal quotation marks

omitted) (quoting *Rogers*, 151 Wn. App. at 180). Unchallenged findings of fact, such as those here, are verities on appeal. *Rush v. Blackburn*, 190 Wn. App. 945, 956, 361 P.3d 217 (2015).

However, where we are reviewing an order for summary judgment, we review de novo whether summary judgment is appropriate. *Nelson*, 198 Wn. App. at 109. Summary judgment is appropriate "if the pleadings . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CR 56(c). "Although we may substitute our judgment for that of the agency on issues of law, we give great weight to the agency's interpretation of the law it administers." *Jones*, 171 Wn. App. at 621.

II. Settlement Subject To Distribution

The Department argues that the superior court erred by reversing the Board's summary judgment decision and remanding for a hearing to allow Boley to present evidence of his pain and suffering damages after the settlement of the third party interpleader action. The Department maintains that the statute and well-established case law preclude Boley from an after-the-fact allocation. Boley argues that the superior court did not err and that under *Tobin*, he should be allowed to present evidence of pain and suffering to the Board to determine the proper allocation. He argues that his entire third party settlement should be allocated to his pain and suffering damages because they far exceeded the amount of the settlement.

But Boley was required and failed to designate any portion to pain and suffering damages in the third party settlement. Thus, the Department correctly applied the statutory distribution

formula.[2] We hold that the superior court erred by reversing the Board's distribution order and remanding for an evidentiary hearing on Boley's pain and suffering damages.

A. LEGAL PRINCIPLES

"[A]ny recovery" obtained from a responsible third party suit "shall be distributed" according to RCW 51.24.060(1)'s distribution formula. RCW 51.24.060(1). The distribution formula requires payment in the following order: (a) attorney fees and costs, (b) twenty-five percent to the injured worker free of any claim by the Department, (c) to the Department, "the balance of the recovery made, but only to the extent necessary to reimburse the [D]epartment . . . for benefits paid," and (d) to the injured worker, "[a]ny remaining balance." RCW 51.24.060(1). The third party reimbursement statute has several purposes: (1) to protect the workers' compensation funds by reimbursing them from third party recoveries, (2) to ensure "'the accident and medical funds are not charged for damages caused by'" third parties, and (3) to prevent workers from receiving a double recovery. *Gersema v. Allstate Ins. Co.*, 127 Wn. App. 687, 693, 112 P.3d 552 (2005) (internal quotation marks omitted) (quoting *Mandery v. Costco Wholesale Corp.*, 126 Wn. App. 851, 855, 110 P. 3d 788 (2005).

In *Tobin*, our Supreme Court held that the Department cannot include the portion of a third party settlement that has been designated for pain and suffering damages in the amount that is subject to its distribution calculation. 169 Wn.2d at 404. However, subsequent cases clarified that when a claimant fails to designate a portion of their third party settlement to pain and suffering damages, the entire settlement amount becomes subject to the statutory recovery and distribution

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[2] We note that although the Department was not statutorily required to, the Department did allocate some amount of the settlement to Boley for his pain and suffering.

formula in RCW 51.24.060(1). *Jones*, 171 Wn. App. at 624-29, (citing *Davis v. Dep't of Labor & Indus.*, 166 Wn. App. 494, 495-98, 268 P.3d 1033 (2012); *Gersema*, 127 Wn. App. at 695-96; *Mills v. Dep't of Labor & Indus.,* 72 Wn. App. 575, 865 P.2d 41 (1994)). These well-established principles apply to Boley's third party settlement.

B. ANALYSIS

Here, Boley settled his claim for $637,500. The settlement agreement did not differentiate between general and special damages, nor did it separately allocate any portion of the settlement for Boley's pain and suffering damages as required. As a result, the Department could have distributed the entire unallocated amount of Boley's settlement to repayment of its lien under RCW 51.24.060. However, the Department decided instead to compromise its lien and allocate fifty percent, or $318,500, of the settlement amount to Boley's pain and suffering damages, an allocation the Department determined to be reasonable. The Department correctly applied its distribution formula consistent with RCW 51.24.060(1), well-established case law, and the legislative policy that the industrial insurance fund should be reimbursed after an injured worker recovers a third party settlement.

Boley argues that the Department misapplied the distribution formula to his third party settlement. Our Supreme Court held in *Tobin* that the Department is not authorized under the IIA to include the portion of a worker's settlement allocated to pain and suffering in its distribution calculation. 169 Wn.2d at 404. However, *Davis*, decided post-*Tobin*, clarified that *Tobin* does not apply to unallocated settlements. *Davis*, 166 Wn. App. at 495. In *Davis*, the worker settled the third party claim without allocating damages for pain and suffering. 166 Wn. App. at 496. On appeal, the worker argued that the Department or the Board in a post-settlement hearing should

allocate a portion of the settlement to pain and suffering damages. *Davis*, 166 Wn. App. at 498. The *Davis* court rejected this argument and held that a remand and recalculation of the distribution order was not proper and recalculation would be inherently speculative. 166 Wn. App. at 501-03.

Similarly, in *Jones*, the worker's settlement agreement with a third party also did not expressly allocate an amount for pain and suffering damages. 171 Wn. App. at 628-29. The *Jones* court held that the entire third party settlement amount is subject to statutory recovery and distribution when a claimant fails to designate a portion of the settlement to pain and suffering damages. 171 Wn. App. at 628-29.

Likewise, in *Gersema*, the court rejected an injured worker's argument that general damages should be decided through a post-third party settlement process. 127 Wn. App. at 697-98. And in *Mills*, the court rejected the worker's argument that a portion of the third party settlement should be allocated by the Department to loss of consortium damages. 72 Wn. App. at 577-78. The *Mills* court held that "the parties to the settlement have the ability to control the outcome simply by allocating a certain amount or percentage of the settlement to the spousal loss of consortium claim." 72 Wn. App. at 577-78.[3]

[3] The concurrence claims that the applicable statutes and the controlling case law place injured workers attempting to settle third party claims in a difficult situation and are unfair. However, we note that the injured worker is in complete control of the settlement process and settlement terms in the third party suit; whereas the Department has no control, or even any say, in that settlement process and terms. Thus, it must be incumbent upon the injured worker to safeguard its own interests in its settlement with the third party. To the extent an injured worker attempts to negotiate an unfair settlement, the Department's only recourse is to follow the applicable statutes and controlling case law, which is fair.

Applying *Davis, Jones, Gersema,* and *Mills*, Boley could have allocated an amount for pain and suffering damages in his third party settlement but failed to do so. As a result, Boley's entire settlement is subject to the statutory recovery and distribution as determined by the Department.

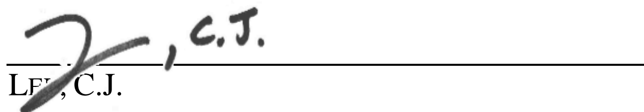
CONCLUSION

Because Boley failed to allocate any portion of his settlement to pain and suffering as required under RCW 51.24.060 and the Department correctly distributed Boley's settlement, the Board is entitled to summary judgment as a matter of law. Thus, we hold that the superior court erred by reversing the Board's order and remanding for a hearing on Boley's pain and suffering damages. We vacate the superior court's order and reinstate the Board's distribution order.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

SUTTON, J.

I concur:



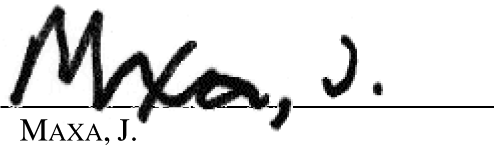
LEE, C.J.

MAXA, J. (concurring) – I agree with the lead opinion. I write separately to highlight the fact that the applicable statutes and the controlling case law place injured workers attempting to settle third party claims in a difficult situation.

Under *Tobin v. Department of Labor and Industries*, the Department of Labor and Industries (DLI) cannot include the portion of an injured worker's settlement with a third party that is allocated to pain and suffering in the distribution formula mandated by RCW 51.24.060(1). 169 Wn.2d 396, 404, 239 P.3d 544 (2010). But the cases clearly state that the full amount of an injured worker's settlement is subject to the RCW 51.24.060(1) distribution formula unless the settlement expressly allocates a portion to pain and suffering. *E.g.*, *Jones v. City of Olympia*, 171 Wn. App. 614, 628-29, 287 P.3d 687 (2012).

However, RCW 51.24.090(1) states that any third party settlement "which results in less than the entitlement" under title 51.24 RCW is void. This means that if an injured worker does allocate an amount of a third party settlement to pain and suffering, DLI can void the entire settlement if it does not agree with that allocation. So the injured worker is placed at the mercy of DLI. Unless DLI agrees with the worker's proposed allocation, DLI can simply void the worker's settlement. And the statutes provide no mechanism for a judicial determination – either by an administrative law judge or by the superior court – of what constitutes a reasonable allocation to pain and suffering.

Here, DLI could have subjected William Boley's entire settlement to the RCW 51.24.060(1) distribution formula, but instead elected to allocate an amount it believed was reasonable to pain and suffering. Under the current statutory scheme, DLI could have imposed that same allocation by applying RCW 51.24.090(1) even if Boley had allocated a greater amount to pain and suffering in his settlement. This result seems unfair.



MAXA, J.

Filed
Washington State
Court of Appeals
Division Two

October 12, 2021

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

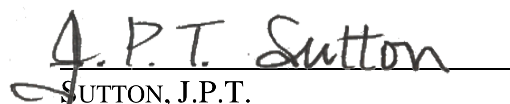
WILLIAM BOLEY, Respondent, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Appellant.	No. 54884-4-II ORDER DENYING MOTION FOR RECONSIDERATION

Respondent moves for reconsideration of the opinion filed August 17, 2021, in the above entitled matter. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj: LEE, SUTTON, MAXA

FOR THE COURT:



SUTTON, J.P.T.

Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on November 12, 2021 I caused the foregoing document to be filed with the Court and served on counsel listed below by way of the Washington State Appellate Courts' Portal.

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SIGNED at Lewis County, WA, this 12th day of November, 2021.

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