No. 95577-8

SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION II
No: 47672-0-II

TIMOTHY NELSON

Plaintiff/Petitioner

vs.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON

Defendant/Respondent

PETITION FOR REVIEW

CARL A. TAYLOR LOPEZ
Lopez & Fantel, Inc., P.S.
2292 W. Commodore Way, Suite 200
Seattle, WA 98199
Tel: (206) 322-5200

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Pages**

Rules

I. IDENTITY OF PETITIONER. Timothy Nelson was Plaintiff in the Superior Court and Appellant in the Court of Appeals. He is Petitioner here. He asks this court to accept review of the published in part Court of Appeals decision terminating review designated in Part II of this petition because it impacts every action brought by any injured worker against multiple third parties.

II. CITATION TO COURT OF APPEALS DECISION. The Court of Appeals decision was filed March 7, 2017. Its cite is Nelson v. Department of Labor & Industries, 198 Wn.App. 101, 392 P.3d 1138 (Div. II, 2017). A motion for reconsideration was timely filed by Petitioner. The motion for reconsideration was denied January 29, 2018. A copy of the Court of Appeals decision is found in Appendix A at pages 1-28. A copy of the Order Denying Reconsideration is found in Appendix A at page 19.

III. ISSUES PRESENTED FOR REVIEW

A. Is an issue of substantial public interest created where the Court of Appeals upholds the Department of Labor & Industries interpretation of RCW 51.24.060 that, in all cases involving injured workers bringing actions against multiple third parties, the department only has to share in costs directly related to the third party against whom recovery is obtained to the exclusion of other costs incurred by the injured worker in the same litigation?

B. RCW 51.24.060 states the Department of Labor & Industries is to proportionately share in costs incurred by an injured worker pursuing claims against third parties when calculating its lien against any recovery. The department has unilaterally restricted its cost participation in all cases involving multiple third party defendants to only those costs directly related to the third party against whom recovery is obtained. Was it error for the Court of Appeals to uphold an interpretation of the statute which adds limiting language not present in the statute to the financial detriment of the injured worker?

C. Was it error for the Court of Appeals to give deference to the Department of Labor & Industries' interpretation of allowable litigation costs where that is not within its special expertise?

IV. STATEMENT OF THE CASE.

Timothy Nelson is an injured worker who pursued third party claims. When Mr. Nelson settled with one of the third party defendants, the Department of Labor & Industries stated the lien statute only required that it share in those costs directly related to the settling defendant and no other costs, even though in the same litigation. The department stated that was how it calculated its lien calculation in all cases involving multiple third parties. Mr. Nelson contends all costs of litigation incurred by him should have been included. This is an issue of first impression.

Mr. Nelson's third party case is founded on a motor vehicle collision. Timothy Nelson was seriously injured on the job when a motor

vehicle operated by a third party ran a stop sign and struck the vehicle he was operating in the course of his employ. CP 107.

Suit was filed against the negligent driver and Pierce County. Appendix C. The claim against Pierce County eventually dismissed on summary judgment. Id. Subsequent to that dismissal, settlement with the negligent third party driver defendant occurred. CP 142.

The Department of Labor & Industries made a lien calculation related to the settlement. CP 101-2. Mr. Nelson opposed the department's calculation, pointing out that the department had included only costs directly related to the settling defendant in its calculation. CP 100. The department responded by stating that only those costs directly related to Mr. Nelson's claim against the settling negligent driver could be considered in the lien calculation. CP 147, lines 19-26. The department stated costs related to the road design claim against Pierce County or any other third party could not be included. When Mr. Nelson asked where in the WAC this rule could be found, he was told there was no rule, the department was simply applying the statute. CP 149, lines 9-12.

Mr. Nelson told the department he had no problem with the mathematics of the calculation. He stated he did, however, have a problem with the variables used because not all costs were included. CP 100.

Mr. Nelson asked for reconsideration of the lien order on the basis of all costs not being included. CP 100; RP 3, ln.. 4-15. Reconsideration was denied.

Nelson then appealed. A hearing before an administrative judge took place. Again the fact that all costs had not been included in the lien calculation was raised. CP 107-8. The administrative judge affirmed the department's lien calculation. CP 38. Nelson filed a Petition for Review with the Board of Industrial Insurance Appeals. CP 14. Again Nelson raised the issue that not all costs were included in the lien calculation. CP 15. The Board affirmed the department's lien calculation. CP 38. The Petition was denied. CP 10. Mr. Nelson timely appealed to the Pierce County Superior Court. CP 1.

In the superior court the following exchange took place:

Mr. Lopez: Thank you, Your Honor. I won't spend a lot of time, because, you know, we really don't have any facts that we dispute in this case. We are simply saying that in our opinion the Department has misinterpreted the statute as related to liens, and that, in fact, all costs related to a litigation should be used to adjust the lien, not simply the costs limited to the settling defendant.

We don't believe the statute provides anything that limits costs to just the settling defendant, and we think that limiting costs in that way actually goes against the purpose of the statute and ends up with the Department getting a larger percentage of the settlement than they ought to.

That's basically what our argument is.

The Court: Is there anything in the record that would indicate how much the other costs were? Was that ever submitted to the Department, or were you submitted just the costs that were involved in this one lawsuit?

Mr. Lopez: No. What we did is we submitted the costs related to this because those were the costs that they wanted. They said their costs weren't to be considered. And we said, well, you ought to consider them, and they weren't.

The Court: But were never submitted because they said we don't want them.

Mr. Lopez: Correct. Right.

RP 2-3; ln. 14-15.[1]

The Pierce County Superior Court affirmed the Board's decision and order. CP 185. An appeal to Division II of the Court of Appeals of the State of Washington timely followed. CP 190.

After oral argument the Court of Appeals filed an opinion March 7, 2017, published in part, affirming the Superior Court and Board of Industrial Appeals. Appendix A. Mr. Nelson timely filed a motion for reconsideration March 27, 2017. An order denying the motion for reconsideration was filed January 29, 2018. Id. at 19.

The issue involved herein has never been addressed by any court prior to the opinion issued in the case at bar by the Court of Appeals. It

[1] "RP" in this brief references the Verbatim Report of Proceedings from the Superior Court hearing of April 24, 2015.

impacts every claim pursued by injured workers where multiple third parties are involved.

V. ARGUMENT

A. The department does not have the discretion under RCW 51.24.060 to unilaterally determine which costs of litigation are allowable.

RCW 51.24.060 controls the lien available to the department where an injured worker seeks recovery from third persons. It provides reasonable costs and reasonable attorneys' fees are to be paid proportionately by the injured worker and the department. RCW 51.24.060(1)(a). After proportionate reduction, it provides the injured worker is to be paid 25% of the balance. RCW 51.24.060(1)(b). The remainder is to be paid the department to the extent necessary to reimburse for benefits paid. RCW 51.24.060(1)(c).

The statute emphasizes the department is required to pay its proportionate share of the costs and reasonable attorney fees, up to the extent of benefits paid. RCW 51.24.060(1)(c)(i). The department's proportionate share is determined by dividing the gross recovery amount into the benefits paid amount and multiplying that by the costs and reasonable attorney fees incurred by the injured worker. RCW 51.24.060(1)(c)(ii). The department's lien is determined by subtracting the result of the proportionate share

calculation from the benefits paid amount. RCW 51.24.060(1)(c)(iii). Any remaining balance belongs to the injured worker. RCW 51.24.060(1)(d). "[T]he department and/or self-insurer may require court approval of costs and attorneys' fees or may petition a court for determination of the reasonableness of costs and attorneys' fees;" RCW 51.24.060(1)(a).

Tobin v. Department of Labor & Industries, 169 Wn.2d 396, 239 P.3d 544 (2010) involved interpretation of RCW 51.24.060. In Tobin the department argued it was authorized to include pain and suffering in its distribution calculation. As support the department cited an amendment to the statute which defined "recovery" as "all damages except loss of consortium." RCW 51.24.030(5).

The Supreme Court disagreed with the department. It stated RCW 51.24.030 needed to be read in context with RCW 51.24.060. The Supreme Court stated, if the legislature intended to include pain and suffering in the "recovery" definition, it could have defined "recovery" to include all non-economic damages except for loss of consortium. Alternatively, the legislature could have expressed which types of damages the statute is meant to provide compensation for by defining "reimburse," which it did not do. Id. at 402.

Similarly, the language of RCW 51.24.060 provides the distribution formula is to include reduction for "costs incurred by the

injured worker." The statute does not include any limitation of "costs incurred by the injured worker." Instead it provides a remedy for the department if it feels costs might be unreasonable. RCW 51.24.060(1)(a). In this case, and all other cases involving multiple third party defendants, the department has unilaterally determined it does not have to bear its proportionate share of any cost not directly related to the settling defendant even though the cost was incurred in the same litigation. CP 147, lines 19-26. The department thus imposes its own limiting definition on "costs incurred by the injured worker" not contained in the statute. It does not have the discretion to impose its limitation of allowable costs.

Hi-Way Fuel Co. v. Estate of Allyn, 128 Wn.App. 351, 115 P.3d 1031 (Div. 2, 2005) addressed the distribution formula contained in RCW 51.24.060. In that case the department unilaterally disallowed certain costs. The Court of Appeals found the department lacked discretion under RCW 51.24.060 to unilaterally deduct certain costs and stated the Board erred in upholding the deduction. The Court of Appeals pointed out that the remedy under the statute was for the department to petition the court if it found certain costs unreasonable; it did not have the discretion to unilaterally determine certain costs were not includable. The Court of Appeals stated this indicated the legislature had "clearly contemplated and provided a mechanism for review of attorney fees and litigation costs." Id.

at 363. It noted: "The department and Hi-Way point to no other authority suggesting a unilateral right to reduce litigation costs." Id.

The department's position is that, where an injured worker brings claims against multiple third parties and settles with one of them, only those costs directly attributable to the claims against the settling defendant may be used to reduce the lien. In the case at bar, for example, Petitioner Nelson brought a claim against Pierce County in the same litigation. The claim was dismissed on summary judgment. The department's position is that no costs related to the Pierce County claim may be considered a costs incurred by the injured worker that it has to share in its lien calculation applicable to the settlement with the negligent driver. CP 147, lines 19-26.

RCW 51.24.060 makes no such cost limitation. The department's interpretation of RCW 51.24.060 limits its share of the costs in a way the statutory language does not. RCW 51.24.060(1)(a) states: "The costs and reasonable attorney fees shall be paid proportionately by the injured worker or beneficiary and the department. . . ." There is no limitation of the department's cost participation to only those costs directly related to the settling third party.

RCW 51.24.060(1)(c)(i) states:

> The department and/or self-insurer shall bear its proportionate share of the costs and reasonable attorney fees incurred by the worker. . . .

Id. The plain language requires the department to participate in costs "incurred by the worker" without limitation. There is no language stating its cost participation is limited to only those costs incurred by the injured worker directly related to the settling third party in a multi third party litigation. The department and Court of Appeals have inferred restrictive language to the detriment of the worker not contained in the statute.

Similarly, RCW 51.24.060(1)(c)(i) does not limit the department's cost participation. It states the department is to participate in "the costs and reasonable attorneys' fees incurred by the worker. . ." Id. It does not say the department's cost participation, where multiple third party defendants are involved, is limited to "only those costs incurred by the worker related to the settling third party."

The Court of Appeals argues language contained in subparagraph (5) of RCW 51.24.060 supports its position that the department only has to participate in those costs directly related to the settling third party and no other costs of a multi-defendant litigation, despite the three earlier sections in the statute that state the department shall bear its proportionate share of costs "incurred by the worker" with no other limitation. The language the Court of Appeals cites for support in paragraph (5) is: "the costs and

reasonable attorneys' fees associated with the recovery. . . " Appendix A, Opinion, p. 11. The Court of Appeals has taken ambiguous language and interpreted it against the injured worker. "Associated with the recovery" is not the same as "only those costs directly related to the settling defendant." A very reasonable argument can be made that any cost incurred by an injured worker in a given litigation is associated with the recovery. At best "associated with the recovery" is ambiguous.

The department has unilaterally restricted the language of the statute to the detriment of the injured worker. It has unilaterally limited its share of "reasonable costs" to mean only those costs directly related to the settling third party and has excluded costs incurred in pursuit of other third parties, such as Pierce County. The language of the statute does not support this.

B. The Department is not permitted to interpret RCW 51.24.060 in a way that adds language to the statute detrimental to the injured worker.

The legislature in Title 51 established how it wanted Title 51 construed:

> This title shall be liberally construed for the purpose of reducing to a minimum the . . . economic losses arising from injuries and/or death occurring in the course of employment.

RCW 51.12.010. The Washington State Supreme Court has clearly stated the meaning of this provision:

> In other words, where reasonable minds can differ over what Title 51 provisions mean. . . . the benefit of the doubt belongs to the injured worker.

Cockle v. Department of Labor and Industries, 142 Wn.2d 801, 811, 16 P.3d 583 (2001).

The department takes the position that only costs related to the settling third party can be applied to reduce its lien. RCW 51.24.060 does limit costs in this way. This is an interpretation of the language of the statute that benefits the department and that is detrimental to the injured worker. It should not be allowed.

C. The department's interpretation of allowable costs in RCW 51.24.060 is entitled to no deference.

The department's interpretation of the law is reviewed *de novo*. If a statute is ambiguous, weight is given to an agency's interpretation only if it is within the department's special expertise. An agency cannot by interpretation amend or modify a statute. Hansen Baking Co. v. Seattle, 48 Wn.2d 737, 296 P.2d 670 (1956); Pierce County v. State, 66 Wn.2d 728, 404 P.2d 1002 (1965).

The court has ultimate authority to interpret a statute. Deference is given to an agency's interpretation "only if (1) the particular agency is charged with the administration and enforcement of the statute, (2) the

statute is ambiguous, and (3) the statute falls within the agency's special expertise." Bastain v. Good Exp., Inc., 159 Wn.2d 700, 716, 153 P.3d 846 (2007). All three requirements must be met for deference to the agency's interpretation of a statute to be given.

The court reviews the department's interpretations of law *de novo*. Yakima County v. Yakima County Law Enforcement Officers' Guild, 174 Wn.App. 171, 180, 297 P.3d 745 (Div. 2, 2013). Deference to agency interpretations is given in the circumstance where "an agency determination is based heavily on factual matters, especially factual matters which are complex, technical, and close to the heart of the agency's expertise." Hillis at 396. The department's unilateral decision to interpret the lien statute to limit offsetting litigation costs to those related to the settling defendant in a litigation involving multiple defendants is neither complex, technical, nor close to the heart of the department's expertise.

What should constitute allowable costs in a litigation does not fall within the department's special expertise. The department's expertise relates to labor and industries. Its special expertise does not relate to what litigation costs ought to be included for lien calculation purposes. The department's interpretation of costs of litigation allowed by the statute is entitled to no deference.

In litigation an injured party frequently has multiple causes of action against multiple defendants for a single injury which must be pursued. Frequently some of the claims end up being abandoned after investigation reveals they are not viable, and sometimes the claims are dismissed by a court. A plaintiff does not always know in advance which claims are viable and which are not until money is spent investigating those claims. These costs are reasonable and should not be unilaterally excluded by the department.

The department, by limiting litigation costs in this case to those incurred with respect to the settling defendant, avoids sharing the real costs of pursuing an action. The lien statute does not limit costs to those directly related to the claim against the settling party. RCW 51.24.060. The department's interpretation is an alteration of the lien statute which diminishes the injured worker's recovery.

The department's interpretation of the lien statute is arbitrary. There is no rational basis for excluding legitimate litigation costs simply because they are not related to the settling party. The intent of the statute is for the department to recover money it has expended on behalf of an injured worker with the caveat that the department also participate in the costs of successful litigation. The statute does not limit the department's cost participation to the category of costs relating to the settling defendant.

The department's interpretation of the lien statute embraced by the Court of Appeals constitutes an erroneous interpretation and application of the law.

D. The finding that a worker could recover less under Nelson's interpretation of the statute is mathematically erroneous.

The Court of Appeals accepted the department's argument that Mr. Nelson's interpretation of the statute could actually result in a reduction of a worker's net recovery. Appendix A, pp. 12-13. The department's argument rests on a false premise. The false premise is that the 25% entitlement prior to distribution to the department is an accurate reflection of the worker's net recovery. It is not.

The only accurate reflection of a worker's net recovery is the amount he has to pay the department for his lien. If the amount he has to pay the department increases, his net recovery decreases; if the amount he has to pay the department decreases, his recovery increases. In fact, in no circumstance would an increase in shared costs result in a decrease in a worker's net recovery. Such a result would be mathematically impossible, and logically it only makes sense that the more the department shares costs, the greater the worker's recovery.

Mr. Nelson's case is illustrative. As the court points out at p. 3 of the Opinion, $117,000 of Mr. Nelson's settlement was considered

"recovery." Against this, the department asserted a lien of $114,957.32. Using the statutory formula, the department calculated attorney fees and costs "associated with the settlement" to be $40,453.75, using only those costs related to the Wade claim ($6,523.23). The department then allocated 25 percent of the award balance ($19,136.56) to Mr. Nelson. The department allocated the remaining balance ($57,409.69) to itself for its lien. The department's position, accordingly, is that Mr. Nelson must pay it $57,409.69. Mr. Nelson's share of the $114,957.32 would be $57,547.63.

Running through the same calculation with inclusion of the costs related to the dismissed Pierce County claim (approximately $25,000) reveals the fallacy of the department's contention. Including the Pierce County costs increases the costs plus attorney fees figure to $65,453.75. Applying the formula, Mr. Nelson's 25 percent share would be $12,886.56. At first glance this might cause one to believe Mr. Nelson's recovery was reduced, until one realizes that the department's lien entitlement is also reduced, in this circumstance to $38,659.69. Mr. Nelson thus pays the department $20,000 less on its lien. Mr. Nelson's share of the $114,957.32 would be $76,297.63. The amount Mr. Nelson has to pay the department is the only real measure of Mr. Nelson's net recovery.

It only makes sense that the more the department participates in the costs of litigation the greater a worker's net recovery. The costs of litigation are a sunk cost for the worker. If the department "pays" less of them, the worker pays more and net recovers less.

E. If the court must go outside the language of a statute to give it meaning, it is ambiguous.

The Court of Appeals' opinion states no ambiguity exists to be interpreted in the lien statute. Appendix A, p. 12. However, the opinion in effect adds language to the statute in arriving at its meaning.

The Court of Appeals' opinion cites RCW 51.24.060, emphasizing "any recovery." Appendix A, p. 9. The phrase "any recovery" can have more than one meaning. It can be a collective reference or it could mean "each recovery." The court has chosen "any recovery" to mean "each recovery." This is an interpretation of the statute. It is in effect a substitution of the word "each" for the word "any." "Any recovery" can have more than one meaning; "each recovery" has only one meaning. The language "any recovery" is ambiguous and should not be interpreted against the worker.

The Court of Appeals' opinion also emphasized language in RCW 51.24.060(5) as support for the reading that the statute intended to limit department cost participation. Appendix A, p. 11. The opinion

emphasizes that the lien statute limits department cost participation to "the costs and reasonable attorneys' fees associated with the recovery." The opinion has interpreted this to mean the department cost participation is limited to "only the costs and reasonable attorneys' fees associated with that particular recovery."

This is in effect a major change of language in the statute to the worker's detriment. The statute does not contain the limitation added by the opinion.

F. The Department unilaterally deducted costs from Nelson and Hi-Way Fuel should apply.

The opinion states the department did not unilaterally deduct costs from the bill Mr. Nelson submitted. Appendix A, p. 13. However, examination of the facts revels that it in effect did.

The opinion noted that the department contacted Mr. Nelson and requested "a ledger of costs relating to this recovery." Appendix A, p. 3. Thus, from the outset the department unilaterally limited the costs to those related to the Wade recovery. Nelson complied under protest.

G. Nelson should be awarded his costs and attorney fees.

RCW 51.52.130 provides a worker who appeals a decision of the Board of Industrial Insurance Appeals is entitled fees and costs if the Board's decision is reversed or modified and the accident fund or medical

and fund are affected by the litigation. RCW 51.52.130. Because a modification of the Board decision will directly affect the fund by reducing the amount the department may recover as reimbursement, Nelson is entitled to his attorney fees and costs if his appeal is successful. Tobin v. Department of Labor & Industries, 169 Wn.2d 396, 406, 239 P.3d 544 (2010).

VI. CONCLUSION.

The issues involved in this case apply to every action by injured workers against multiple third parties. Review should be accepted, and the Court of Appeals decision should be reversed.

Dated this 28th day of February, 2018.

LOPEZ & FANTEL, INC., P.S.

CARL A. TAYLOR LOPEZ,
WSBA No. 6215
Of Attorneys for Petitioner

Filed
Washington State
Court of Appeals
Division Two

March 7, 2017

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TIMOTHY M. NELSON. Appellant, v. DEPARTMENT OF LABOR & INDUSTRIES, Respondent.	No. 47672-0-II PART PUBLISHED OPINION

BJORGEN, C.J. — Timothy Nelson appeals the superior court's decision affirming the Board of Industrial Insurance Appeals (Board), which determined that the allocation of Nelson's recovery from a third party under the distribution formula of RCW 51.24.060 was proper. Under the Industrial Insurance Act (IIA), title 51 RCW, a worker injured in the course of his employment has a right to sue any third party involved in the tortious act. RCW 51.24.030(1).[1]

[1] "If a third person, not in a worker's same employ, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title, the injured worker or beneficiary may elect to seek damages from the third person." RCW 51.24.030(1).

If the injured worker collects any "recovery" from the third party, it is subject to a distribution formula that requires, among other matters, the attorney fees and costs to be proportionately shared by the injured worker and the Department. RCW 51.24.060(1).

In the published portion of this opinion, we address Nelson's contention that the Department's distribution of his recovery was premature because the pertinent IIA provisions require that attorney fees and costs from all claims pursued, even if unsuccessful, be included in the distribution of recovery. We hold that the Department's distribution of Nelson's recovery was not erroneous because the plain language of RCW 51.24.060 indicates that only attorney fees and costs associated with the resolved claims causing the recovery must be included in a distribution—not attorney fees and costs related to other unsuccessful claims. We address Nelson's remaining arguments in the unpublished portion of this opinion and hold that they fail. Accordingly, we affirm.

FACTS

In the course of his employment, Nelson was in a motor vehicle accident with Amanda Wade and suffered personal injuries. The Department paid $116,958.64 in worker's compensation benefits to Nelson. Pursuant to RCW 51.24.030(1), Nelson elected to pursue civil damages against Wade and Pierce County.[2] The trial court granted summary judgment in favor of Pierce County on all Nelson's claims against it. Nelson then settled with Wade, releasing all claims and causes of action against her. The settlement amount totaled $525,000, $408,000 of

[2] Other than a faulty highway design claim, it is unclear from the record what claims Nelson asserted against Pierce County.

which was allocated to pain and suffering.[3] The remaining $117,000 constituted economic damages considered a "recovery" and triggered distribution under the formula set forth in RCW 51.24.060.

The Department contacted Nelson about the settlement with Wade and requested a copy of the settlement agreement, his attorney fee agreement, and "a ledger of costs relating to this recovery." Clerk's Papers (CP) at 77. The attorney fee agreement indicated that Nelson's lawyers represented him on all claims relevant to his motor vehicle accident with Wade and that he would pay his lawyers one-third of the total recovery in the case. The ledger of attorney costs showed various expenses totaling $6,523.23.

After receiving this information, the Department asserted a lien of $114,957.32[4] against Nelson's settlement. Pursuant to the RCW 51.24.060 formula, the Department then calculated the distribution of Nelson's $117,000 settlement. First, the Department calculated the total attorney fees and costs associated with the settlement as $40,453.75. RCW 51.24.060(1)(a). Second, the Department distributed 25 percent of the award's balance, $19,136.56, directly to Nelson. RCW 51.24.060(1)(b). Finally, the Department allocated the remaining portion, $57,409.69, to itself for reimbursement of benefits paid out to Nelson. RCW 51.24.060(1)(c).

---

[3] Under *Tobin v. Department of Labor & Industries*, 169 Wn.2d 396, 404, 239 P.3d 544 (2010), pain and suffering damages are not subject to distribution.

[4] According to the Department, the lien was for less than benefits paid out to Nelson because certain administrative expenses are excluded when the Department asserts a lien against a third party recovery. *E.g. Ziegler v. Dep't of Labor & Indus.*, 42 Wn. App. 39, 42, 708 P.2d 1212 (1985) (medical examinations not reimbursable).

Subsequently, the Department issued an order that requested Nelson to reimburse the Department in the amount of $57,409.69.

Nelson objected to the Department's distribution order. He argued that the Department's order was "premature and potentially overstate[d] the amount the [Department] is entitled to recover" because the calculation "understates costs and attorney fees incurred in causes of action[s] . . . being pursued and/or investigated for underinsured motorist, highway design and products liability, based on the same injuring event." CP at 100. Nelson hypothesized that because those cause of actions may ultimately prove unsuccessful, he would never recover the costs and attorney fees associated with those claims. Furthermore, Nelson alleged that at least $25,000 in additional expenses had been incurred after the settlement for the other pending causes of action. He did not contend that the Department's calculation was incorrect, nor did he make an argument that its calculation was contrary to the statutory language of RCW 51.24.060. The Department denied reconsideration of its distribution order.

Nelson appealed to the Board, where both Nelson and the Department moved for summary judgment. Nelson reiterated the same argument to the Board that the Department's distribution was premature because it failed to account for attorney fees and costs that might result from other potential causes of action arising from the same incident. Further, Nelson argued for the first time that the plain language of RCW 51.24.060 does not limit the distribution of attorney fees and costs to successful claims against parties. Rather, he argued the purpose of the IIA requires the Department to wait until all claims are resolved to ensure an injured worker receives the full benefit of sharing attorney fees and costs with the Department. Thus, Nelson

contended the Department should not have distributed the money received from the settlement with Wade until all claims related to the auto accident were resolved.

After a hearing, the Board granted summary judgment in favor of the Department, reasoning that the plain language of RCW 51.24.060 applies only to actual or realized recoveries, not to potential or possible recoveries. Relying on RCW 51.24.030(2)[5] and prior cases it adjudicated,[6] the Board concluded that the IIA contemplates "multiple . . . causes of action arising from a claim." CP at 42-43. Furthermore, the Board explained that the settlement completely resolved Nelson's lawsuit against Wade and that the settlement was a recovery triggering application of RCW 51.24.060 for calculation of a distribution. Along with these reasons, the Board entered findings of fact and conclusions of law, reflecting that the Department properly calculated the distribution.[7]

Nelson appealed to the superior court. The superior court affirmed the Board and adopted the Board's findings of fact and conclusions of law to support its decision. Nelson appeals.

---

[5] "In every action brought under this section, the plaintiff shall give notice to the department or self-insurer when the action is filed." RCW 51.24.030(2).

[6] *See* CP at 43 (citing Board decisions *In re Richard Boney*, No. 98-15811 (Wash. Bd. of Indus. Ins. Appeals) (Dec. 2001), http://www.biia.wa.gov/DO/9915811_ORD_20011024_DO.PDF; and *In Re Todd A. Hosking*, No. 08-17806 (Wash. Bd. of Indus. Ins. Appeals) (Apr. 24, 2009), http://www.biia.wa.gov/DO/0817806_ORD_20090824_DO.PDF.

[7] These findings of fact and conclusions of law are primarily a reflection of the Department's application of the distribution formula to Nelson's settlement discussed earlier in the Facts section. To avoid redundancy, we do not reiterate them here.

ANALYSIS

I. STATUTORY INTERPRETATION

Nelson argues that the Board arrived at an erroneous interpretation of RCW 51.24.060 by finding it "not reasonable to include in the distribution formula any cost not directly related to the settling defendant even though the cost was incurred in the same litigation." Br. of Appellant at 9, 17. The Department contends that the plain meaning of RCW 51.24.060 indicates that a distribution of a recovery only requires inclusion of the attorney fees and costs associated with the resolved claims that caused the recovery and triggered the distribution. For the reasons set forth below, we agree with the Department and resolve the statutory interpretation question on a plain meaning analysis.

1. Standard of Review/Legal Principles

A superior court reviews the Board's actions de novo, but relies on the certified Board record and decides only those matters that the administrative tribunals previously determined. *Matthews v. Dep't of Labor & Indus.*, 171 Wn. App. 477, 491, 288 P.3d 630 (2012); *Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179, 210 P.3d 355 (2009). The superior court must consider the Board's decision as prima facie correct. RCW 51.52.115. If the superior court determines that the Board has acted within its power and has correctly construed the law, its decision will be upheld. *Id.*

From the superior court's judgment, our review "'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.'" *Rogers*, 151 Wn. App. at 180 (quoting *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5, 977 P.2d 570 (1999)).

However, the superior court's findings of fact and conclusions of law were entered in its review of the summary judgment entered by the Board, which in turn adopted the proposed decision and order by an industrial insurance judge that found no genuine issues of material fact and granted summary judgment to the Department. The superior court adopted the findings and conclusions of the Board's decision, granting summary judgment. "Findings of fact and conclusions of law are not necessary on summary judgment and, if made, are superfluous . . ." *Concerned Coupeville Citizens v. Town of Coupeville*, 62 Wn. App. 408, 413, 814 P.2d 243 (1991). On review of summary judgment, as here, we review de novo whether there are any genuine issues of material fact and whether the moving party is entitled to judgment as a matter of law. CR 56(c).

Nelson concedes that no genuine issues of material fact exist and that the dispositive issue was purely of statutory interpretation. Because statutory interpretation is purely a question of law, we review the superior court's ruling de novo. *Hill v. Dep't of Labor & Indus.*, 161 Wn. App. 286, 292, 253 P.3d 430 (2011). Further, "[a]lthough 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 v. City of Olympia*, 171 Wn. App. 614, 621, 287 P.3d 687 (2012).

The goal of statutory interpretation is to ascertain and give effect to the legislature's intent. *Birgen v. Dep't of Labor & Indus.*, 186 Wn. App. 851, 857, 347 P.3d 503, *review denied*, 184 Wn.2d 1012 (2015). "To determine legislative intent, we first look to the plain language of the statute." *Id.* To decipher the plain language, we look at the meaning of the provisions in

question as well as the context of the statute and related statutes. *Id.* "We do not rewrite unambiguous statutory language under the guise of interpretation," or "'add words where the legislature has chosen not to include them.'" *Id.* at 858 (quoting *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003)).

"When statutory language is susceptible to more than one reasonable interpretation, it is considered ambiguous." *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001). "However, it is not ambiguous simply because different interpretations are conceivable." *Hi-Way Fuel Co. v. Estate of Allyn*, 128 Wn. App. 351, 358, 115 P.3d 1031 (2005). "We are not to search for 'an ambiguity by imagining a variety of alternative interpretations.'" *Id.* (quoting *Am. Cont'l Ins. Co. v. Steen*, 151 Wn.2d 512, 518, 91 P.3d 864 (2004)).

2. Plain Meaning

Nelson argues that the Department's distribution of his recovery was premature because the IIA requires that attorney fees and costs from all claims pursued, even if unsuccessful, be included in the distribution of his recovery. We disagree.

The IIA "is based on a compromise between workers and employers, under which workers become entitled to speedy and sure relief, while employers are immunized from common law responsibility." *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 422, 869 P.2d 14 (1994) (citing RCW 51.04.010). However, the IIA permits suit against third party tortfeasors. RCW 51.24.030(1). The injured worker can pursue such an action himself or can assign his claims to the Department. RCW 51.24.030(1), .050(1). Nelson elected to take the

former approach, making any successful recovery against a third party subject to a lien by the Department to offset benefits it paid out to Nelson. RCW 51.24.060(1), (2).

The distribution of that recovery is subject to a specific formula outlined in RCW 51.24.060, which reads in pertinent part:

> (1) If the injured worker or beneficiary elects to seek damages from the third person, *any recovery* made shall be distributed as follows:
>
> (a) *The costs and reasonable attorneys' fees shall be paid proportionately by the injured worker or beneficiary and the department* and/or self-insurer: PROVIDED, That the department and/or self-insurer may require court approval of costs and attorneys' fees or may petition a court for determination of the reasonableness of costs and attorneys' fees;
>
> (b) The injured worker or beneficiary shall be paid twenty-five percent of the balance of the award: PROVIDED, That in the event of a compromise and settlement by the parties, the injured worker or beneficiary may agree to a sum less than twenty-five percent;
>
> (c) The department and/or self-insurer shall be paid the balance of the recovery made, but only to the extent necessary to reimburse the department and/or self-insurer for benefits paid;
>
> (i) The department and/or self-insurer shall bear its proportionate share of the costs and reasonable attorneys' fees incurred by the worker or beneficiary to the extent of the benefits paid under this title: PROVIDED, That the department's and/or self-insurer's proportionate share shall not exceed one hundred percent of the costs and reasonable attorneys' fees;
>
> (ii) The department's and/or self-insurer's proportionate share of the costs and reasonable attorneys' fees shall be determined by dividing the gross recovery amount into the benefits paid amount and multiplying this percentage times the costs and reasonable attorneys' fees incurred by the worker or beneficiary;
>
> (iii) The department's and/or self-insurer's reimbursement share shall be determined by subtracting their proportionate share of the costs and reasonable attorneys' fees from the benefits paid amount;
>
> (d) Any remaining balance shall be paid to the injured worker or beneficiary.

(Emphasis added.) The key statutory interpretative issue here is the linguistic relationship between an injured worker's "recovery" noted in RCW 51.24.060(1) and which attorney fees and costs must be paid from a distribution of that "recovery."

First, the definition of recovery suggests only attorney fees and costs spent on resolved claims triggering the recovery should be included in the distribution formula. Under the IIA, recovery includes "all damages except loss of consortium" and pain and suffering. RCW 51.24.030(5); *Tobin v. Dep't of Labor & Indus.*, 169 Wn.2d 396, 404, 239 P.3d 544 (2010). *Black's Law Dictionary* at 1466 (10th ed.) defines "recovery" as "1. The regaining or restoration of something lost or taken away. 2. The obtainment of a right to something (esp. damages) by a judgment or decree. . . . 4. An amount awarded in or collected from a judgment or decree." In *Webster's Third New International Dictionary* at 1898 (2002), "recovery" is defined as "the obtaining in a suit at law of a right to something by a verdict, decree, or judgment of court."

Under these definitions, a recovery exists when a plaintiff receives damages other than loss of consortium and pain and suffering damages. The resolution that fixed the damages might be the settlement of a single claim against one party or a judgment entered against multiple parties for multiple claims. In either situation, the recovery will be defined by the damages acquired from resolving specific claims against specific parties. Thus, the costs and attorney fees that are subject to the distribution formula are those related to the settlement or judgment of claims constituting the recovery. RCW 51.24.060(1).

The legislature's positioning of the RCW 51.24.060 subsections further buttresses this interpretation. As the Department suggests, the "'costs and reasonable attorneys' fees' noted in subsection (1)(a) are linked to the particular 'recovery' identified in subsection (1)." Br. of Resp't at 13. The legislature's arrangement of RCW 51.24.060's subsections shows its intent to associate the attorney fees and costs with resolved claims causing the recovery and triggering the distribution formula in the first place.

In addition, RCW 51.24.060(5), which imposes a duty on a party who recovers to provide notice to the Department, further compels this reading of recovery. RCW 51.24.060(5) states:

> It shall be the duty of the person to whom any recovery is paid before distribution under this section to advise the department or self-insurer of the fact and amount of such recovery, the costs and reasonable attorneys' fees *associated with the recovery*, and to distribute the recovery in compliance with this section.

(Emphasis added). As the Department points out, we interpret a statute to give effect to all language, so as to render no portion meaningless or superfluous. *Rivard v. State*, 168 Wn.2d 775, 783, 231 P.3d 186 (2010). Through RCW 51.24.060(5), the legislature only considered the costs and attorney fees that are associated with the recovery pertinent for the Department to know in implementing the distribution required by RCW 51.24.060. Thus, RCW 51.24.060(5) implies that costs and attorney fees that are *not* associated with the recovery that triggered the distribution formula are not covered in the distribution of that recovery. This premise, along with the definitions of recovery and the subsection arrangement of RCW 51.24.060, shows that the costs and attorney fees to be distributed under that statute are those that are associated with the resolution of claims that triggered the recovery.

Nelson argues that this interpretation runs against the mandate of RCW 51.12.010. This section states that the IIA "shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment." However, we "cannot use the liberal construction requirement to support a 'strained or unrealistic interpretation' of statutory language." *Birgen*, 186 Wn. App. at 862

(quoting *Senate Republican Campaign Comm. v. Pub. Disclosure Comm'n*, 133 Wn.2d 229, 243, 943 P.2d 1358 (1997)). Moreover, the liberal construction provision is only triggered when doubts or ambiguities in the IIA need to be resolved. *See Dep't of Labor & Indus. v. Lyons Enters. Inc.*, 185 Wn.2d 721, 734, 374 P.3d 1097, *recons. denied*, (2016).

Nelson's interpretation, while conceivable, would strain the provisions of RCW 51.24.060 to construe an ambiguity that does not exist. *Hi-Way Fuel*, 128 Wn. App. at 358-59. Thus, the rule of liberal construction cannot blunt the effect of the plain language of the IIA: in distributing a recovery under RCW 51.24.060, only the attorney fees and costs associated with the resolved claims that caused the recovery and triggered the distribution are considered in the distribution.[8]

Nelson also contends that he will receive less than the 25 percent net recovery RCW 51.24.060 guarantees him if other attorney fees and costs from other unsuccessful claims are not included. *Id.* The distribution formula, though, requires attorney fees and costs to be deducted first from the recovery before the worker's 25 percent share of the remaining balance is calculated. *Tobin*, 169 Wn.2d at 408-09 (citing RCW 51.24.060(1)(a), (b), (c)). If, for example, other costs associated with the unsuccessful Pierce County claim were included in the distribution formula, Nelson's entitlement to his portion of the recovery would actually have

[8] This plain meaning analysis is consistent with two cases suggesting that only attorney fees and costs associated with the recovery are to be included in the distribution. In *Davis v. Department of Labor & Industries*, 71 Wn. App. 360, 363, 858 P.2d 1117 (1993), the court stated it is "[t]he costs and reasonable attorneys' fees [of the third party recovery]" that shall be paid proportionately." (Second alteration in original). In *Rhoad v. McLean Trucking Co.*, 102 Wn.2d 422, 424, 686 P.2d 483 (1984), the court stated that "the Department is required to bear a proportionate share of the fees and costs incurred in obtaining . . . a recovery."

been reduced. Thus, his interpretation may frustrate the IIA's purpose of protecting an injured worker because inclusion of additional attorney fees and costs not linked to the specific recovery could reduce a worker's potential recovery.

Finally, Nelson cites *Hi-Way Fuel*, 128 Wn. App. at 354, arguing that the Department "unilaterally disallowed" the costs calculated in the distribution formula. Br. of Appellant at 9-10. In *Hi-Way Fuel*, 128 Wn. App. at 354-55, the claimant submitted a letter from her attorney to the Department detailing the attorney fees and costs associated with the third party recovery. Before calculating the distribution, the Department unilaterally deducted costs related to internal copying and postage. *Id.* at 355. The *Hi-Way Fuel* court held that because the Department may petition a court to determine whether costs are reasonable, RCW 51.24.060(1)(a), it does not have a "unilateral right" to determine the amount or types of costs that should be included in the distribution formula. *Id.* at 363. It thus remanded the case, in part, for a new distribution calculation that included the costs for internal copying and postage. *Id.* Unlike *Hi-Way Fuel*, the Department here did not unilaterally deduct any costs from the bill Nelson submitted. Instead, the Department included all costs Nelson submitted to it when it applied the distribution formula. Thus, *Hi-Way Fuel* is inapplicable.

For the reasons stated above, the costs and attorney fees to be distributed are those that are associated with the resolution of claims that triggered the recovery. Accordingly, the Department did not err in its interpretation.

CONCLUSION

We hold that the Department's distribution of Nelson's recovery was not erroneous. The plain language of RCW 51.24.060 indicates that only the attorney fees and costs associated with

the resolved claims causing the recovery must be included in a distribution—not attorney fees and costs related to other claims. We affirm the superior court.

A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record pursuant to RCW 2.06.040, it is so ordered.

ADDITIONAL CLAIMS

In the unpublished portion of this opinion, we consider (1) whether the Department's interpretation of RCW 51.24.060 constituted rule making without following the required rule making procedures, and (2) whether Nelson is entitled to an award of attorney fees and costs. For the reasons below, we hold that no rule making occurred and that Nelson is not entitled to an award of attorney fees and costs.

II. RULE MAKING

Nelson argues that the Department's interpretation of RCW 51.24.060 constituted rule making. We disagree.

The Administrative Procedure Act (APA), chapter 34.05 RCW, sets out certain formal requirements that an agency must follow before adoption of a new rule. *Providence Physician Servs. Co. v. Dep't of Health*, 196 Wn. App. 709, 725, 384 P.3d 658 (2016). If an agency adopts a rule without compliance with these required procedures, we will declare the rule invalid. *Id.* (citing RCW 34.05.570(2)(c)). However, for rule making procedures to apply, an agency action or inaction must fall into the APA definition of a rule. *Id.*

In order to qualify as a "rule" under the APA, two elements must be satisfied. *Id.* at 726. First, an agency action must be any agency "'order, directive, or regulation of general

applicability.'" *Id.* (quoting RCW 34.05.010(16)). Second, as applicable to this appeal, the agency action must "establish[], alter[], or revoke[] any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law." RCW 34.05.010(16)(c)

First, the Department's order was not one of general applicability. Rather, the order set forth the distribution calculation that applied to Nelson's settlement. Nelson cites to two of the Department's representations made to the Board to support his position that the Department's order was one of general applicability. First, he cites a declaration that the Department attached to its summary judgment motion to the Board where a Department representative stated:

> I determined the Department's distribution share of Mr. Nelson's recovery against Amanda Wade in the same manner as I would for any recovery made by an injured worker against a third party tortfeasor—pursuant to RCW 51.24.060. If Mr. Nelson obtains recoveries relating to this incident from additional third persons, those recoveries will also be distributed in accordance with Ch. 51.24, RCW.

CP at 78-79. Nelson also cites the hearing before the Board where the Department's attorney stated:

> [The Department] believe[s] that the third party statute is unambiguous and so there has not been a need for rule making in order to resolve any ambiguities within the statute.

CP 149. These statements, though, were part of the Department's arguments to the Board. They do not broaden the Department's original order, which confined itself to an application of the distribution formula to Nelson's settlement. Furthermore, Nelson's original objection to the Department's distribution order was not based on an improper interpretation of RCW 51.24.060. Rather, he believed the calculation was "premature" and "understate[d] costs and attorney fees incurred" because Nelson had other specific causes of action which might produce additional

expenses. CP at 100. The Department's distribution order and Nelson's arguments related to that order were limited to Nelson's case.

Second, the Department's order did not establish, alter, or revoke any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law. Generally, an agency is permitted to interpret language in a statute or regulation without going through formal rule making procedures. *Providence Physician Servs. Co.*, 196 Wn. App. at 726 (collecting cases). If, however, an agency adds a new requirement to an already well defined regulation, that requirement will be deemed a rule subject to the formal rule making procedures. *Id.* at 726-27 (citing *Failor's Pharmacy v. Dep't of Soc. & Health Servs.*, 125 Wn.2d 488, 886 P.2d 147 (1994)).

To support his argument, Nelson cites to *Hillis v. Department of Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997). In *Hillis*, 131 Wn.2d at 399, the Department of Ecology implemented a system, not contemplated in the relevant statutes or regulations, in which it prioritized the processing of applicants for certain water rights. Because applicants had a right under statute to have their water permit application investigated and decided upon, the *Hillis* court held that the agency engaged in improper rule making in creating its own priority system without going through the formal rule making procedures. *Id.* at 399-400. Notably, the Department of Ecology did not rely on an interpretation of any statutory or regulatory language to create its approach; rather, it was in response to a reduced budget, a large number of applications pending, and the complexities of determining an individual's water rights. *See id.* at 378-80, 394.

Here, the Department's order relied on the statutory language of RCW 51.24.060 to apply the distribution formula to Nelson's settlement. Although the Department did not engage in an

overt interpretation of RCW 51.24.060 in its order, the application to Nelson's settlement constitutes an implicit reliance on the distribution formula's language to arrive at its result. Therefore, unlike *Hillis*, the Department's order is more accurately characterized as a proper interpretation of a statute, rather than an improper alteration of the distribution formula.

Accordingly, because the Department's order is neither generally applicable nor an alteration of any qualification or requirement in the distribution formula, Nelson's rule making claims fails.

III. ATTORNEY FEES

Nelson argues that he is entitled to attorney fees and costs both at superior court and on appeal pursuant to RCW 51.52.130.[9]

> Under RCW 51.52.130, where a worker appeals a decision of the Board of Industrial Insurance Appeals, he is entitled to fees and costs if (a) the Board's decision is "reversed or modified" and (b) "the accident fund or medical aid fund is affected by the litigation." RCW 51.52.130(1).

Tobin, 169 Wn.2d at 406.

Because Nelson fails to prevail on the merits of his claims, we do not reverse or modify the Board's decision. Thus, an award of attorney fees and costs is not appropriate.

CONCLUSION

We hold that (1) the costs and attorney fees to be taken into account in distributing a recovery under RCW 51.24.060 are those associated with the resolution of claims that triggered

[9] RCW 51.52.130 encompasses fees in both the superior and appellate courts when both courts review the matter. *Hi-Way Fuel Co.*, 128 Wn. App. at 363-64.

the recovery; (2) the Department's order did not constitute rule making; and (3) an award of attorney fees and costs is not appropriate. Therefore, we affirm.

Bjorgen, C.J.
BJORGEN, C.J.

We concur:

Johanson, J.
JOHANSON, J.

Lee, J.
LEE, J.

Filed
Washington State
Court of Appeals
Division Two

January 29, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

TIMOTHY M. NELSON.

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

No. 47672-0-II

ORDER DENYING MOTION FOR RECONSIDERATION

The appellant has filed a motion for reconsideration of the part published opinion filed on March 7, 2017. After review, it is hereby

ORDERED that the motion for reconsideration of the part published opinion filed on March 7, 2017 is denied.

IT IS SO ORDERED.

Jjs.: Johanson, Bjorgen, Lee

FOR THE COURT:

Bjorgen, C.J.

RCW 51.24.060

Distribution of amount recovered—Lien.

(1) If the injured worker or beneficiary elects to seek damages from the third person, any recovery made shall be distributed as follows:

(a) The costs and reasonable attorneys' fees shall be paid proportionately by the injured worker or beneficiary and the department and/or self-insurer: PROVIDED, That the department and/or self-insurer may require court approval of costs and attorneys' fees or may petition a court for determination of the reasonableness of costs and attorneys' fees;

(b) The injured worker or beneficiary shall be paid twenty-five percent of the balance of the award: PROVIDED, That in the event of a compromise and settlement by the parties, the injured worker or beneficiary may agree to a sum less than twenty-five percent;

(c) The department and/or self-insurer shall be paid the balance of the recovery made, but only to the extent necessary to reimburse the department and/or self-insurer for benefits paid;

(i) The department and/or self-insurer shall bear its proportionate share of the costs and reasonable attorneys' fees incurred by the worker or beneficiary to the extent of the benefits paid under this title: PROVIDED, That the department's and/or self-insurer's proportionate share shall not exceed one hundred percent of the costs and reasonable attorneys' fees;

(ii) The department's and/or self-insurer's proportionate share of the costs and reasonable attorneys' fees shall be determined by dividing the gross recovery amount into the benefits paid amount and multiplying this percentage times the costs and reasonable attorneys' fees incurred by the worker or beneficiary;

(iii) The department's and/or self-insurer's reimbursement share shall be determined by subtracting their proportionate share of the costs and reasonable attorneys' fees from the benefits paid amount;

(d) Any remaining balance shall be paid to the injured worker or beneficiary; and

(e) Thereafter no payment shall be made to or on behalf of a worker or beneficiary by the department and/or self-insurer for such injury until the amount of any further compensation and benefits shall equal any such remaining balance minus the department's and/or self-insurer's proportionate share of the costs and reasonable attorneys' fees in regards to the remaining balance. This proportionate share shall be determined by dividing the gross recovery amount into the remaining balance amount and multiplying this percentage times the costs and reasonable attorneys' fees incurred by the worker or beneficiary. Thereafter, such benefits shall be paid by the department and/or self-insurer to or on behalf of the worker or beneficiary as though no recovery had been made from a third person.

(2) The recovery made shall be subject to a lien by the department and/or self-insurer for its share under this section.

(3) The department or self-insurer has sole discretion to compromise the amount of its lien. In deciding whether or to what extent to compromise its lien, the department or self-insurer shall consider at least the following:

(a) The likelihood of collection of the award or settlement as may be affected by insurance coverage, solvency, or other factors relating to the third person;

(b) Factual and legal issues of liability as between the injured worker or beneficiary and the third person. Such issues include but are not limited to possible contributory negligence and novel theories of liability; and

(c) Problems of proof faced in obtaining the award or settlement.

(4) In an action under this section, the self-insurer may act on behalf and for the benefit of the department to the extent of any compensation and benefits paid or payable from state funds.

(5) It shall be the duty of the person to whom any recovery is paid before distribution under this section to advise the department or self-insurer of the fact and amount of such recovery, the costs and reasonable attorneys' fees associated with the recovery, and to distribute the recovery in compliance with this section.

(6) The distribution of any recovery made by award or settlement of the third party action shall be confirmed by department order, served by a method for which receipt can be confirmed or tracked, and shall be subject to chapter 51.52 RCW. In the event the order of distribution becomes final under chapter 51.52 RCW, the director or the director's designee may file with the clerk of any county within the state a warrant in the amount of the sum representing the unpaid lien plus interest accruing from the date the order became final. The clerk of the county in which the warrant is filed shall immediately designate a superior court cause number for such warrant and the clerk shall cause to be entered in the judgment docket under the superior court cause number assigned to the warrant, the name of such worker or beneficiary mentioned in the warrant, the amount of the unpaid lien plus interest accrued and the date when the warrant was filed. The amount of such warrant as docketed shall become a lien upon the title to and interest in all real and personal property of the injured worker or beneficiary against whom the warrant is issued, the same as a judgment in a civil case docketed in the office of such clerk. The sheriff shall then proceed in the same manner and with like effect as prescribed by law with respect to execution or other process issued against rights or property upon judgment in the superior court. Such warrant so docketed shall be sufficient to support the issuance of writs of garnishment in favor of the department in the manner provided by law in the case of judgment, wholly or partially unsatisfied. The clerk of the court shall be entitled to a filing fee under RCW 36.18.012(10), which shall be added to the amount of the warrant. A copy of such warrant shall be mailed to the injured worker or beneficiary within three days of filing with the clerk.

(7) The director, or the director's designee, may issue to any person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state, a notice and order to withhold and deliver property of any kind if he or she has reason to believe that there is in the possession of such person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state, property which is due, owing, or belonging to any worker or beneficiary upon whom a warrant has been served by the department for payments due to the state fund. The notice and order to withhold and deliver shall be served by the sheriff of the county or by the sheriff's deputy; by a method for which receipt can be confirmed or tracked; or by any authorized representatives of the director. Any person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state upon whom service has been made shall answer the notice within twenty days exclusive of the day of service, under oath and in writing, and shall make true answers to the matters inquired of in the notice and order to withhold and deliver. In the event there is in the possession of the party named and served with such notice and order, any property which may be subject to the claim of the department, such property shall be delivered forthwith to the director or the director's authorized representative upon demand. If the party served and named in the notice and order fails to answer the notice and order within the time prescribed in this section, the court may, after the time to answer such order has expired, render judgment by default against the party named in the notice for the full amount claimed by the director in the notice together with costs. In the event that a notice to withhold and deliver is served upon an employer and the property found to be subject thereto is wages, the employer may assert in the answer to all exemptions provided for by chapter 6.27 RCW to which the wage earner may be entitled.

[2011 c 290 § 4; 2001 c 146 § 9; 1995 c 199 § 4; 1993 c 496 § 2; 1987 c 442 § 1118; 1986 c 305 § 403; 1984 c 218 § 5; 1983 c 211 § 2; 1977 ex.s. c 85 § 4.]

NOTES:

Severability—1995 c 199: See note following RCW 51.12.120.

Effective date—Application—1993 c 496: See notes following RCW 4.22.070.

Preamble—Report to legislature—Applicability—Severability—1986 c 305: See notes following RCW 4.16.160.

Applicability—Severability—1983 c 211: See notes following RCW 51.24.050.

SUPERIOR COURT OF WASHINGTON
IN AND FOR PIERCE COUNTY

TIMOTHY NELSON, an individual, Plaintiff, v. AMANDA WADE, an individual; PIERCE COUNTY, Defendants.	NO.10-2-07104-6 FIRST AMENDED COMPLAINT FOR PERSONAL INJURY

Plaintiff states:

1. The above-entitled court properly has jurisdiction over this cause.

2. Plaintiff Timothy Nelson resides in Pierce County, Washington.

3. Defendant Amanda Wade is a resident of Pierce County, Washington. She is subject to the jurisdiction of the above-entitled court.

4. A proper claim has been timely filed against Defendant Pierce County. Pierce County is subject to the jurisdiction of the above-entitled court.

5. On or about May 23, 2008, a vehicle operated by Defendant Amanda Wade struck the vehicle Plaintiff was operating. The subject collision occurred at Key Peninsula Highway and 134th Avenue KPN, Pierce County.

LOPEZ & FANTEL
1510 14th Ave
Seattle, WA 98122
206.322.5200

6. The collision described in paragraph 4 was directly and proximately caused by the negligence of Defendants.

7. As a direct and proximate result of said negligence Plaintiff has suffered, and in the future will suffer, injury, including but not limited to, physical injury, pain, suffering, mental anguish, emotional distress, financial loss, medical costs and expenses, and other injuries to be identified and proved at trial.

WHEREFORE, Plaintiff prays for judgment against Defendants as follows:

1. For general damages sustained to date and in the future;

2. For medical costs and expenses incurred to date and in the future;

3. For financial loss suffered to date and in the future;

4. For additional foreseeable costs and expenses incurred to date and in the future;

5. For reasonable attorney's fees and court costs; and

6. For such other and further relief as the court may deem just and appropriate.

DATED this 22 day of September, 2010.

LOPEZ & FANTEL, INC. P.S.

Carl A. Taylor Lopez, WSBA No. 6215
Of Attorneys for Plaintiff

LOPEZ & FANTEL
1510 14th Ave
Seattle, WA 98122
206.322.5200

Hon. Susan K. Serko
Dept. 14

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

TIMOTHY NELSON, an individual, Plaintiff, vs. AMANDA WADE, an individual, PIERCE COUNTY, Defendants.	NO. 10-2-07104-6 ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

The motion of defendant Pierce County for dismissal of plaintiff's action against it pursuant to Civil Rule 56 came on regularly before the Court on Friday, June 17, 2011.

In ruling upon defendant's Pierce County motion for summary judgment, the Court has considered the following:

1. Defendant Pierce County's Motion for Summary Judgment with attachments thereto;

2. Declaration of Ronald L. Williams in Support of Defendant Pierce County's Motion for Summary Judgment with attachments thereto;

3. Declaration of Rory Grindley;

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

4. Plaintiff's Opposition to Pierce County's Summary Judgment Motion with attachments thereto;

5. Defendant Pierce County's Reply on Motion for Summary Judgment.

The Court has considered all materials submitted in support of and in opposition to the motion for summary judgment, and finds that there are no genuine issues of material fact and that defendant Pierce County is entitled to summary judgment dismissal as a matter of law regarding plaintiff's claims.

Therefore, it is hereby ORDERED, ADJUDGED, AND DECREED that defendant Pierce County's motion for summary judgment is hereby GRANTED and that all claims of plaintiff are hereby DISMISSED with prejudice.

~~IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that plaintiff shall pay costs and sanctions of $_____ to defendant Pierce County.~~ RW

DONE IN OPEN COURT this 17th day of June, 2011.

SUSAN K. SERKO
JUDGE

FILED
DEPT. 14
IN OPEN COURT
JUN 17 2011
Pierce County Clerk
By..... DEPUTY

Presented by:

MARK LINDQUIST
Prosecuting Attorney
By: Ronald L. Williams
RONALD L. WILLIAMS / WSB# 13927
Deputy Prosecuting Attorney
Attorneys for Defendant Pierce County

Approved as to form:

LOPEZ & FANTEL

By: [illegible]
CARL A. TAYLOR LOPEZ / WSB# 6215
Attorneys for Plaintiff PLAINTIFF NAME

EDWARDS

Pierce County Prosecuting Attorney/Civil Division
955 Tacoma Avenue South, Suite 301
Tacoma, Washington 98402-2160
Main Office: (253) 798-6732
Fax: (253) 798-6713

No.

SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION II
No: 47672-0-II

TIMOTHY NELSON

Plaintiff/Petitioner

vs.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON

Defendant/Respondent

CERTIFICATE OF SERVICE OF

PETITION FOR REVIEW

CARL A. TAYLOR LOPEZ
Lopez & Fantel, Inc., P.S.
2292 W. Commodore Way, Suite 200
Seattle, WA 98199
Tel: (206) 322-5200

I, Cynthia Ringo Palmer, declare and state as follows:

1. I am and at all times herein was a citizen of the United States, a resident of Snohomish County, Washington, and am over the age of 18 years.

2. On the 28th day of February, 2018, I caused to be served on counsel as follows:

- Petition for Review; and
- Certificate of Service.

Court of Appeals, Division II
950 Broadway, Suite 300
MS TB-06
Tacoma, WA 98402-4454

[ ] via e-filing
[ ] via Fax:
[X] via ABC legal messenger, special
[ ] via U.S. regular mail

William F. Henry
Scott T. Middleton
Attorney General of Washington
Labor & Industries Division
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188

[ ] via email
[ ] via Fax: 206-587-4290
[X] via ABC legal messenger, special run
[ ] via U.S. regular mail

I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated at Seattle, Washington, this 28th day of February, 2018.

Cynthia Ringo Palmer

Cynthia Ringo Palmer