

NO. 35052-1-II

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant,

v.

DARRIN R. THARALDSON,

Respondent.

BRIEF OF APPELLANT

ROB MCKENNA
Attorney General

STEVE VINYARD
Assistant Attorney General
WSBA No. 29737
PO box 40121
Olympia, WA 98504-0121
(360) 586-7707

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I. NATURE OF THE CASE

This is a workers' compensation case under what is known as the Third Party Statute, chapter 51.24 RCW. In order to ensure that the industrial insurance funds are replenished and workers do not receive double recoveries in tort cases, the Third Party Statute provides the Department with a statutory right of reimbursement from worker recoveries against third party tortfeasors. In this case, the Board of Industrial Insurance Appeals (Board) agreed with the Department of Labor and Industries (Department) that the Department's right of reimbursement applies to a tort settlement between the injured worker and a tortfeasor for a motor vehicle accident that took place six weeks after the worker's industrial injury, and that exacerbated the worker's on-the-job injury. The Pierce County Superior Court reversed on burden-of-proof grounds not supported by either the Third Party Statute nor by any other legal authority. The Department requests that this Court reverse the Superior Court's decision and reinstate the Board decision in this case.

II. ASSIGNMENT OF ERROR

A. Assignment of error

1. **The trial court erred when it granted Tharaldson's motion for summary judgment and when it denied the Department's cross motion. The Department is entitled to recover a portion of Tharaldson's third party recovery against Sasco for a motor vehicle accident,**

because the undisputed evidence established that Tharaldson had received duplicative benefits from the Department and from Sasco, and that Tharaldson's disability was 40 per cent due to the effects of his industrial injury, while 60 per cent was caused by the subsequent motor vehicle accident.

B. Issues

1. Under RCW 51.24.030, does the Department have authority to assert its third party reimbursement rights against a tort recovery where the recovery is based on a second, nonindustrial accident that aggravated the effects of an industrial injury?¹
2. When an injured worker appeals a Department order that asserted a right to a portion of the worker's tort recovery, does the worker or the Department bear the burden of proof?
3. Assuming that the Department bears the burden of proving that an order asserting a right to a tort recovery was correct, did the Department meet its burden, when the undisputed medical testimony established that 40 per cent of the worker's condition was due to his industrial injury and that 60 per cent of the worker's condition was due to his tort-caused injury?

¹ Although the Pierce Superior Court granted Tharaldson's motion for summary judgment, the court rejected the claimant's argument that RCW 51.24.030 did not authorize the Department to assert a lien against a portion of the claimant's tort recovery. Even though the superior court rejected this argument, the Department anticipates that Tharaldson will continue to argue that RCW 51.24.030 did not authorize the Department to assert a lien against any portion of his tort recovery, and the Department will therefore address this issue.

III. STATEMENT OF THE CASE

A. Tharaldson's Injuries and Industrial Insurance Benefits

1. The On-The-Job Injury

Darrin Tharaldson ("Tharaldson") suffered an injury to his back on September 17, 2001 while in the course of his employment with T&T Trucking, a state fund employer. CABR Tharaldson I, p.6, ll.31-47.² The Department granted Tharaldson's claim, and promptly began paying his treatment bills. *Id.* at p. 7, ll.27-33.

According to Tharaldson, at the time of his injury he "felt a sharp pain in [his] right side buttocks in [his] lower back." *Id.* at p.6, l.49 – p.7, l.1. He initially received conservative treatment from Dr. Haven Silver, but this provided him with little relief. *Id.* at p.7, ll.7-13.

Tharaldson did not return to work at any time between September 17 and October 24, 2001. *See id.* at p.8, ll.9-19. The Department provided time loss compensation on Tharaldson's claim for this period, as

² Citations to testimony in the Board Record will be indicated by "CABR" followed by the witness's name and the page and line numbers therein. Tharaldson testified on two dates; citations to his December 16, 2004 testimony will include the reference "Tharaldson I," while his January 11, 2005 testimony will be referred to as "Tharaldson II." Board exhibits will be indicated by "CABR Ex." followed by the appropriate exhibit number. Other documents in the Board Record bear machine-stamped numbers in their lower right-hand corners; citations to such documents will be to those numbers.

well as paying for medical treatment associated with the injury.³ See CABR Ex. 3.

2. The Motor Vehicle Tort Injury Six Weeks Later

On October 24, 2001, while his workers' compensation claim was still open and while he was still off work and receiving Industrial Insurance benefits, Tharaldson was involved in a motor vehicle accident. CABR Tharaldson I, p.8, ll.33-43. This accident involved a rear-end collision in which Tharaldson's vehicle was hit by another driver, who was employed by Sasco Electric ("Sasco"). *Id.* at , ll.39-43; p.16, ll.17-33. This accident did not occur in the course of Tharaldson's employment. *Id.* at p. 8, l.45, p. 9 , l.1.

Tharaldson received treatment from Dr. Silver following his automobile accident. *Id.* at p.9, ll.3-7. Tharaldson testified that following the car accident he had increased pain radiating from his back into his legs. *Id.* at p.9, ll.9-29.

Dr. Silver referred Tharaldson to Dr. Chan Hwang at United Back Care, who first saw Tharaldson on November 14, 2001, three weeks after the motor vehicle accident. See CABR Tharaldson, pp. 9, 21; Hwang, pp. 8-10. Tharaldson described both his workers' compensation injury and the car accident to Dr. Hwang. CABR Hwang, pp. 10, 20. He specifically

³ Time loss compensation is partial wage replacement provided when industrial injury renders a claimant temporarily unable to work in any capacity. RCW 51.32.090.

advised Dr. Hwang that his leg pain had worsened since the motor vehicle accident. *Id.*

Based on Tharaldson's detailed descriptions of his accidents, treatment and worsening symptoms, *see id* at 7, 8, 9, 16, and Dr. Hwang's review of Tharaldson's medical records and thorough physical examination, *see id* at 16-18, 21, 25, Dr. Hwang concluded that Tharaldson's then present back problems were approximately *40 per cent attributable to the industrial injury and 60 per cent due to the automobile accident.* *Id.* at 8-9, 18-19,. Dr. Hwang held this opinion "within reasonable medical probability." *Id* at 15, 18-19. *Dr. Hwang's testimony regarding the apportionment of Tharaldson's injuries is unrebutted, as he is the only witness who addressed this issue.*

Following his initial visit with Tharaldson, Dr. Hwang "recommended considering a magnetic resonance imaging study of the lumbar spine" to evaluate Tharaldson's symptoms, in particular to determine whether Tharaldson suffered from "a central midline herniation of a disk into the lumbar spine." *Id* at 11. On December 14, 2001 Tharaldson underwent an MRI at Mount Rainier Imaging. CABR Hwang, pp. 10, 26; Brack, p. 12, which did in fact show a disk herniation. *See* CABR Hwang, p. 20.

Dr. Hwang saw Tharaldson three more times after the November 14 visit: on December 19 and 26, 2001; and January 16, 2002. CABR Hwang, p. 11. Tharaldson expressed no new complaints during those visits.

Given the relationship between Tharaldson's on-the-job injury and the injury he sustained in his car accident, Dr. Hwang testified that it would be "impossible" to treat the back condition relating to the first incident separately from the problems related to the second. *Id* at 20. Dr. Hwang ultimately referred Tharaldson to Dr. Steven Brack. *Id* at 28.

Beginning on January 22, 2002, Tharaldson treated with Dr. Brack. CABR Brack, pp. 6, 9, 13. As he had with Dr. Hwang, Tharaldson explained his two 2001 accidents to Dr. Brack, and described the treatment he had received since the September industrial injury. *Id* at 9. He also told Dr. Brack that his symptoms had worsened after the car accident. *Id* at 10, 32.

Based on his knowledge of Tharaldson's condition and history, it was Dr. Brack's opinion that both the automobile accident and the industrial injury played a role in Tharaldson's need for treatment. *Id* at 13, 16. He also concurred with Dr. Hwang (and Tharaldson) that the automobile accident had "aggravated" the condition resulting from the September 17 on-the-job injury. *Id* at 14.

On February 27, 2002, Dr. Brack performed surgery on Tharaldson's herniated disk, specifically "a right L4-L5 microdiscectomy and foraminotomy"⁴. *Id* at 14, 15, 16. Dr. Brack saw Tharaldson for several post-operative follow-up visits, the last on May 22, 2002. *Id* at 17-18. At that point, Tharaldson was "[d]oing very well, having few complaints of back and leg pain. Looked like he was back working out at the YMCA." *Id* at 18. Dr. Brack released Tharaldson to return to work, and on June 1, 2002 Tharaldson did so. *Id* at 19.

Dr. Brack determined that Tharaldson rated a Category III permanent impairment of the lumbosacral spine. CABR Brack, p. 20. *See* also WAC 296-20-280(3). This rating converts to a 10 per cent total bodily impairment, which, for injuries incurred on September 2001 led to a permanent partial disability award of \$14,516.76. WAC 296-20-680(3). The Category III rating was based on the residuals of both Tharaldson's industrial injury and his automobile accident. *Id* at 20.

3. Workers' Compensation Benefits

The Department continued to provide workers' compensation benefits to Tharaldson after his motor vehicle accident, including unreduced time loss compensation and medical benefits. CABR 6. The

⁴ The purpose of this surgery is to "tak[e] pressure off a nerve and then . . . open[] up the nerve hole that's right next to the disk rupture." Brack 16.

Department also paid Tharaldson a permanent partial disability award representing a Category III low back impairment under his claim related to the September 17, 2001 industrial injury, and did not reduce this award based on the fact that he had had a subsequent car accident. *Id* at 5.

Tharaldson's workers' compensation benefits thus were not reduced by one penny as a result of his motor vehicle accident and, to the extent he received treatment, was unable to work, and was permanently impaired by the motor vehicle accident, the Department paid these costs as though that accident had never occurred. *Id.* at 5-6. Tharaldson eventually received \$39,340.70 in total Industrial Insurance benefits. CABR Tharaldson I, p. 22.

B. The Third Party Lawsuit and Its Relationship to the Workers' Compensation Claim

As set out above, the Department paid full workers' compensation benefits to Tharaldson both before and after his motor vehicle accident, with no reduction to reflect injury or treatment that might be attributable to that non-work-related event. However, because he had been rear-ended by an employee of Sasco, Tharaldson filed a personal injury lawsuit against that firm in King County Superior Court. CABR Tharaldson I, pp. 4, 16. In connection with that lawsuit, Tharaldson filed a Statement of Damages with the Court. CABR Tharaldson II, p. 5.

Tharaldson's receipt of workers' compensation benefits from the Department bear a striking resemblance to his tort recovery figures, as is apparent from the following summaries:

Industrial Insurance Benefits

Permanent partial disability:	\$14,516.76
Treatment:	\$ 9,936.90
Time loss compensation:	\$14,887.04

Damages claimed in Tort

Permanent partial disability:	\$14,516.76
Medical damages:	\$27,065.77
Wage loss:	\$17,687.40

CABR Tharaldson II, p. 5.

Not coincidentally, the "permanent partial disability" Tharaldson claimed as "damages" in his automobile accident suit was *precisely* the award for permanent partial disability he received from the Department due to his industrial injury. *Compare* CABR Tharaldson II, p. 5 with CABR 5-6.

The "medical damages" sought by Tharaldson are almost exactly the difference between the amount of treatment billings and the amount paid at Department rates. *See* CABR Ex. 1 (reflecting total billings of \$37,025.11 and Department payments of \$9,936.90).⁵

⁵ Tharaldson, of course, was not responsible for the difference between these two figures and in fact could not lawfully have been billed for it. Treating an injured worker constitutes acceptance of the Department's fee schedule, *see* WAC 296-20-020,

The fact that Tharaldson sought to recover slightly more in lost wages under his tort claim than he had received in time loss compensation from the Department is consistent with the rule that time loss compensation benefits are calculated based on a percentage of a worker's wages. *See* RCW 51.32.060(1); RCW 51.32.090(1).

C. The Third Party Recovery

Tharaldson's Statement of Damages totaled \$59,269.93 (as noted above, this was an overstatement of Tharaldson's medical "damages," as he could not, in any event, have been required to pay any portion of the \$27,000 difference between what his providers billed and what the Department paid). CABR Tharaldson II, pp.5-6. On April 13, 2004 Tharaldson settled his third party lawsuit for \$50,000, more than 80 per cent of his alleged damages. CABR Malcom, pp. 9, 13, 17. On April 29, 2004, he signed a release in connection with the settlement agreement. *Id.* at 5.

Long before he settled his lawsuit, Tharaldson recognized that the Department would be entitled to a share of the proceeds pursuant to the Third Party Statute. On November 26, 2002, his attorney notified the Department that "I have been retained by Darrin Tharaldson to represent

and providers are not allowed to bill workers for the difference between their usual fees and the Department's fee schedule. WAC 296-20-010(6).

his interests relating to an automobile accident that occurred on October 24, 2001.” CABR Ex. 2. The November 26 letter continued,

It is my understanding that Mr. Tharaldson had opened a Labor and Industries claim on September 17, 2001, just prior to this automobile accident. It is also my understanding that L&I has paid a portion of the subsequently incurred medical and surgical bills. We are currently gathering all documentation necessary to reach a settlement for his claim with the adverse driver’s insurance company. Therefore, it will be necessary for us to determine what portions of his medical and surgical billings L&I has paid out so that we may include that information into our proposed settlement package, *and of course thereby securing that L&I will be reimbursed for that proportionate share of costs incurred. . . .*

Id. (emphasis added).

D. The Department’s Distribution Order

RCW 51.24.060 governs the distribution of third party recoveries. Mr. Tharaldson has not, at any point during his appeals, disputed the Department’s calculations and proportional amounts achieved by calculation under RCW 51.24.060. It is nonetheless helpful to explain how the Department calculated its entitlement to recover a portion of Tharaldson’s third party damages suit, in order to illustrate the fact that Tharaldson has received a double recovery in this case. Indeed, under the terms of the Department’s order on appeal Tharaldson is allowed to retain a considerable double recovery.

When it learned that Tharaldson had settled his third party case, the Department requested and received the settlement documents, a copy of Tharaldson's fee agreement with his attorney, and an itemization of the attorney's costs associated with the action. CABR Malcom, pp. 9-10. It then issued a distribution order pursuant to RCW 51.24.060. CABR Ex. 3; Malcom, p. 12. The order did not, however, attempt to obtain reimbursement for all benefits the Department had paid under Tharaldson's claim. Instead, the order sought reimbursement for all benefits paid *that could be attributed to the automobile accident*.

Consistent with the foregoing, in Tharaldson's case Mr. Malcom "determined the amounts [of workers' compensation benefits] that were due just to the motor vehicle accident and applied those to the statutory formula." CABR Malcom, p. 13. To accomplish this, Mr. Malcom "subtracted out all amounts of time-loss that were due to the industrial injury." *Id.* He also "subtracted out all the amounts for medical that were due to the industrial injury, and then determined that there was 60 per cent of those figures to be applied to the formula." *Id.* at 13. The 60 per cent figure was based on the apportionment provided by Dr. Hwang. *Id.* at 17-18.

Thus, for the purpose of calculating its third party recovery amount, the Department acted as if Tharaldson had received only

\$21,700.20 in benefits and treatment, even though he had actually received a total of \$39,340.70 from the Department. *Id* at 13-14.

E. Appeal Proceedings

On April 29, 2004, the Department issued its initial distribution order. CABR 5. Tharaldson timely appealed the April 29 order, and on June 7, 2004 the Department held the April 29 order in abeyance. *See id.* Following its further investigation, the Department affirmed the April 29 distribution in an order issued August 10, 2004. *Id.* Tharaldson again appealed to the Board. *Id.*

Tharaldson's arguments before the Board were that (a) "the Department did not have statutory authority to assert any lien or interest in [his] tort recovery from the . . . non-work-related motor vehicle collision claim"; (b) "since there is no evidence rising to the level of probability that the motor vehicle accident injuries added to the cost of [his] industrial injury claim, the order asserting a lien should be nullified"; and (c) "attempting to assert a claim against [his] tort recovery constitutes a taking in violation of substantive due process constitutional protections." *See, e.g., CABR 84.*⁶

⁶ Neither the Board nor the superior court decided this case on constitutional grounds, and the Department will not address Tharaldson's constitutional theories in this Brief of Appellant.

An Industrial Appeals Judge (IAJ) who was appointed by the Board conducted hearings and considered evidence and briefs submitted by the parties. On March 23, 2005 the IAJ issued a proposed decision and order (PD&O) affirming the Department's distribution of Tharaldson's settlement proceeds, finding that, "[p]ursuant to RCW 51.24, the Department of Labor and Industries has the right to reimbursement from Mr. Tharaldson's third party recovery for the compensation and benefits provided for the injury for which the third party is liable to pay damages." CABR 45-46. The PD&O made a Finding of Fact (no. 3) that "On October 24, 2001, Mr. Tharaldson sustained an aggravation of his low back injury in an auto accident caused by a third party." CABR 45. The PD&O also made a Finding of Fact (no. 5) that "the Department received notice of a third party action under RCW 51.24 and continued to pay benefits, including medical costs, time-loss compensation, and permanent partial disability, under the industrial insurance claim." *Id.*

Tharaldson petitioned the full Board for review of its IAJ's decision. CABR 22-38. In his Petition For Review, Tharaldson disputed the PD&O's legal conclusion that the Department was entitled to a portion of his third party recovery, but he did not challenge any of the PD&O's Findings of Fact. *Id.* at 22-23.

In response to Tharaldson's petition, the Board issued a Decision and Order (D&O) rejecting Tharaldson's arguments even more forcefully than had the IAJ's PD&O. *See* CABR 1-6. Specifically, the Board relied on the language of the Third Party Statute (discussed in detail below) and noted that:

RCW 51.24 was enacted to allow injured workers to sue third parties for damages under certain circumstances, and to extend the Department's ability to recover from the third party proceeds for benefits paid by the Department. The purposes of the statutory scheme are to prevent double recovery and to protect the State Fund. *Mr. Tharaldson received a settlement from the third party for damages representing treatment, time-loss compensation, and permanent disability paid for entirely by the Department.*

CABR 2 (emphasis added).

In ruling against Tharaldson, the Board made the following

Finding of Fact (no. 4):

The Department received notice of the Third Party action under RCW 51.24. The Department paid full benefits to and on behalf of Mr. Tharaldson, including medical costs, time-loss compensation, and a permanent partial disability award. *The Department's expenditures to and on behalf of Mr. Tharaldson after October 24, 2001, were for a condition caused in part by the industrial injury and in part by the automobile accident.*

CABR 6 (emphasis added). This Finding of Fact was essentially identical to the PD&O's Findings of Fact Nos. 3 and 5, which Tharaldson had not challenged in his Petition For Review. The Board also concluded that "the

Department of Labor and Industries has the right to reimbursement from Mr. Tharaldson's third party recovery for the compensation and benefits provided for the low back injury." *Id.* (Conclusion of Law 2).

Tharaldson appealed the Board's D&O to Pierce County Superior Court. CP 1-2. Tharaldson filed a motion for summary judgment (CP 3-26), and the Department filed a cross motion for summary judgment (CP 27-77). Both parties made arguments similar to the arguments they had made at the Board.

The trial court granted Tharaldson's motion for summary judgment. CP 78-79. However, the trial court rejected Tharaldson's argument that the Department lacked authority under RCW 51.24.030 to recover any portion of a tort recovery where the tort recovery was for a subsequent, non-industrial injury. *See* Verbatim Report of Proceedings 21, 22. Judge Nelson indicated that she agreed with the Department that under RCW 51.24, "there is a right to reimbursement" when a subsequent tort aggravates the effects of an industrial injury and the injured worker receives industrial insurance benefits for the effects of both injuries.⁷ *Id.* at 21.

⁷ Judge Nelson cited *Cox v. Spangler*, 141 Wn.2d 431, 5 P.3d 1265 (2000) as the source for this conclusion. This is one of several cases that the Department cited to in support of its interpretation of RCW 51.24, and it is discussed in more detail *infra* at 31-32.

Judge Nelson apparently concluded that the burden of proof rested with the Department to prove its order asserting a right of recovery was correct (although she did not specifically state this), and that the Department had failed to meet its burden. *Id* at 22. She stated:

I don't believe what the Department has shown me in the summary judgment brief gives them any right to reimbursement. The 60/40 had to do with current symptoms. That could be how much pain. Before the accident, he had a pain of four; after the accident, he had a pain of ten. But that doesn't have anything to do with what treatment is necessary due to the industrial accident and what treatment is necessary due to the motor vehicle accident.

Verbatim Report of Proceedings 22. Judge Nelson concluded by saying:

So I think the Department has to give back the money that it took, not because of all the reasons that Mr. Rumbaugh has cited but because of the reason that, in this particular case, there is no foundation for proving that the Department paid for something that it wouldn't otherwise have had to pay for, nor is there anything that says he got a double recovery because it was a settlement and not a jury trial, as I understand it.

Id at 22-23.

The basis for the trial court's statement that the Department had merely proved that "before the accident, he had a pain of four; after the accident he had a pain of ten" is not entirely clear. *See id*. No witness testified that Mr. Tharaldson's pain complaints had increased from a "4" to a "10," let alone testified that it would be reasonable to apportion the effects of the industrial injury and the automobile accident in such a fashion. Judge Nelson apparently was referring to Dr. Hwang's testimony

that, from a subjective standpoint, Mr. Tharaldson's low back condition was 60 per cent related to the car accident and 40 per cent related to the industrial injury. CABR Hwang, pp. 8-9. Needless to say, this characterization of the evidence that the Department presented in defense of its order rests upon a serious misunderstanding of Dr. Hwang's testimony.

Judge Nelson's statement that there was no "double recovery" is puzzling, as the undisputed evidence demonstrated that Tharaldson received full benefits from both the Department and Sasco for the combined effects of his industrial injury and the subsequent automobile accident. *See, e.g.*, CABR Tharaldson II, pp. 5-6.

IV. SUMMARY OF THE ARGUMENT

The injured worker in this case is attempting to retain a double recovery of the nature prohibited by chapter 51.24 RCW (the Third Party Statute). Tharaldson recovered \$50,000 in a tort settlement from Sasco for a motor vehicle accident that took place only six weeks after an on-the-job injury for which he was receiving workers' compensation benefits under Title 51 RCW, the Industrial Insurance Act (the Act). The car accident exacerbated the injury covered by Tharaldson's workers' compensation claim, and the Department paid full benefits to Tharaldson and his medical providers for both the on-the-job injury and the motor vehicle accident. In

other words, the damages resulting from Tharaldson's car accident were duplicative of his workers' compensation benefits.

Tharaldson's tort lawsuit against Sasco was authorized by the Third Party Statute, which provides in pertinent part that:

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) (emphasis added). To replenish the Industrial Insurance funds for benefits paid that are also recovered in tort cases, and to ensure that workers do not receive a double recovery under such circumstances, the Third Party Statute provides the Department with a statutory right of reimbursement. *See* RCW 51.24.060 (setting out formula for distributing third party recovery).

In calculating the statutory distribution of Tharaldson's recovery under RCW 51.24.060, the Department excluded benefits it had paid that were not directly related to the automobile accident. It reduced its calculation of the "benefits paid" figure to reflect only a percentage of the total benefits Tharaldson received *after* his motor vehicle accident. The percent reduction was based on a figure provided by Tharaldson's own doctor. Throughout this appeal, Tharaldson has maintained that the Department should not receive any reimbursement whatsoever. Despite

the fact that he claimed and received tort damages that included damages associated with his industrial injury *and* his car accident, Tharaldson insisted that the Department's statutory reimbursement right should be extinguished and that he should be allowed to keep his double recovery in its entirety.

The Department and Board each rejected *all* of Tharaldson's arguments, recognizing that the arguments are contrary to statute, contrary to policy, and contrary to case law. The trial court *rejected* Mr. Tharaldson's argument that the Third Party Statute did not give the Department a right to reimbursement from a tort recovery when the tort recovery was for a subsequent, non-industrial injury.

The trial court nonetheless granted Tharaldson's motion for summary judgment, apparently concluding, contrary to the plain language of the Act, that the burden rested with the Department to present evidence establishing that its order was correct. RCW 51.24.060 states that a distribution order issued by the Department, which seeks a portion of a claimant's third party recovery, is subject to RCW 51.52. RCW 51.52.050 states that a party who appeals a Department order bears the burden of proving that Department orders are incorrect. The trial court did not cite any legal authority in support of its conclusion that the Department bore the burden of the proof. The Court went on to state, based on a distorted

characterization of Dr. Hwang's testimony, that the Department had not met its burden of proof.

Even if it is assumed that the Department bore the burden of proof, the Department met its burden, as it was the only party that presented any evidence regarding the extent to which Tharaldson's condition was due to his industrial injury as opposed to the subsequent motor vehicle accident. The Department's order asserting a right of recovery under the Third Party statute was correct, and should have been affirmed by the court.

V. STANDARD OF REVIEW AND GUIDES TO STATUTORY CONSTRUCTION

The questions presented in this case are all either pure questions of law, or mixed questions of law and fact. This Court reviews a superior court's decision on these issues *de novo*. *Adams v. Great Am. Ins. Co.*, 87 Wn. App. 883, 887, 942 P.2d 1087 (1997).

When an administrative agency is charged with application of a statute, the agency's interpretation of an ambiguous statute is accorded great weight. *City of Pasco v. Public Employment Relations Comm'n*, 119 Wn.2d 504, 507-08, 833 P.2d 381 (1992). Department and Board interpretations of the Act are entitled to great deference, and the courts "must accord substantial weight to the agenc[ies'] interpretation of the law." *Littlejohn Constr. Co. v. Dep't of Labor & Indus.*, 74 Wn. App.

420, 423, 873 P.2d 583 (1994) (deference given to Department interpretation).

VI. ARGUMENT

A. The Department Was Legally Required to Treat the Settlement from Tharaldson's Automobile Accident as a Third Party Recovery.

1. The plain language of RCW 51.24.030 supports the Department's right to a portion of Tharaldson's third party claim.

Tharaldson argues that because his recovery from Sasco was for “a *nonindustrial injury*” it is thus shielded from the Department’s statutory right of reimbursement. *See* CP 4, 5, 9-15. According to Tharaldson, because Sasco did not literally *cause* his on-the-job injury, the fact that it *exacerbated* that injury and that the Department paid benefits for *all* residuals of the injury, whether caused by the original injury or Sasco’s aggravation of the injury are of no moment, and the Department cannot touch his duplicative recovery from Sasco. CP 4-15. This argument was rejected by both the Board (which affirmed the Department’s order) and the superior court (which reversed the Department’s order on other grounds). CABR 6; Verbatim Report of Proceedings 21-22.

RCW 51.24.030 provides:

- (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.

- (2) In every action brought under this section, the plaintiff shall give notice to the department or self-insurer when the action is filed. The department or self-insurer may file a notice of statutory interest in recovery. When such notice has been filed by the department or self-insurer, the parties shall thereafter serve copies of all notices, motions, pleadings, and other process on the department or self-insurer. The department or self-insurer may then intervene as a party in the action to protect its statutory interest in recovery.
- (3) For the purposes of this chapter, "injury" shall include any physical or mental condition, disease, ailment or loss, including death, for which compensation and benefits are paid or payable under this title.
...
- (5) For the purposes of this chapter, "recovery" includes all damages except loss of consortium.

RCW 51.24.030.

The Department's order must be affirmed under the plain language of RCW 51.24.030. There is no doubt that "a third person, not in [Tharaldson's] same employ, [was] or [became] liable to pay damages on account of [Tharaldson's] injury for which benefits and compensation [were] provided under this title." The facts are that Tharaldson suffered an industrial injury which was aggravated in the ensuing motor vehicle accident. The driver of Sasco's vehicle is a "third person" for purposes of

RCW 51.24.030, and he became “liable to pay damages” on account of an injury, Tharaldson’s low back condition, “for which benefits and compensation” were provided under the Act. The Department paid for *all* damages resulting from the industrial injury and *all* damages resulting from the motor vehicle accident. Tharaldson’s action against Sasco falls neatly within the scope of RCW 51.24.030.

This result is supported by RCW 51.24.030(3), which provides that the word “injury” as used in the Third Party Statute “shall include any physical or mental condition, disease, ailment or loss, including death, *for which compensation and benefits are paid or payable under this title.*” (Emphasis added.) Again, the Department paid compensation and benefits for Tharaldson’s “physical . . . condition, . . . ailment or loss” resulting from his industrial injury *and* his motor vehicle accident. His recovery from Sasco logically falls squarely within the Third Party Statute.

The Board focused on RCW 51.24.030 when it upheld the Department’s order, stating:

We find no ambiguity in the statutory language. The statute does not require the third party claim to stem from the industrial injury itself, as Mr. Tharaldson maintains. The statute provides that when the third party recovery represents damages (paid) *on account of a worker’s injury for which benefits and compensation are provided under this title*, the injured worker can seek damages from the

third party and the Department then has the authority to assert a lien against that portion of the recovery.

CABR 2-3 (emphasis in original). The Board also emphasized that the Third Party Statute defined “injury” in different terms than the balance of the Industrial Insurance Act:

We note further that this statutory scheme contains a definition of “injury” that differs from the definition of “industrial injury.” For purposes of RCW 51.24.030, “injury” encompasses *anything that causes a physical or mental condition for which the Department pays benefits or compensation*. If the third party lien statute was intended to apply only to conditions arising out of the industrial injury, we can think of no legislative purpose for including an alternative definition of the word “injury.”

CABR 3 (emphasis added). The Department concurs.

As the Board observed, the Legislative history of RCW 51.24.030 supports the Department’s right to reimbursement from Tharaldson’s motor vehicle accident settlement proceeds. *See* CABR 3. The Board quoted from the Commentary on the 1984 proposed changes to the Third Party Statute (changes that were ultimately enacted by the Legislature):

Although compensation and benefits may be provided for pre-existing or intervening physical or mental conditions *not caused by the industrial injury but which may be due to the negligence or wrong of a ‘third party’, the section’s present language is being argued to exclude the [Third Party Statute’s] application to such situations. The proposed amendment will support the Department’s present policy to apply the Third Party chapter to such cause of action.*

...

In concert with the preceding amendment, 'injury' is defined to include all aspects of a claim for which the Act's compensation and benefits have been claimed and paid.

Charles Bush, Section by Section Commentary on Proposed Amendments to Ch. 51.24 RCW, The Ind. Ins. Act Third Party Chapter for the 1984 Legislative Session, § B & C (1984) (emphases added).

Tharaldson's argument thus seeks to accomplish the exact opposite of what the Legislature intended when it amended RCW 51.24.030 in 1984. Based on the language of the statute as well as the legislative history, it is apparent that the Legislature expected the Third Party Statute to apply to "injuries" for which workers' compensation benefits have been paid, whether or not such injuries pre- or *post*-date the injury that forms the basis of the actual Industrial Insurance claim. Application of the Third Party Statute to such injuries, of course, prevents claimants from receiving double recoveries and ensures that the workers' compensation funds are properly reimbursed.

- 2. Even assuming that the Third Party statute is ambiguous, the case law clearly demonstrates that the Department's right to a third party recovery is not limited to events that are the literal cause of an industrial injury.**

Tharaldson's argument that the Third Party Statute "simply cannot be utilized to claim a lien against a tort recovery which did not occur in the course of Tharaldson's employment" is not supported by the relevant

case law, including the cases that Tharaldson himself cited in his motion for summary judgment. CP 14. Every published decision that has dealt with this issue contradicts Tharaldson's argument. *See, e.g., Cox v. Spangler*, 141 Wn.2d 431, 443-445, 5 P.3d 1265 (2000); *Tallerday v. DeLong*, 68 Wn. App. 351, 842 P.2d 1023 (1993).

An excellent example of this principle is *Tallerday*, a case on which Tharaldson relied. 68 Wn. App. 351. *See* CP 11. In *Tallerday*, the Court upheld the Department's decision to apply the Third Party Statute not to an action against the original tortfeasor, but to a legal malpractice claim against the attorney who handled that tort case. 68 Wn. App. 351.

Tallerday was a consolidated appeal of two tort cases. *Id.* One case involved a plaintiff named Undsderfer, who sustained an industrial injury in a motor vehicle accident under the course of his employment, of which the Department paid benefits. *Id.* at 354. Undsderfer retained a law firm to pursue a third party claim. *Id.* The complaint as prepared by Undsderfer's counsel named only the driver (employee), not the driver's employer, as a defendant and the action against the employer was never timely pursued because the statute of limitations had expired. *Id.*

Undsderfer was awarded damages against the driver. *Id.* Because the driver's assets were limited to an insurance policy, Undsderfer accepted less than the award of damages in full satisfaction of the driver's

liability. *Id.* Undsderfer then brought a legal malpractice action against the law firm representing him, claiming as damages the difference between the damages awarded in the personal injury action and the insurance amount received from the employee. *Id.* Undsderfer's malpractice claim settled for the sum of \$52,000. *Id.*

The Department asserted its right of reimbursement on the settlement proceeds. *Id.* The Board ruled that Undsderfer's recovery was subject to the Department's reimbursement right. *Id.* Undsderfer appealed, claiming that the Department should have pursued the original tortfeasor rather than sought a portion of his tort recovery. *Id.* at 362. The Supreme Court found that this argument would allow Undsderfer to "retain a double recovery, contrary to the intent of the Act, while the Department expends time and resources to recover damage amounts from the initial tortfeasor from whom Undsderfer has in essence already recovered. *Id.* This would result in needless litigation and expense." *Id.*

The second case involved the plaintiff named Tallerday, who sustained an industrial injury when a safety railing he was leaning against broke, causing him to fall. *Id.* at 354. Tallerday retained an attorney to investigate and pursue any possible third party claims arising from the accident. *Id.* The attorney concluded that Tallerday did not have a valid third party claim. *Id.* Tallerday retained another attorney who concluded

that a valid third party claim could indeed have been pursued by Tallerday. *Id.* at 355.

Tallerday filed an action against his former attorney for malpractice. *Id.* The complaint was amended to add the State of Washington as an additional defendant, and a request was made for the court to determine whether the State, through the Department, had reimbursement right on any settlement or judgment proceeds. *Id.* Tallerday settled the malpractice claim for \$160,000. *Id.* By that time, Tallerday had received approximately \$137,132 in workers' compensation benefits. *Id.*

In August 1988, the Department issued an order distributing the third party recovery and asserting a right to reimbursement for workers' compensation benefits. *Id.* The Supreme Court found that under the third party statute's language, a worker's recovery against his or her attorney for negligence in prosecuting a third party claim constitutes a third party recovery. *Id.* The attorney under such circumstances is a party who "is or may become liable to pay damages on account of a worker's injury". *Id.* at 358 (citing RCW 51.24.030(1)); *see also O'Rourke v. Dep't of Labor & Indus.*, 57 Wn. App. 374, 380, 788 P.2d 17 (1990).

The *Tallerday* court found that its interpretation was supported by a “Fiscal Note” to the 1986 legislation which indicates the amendment was meant as a clarification:

The original tortfeasor whose negligence or wrong caused the industrial injury may not always be the entity from which recompense is obtained. Examples of this include legal malpractice or UIM cases. This amendment *clarifies* that the liable source for any action in recovery may bear the cost of the claim and allows the trust fund to recoup expenditures made to or on behalf of the worker with the exception of a UIM policy purchased by the worker.

Id at note 3 (citing Fiscal Note, S.H.B. 1873 (1986) (Emphasis supplied)).

The court found that prior to the amendment, the statute was ambiguous as to whether a worker’s recovery from someone other than the party causing the injury was subject to the Department’s reimbursement lien. *Id.* at 358. It held that “the 1986 amendment clarifies this ambiguity by making clear that a ‘third party’ can be anyone liable ‘on account of a worker’s injury . . .’ RCW 51.24.030(1).” *Id* at 359.

The Department’s right to seek reimbursement from third party recoveries not based on the event causing the workers’ compensation claim is also supported by *Cox v. Spangler*, 141 Wn.2d at 443-445. In *Cox*, as here, the plaintiff suffered an industrial injury, and later suffered a non-industrial injury that aggravated the effects of the first injury. *Id.* *Cox* was first injured in an on-the-job motor vehicle accident that had

nothing whatsoever to do with the defendant Spangler. *Id.* Spangler, instead, caused the *second*, non-industrial injury, when she rear-ended Cox six months after Cox's industrial injury. *Id.* at 433-434. Spangler attempted to introduce evidence showing that Cox had received industrial insurance benefits for the effects of the original injury. *Id.* The Supreme Court ruled that Spangler was *not* entitled to introduce evidence of Cox's receipt of workers' compensation benefits. *Id.* at 439-440.

The Supreme Court based this decision on the collateral source rule, *i.e.*, that "Spangler would have improperly benefited from" the introduction of evidence that Cox had received industrial insurance benefits. *Id.* "That is because the jury could have reduced Cox's damages by the amount of industrial insurance benefits Cox had received In that event, Spangler would have received a windfall." *Id.* at 440.

The *Cox* Court emphasized that Cox would not receive a double recovery if evidence of her workers' compensation claim were excluded:

Our decision is buttressed by our awareness that the Department would be entitled to claim a lien for the amount of benefits it paid to Cox against any recovery Cox obtained from Spangler. . . . *This would have had the effect of allowing Spangler to escape paying those damages while Cox would have to reimburse the Department from whatever damages she recovered from Spangler.* This is a circumstance the collateral source rule is designed to prevent.

Cox at 440, citing *Flanigan* (emphasis added).

Thus, although Tharaldson attempted to rely upon *Tallerday* to support his argument that the Department has no reimbursement right to a tort recovery unless the tort itself was an industrial injury, his reliance is misplaced. CP 11. Far from supporting this argument, this case actually demonstrates that the opposite is true. *Tallerday* allows the Department to seek reimbursement from a legal malpractice recovery. Furthermore, *Cox* strongly indicated that the Third Party Act would allow the Department to seek reimbursement in the event an industrial injury was aggravated by a subsequent motor vehicle accident. The cases confirm that, as explained above, the Department's right to reimbursement under the Third Party Statute is not limited to recoveries made against tortfeasors who caused the industrial injury. Tharaldson has not presented any *relevant* legal authority to the contrary.

3. The Department's assertion of a right to recovery in this case is consistent with the policies underlying the Third Party statute.

The policies underlying the Third Party Statute are straightforward and consistent with common sense. As the Supreme Court explained in *Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 422-426, 869 P.2d 14 (1994), there are two policies underlying RCW 51.24 authorization of a tort suit by an injured worker who is harmed by another's negligence:

First, it spreads responsibility for compensating injured employees and their beneficiaries to third parties who are legally and factually responsible for the injury. Because third parties are not part of the compromise underlying the Act, they are not entitled to immunity from civil actions. Second, it permits the employee to increase his or her compensation beyond the Act's limited benefits.

Id. at 424 (citations omitted). The Court also explained:

Allowing the Department to obtain reimbursement from the proceeds of a third party recovery likewise serves two roles, ensuring that:

(1) the accident and medical aid funds are not charged for damages caused by a third party and (2) the worker does not make a double recovery. In other words, the worker, under [the third party statute], cannot be paid compensation and benefits from the Department and yet retain the portion of damages which would include those same elements.

Id. at 425, quoting *Maxey v. Dep't of Labor & Indus.*, 114 Wn.2d 542, 549, 789 P.2d 75 (1990).

Tharaldson has not disputed that the Department paid full benefits for all the residuals of the industrial injury *and* the motor vehicle accident. Tharaldson reached a settlement in his third party lawsuit that provided him compensation for precisely those benefits the Department had already paid. CABR Tharaldson II, pp. 5-6. The Department applied the Third Party Statute to Tharaldson's third party recovery, although it reduced its own "benefits paid" figure to reflect the causal apportionment (60 per cent

car accident, 40 per cent industrial injury) to which Dr. Hwang testified. This meant changing the “benefits paid” figure from nearly \$40,000 to \$21,700, and resulted in a commensurate reduction in the Department’s reimbursement from Tharaldson’s recovery.

Tharaldson insists that the Department was entitled to reimbursement of exactly zero from his tort recovery. If the Department received no reimbursement, the Industrial Insurance accident and medical aid funds would bear the full costs of Tharaldson’s on-the-job injury and his car accident, a result which flies in the face of the policies related to the Third Party Statute. Extinguishing the Department’s statutory right to reimbursement from Tharaldson’s third party recovery would burden the Industrial Insurance Funds for an injury caused by a negligent third party, and unjustly enrich Tharaldson by providing him with the windfall of a double recovery. Nothing requires such a curious result.

B. Under the Plain Language of RCW 51.52.050, Tharaldson Bore the Burden of Proving that the Department’s Order that Asserted a Right to Reimbursement From His Third Party Claim was Incorrect.

Tharaldson argued, and the trial court apparently agreed, that the Department bore the initial burden of proof in his appeal. CP 15-20. Verbatim Report of Proceedings 21-22. However, the trial court’s conclusion is directly contrary to the law governing appeals before the

Board. RCW 51.24.060 provides that Department orders asserting a right to a portion of an injured worker's tort claim are subject to RCW 51.52.

RCW 51.52.050 provides that:

In an appeal before the board, the appellant shall have the burden of proceeding with the evidence to establish a prima facie case for the relief sought in such appeal: PROVIDED, That in an appeal from an order of the department that alleges willful misrepresentation, the department or self-insured employer shall initially introduce all evidence in its case in chief. Any such person aggrieved by the decision and order of the board may thereafter appeal to the superior court, as prescribed in this chapter.

RCW 51.52.050 (emphasis added).

This case is not one in which the Department “alleges willful misrepresentation.” Thus, RCW 51.52.050 required Tharaldson to prove the Department’s order incorrect.⁸ See *Jussila v. Dep’t of Labor & Indus.*, 59 Wn.2d 772, 780, 370 P.2d 582 (1962) (regarding industrial insurance appeals); see also *Young v. Dep’t of Labor & Indus.*, 81 Wn. App. 123, 127, 913 P.2d 402 (1996) (same).

⁸ Tharaldson’s only witness was himself, and his testimony in no way demonstrates error in the Department’s order. Thus, the Department did not even need to present a case to the Board. It could have simply rested after Tharaldson testified and had its order affirmed by virtue of Tharaldson’s failure to make a *prima facie* case. See also WAC 263-12-115 (“[i]n any [Board] appeal under . . . the Industrial Insurance Act, . . . the appealing party shall initially introduce all evidence in his or her case-in-chief except that in an appeal from an order of the department that alleges fraud the department or self-insured employer shall initially introduce all evidence in its case-in-chief”).

Nevertheless, Tharaldson argued, and the superior court apparently agreed, that the plain language of RCW 51.52.050 should be ignored, and that the Department bore the burden of proving its order correct. CP 15-20. In support of this notion, Tharaldson cited to a set of cases which stand for the proposition that the plaintiff bears the burden of proof in a suit when the plaintiff is either seeking damages or is seeking to impose a common law lien upon another party. CP 15-20.⁹

The essence of Tharaldson's burden of proof argument is that because the Department in this case is seeking a portion of a tort recovery, the Department should have the burden of proof as if it were a plaintiff claiming damages. *See* CP 16 (citing *Carstens*, 58 Wash. at 250-51 (1910); *Ang v. Martin*, 154 Wn.2d 477, 481-82, 114 P.3d 637 (2005); and Washington Pattern Jury Instruction 30.01.01)).

⁹ *See Carstens Packing v. Southern Pac. Co.*, 58 Wash. 239, 240, 252, 108 P. 613 (1910) (in tort case involving "loss and injuries to cattle, . . . if the nature and extent of the damages proven is such that the jury may reasonably infer therefrom that it was caused by the rough handling of the carrier's train, it seems to us that such proof would be sufficient to sustain a finding that the damage was caused by the carrier's negligence"); *Ang v. Martin*, 154 Wn.2d 477, 481-482, 114 P.3d 637 (2005) (in legal malpractice case, party alleging malpractice must prove all four elements of claim, *i.e.*, "1) The existence of an attorney-client relationship which gives rise to a duty of care on the part of the attorney to the client; (2) an act or omission by the attorney in breach of the duty of care; (3) damage to the client; and (4) proximate causation between the attorney's breach of the duty and the damage incurred," by a preponderance of evidence); *State v. Pike*, 118 Wn. 2d 585, 591, 826 P.2d 151 (1992) (in criminal case involving alleged theft from party whose only interest in property was mechanic's lien interest, "the State cannot merely assume the existence of a valid mechanic's lien, but must prove beyond a reasonable doubt that the stolen item was the property of another").

This argument rests upon a logical fallacy. The Department was not a party to Tharaldson's personal injury lawsuit. Nor was it a party claiming any damages. Tharaldson was the party who needed to prove damages in the tort case, not the Department. *See id.* None of the cases Tharaldson attempts to rely upon stand for the proposition that the Department has the initial burden of proving *anything* in an appeal arising under the Act. CP 15-20.

Tharaldson also argues that the Department ought to bear the burden of proof in this case based on a general rule that a party seeking to impose a common law "lien" against another's interests bears the burden of proof. *Id.* This argument is also without merit. The Department is not asserting a common law lien against Tharaldson. Rather, it is asserting its right to recovery pursuant to RCW 51.24.030, a statute that expressly grants the Department this right.

Unlike a party asserting a common law "lien", the Department has an "absolute right" to its share of a third party recovery under the Act. *See Maxey*, 114 Wn.2d at 545-549 (upholding Department's position in case where "[t]he Department claims an absolute right to reimbursement . . . [while] IRS contends that the Department only has a statutory lien in competition for priority with the IRS lien"). As noted above, RCW

51.24.060 reveals that appeals from Department orders asserting a right of recovery to tort damages are governed by RCW 51.52.

This right, as the *Maxey* Court explained, furthers the policies, protecting the industrial insurance funds and preventing double recovery, underlying the Third Party Statute:

[O]ur conclusion is consistent with the underlying purpose of RCW 51.24. The third party statute accomplishes two things. First, it makes it possible for the worker to recover full compensation from the party which is legally and in fact responsible for his injuries and consequent damages. Second, it permits the worker to receive the certain compensation and benefits of Industrial Insurance, but mandates reimbursement to the Department so that (1) the accident and medical funds are not charged for damages caused by a third party and (2) the worker does not make a double recovery. In other words, *the worker, under the statute, cannot be paid compensation and benefits from the Department and yet retain the portion of damages which would include those same elements*. To allow the IRS claim against the Department's reimbursement would amount to a double recovery. The worker has received compensation and benefits from the Department. He has recovered an equivalent amount from the third party. Permitting use of the reimbursement funds to pay the worker's creditors ahead of the Department is a double recovery not contemplated or authorized by the statute.

Maxey at 549 (emphasis added). *See also Rhoad v. McLean Trucking Co.*, 102 Wn.2d 422, 427, 686 P.2d 483 (1984) (Department's interest in third party recovery is not a lien claim, but is instead a "right of reimbursement") (emphasis added). Thus, the Department's, or more accurately the state accident and medical aid funds', right of

reimbursement is not equitable in nature, but is a statutory one. *Id.* “Equitable principles cannot be asserted to establish equitable relief in derogation of statutory mandates.” *Id.* (citing *Dep’t of Labor & Indus. v. Dillon*, 28 Wn. App. 853, 855, 626 P.2d 1004 (1981)). Therefore, any equitable argument fails. *Id.*

The fact that the Department possesses an “absolute right to reimbursement” from Tharaldson’s recovery, a right based on statute rather than common law, also renders irrelevant Tharaldson’s argument regarding whether the Department may claim reimbursement “based on equitable principles.” *See* CP 12-14. It is not equity, but a *statute*, that authorizes the Department to act as it did.

While irrelevant to his argument that the Department was required to prove its case before he proved his own, the cases that Tharaldson cites *are* relevant in one respect. As Tharaldson noted below, “[i]n the context of apportioning damages, the burden of proving the apportionment of damages related to two injuries falls on the party asserting the apportionment claim.” *Cox*, 141 Wn.2d at 443-445. CP 19. *Cox v. Spangler* was a personal injury case, and it did not decide the question of whether an injured worker or the Department would bear the burden of proof in an appeal from a Department order seeking a portion of a tort recovery. *Id.*

What *Cox* does demonstrate is that in Tharaldson's *tort* case, *i.e.*, the case that he brought against Sasco, Sasco would have been required to prove apportionment of damages had the case gone to trial. No such apportionment was ever made in that case, meaning that for the purposes of that case the injuries resulting from Tharaldson's workers' compensation claim and his motor vehicle accident were "indivisible," *see* CP 19-20, and Sasco was responsible for *all* damages resulting from *both* events. *See Cox*, 141 Wn.2d at 446, 447.

Contrary to Tharaldson's reasoning, this does not mean that the Department now bears the burden of proving that its order was correct. Rather, *Cox* stands for the proposition that the defendant in a *tort* case involving an industrial injury and a separate motor vehicle accident is responsible for apportioning damages between the two events. 141 Wn.2d at 446, 447. Failing this, the defendant is responsible for the entire amount of damages, *including workers' compensation benefits*. Under such circumstances, the Department is entitled to reimbursement "for the amount of benefits it paid" to the plaintiff "against any recovery" from the defendant.

Cox did not shift the burden away from Tharaldson in the current appeal. *Id.* Rather, *Cox* shows that the Department acted properly in this case. *Id.* Because Sasco did not apportion damages between Tharaldson's

industrial injury and his motor vehicle accident, it was responsible to pay (and did pay) a settlement that included damages from both occurrences. Once such a settlement was reached, the Department was entitled to seek reimbursement “for the amount of benefits it paid” to Tharaldson. That is what the Department did, and the Board did not err in upholding the Department’s action.

The trial court apparently concluded that the Department bore the burden of proof in this case. Verbatim Report of Proceedings 22. The court did not actually state that the Department bore the burden of proof. However, the court granted Tharaldson’s summary judgment motion based on its conclusion that the Department had not presented adequate evidence to lay a “foundation” showing that its order was correct. Verbatim Report of Proceedings 21-22. The court’s statement would not make sense unless one assumes that the court found that the burden of proof lay with the Department. If the burden of proof lay with Tharaldson, the Department would not be required to lay any “foundation” showing that its order was correct. The court did not explain why the burden of proof lay with the Department given the plain language of RCW 51.52.050 (which places the burden of proof on an appealing party) nor did the court comment upon any of Tharaldson’s various arguments in this regard. *Id.* Indeed, the court failed to cite *any* legal authority of any sort

to support its apparent conclusion that the Department bore the burden of proof. *Id.*

Given that the plain language of the Act put the burden of proof on Tharaldson to show that the Department's order was incorrect, the court's apparent ruling that the Department bore the burden of proof was incorrect. *Compare* RCW 51.52.050 *with* CP 21-22. If this Court concludes that the burden of proof rested with Tharaldson, then the Department's decision in this case must be affirmed, because the Department was the only party to present *any* evidence on the issue of how damages should be apportioned between the industrial insurance claim and the third party claim.

C. Assuming the Department Bore the Burden of Proving that its Order was Correct, it Met this Burden, Because the Undisputed Medical Testimony is that the Claimant's Disability and Need for Treatment was 60 Percent Due to the Car Accident and 40 Percent Due to the Industrial Injury.

Even if the Department bore some burden of proof with respect to the distribution order, it met that burden with the testimony of Dr. Hwang. Dr. Hwang apportioned the costs associated with Tharaldson's industrial injury and his car accident at 40 per cent and 60 per cent, respectively. CABR Hwang, pp. 6-9, 16, 18, 21, 25. This opinion was given with "reasonable medical probability," and is unrebutted. *Id.* at 15, 18. The only other medical expert to testify, Dr. Brack, stated that the industrial

injury and the car accident were both responsible for Mr. Tharaldson's condition, but he did not express any opinion that apportioned causation between the two injuries. CABR Brack, pp. 13-14

Tharaldson attacked Dr. Hwang's testimony on two grounds, neither of which has merit. First, Tharaldson argued that Dr. Hwang's opinion was not supported by any objective findings, and that his opinion was therefore of no evidentiary value whatsoever. CP 5. Second, he argued that the Department was required to prove that there was an increase in the dollar amount of his industrial insurance benefits as a result of the car accident, and that he would have received the same industrial insurance benefits even if the car accident had never occurred. CP 11-19.

Tharaldson's argument that Dr. Hwang's opinion regarding the proper apportionment between the two claims was purely subjective was based on a distortion of Dr. Hwang's testimony. *Compare* CP 5 with CABR Hwang 9-15. If Dr. Hwang's testimony is viewed in its entirety, it is apparent that his opinion regarding the relative contribution of the industrial injury and the automobile accident was not based on purely subjective statements. CABR Hwang 6-9, 16, 18-21, 25. Rather, Dr. Hwang's opinion was based on consideration of all of the information in the file, including a detailed clinical examination of Tharaldson and Dr.

Hwang's review of the medical records (including radiographic studies).

Id.

It should also be noted that when Dr. Hwang referenced a change in Tharaldson's symptoms and used that as a basis for apportioning causation, he was not simply relying on Tharaldson's statement that he had an increase in his overall pain levels. *Id.* Rather, Dr. Hwang testified that Mr. Tharaldson's first injury caused "back pain into the right leg" only, while the second injury caused him to develop radiating pain into both the right and left legs. *Id.* at 18-21. The industrial injury resulted in radiating pain extending down to the knees, while the car accident caused the pain to radiate down into the feet. *Id.* Dr. Hwang explained that Tharaldson suffered from radiculopathy, which refers to pain in the extremities which results from impingement of a nerve in the lumbar spine. *Id.* Dr. Hwang also noted that an MRI performed after both the industrial injury and the car accident revealed findings consistent with Tharaldson's bilateral, radicular pain complaints. *Id.*¹⁰ To the extent that Dr. Hwang relied upon a change in Tharaldson's subjective complaints when he formed his opinion regarding causation, he relied upon subjective

¹⁰ No MRI was performed after the industrial injury but before the motor vehicle accident, so Dr. Hwang acknowledged that it was impossible to say with certainty exactly which of the findings on the MRI were due to one injury as opposed to the other. *Id.*

complaints which were corroborated by and consistent with Tharaldson's objective findings. *Id.*

The trial court apparently agreed with Tharaldson's argument that Dr. Hwang's opinion regarding apportionment was based on purely subjective considerations, and that his opinion was thus insufficient as a matter of law. Verbatim Report of Proceedings 22. Indeed, the trial court characterized the evidence the Department offered in defense of its order in an even more distorted fashion than Tharaldson did, concluding that the Department had merely demonstrated that Tharaldson's pain increased from "4" to a "10" following the motor vehicle accident. *Id.*

Dr. Hwang did not testify that Tharaldson's pain complaints increased from a "4" to a "10" following the motor vehicle accident, let alone rely on such a complaint as the sole basis for his opinion regarding apportionment. Dr. Hwang's opinion regarding the relative contribution of the two injuries was based upon a review of the medical records, a detailed clinical examination of Tharaldson, and the fact that Tharaldson's radicular complaints changed significantly following the motor vehicle accident. CABR Hwang 6-9, 16, 18-21, 25. To the extent that Dr. Hwang relied on Tharaldson's pain complaints in forming this opinion, he did not simply note an overall increase in Tharaldson's pain levels. *Id.* Rather, he noted that Tharaldson had bilateral radicular complaints after the motor

vehicle accident, where the radicular complaint was only present in the right leg following the industrial injury. *Id.*

Tharaldson also argues that the Department had the burden of proving that it paid Tharaldson *more* industrial insurance benefits than it otherwise would have as a result of the car accident. CP 11-19. Under Tharaldson's theory, it is not sufficient to prove that a claimant's disability resulted from the combined effects of an industrial injury and the third party claim. Rather, the Department must show that it paid for some treatment or provided some benefits that it would not have provided at all but for the subsequent, non-industrial claim.

While it is true that no witness in this case specifically testified that Tharaldson required more medical treatment or suffered more disability than would have been the case had the motor vehicle never occurred, it should also be noted that no witness testified that Tharaldson's need for treatment and disability would have been the *same* had the injury never occurred. All of the witnesses agreed that Tharaldson's need for treatment and his disability resulted from the combined effects of the industrial injury and the motor vehicle accident, and that it would have been *impossible* for a doctor to treat the effects of the industrial injury without also treating the effects of the car accident. CABR Hwang, pp. 6-9, 16, 18-21, 25; Brack, pp 13-14. Under the circumstances of this case, it is

difficult to see how any witness could express *any* opinion with reasonable medical certainty regarding whether or not Tharaldson required more treatment, or suffered more disability than would have taken place had the car accident not occurred.

Tharaldson's argument that the Department must prove that there was an increase in total claim costs as a result of the motor vehicle accident would result in him receiving a windfall. In this case, it is essentially undisputed that Tharaldson's industrial injury resulted in 40 per cent of his disability, while the motor vehicle accident resulted in 60 per cent of his disability. It is also undisputed that Tharaldson received full benefits from the Department (under his industrial insurance claim) and from Sasco (under his tort claim). Allowing Tharaldson to keep 100 per cent of his industrial insurance benefits and his tort damages, when each injury was only partially responsible for his overall disability, would result, by definition, in a windfall. In contrast, allowing the Department to recover a *portion* of its claim costs equal to the relative contribution of the industrial injury and the motor vehicle accident prevents this windfall, without granting the Department any unjust enrichment.

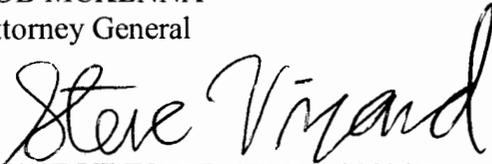
VII. CONCLUSION

For the reasons discussed above, the Department respectfully requests that this Court reverse the Superior Court's decision, and direct it

to grant the Department's motion for summary judgment, and deny
Tharaldson's motion.

RESPECTFULLY SUBMITTED this 27 day of November,
2006.

ROB MCKENNA
Attorney General

A handwritten signature in cursive script that reads "Steve Vinyard". The signature is written in black ink and is positioned above the typed name and contact information.

STEVE VINYARD, WSBA #29737
Assistant Attorney General
PO Box 40121
Olympia, Washington 98504-0121
Phone: (360) 586-7707

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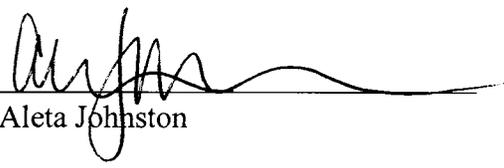
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I certify that I served a copy of this document on all parties or their
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I certify under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct.

DATED this 27th day of November, 2006, at Tumwater,
Washington.


Aleta Johnston