

No. 35052-I-II

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

DEPARTMENT OF LABOR & INDUSTRIES,

Appellant,

v.

DARRIN R. THARALDSON,

Respondent.

07 JAN 25 PM 1:53
COURT OF APPEALS
DIVISION II
BY _____
STATE DEPARTMENT OF LABOR & INDUSTRIES

BRIEF OF RESPONDENT

Stanley J. Rumbaugh
WSBA No. 8980
RUMBAUGH RIDEOUT BARNETT & ADKINS
820 A Street, Suite 220
P.O. Box 1156
Tacoma, WA 98402
253.756.0333

TABLE OF CONTENTS

I. STATEMENT OF THE CASE 1

II. RESPONDENT'S POSITION ON ASSIGNMENT OF ERROR 5

III. LEGAL ANALYSIS ISSUES RELATED TO ASSIGNMENT OF ERROR 5

(1) The standard of review of the trial court's order on summary judgment is *de novo*. No deference should be shown to the DLI's interpretation of the lien statutes found at RCW 51.24, et seq., because in the context of this case, the statutes are unambiguous. 6

(2) The evidence in the record supports the trial court's decision that there was no increase in claim cost to the DLI due to the MVA. Therefore, assertion of reimbursement rights pursuant to RCW 51.24.060 was unsupported even if the statutory basis for that assertion existed. 8

(i) Proximate Cause 8

(ii) Burden of Proof of Apportionment 11

(3) The DLI's reliance on RCW 51.24.030 and RCW 51.24.060 in attempting to extend reimbursement rights to a later, *nonindustrial* tort recovery is without precedent or statutory basis. 13

(i) The relevant statutes simply do not state that subsequent, *nonindustrial* tort recoveries are subject to the DLI's reimbursement claims. 14

(ii) Legislative history cited by the DLI is misplaced and irrelevant. 16

(iii) The Department cannot claim reimbursement based on equitable principles. 18

(4)	The DLI's order requiring "reimbursement" to the DLI from Tharaldson's <i>non</i> industrial tort recovery is an unconstitutional taking of property in violation of the substantive due process protections granted by the Washington State Constitution, Article I, §3, as well as the 5 th Amendment and §1 of the 14 th Amendment to the United States Constitution.	19
	(i) Negligence claims and recoveries are property, and Tharaldson's was taken.	20
	(ii) Application of RCW 51.24.060 violates all three prongs of the substantive due process test, and constitutes an unconstitutional taking of his personal property in this case	21
(5)	The DLI should be ordered to pay Tharaldson's reasonable attorney's fees incurred in responding to this appeal.	24
IV.	CONCLUSION	25

TABLE OF AUTHORITIES

Table of Cases

Ames v. DLI

176 Wash. 509, 30 P.2d 239 (1934) 19

Bullo v. Fife

50 Wn. App. 602, 609, 749, P.2d 749 (1988). 14

Cockle v. DLI

142 Wn.2d 801, 812, 16 P.3d 583 (2001) 7, 8, 13

Cox v. Spangler

141 Wn.2d 431, 443-45, 5 P.3d 1265 (2000) 12

Dep't of Labor & Indus. v. Dillon

28 Wn. App. 853, 626 P.3d 1004 (1981) 18

Dioxin Ctr. v. Pollution Board

131 Wn.2d 345, 356-57; 932 P.2d 158 (1997) 17

DLI v. American Adventures

59 Wn. App. 790, 792; 801 P.2d 1032 (1990) 7

Duke v. Boyd

133 Wn.2d 80, 86-87; 942 P.2d 351 (1997) 17

Flanigan v. DLI

123 Wn.2d 418, 425; 869 P.2d 14 (1994) 9, 15, 23

<u>Flanigan v. DLI</u>	
123 Wn. 2d at 423	23
<u>Gersema v. Allstate Ins. Co.</u>	
127 Wn. App. 687, 692 112 P.3d 552 (2005) . . .	16, 20, 22, 23
<u>Haslund v. Seattle</u>	
86 Wn. 2n 607, 620; 547 P.2d 1221 (1976)	11, 12
<u>Hayes v. Wieber Enterprises</u>	
105 Wn. App. 611, 20 P.3d 496 (2001)	5
<u>Impoundment of Chev. Truck</u>	
148 Wn. 2d 145, 157, 60 P.3d 53 (2002)	7
<u>In re Estate of Foster</u>	
55 Wn. App. 545, 551-52; 779 P.2d 272 (1989)	18
<u>In re: Newton</u>	
BIIA Dec., Dckt. No. 00 13742 (2001) (significant decision)	9, 10, 15
<u>Kingery v. DLI</u>	
132 Wn. 2d 162, 173, 937 p.2d 505 (1997)	19
<u>Mandery v. Costco Wholesale Corp.</u>	
126 Wn. App. 851, 855-56, 110 P.3d 778 (2005)	22
<u>Marriage of Brown</u>	
100 Wn.2d 729, 675 P.2d 1207 (1984)	21

<u>McCarthy v. Dep't of Social & Health Services</u>	
110 Wn.2d 812, 759 P.2d 351 (1988).	18
<u>McLaughlin v. Cooke</u>	
112 Wn. 2d 829, 840, 774 P.2d 1171 (1989) citing WPI 30.18	9
<u>Orion Corp. v. Seattle</u>	
109 Wn. 2d 621; 747 P.2d 1062 (1987)	23
<u>Phennah v. Whalen</u>	
28 Wn. App. 19, 26, 27, 621 P.2d 1304 (1980).	12
<u>Presbytery of Seattle v. King County</u>	
114 Wn.2d 320, 330; 787 P.2d 907 (1990)	20, 23
<u>Rivett v. City of Tacoma</u>	
123 Wn.2d 573, 581; 870 P.2d 299 (1994)	23
<u>Rodriguez v. DLI</u>	
85 Wn. 2d 849; 540 P.2d 1359 (1975)	19
<u>Rossner v. Bellevue</u>	
116 Wn. 2d 342, 350; 804 P.2d 24 (1991)	17
<u>Schmidt v. Coogan</u>	
135 Wn. App. 605, 610, 145 P. 3d 1216 (2006).	15
<u>Serrillo v. Esparza</u>	
158 Wn. 2d 194, 142 P.3d 155 (2006)	6

<u>State v. Anderson</u>	
141 Wn.2d 537, 562-63; 5 P.3d 1247 (2000)	17
<u>State v. Bradshaw</u>	
152 Wn.2d 528, 537; 98 P.3d 1190 (2004)	17
<u>State v. Pike</u>	
118 Wn.2d 585, 591, 826 P.2d 151 (1992)	13
<u>Tallerday v. DeLong</u>	
68 Wn. App. 351, 357, 842 P.2d 1023 (1993).	15
<u>Thiringer v. American Motors Ins. Co.</u>	
91 Wn.2d 215, 588 P.2d 191 (1978)	19
<u>Wn. St. Physicians Ins. Exchange v. Fisons</u>	
112 Wn.2d 299, 263; 858 P.2d 1054 (1993)	17
<u>Willoughby v. Dep't of Labor & Indus.</u>	
147 Wn.2d 725, 732-34, 57 P.3d 611 (2002)	20
<u>Willoughby v. Dep't of Labor & Indus.</u>	
147 Wn.2d 736-37, 57 P.3d 611 (2002)	22
<u>Woody's Olympic Lumber, Inc. v. Roney</u>	
9 Wn. App. 626, 634, 513 P.2d 849 (1973)	21

Rules

RCW 49.46.130(2)(g)(ii) 6, 12

RCW 51.04.010 8, 14

RCW 51.12.010 13

RCW 51.24.030 13

RCW 51.24.030(3) 14

RCW 51.24.060 5, 8, 9, 13, 17, 21, 22, 23, 25

RCW 51.24, et seq., 6, 13, 16

RCW 51.32.010 14

RCW 51.32.040(3) 22

RCW 51.52.050 9, 11

RCW 51.52.130 24

I. STATEMENT OF THE CASE

Darrin R. Tharaldson, Respondent, injured his low back in a fall at work on September 17, 2001. Claim No. Y553035 was filed with, and accepted by the Department of Labor and Industries ("DLI"). ABR P5⁽¹⁾.

Respondent had a history of at least four prior work related back injuries, dating to 1985. ABR at 11:39-3:1.

Immediately following his September 17, 2001 injury Tharaldson sought medical treatment with Dr. Haven Silver. He was suffering from extreme low back pain and radicular symptoms extending into both his buttocks and down the back of his right thigh to the knee. ABR Test. Tharaldson at 7:3-9; Dep. of Hwang at 7:12-17. Dr. Silver treated Tharaldson with medication and recommended diagnostic testing following the industrial injury. This treatment regimen continued through the time of a later, *non*industrial motor vehicle accident (MVA) which occurred October 24, 2001. ABR Test. of Tharaldson at 8:21-35. No claim with the DLI was, or could be filed related to the MVA.

Dr. Silver referred Tharaldson to Dr. Chan Hwang for

¹ The Board of Industrial Insurance Appeals Record will be cited as "ABR" (Appeals Board Record). All cited Board testimony occurred on December 16, 2001 unless otherwise specifically noted.

specialized low back care and pain management. Dep. Hwang at 24:2-6. Dr. Hwang testified on direct examination that the purpose of the referral from Dr. Silver was to treat both the effects of the industrial injury and the later MVA, and to attempt to apportion the injuries between the two events. Dep. Hwang at 6:11-22. On cross examination, Dr. Hwang conceded that the referral of Tharaldson was made by Dr. Silver eight (8) days before the MVA occurred. The referral was made not to apportion the effect of each injury, but solely to address the unabated painful and disabling effect of Tharaldson's industrial back injury. Dep. Hwang at 24:2-20.

Dr. Hwang acknowledged that Tharaldson had been disabled from work due to low back symptoms since the September 17, 2001 industrial injury, and no projected return to work date had been established prior to the October 24, 2001 MVA. Dep. Hwang at 25:22-26. Dr. Hwang testified it was not possible to state that, had the MVA had not occurred, Tharaldson would not have required the low back surgery ultimately performed by Dr. Brack. Dep. Hwang at 28:19-23. Dr. Hwang also testified there was no way of telling on any objective basis when Tharaldson might have returned to work from the industrial injury if the car crash had not occurred. Dep. of Hwang at 28:24-29:5. Dr. Hwang based his opinion regarding apportionment

of Tharaldson's low back symptoms as being 40% related to the industrial injury and 60% related to the MVA on Dr. Hwang's assessment of Tharaldson's subjective self report, as follows:

Q: In your November - or excuse me - 14, 2001 report, you concluded that, "From a subjective point of view, using the patient's self report, I would state that approximately 40% of his current symptoms can be attributed to this work - related aggravation of his low back complaints which occurred on September 17, 2001. Approximately 60% may be attributed to the aggravation of the motor vehicle collision which occurred on October 24, 2001."

Did I read that correctly?

A: Yes, you did.

Q: In making that determination, were you basically relying on the fact or were you basically referencing the fact that Mr. Tharaldson's radicular complaints extended down into his feet after the October 24, 2001 car crash?

A: Yes.

Dep. Hwang at 29:6-20.

Dr. Steven Brack performed low back surgery for Tharaldson on February 27, 2002. Dep. Brack at 14:15-25. In comparing his initial note of the Tharaldson examination on January 22, 2002 with Dr. Silver's post industrial injury - pre MVA records, Dr. Brack agreed that Tharaldson's self rating of his pain levels (between 7 to 9 on a 10 scale) were about the same at both times. Dep. Brack at 24:6-19.

Dr. Brack agreed that, since Tharaldson had radiating leg pain after the industrial injury, there was no way of telling whether or not the low back surgery would have been necessary had the MVA not occurred. Dep. Brack at 28:8-16. Dr. Brack confirms that there was no way of determining whether Tharaldson would have returned to work after the industrial injury any sooner had the automobile accident not occurred. *Id.* at 29:15-21; 31:5-9.

The DLI hangs its case upon the assertion that Tharaldson would receive a "double recovery" for medical bills and wage loss if his *non*industrial tort recovery were not subject to the DLI's reimbursement claim. (See, e.g. App. Br., Page 11 §10.) Fortunately for Tharaldson, the frequency of the DLI's "double recovery" refrain in its brief can not create evidence of the double recovery in a record wholly devoid of such evidence.

In negotiating and litigating Tharaldson's motor vehicle claim a variety of damage elements, including wage loss and medical billings, were alleged though not proven. Test. Tharaldson (January 11, 2005) at 5:5-45. The sole payment from the Hartford Insurance Company in agreed upon resolution of the MVA claim was an undifferentiated payment of \$50,000. The settlement did not itemize, and the Board Record is barren of evidence detailing what, if any,

damage elements were included in the tort recovery. Test. Tharaldson at 16:47-17:15. Curiously absent from Appellant's Brief is any mention of general damages in Tharaldson's tort recovery.²

II. RESPONDENT'S POSITION ON ASSIGNMENT OF ERROR

The trial court was correct when it granted Respondent Tharaldson's Motion for summary judgment, ruling that no issue of material fact existed as to the invalidity of the Board of Industrial Insurance Appeals (BIIA) Order of August 22, 2005. The BIIA Order affirmed the (DLI) Order asserting reimbursement rights pursuant to RCW 51.24.060 against Tharaldson's non-work related tort recovery. The trial court correctly concluded that the record contained no evidence that Tharaldson's benefits paid by the DLI under his claim was increased by the effect of his later car crash.

III. LEGAL ANALYSIS ISSUES RELATED TO ASSIGNMENT OF ERROR

- (1) **The standard of review of the trial court's order on summary judgment is *de novo*. No deference should be shown to the DLI's interpretation of the**

² The DLI also fails to grasp the law regarding medical expense recovery in tort claims. At App. Br., Page 10 §C the DLI alleges that the actual medical provider billings referenced in the tort claim were "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." It is the reasonableness of the cost necessary medical services, not the capitated payment accepted by any particular provider which is the measure of medical expenses in any tort litigation. See Hayes v. Wieber Enterprises, 105 Wn. App. 611; 20 P.3d 496 (2001).

lien statutes found at RCW 51.24, et seq., because in the context of this case, the statutes are unambiguous.

The standard of review of summary judgment orders which are dependent upon determining the meaning of the statute is explained in Serrillo v. Esparza, 158 Wn. 2d 194, 142 P.3d 155 (2006). In Serrillo, the Supreme Court rejected the DLI's interpretation of the overtime pay statute, RCW 49.46.130(2)(g)(ii), giving no deference to the agency's interpretation. The court ruled:

In order to ascertain the meaning of [a statute], we look first to its language. If the language is not ambiguous, we give effect to its plain meaning. If a statute is clear on its face, its meaning is to be derived from the language of the statute alone. If a statute is ambiguous, we employ tools of statutory construction to ascertain its meaning. A statute is ambiguous if it is susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable. This court does not subject an unambiguous statute to statutory construction and has declined to add language to an unambiguous statute even if it believed the legislature intended something else but did not adequately express it. Courts may not read into a statute matters that are not in it and may not create legislation under the guise of interpreting a statute. Serrillo (*supra*) P. 158 (citations omitted).

As will be discussed in Section 3 (*infra*), the Department's argument that the scope of their lien extends to *non*industrially related torts for which no workers compensation claim was or could be filed

reads into the relevant lien statute language that is not there, and misinterprets language that is there.

The Department's argument for deference to its interpretation of the statute should be unavailing. Courts deny deference when an agency's decision exceeds its statutory authority, and "[T]he Department's authority does not extend beyond the statute." DLI v. American Adventures, 59 Wn. App. 790, 792; 801 P.2d 1032 (1990) (citation omitted). See also Impoundment of Chev. Truck, 148 Wn. 2d 145, 157, 60 P.3d 53 (2002) (Courts do not "defer to an agency the power to determine the scope of its own authority.").

See also Cockle v. DLI, 142 Wn. 2d 801, 812, 16 P.3d 583 (2001).

While we may defer to an agency's interpretation when that will help the court to achieve a proper understanding of the statute, such interpretation is not binding on us. Indeed, we have deemed such deference inappropriate when the agency's interpretation conflicts with the statutory mandate. Both history and uncontradicted authority make clear that it is the province and duty of the judicial branch to say what the law is and to determine the purpose and meaning of statutes[.] (citations omitted)

In the event this court perceives ambiguity in the lien statute, settled authority requires that where the Industrial Insurance Act ("IIA") is ambiguous, ambiguity must be resolved in the worker's favor:

[T]he guiding principle in construing provisions of the Industrial Insurance Act is that the Act is remedial in nature and is to be liberally construed in order to achieve its purpose of providing compensation to all covered workers injured in their employment, with doubts resolved in favor of the worker. Cockle, (supra), P. 811 (citations omitted). See also RCW 51.04.010.

(2) **The evidence in the record supports the trial court's decision that there was no increase in claim cost to the DLI due to the MVA. Therefore, assertion of reimbursement rights pursuant to RCW 51.24.060 was unsupported even if the statutory basis for that assertion existed.**

(i) Proximate Cause.

Appellants make the extraordinary statement that: "Tharaldson has not disputed that the Department paid full benefits for the residuals of the industrial injury and the motor vehicle accident". Br. App. P. 33. This assertion is simply not true. Most of the record is directed to this very dispute. Appellant, again ignoring any analysis of Tharaldson's general damage recovery in his MVA claim, states that "Tharaldson reached a settlement in his third party lawsuit that provided him compensation for precisely those benefits the Department had already paid" (*Id*). Life holds few universal truths, but a casualty insurance company's unbending resistance to paying for damages not caused by the negligence of their insured is one such truth. As a matter of fundamental tort law, an insurer is not legally obligated to pay damages which were not proximately caused by their

insured's negligence. McLaughlin v. Cooke, 112 Wn. 2d 829, 840, 774 P.2d 1171 (1989) citing WPI 30.18.

In light of the guiding principle of proximate cause, the MVA carrier's payment of Respondent's damages extended only to those damages proximately resulting from the MVA, and excluded any obligation to pay damages stemming from Tharaldson's industrial injury. Assuming, *arguendo*, the DLI is correct in interpreting RCW 51.52.050 to require Tharaldson to prove a negative - that the tort recovery did not encompass any damages resulting from the industrial injury - he has done so. The law visits no requirement on the MVA insurer to pay unrelated, preexisting damages, and there is no evidence it did so.

Under its theory of how RCW 51.24.060 operates, the Department must show that the third party tortfeasor proximately caused it to pay benefits it otherwise would not have paid. In re: Newton, BIIA Dec., Dckt. No. 00 13742 (2001) (significant decision); see *also*, Flanigan v. DLI, 123 Wn.2d 418, 425; 869 P.2d 14 (1994) (the purpose of allowing the Department to assert a lien on a third party recovery is to ensure that the "medical funds are not charged for **damages caused by a third party**"). (emphasis added)

In Newton, the claimant suffered an industrial injury, and filed a DLI claim. In the course of her treatment, a physician misdiagnosed her injury, resulting in the need for additional treatment. The Department paid her benefits for the treatment of her industrial injury and the treatment necessitated by the misdiagnosis. The Department asserted a lien on the claimant's subsequent third party medical malpractice settlement for both the benefits paid because of her original industrial injury and the benefits paid because of the misdiagnosis of that industrial injury. The issue before the Board was which of the pre and post malpractice benefits should be reimbursed. *Id.* at 4. The Board held that the right to reimbursement is limited to benefits paid that were caused by the third party tortfeasor and would not have been paid had the injury caused by the third party not occurred. The Board ruled:

Finally, we agree with the industrial appeals judge that the evidence presented by the parties supports a finding that benefits and compensation were provided on account of the medical malpractice for which the third party recovery was made, **beyond the benefits and compensation that would have been provided had the malpractice not occurred.**

Id. at 7 (emphasis added).

The Department did not meet its burden on the proximate cause issue here, and Tharaldson's evidence is directly to the

In Newton, the claimant suffered an industrial injury, and filed a DLI claim. In the course of her treatment, a physician misdiagnosed her injury, resulting in the need for additional treatment. The Department paid her benefits for the treatment of her industrial injury and the treatment necessitated by the misdiagnosis. The Department asserted a lien on the claimant's subsequent third party medical malpractice settlement for both the benefits paid because of her original industrial injury and the benefits paid because of the misdiagnosis of that industrial injury. The issue before the Board was which of the pre and post malpractice benefits should be reimbursed. *Id.* at 4. The Board held that the right to reimbursement is limited to benefits paid that were caused by the third party tortfeasor and would not have been paid had the injury caused by the third party not occurred. The Board ruled:

Finally, we agree with the industrial appeals judge that the evidence presented by the parties supports a finding that benefits and compensation were provided on account of the medical malpractice for which the third party recovery was made, **beyond the benefits and compensation that would have been provided had the malpractice not occurred.**

Id. at 7 (emphasis added).

The Department did not meet its burden on the proximate cause issue here, and Tharaldson's evidence is directly to the

contrary. There is no competent evidence that the third party tortfeasor in the *nonindustrial* MVA proximately caused the Department to pay benefits it otherwise would not have paid.

(ii) Burden of Proof of Apportionment.

All health care providers testified that they could not state, more probably than not, that any of the DLI's claim-related costs were effected by Tharaldson's MVA injuries. Tharaldson has therefore made a *prima facie* case that the order under appeal is incorrect. Whether Tharaldson has the primary burden of proof here, or as the party claiming apportionment the DLI has the burden of proving it, matters little to the resolution of this case.

If the DLI is to succeed in its novel view that RCW 51.24.050 established lien rights which can be asserted against Tharaldson's *nonindustrial* tort claim it must prove its exposure to pay benefits was increased by the effect of Tharaldson's MVA related injuries. There is no case law on point. No doubt this is because the DLI's fundamentally, highly dubious contention it has entitlement to lien the recovery from tort claims unrelated to the employment relationship has no basis in worker's compensation law. Mr. Tharaldson acknowledges he, like any litigant asserting an affirmative defense, carries the burden of proving that defense. See Haslund v. Seattle,

86 Wn. 2n 607, 620; 547 P.2d 1221 (1976). If the fact that the DLI paid no additional benefits due to his MVA is characterized as an affirmative defense, Tharaldson has carried his burden of proof. Conversely, the Department, as the party asserting the lien, bears the initial burden of establishing a *prima facie* factual case proving it can apportion some of the benefit costs in Tharaldson's claim to the MVA injuries.

In the context of apportioning damages, the burden of proving the apportionment of damages related to two separate injuries falls on the party asserting the apportionment claim. Cox v. Spangler, 141 Wn.2d 431, 443-45, 5 P.3d 1265 (2000). The long established rule is that . . . [W]hen the harm is indivisible as among successive tortfeasors, the defendants must bear the burden of proving allocation of the damages among themselves. Phennah v. Whalen, 28 Wn. App. 19, 26, 27, 621 P.2d 1304 (1980).

The rationale underlying this rule is that when successive tortfeasors cause an entirely innocent person harm, any hardship due to lack of evidence as to apportionment of the extent of the harm caused by a particular tortfeasor should not fall upon the innocent victim. Cox, 141 Wn.2d at 444.

Dr. Hwang's "60/40" apportionment was only related to

Tharaldson's subjective report of symptoms. This subjective attribution of claimant did not relate to, or address benefit costs to the DLI. No testimony from any witness supported the proposition that Mr. Tharaldson's low back surgery, time loss compensation benefits, or permanent partial disability benefits would not have been exactly the same notwithstanding the effects of the motor vehicle collision.

Statutory liens, including RCW 51.24.060, are *stricti juris*; one claiming the benefit of the lien must carry the burden of proving he has complied strictly with the provisions of the law that created it. State v. Pike, 118 Wn.2d 585, 591, 826 P.2d 151 (1992). The DLI is the party claiming a right to lien Mr. Tharaldson's third party recovery, so the DLI must establish the *prima facie* case of entitlement to assert a lien.³ The DLI has not carried the burden of proof of apportionment, and the Superior Court correctly reversed the BIIA on that basis.

- (3) **The DLI's reliance on RCW 51.24.030 and RCW 51.24.060 in attempting to extend reimbursement rights to a later, *nonindustrial* tort recovery is without precedent or statutory basis.**

While the trial court did not agree with Tharaldson's position that RCW 51.24, et seq. provides no statutory basis for asserting

³ This position is also further supported by the liberal construction rule, if any further support is needed. RCW 51.12.010; Cockle v. DLI, 142 Wn.2d 801, 811, 16 P.3d 583 (2001).

reimbursement rights against a non-industrial tort recovery, he believes this view erroneous. The trial court can be affirmed on any ground within the pleadings and record, even if the trial court did not rely on that ground in making its ruling Bullo v. Fife, 50 Wn. App. 602, 609, 749, P.2d 749 (1988).

- (i) The relevant statutes simply do not state that subsequent, nonindustrial tort recoveries are subject to the DLI's reimbursement claims.

The IIA abolished all civil causes of action for personal injuries *caused in the course of employment*. RCW 51.04.010 (emphasis added). An exception is made as to third parties not in the injured workers same employ. RCW 51.24.030(1). The Act strictly limits compensation to those people injured in the course of their employment. DLW 51.32.015.

“Benefits and compensation” are only “provided under this title” if the injury arises while the worker is in the course of his or her employment. RCW 51.32.010. Further, RCW 51.24.030(3) defines “injury” as “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). If benefits were not “payable” under the IIA, then the DLI has no right to a reimbursement lien since.

The DLI cites the Tallerday v. DeLong 68 Wn. App. 351, 842 P.2d 1023 (1993), in which a lien was allowed in a recovery obtained for legal malpractice, as authority that the DLI has lien rights against claims brought in *nonindustrially* related tort claims. In Tallerday, the recovery was based on an industrially related tort claim, for which a DLI claim was allowed. The damages recovered in the legal malpractice claim were only those which should have been recovered from the third party responsible for the industrial injury. This is consistent with the established “case within a case” requirement in all legal malpractice claims. See Schmidt v. Coogan, 135 Wn. App. 605, 610, 145 P. 3d 1216 (2006). A similar situation occurs where medical negligence occurs in treatment of an industrial injury for which a claim was allowed and benefits directly paid. See In re Newton, BIIA Dec., Docket No. 00 13742 (2001) (*significant decision*) (*supra*).

The purpose of allowing an injured worker to sue a third party is to ensure that the “medical funds are not charged for damages caused by a third party.” Flanigan v. Dep’t of Labor & Indus., (*supra*) p. 425. In Flanigan, the DLI was denied reimbursement for loss of consortium damages obtained by an injured worker’s spouse in an industrially related third party claim because the Act does not authorize benefits for loss of consortium. The underlying theory

applies here. No recovery was made for industrially related injuries in a *non*industrial tort action, because no benefits were, or by statute could be paid for those *non*industrial injuries.

The Court of Appeals has clarified the restrictions on the DLI's reimbursement rights, by stating "[I]n addition to filing a workmen's compensation claim for ***work-related*** injuries with the Department or a self-insured employer, an injured worker may sue a third party tortfeasor for ***the same injury that triggered his receipt of industrial insurance benefits.***" Gersema v. Allstate Ins. Co., 127 Wn. App. 687, 692, 112 P.3d 552 (2005) (emphasis added).

Tharaldson did not sue the MVA defendant for the same injury that triggered his industrial injury claim. As a matter of law, the Department had no authority to assert a lien on Mr. Tharaldson's third party recovery.

(ii) Legislative history cited by the DLI is misplaced and irrelevant.

The DLI cites to an article by Charles Bush commenting on the amendments to RCW 51.24 made during the 1984 legislative session (App. Br., P. 26). Mr. Bush was an Assistant Attorney General advocating for, and commenting on the DLI's desire to have the language of RCW 51.24 amended to specifically cover later occurring, *non*industrial tort recoveries. That is advocacy, and by no means

constitutes legislative history.

Proper sources of legislative history include the final legislative report on a particular bill (Rossner v. Bellevue, 116 Wn. 2d 342, 350; 804 P.2d 24 (1991)); a series of prior amendments to the actual statutory language (State v. Bradshaw, 152 Wn.2d 528, 537; 98 P.3d 1190 (2004)); lack of specific language in a particular statute where other statutes regulating similar conduct contain such language (State v. Anderson, 141 Wn.2d 537, 562-63; 5 P.3d 1247 (2000)); comments of a legislator during floor discussions regarding a bill that later contains language substantially similar to that proposed by the legislator during the floor discussion. (Duke v. Boyd, 133 Wn.2d 80, 86-87; 942 P.2d 351 (1997)); committee reports authored by Senate or House Committees considering a particular bill (Wn. St. Physicians Ins. Exchange v. Fisons, 112 Wn.2d 299, 263; 858 P.2d 1054 (1993)); reports from duly appointed, independent legislative commissions. (Dioxin Ctr. v. Pollution Board 131 Wn.2d 345, 356-57; 932 P.2d 158 (1997)).

Through citation of Mr. Bush's article, the DLI has effectively demonstrated that the legislature did not intend to extend the reach of RCW 51.24.060 to later occurring tort claims. Had the legislature adopted the DLI's view, it would have included straight forward

language specifying that the DLI's reimbursement rights may be so extended. In light of the numerous legal pitfalls associated with such an extension, the legislature wisely chose not to statutorily authorize the reimbursement rights the DLI seeks here.

Nowhere have the courts allowed comments of an advocate for a party to masquerade as legislative history. Resort to legislative history is unnecessary where, here, the statute is unambiguous. In re Estate of Foster, 55 Wn. App. 545, 551-52; 779 P.2d 272 (1989).

- (iii) The Department cannot claim reimbursement based on equitable principles.

Since the worker's compensation laws did not exist in common law, the exclusive remedy provisions of the IIA preclude the application of common law principles to issues arising under the IIA. See McCarthy v. Dep't of Social & Health Services, 110 Wn.2d 812, 759 P.2d 351 (1988). No equitable right to assert a lien on behalf of the DLI exists, since equitable subrogation principles are wholly supplanted by statutory entitlement granted under Title 51 RCW. In Dep't of Labor & Indus. v. Dillon, 28 Wn. App. 853, 626 P.3d 1004 (1981), the claimant sought to enforce the common law equitable principle that the DLI was not entitled to any lien until claimant was

“made whole” by his tort settlement.⁴ The court ruled “Equitable principles cannot be asserted to establish equitable relief in derogation of statutory mandates.” *Id.* at 855. This door swings both ways. The Department cannot expand the scope of its statutory lien rights by relying upon equitable doctrines. Through the various areas of application of the IIA, the courts have shown almost complete aversion to the implementation of equitable principles through the exercise of the court’s inherent equitable powers.⁵ In Kingery v. DLI 132 Wn. 2d 162, 173, 937 p.2d 505 (1997), the court articulated that:

“Although we have recognized equity may undo a final Department order, we have rarely exercised such equitable power.”

- (4) **The DLI’s order requiring “reimbursement” to the DLI from Tharaldson’s *non*industrial tort recovery is an unconstitutional taking of property in violation of the substantive due process protections granted by the Washington State Constitution, Article I, §3, as well as the 5th Amendment and §1 of the 14th Amendment to the United States Constitution.**

Article I Section 3 of the Washington State Constitution provides “[N]o person shall be deprived of life, liberty, or property,

⁴ See Thiringer v. American Motors Ins. Co., 91 Wn.2d 215, 588 P.2d 191 (1978).

⁵ The courts have twice applied equitable principles to the benefit of claimants who were *non compos mentis*. That is as far as the courts have shown willingness to venture. Ames v. DLI 176 Wash. 509, 30 P.2d 239 (1934); Rodriguez v. DLI 85 Wn. 2d 849; 540 P.2d 1359 (1975)

without due process of law.” This is the functional equivalent of the Fifth and Fourteenth Amendment to the U.S. Constitution. The analytical framework for resolving a claim of an unconstitutional taking in violation of substantive due process involves a three prong test. In Presbytery of Seattle v. King County, 114 Wn.2d 320, 330; 787 P.2d 907 (1990), the court stated as follows:

The determine whether the regulation violates due process the court should engage in a classic 3-prong due process test and ask: (1) whether the regulation is aimed at achieving a legitimate public purpose; (2) whether it uses means that are reasonably necessary to achieve that purpose; and (3) whether it is unduly oppressive on the landowner.

The initial inquiries in a substantive due process analysis is to determine whether the claimant has an entitlement to the property at issue. Willoughby v. Dep’t of Labor & Indus., 147 Wn.2d 725, 732, 57 P.3d 611 (2002). The court must then determine if there was a governmental taking. Gersema, 127 Wn. App. at 699. If the plaintiff satisfies these threshold questions, then the court will apply the classic three prong due process test. Willoughby, 147 Wn.2d at 733-34.

- (i) Negligence claims and recoveries are property, and Tharaldson’s was taken.

A cause of action, a judgment, and the money from the judgment are personal property covered by substantive due process

protections. Case law has unequivocally established, that an individual's cause of action for damages against another is property. See Marriage of Brown, 100 Wn.2d 729, 675 P.2d 1207 (1984) (Any recovery for pain and suffering is the spouse's separate property, any recovery for lost wages and injury related expenses are community property); Woody's Olympic Lumber, Inc. v. Roney, 9 Wn. App. 626, 634, 513 P.2d 849 (1973) (stating that negligence claims are property regardless of whether they are unliquidated or reduced to a judgment).

Not only was Tharaldson's unliquidated MVA negligence claim property, the \$50,000.00 recovery derived from his negligence claim is property in its most fundamental form - money. Mr. Tharaldson's money is protected against a government taking without due process of law under the state and federal constitutions. The Department took Mr. Tharaldson's property when it asserted its alleged reimbursement rights and demanded payment of \$13,908.35 for industrial injury claims related expenses. ABR p. 5 Finding of Fact (1). This is an unconstitutional taking of property because RCW 51.24.060 fails all three prongs of the due process test in this case.

- (ii) Application of RCW 51.24.060 violates all three prongs of the substantive due process test, and constitutes an unconstitutional taking of his personal property in this case.

The three prong due process test has been applied in the workers' compensation context. See, e.g., Willoughby, (*supra*), 147 Wn.2d 725 (applying the three prong Presbytery test to RCW 51.32.040(3) and ruling that statute unconstitutional).

The first prong of the due process test is not satisfied here. The legitimate public purpose of RCW 51.24.060 is to hold the third party responsible for causing the industrial injury financially responsible, and to prevent a double recovery by the victim. Gersema, (*supra*) at 693 (quoting Mandery v. Costco Wholesale Corp., 126 Wn. App. 851, 855-56, 110 P.3d 778 (2005)). This prevention is a legitimate public purpose. The public purpose only is legitimized, however, when the lien asserted is against proceeds from a third party claim arising in the course of employment, for which the employee/claimant actually received benefits under the IIA. "[M]erely asserting a legitimate objective does not end the inquiry; the means must still reasonably advance the objective and not be unduly oppressive." Willoughby, 147 Wn.2d at 736-37. Party recovery is made. Here, the double recovery proscribed in Mandery never occurs, because Tharaldson did not and could not obtain IIA benefits for his MVA. Consequently, the legitimate public purpose never arises here.

The second Presbytery prong fails as well. Taking proceeds from a person's settlement arising out of a *non*industrial automobile accident is not a means reasonably necessary to achieve the stated purpose of preventing a double recovery. Since the IIA does not provide benefits to people for *non*industrial injuries, there is absolutely no justification for taking funds recovered for those injuries under the guise of preventing a double recovery. See Flanigan v. Dept. of Labor and Industries, 123 Wn.2d at 423; Gersema, 127 Wn. App. at 696 (holding that RCW 51.24.060 potentially may not reach a clearly differentiated general damage recovery in a third party claim since the IIA does not provide benefits for general damages).

Addressing the "unduly oppressive" prong of the substance due process test, the court in Rivett v. City of Tacoma, 123 Wn.2d 573, 581; 870 P.2d 299 (1994) noted "the third inquiry will usually be the difficult and determinative one".

The DLI's grossly overreaching lien assertion which satisfies the unduly oppressive third prong of the Presbytery test.

Most substantive due process violations are alleged when a municipality or the state attempts to regulate land use. See, e.g. Orion Corp. v. Seattle 109 Wn. 2d 621; 747 P.2d 1062 (1987). The oppressive nature of the challenged land use regulation usually

centers on whether a reasonable economic use of the property can be made when the regulation is complied with, even if not the highest and best use. If an ordinance left a landowner with no real economic use of her or his property, a taking would likely be found. The Department simply took Mr. Tharaldson's money damages recovered in a *non*industrial tort claim, leaving him with no use of the taken money, and providing him no economic benefit in return. It is a taking of the most fundamental nature, and constitutes a blatant violation of Mr. Tharaldson's substantive due process rights.

The third prong consequently fails here because taking money from Tharaldson's tort recovery is simply confiscatory. If the Department can lien Mr. Tharaldson's recovery from a *non*industrial automobile collision, then the Department might as well be entitled to simply garnish Mr. Tharaldson's wages or levy against his real property to reimburse industrial claim costs. Undoubtedly, this court would not allow either.

- (5) **The DLI should be ordered to pay Tharaldson's reasonable attorney's fees incurred in responding to this appeal.**

RCW 51.52.130 requires the court to award reasonable fees and costs to an injured worker who improves his position by appeal. Mr. Tharaldson requests such relief if he prevails on this appeal.

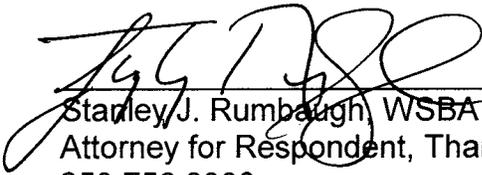
IV. CONCLUSION

The DLI's reimbursement reach here exceeds its grasp. No legal authority, statutory or otherwise, supports application of RCW 51.24.060 to Tharaldson's *nonindustrial* MVA recovery. Even if the legal authority was available to the DLI, it has failed to provide any competent evidence that the MVA proximately caused payment of any benefits it was not otherwise obligated to pay. Taking Tharaldson's money under these circumstances is a violation of his substantive due process rights. The Superior Court order on summary judgment should be affirmed.

DATED this 29 day of January, 2007.

Respectfully submitted,

RUMBAUGH RIDEOUT BARNETT & ADKINS


Stanley J. Rumbaugh, WSBA 8980
Attorney for Respondent, Tharaldson
253.756.0333

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION II

DEPARTMENT OF LABOR
AND INDUSTRIES OF THE
STATE OF WASHINGTON,

Appellant,

v.

DARRIN R. THARALDSON,

Respondent.

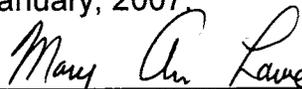
CERTIFICATE OF SERVICE

FILED
COURT OF APPEALS
DIVISION II
07 JAN 26 AM 1:54
STATE OF WASHINGTON
BY 

I certify under penalty of perjury of the laws of the State of Washington that on date noted below, I served a copy of of Stanley J. Rumbaugh's Brief of Respondent, via U.S. Mail, postage prepaid to the following:

MICHAEL KING HALL
STEVE VINYARD
OFFICE OF THE ATTORNEY GENERAL
P O BOX 40121
OLYMPIA WA 98504-0121

DATED this 24rd day of January, 2007.



Mary Ann Lowe, Legal Assistant
to Stanley J. Rumbaugh
Attorney for Respondent Tharaldson