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NO. 37431-5-II

STATE OF WASHINGTON
BY
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**COURT OF APPEALS, DIVISION TWO
OF THE STATE OF WASHINGTON**

SCOTT WALTER MAZIAR,

Appellant,

v.

STATE OF WASHINGTON and
The DEPARTMENT OF CORRECTIONS,

Respondents.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This case involves the interplay of the state workers' compensation statute and federal maritime law. Maziar, an admittedly non-maritime worker employed by the Department of Corrections (DOC) as a corrections officer, was injured while waiting aboard a ferry owned and operated by DOC for transporting staff to and from McNeil Island Corrections Center. He applied for and received workers' compensation benefits for his injury. He then brought this lawsuit against DOC asserting a claim under federal maritime law because he was sitting on a boat at the time of the injury. These facts were not in dispute in the trial court on summary judgment. The trial court granted summary judgment because Maziar's suit against his employer was barred by the exclusive remedy provision of the Industrial Insurance Act (Act), RCW 51.04.010.

II. RESTATEMENT OF THE ISSUES

1. When the exclusive remedy provision for workers' compensation otherwise applies to a non-maritime worker, can the exclusion for coverage under RCW 51.12.100(1) for workers with a federal maritime remedy apply to the non-maritime worker?

2. When the employer provides the only available transportation to a jobsite, does the 'going and coming rule' apply?

3. When a co-employee intentionally kicks a chair on which an employee is resting his feet, does the intentional injury exception to the exclusive remedy provision apply to the resulting unintended injury?

4. Does federal maritime law preempt the application of state workers' compensation to a claim by a corrections officer who, while in the course of his employment, is injured while on board a docked ferry operated by the employer solely for the intrastate transport to and from the restricted island that is home to the prison where he works?

5. Did the legislature, in passing RCW 4.92.090, intend to subject the state in general to actions under federal maritime law?

III. RESTATEMENT OF THE CASE

McNeil Island is home to the McNeil Island Corrections Center (MICC) and the Special Commitment Center (SCC).¹ Transportation to and from the island for MICC and SCC staff is provided by ferry operated by DOC. CP at 76. Access to the island is restricted to authorized visitors and employees; only authorized persons may board the ferry. CP at 76. No one is charged for transportation to the island. CP at 76.

¹ The Special Commitment Center is a secure, "total confinement facility" for the detention and commitment of sexually violent predators under chapter 71.09 RCW, operated by the Department of Social and Health Services. RCW 71.09.020(17).

Maziar, a corrections officer employed by DOC at MICC, was waiting aboard the ferry at the conclusion of his shift for transport from McNeil Island to the mainland terminal at Steilacoom. CP at 31. The ferry captain encountered Maziar and his co-worker Corey Carter seated, with their legs out resting and on another chair. According to Maziar, the captain kicked the chair out from underneath his legs. CP at 31, 42. Maziar allegedly fell to the floor and sustained an injury. CP at 31. He applied for and received workers' compensation for his injuries. CP at 16 -19.

IV. LAW AND ARGUMENT

A. Standard Of Review

An appellate court reviews a summary judgment *de novo*, engaging in the same inquiry as the trial court. *Chen v. State*, 86 Wn. App. 183, 187, 937 P.2d 612 (1997). Questions of law are reviewed *de novo*. *City of Tacoma v. William Rogers Co.*, 148 Wn.2d 169, 181, 60 P.3d 79 (2002).

The meaning of a statute is a question of law that is reviewed *de novo*. *Cockle v. Dep't of Labor & Indus.*, 142 Wash.2d 801, 807, 16 P.3d 583 (2001). The Court's fundamental objective in determining what a statute means is to ascertain and carry out the Legislature's intent. *State v. Alvarez*, 128 Wash.2d 1, 11, 904 P.2d 754 (1995).

This Court may affirm the trial court's decision if there is any basis in the record for sustaining it, regardless of whether the trial court relied on that basis. *Gross v. City of Lynnwood*, 90 Wn.2d 395, 401, 583 P.2d 1197 (1978).

B. Summary Of Argument

Maziar was a Department of Corrections employee covered by the state workers' compensation statute. His job as a correctional officer was not maritime related. His injury occurred while he was waiting onboard a ferry owned and operated by DOC for transportation of employees to and from the job site. The incident leading to Maziar's injury occurred while the ferry was moored at the terminal at McNeil Island.

Although the Industrial Insurance Act (Act) excludes maritime workers with a federal maritime remedy from workers' compensation coverage under the Act, RCW 51.12.100(1), it does not exclude correctional officers. Therefore, unless state workers' compensation coverage is somehow preempted by federal maritime law, Maziar's case is barred by the exclusive remedy provisions of RCW 51.04.010. Since Maziar's work was not maritime, and the undisputed facts of this case implicate no general federal maritime considerations, RCW 51.04.010 applies and bars Maziar's lawsuit. In any event, the state has not waived immunity for actions involving federal maritime claims except for claims

against the Department of Transportation and the Washington State Ferries.

C. Argument

1. The Exclusive Remedy Provision Of RCW 51.04.010 Applies To This Case; Only Maritime Workers With A Federal Remedy Are Excluded From The Statute

There is no dispute that if RCW 51.04.010 applies to this case, Maziar is barred from bringing this lawsuit. *See Judy v. Hanford Env'tl. Health Found.*, 106 Wn. App. 26, 22 p.3d 810 (2001). Maziar argues, however, that because he states a “maritime” claim, pursuant to RCW 51.12.100(1), which excludes maritime workers with a federal remedy from coverage under the Act, his case is not barred in spite of the fact that he received workers’ compensation benefits for his injury. Br. of Appellant at 18.

RCW 51.12.100(1) provides:

The provisions of this title shall not apply to a master or member of a crew of any vessel, or to employers and workers for whom a right exists under the maritime laws or federal employees’ compensation act for personal injuries or death of such worker.

The language of this maritime law exception only applies to maritime workers not a DOC correctional officer travelling on the ferry to McNeil Island. The legislative history of the statute indicates the Legislature’s purpose was to carve out from state workers’ compensation coverage

those maritime workers who are covered under federal maritime remedies, most notably the Longshoreman and Harbor Worker's Act, 33 U.S.C. § 901. The statute has a long history and has been amended several times as the Legislature has attempted to deal with the issue of maritime workers and respond to changes in federal law.² The original section was enacted in 1911, but did not specifically include maritime workers.³ In 1919 the act was amended to specifically include workers engaged in railway and maritime occupations.⁴ In 1961, the act provided:

The provisions of this title shall apply to all employers and workman, except a master or member of a crew of any vessel, engaged in maritime occupations for whom no right or obligation exists under the maritime laws for personal injuries or death of such workmen.⁵

The statute was amended in 1975 adopting the language at issue in this case.⁶ Although the language was changed, the meaning and intent was not. House archives of the 1975 legislative session reflect that the amendment was not intended to make any major changes, but was intended to respond to changes in scope of the Longshoremen's and

² CP at 58-75. (legislative history of RCW 51.12.100(1))

³ CP at 59-60.

⁴ CP at 61-2. This excluded maritime workers who's payroll could be segregated from non-maritime wages.

⁵ CP at 63

⁶ CP at 64.

Harborworkers' Act.⁷ The Senate bill analysis is to the same effect, clarifying that the exclusion is for workers entitled to federal benefits.⁸ RCW 51.12.100 was never intended to and does not exclude land based, non-maritime workers, such as Maziar, from its coverage.

In arguing for a contrary interpretation of the statute, Maziar relies on the case of *Chan v. Soc'y Expeditions, Inc.*, 39 F.3d 1398 (9th Cir. 1994), *cert. denied*, 514 U.S. 1004, 115 S. Ct. 1314, 131 L. Ed. 2d 196 (1995).⁹ *Chan*, unlike this case, involved an injury occurring on the high seas at a coral atoll in French Polynesia. *Id.* at 1402. On its face, *Chan* appears to offer some support for Maziar's argument. However, a closer examination indicates that *Chan* does not engage in sufficient detailed analysis to provide authority on this issue. In large part, the entire *Chan* discussion of the Washington statute can be considered dicta. The court stated, "We express no opinion whether he was injured in the scope of employment, but the point is irrelevant on the narrow question in this case.

⁷ CP at 65-6. "The proposed revisions to the Industrial Insurance Act (Title 51 RCW) . . . are not intended to effect major changes in the existing law. The bill is designed to make technical changes for clarity, consistency, legal reasons, and to enable the Department's Division of Industrial Insurance to fulfill its legal obligations more effectively. . . Section 3. This section, RCW 51.12.110, needs revision in light of the changes in the scope of the federal Longshoremen's and Harborworker' Act in 1972" Department of Labor and Industries Commentary.

⁸ CP at 74.

⁹ Maziar correctly concedes that the *Chan* case's interpretation of state law is not binding on this court.

Benny Chan has a federal maritime right to sue society Expeditions and the operators of the vessel as a passenger, visitor or vacationing employee” *Id.* at 1403. The case, instead, restates the accepted concept that maritime jurisdiction applies to a passenger injured aboard a cruise ship on the high seas.¹⁰ The case presents a very different factual setting from the present one.

Because it was not relevant to its decision, the *Chan* court assumed that Benny Chan was a “worker” because he received workers’ compensation benefits. *Id.* at 1403. The court discussed RCW 51.12.100 in response to the defendant’s argument that the exclusive remedy provision barred Mr. Chan’s claim. In response to the defendant’s argument that RCW 51.12.100 applies only to seamen, longshoremen and harbor workers, the court, without further analysis stated, “[n]othing in the plain language of the statute limits the exception in any such way. We decline to do so here.” *Chan*, 39 F.3d at 1403.¹¹ The court did not

¹⁰ “Maritime jurisdiction is appropriate when a potential hazard to maritime commerce arises out of an activity that bears a substantial relationship to traditional maritime activity.” *Chan*, 39 F.3d at 1403 n.7. Injuries aboard cruise ships on the high-seas have long been recognized as falling within admiralty jurisdiction. *See e.g. Friedman v. Cunard Line Ltd.* 996 F. Supp. 303 (S.D. N.Y. 1998).

¹¹ The *Chan* court also cites to a Washington case and a Ninth Circuit case for the proposition that a worker who receives workers’ compensation could nonetheless sue under federal maritime law. However in both these cases, *Rhodes v. Dep’t of Labor & Indus.*, 103

discuss or apparently examine the legislative history of the statute. As discussed above, the legislative history, however, establishes that the exception in the statute was and is directed at maritime workers and not land-based, non-maritime, workers such as Maziar. Thus, as a matter of state law, the claim in this instant suit is barred by RCW 51.04.010 and Maziar does not meet the exception in RCW 51.12.100.

2. Maziar's Job Status And Transportation To And From The Jobsite Do Not Remove Him From Coverage Under The Act

Maziar additionally argues that he is excluded from workers' compensation by virtue of the "going and coming rule." The going and coming rule generally provides that a worker is not within the scope of his or her employment while travelling to or from work. However, this is not the rule for employer provided transportation to or from the jobsite. This case is governed by *Venho v. Ostrander Ry. & Timber Co.*, 185 Wash. 138, 52 P.2d 1267 (1936), and a long line of similar cases. While the general rule is that a worker is not covered by workers' compensation when injured while going and coming to work, "[w]hen a workman is so injured, while being transported in a vehicle furnished by his employer as

Wn.2d 895, 700 P.2d 729, 731 (1985), and *Western Boat Bldg. Co. v. O'Leary*, 198 F.2d 409, 411 (9th Cir.1952), the worker was clearly a maritime worker and entitled to benefits under the Longshoremen's and Harbor Workers' Compensation Act 33 U.S.C. § 901.

an incident of employment, he is within ‘the course of his employment’ as contemplated by the act.” *Id.* at 139. *Venho* concerned a logging train that was “the only way to get into and out of camp.” *Id.*

The appellant in this case was injured while in the course of his employment and incidental thereto, for it was necessary for him to be riding on the [employer’s] train on his way to work, and it is often held under similar circumstances, where the employer has furnished the means of transportation to the place of work and either before or after the work has actually commenced the employee is injured, that injury arises out of and in the course of his employment.

Id. at 141.

The court reaffirmed this rule in *Aloha Lumber Corp. v. Dep’t of Labor & Indus.*, 77 Wn.2d 763, 466 P.2d 151 (1970). In that case, the employee was driving his own truck to the worksite because his schedule did not fit the crew bus schedule. However, the employer paid all the expenses. He was covered under the act. *Id.* at 773.

In *Pearson v. Aluminum Co. of Am.*, 23 Wn.2d 403, 413-14, 161 P.2d 169 (1945), the employer provided transportation by bus to and from the work site. The bus was not public. *Id.* at 413. No fare was charged to the employees. *Id.* The employees were not paid for their time on the bus. *Id.* Unlike the present case, the employees were not required to ride the bus. *Id.* at 414. The court said, “[w]e have recognized the general rule that a workman injured while going to or from the place of work is not ‘in

the course of his employment.’ However, we have recognized an exception to this rule, which exception is as well established as the rule itself, and is supported by overwhelming authority”. *Id.* at 412. This exception is stated as follows:

When a workman is so injured, while being transported in a vehicle furnished by his employer *as an incident of the employment*, he is within ‘the course of his employment,’ as contemplated by the act. In other words, *when the vehicle is supplied by the employer for the mutual benefit of himself and the workman to facilitate the progress of the work, the employment begins when the workman enters the vehicle and ends when he leaves it on the termination of his labor.*

Id. (emphasis in original) (quoting *Venho*, 185 Wash. 138).

Maziar also relies on the “alternate commute mode” definition in RCW 51.08.013 to argue he was within the “going and coming” rule.¹² However, while including the term “ferry”, this statute is directed at public transportation: “a bus, ferry, or other *public* transportation service.” RCW 51.08.013(3) (emphasis added).

¹² "Alternative commute mode" means (a) a carpool or vanpool arrangement whereby a group of at least two but not more than fifteen persons including passengers and driver, is transported between their places of abode or termini near those places, and their places of employment or educational or other institutions, where the driver is also on the way to or from his or her place of employment or educational or other institution; (b) a bus, ferry, or other public transportation service; or (c) a nonmotorized means of commuting such as bicycling or walking. RCW 51.08.013(3).

However, RCW 51.08.013(3) is not applicable to the DOC McNeil Island ferry. Access to the island and the ferry is severely restricted. CP at 76-77. There is no public access. CP at 76-77. All persons accessing the Island must be cleared through security. CP at 76-77. Everyone is screened or has authorization. CP at 76-77. No one is charged for transport on the ferry. CP at 76-77. The ferry is operated by the Department of Corrections. The McNeil Island ferry is not a public ferry comparable to the Washington State or other public ferries contemplated by RCW 51.08.013(3).

Because he was aboard employer provided private transportation, the workers' compensation statute applies to Maziar while on the ferry. As the trial court correctly stated, "it is different on that ferry. There's no other way for [Maziar] to get to work." RP at 17.

Finally, Maziar argues that since he was not being paid while sitting on the ferry at the dock, he is not covered by the workers' compensation statute. However, that fact does not alter the result here. The question of whether he was being paid is irrelevant to this issue. *See Pearson*, 23 Wn.2d at 414; *see also Boeing Co. v. Rooney*, 102 Wn. App. 414, 417, 10 P.3d 423 (2000). ("It is not necessary that at the time an injury is sustained by a worker he or she is doing the work on which his or her compensation is based or that the event is within the time limits on

which industrial insurance or medical aid premiums or assessments are paid.”).

Maziar’s pay status does not exclude him from coverage under the workers’ compensation in this case. What brings him within the coverage of the Act is that his employer provided him transportation to and from the jobsite as an incident of his employment. He was therefore in the course and scope of his employment while sitting on the ferry awaiting transport.

3. The Intentional Injury Exception To The Exclusive Remedy Provision Of The Workers’ Compensation Statute Requires A Certainty Of Injury, Not An Intentional Act

To fall within the exception to the exclusive remedy provision provided for intentional injury in RCW 51.24.020, the injury must be intended, not the conduct. *Birklid v. Boeing Co.*, 127 Wn.2d 853, 860, 904 P.2d 278 (1995). There is nothing in the record that could support an intent to injure. The record indicates that the captain kicked a chair out from under Maziar’s outstretched legs. This may reflect an intent to remove the chair, but it does not reflect an intent to injure. There must be a deliberate intent to injure. “Neither gross negligence nor failure to observe safety laws or procedures rise to the level of deliberate intention.” *Brame v. W. State Hosp.*, 136 Wn. App. 740, 746, 150 P.3d 637 (2007) (citing *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16,

27, 109 P.3d 805 (2005)). “Even an act that has a substantial certainty of producing injury is insufficient to show a deliberate intent to injure.” *Id.* *Brame* concerned assaults by mental health patients which the court assumed were foreseeable. However, the court said, “[f]oreseeability is not sufficient to establish deliberate intent to injure an employee.” *Id.* at 749 (citation omitted). Even taken in the light most favorable to Maziar, kicking a chair might pose the risk of an injury but it is far from certain that an injury will occur. The intentional injury exception is not applicable here.

4. Federal Maritime Law Does Not Preempt Washington Law

As shown above, the provisions of Washington’s workers’ compensation statute apply to and bar this case. Washington law must be applied unless the application of the Washington statute is preempted by federal maritime law. In this case, it is not. Federal law does not preempt state workers’ compensation statutes when the matter is of local concern. *See Millers' Indem. Underwriters v. Braud*, 270 U.S. 59, 46 S. Ct. 194, 70 L. Ed. 470 (1926); *Grant Smith-Porter Ship Co. v. Rohde*, 257 U.S. 469, 42 S. Ct. 157, 66 L. Ed. 321 (1922).¹³ If “the matter is of mere local

¹³ This may be contrasted with *Spencer Kellogg & Sons, Inc., v. Hicks*, 285 U.S. 502, 52 S. Ct. 450, 76 L. Ed. 903 (1932), where the court determined the provisions of New Jersey’s workers’ compensation statute

concern and its regulation by the state will work no material prejudice to any characteristic feature of the general maritime law”, a state workers’ compensation statute should be applied. *Braud*, 270 U.S. at 64. “[The Texas workers’ compensation act] prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist.” *Id.*¹⁴

The Washington courts have considered and answered the preemption question against Maziar. In *Garrisey v. Westshore Marina Assoc.*, 2 Wn. App. 718, 469 P.2d 590 (1970), the court considered an employee who was injured aboard a raft on Lake Union. Garrisey was working aboard the raft that was being used to move lumber to the construction site of a marina when the raft began to sink and he was injured. He filed a claim for benefits under the Industrial Insurance Act and then filed suit. *Id.* at 720. After an extensive discussion of legal principles and remedies available to workers, the court identified four classes of cases to determine what remedies were available to Garrisey. These were: (1) cases within exclusive maritime and admiralty jurisdiction; (2) cases within exclusive state jurisdiction in which the

did not apply in an admiralty action in federal court, involving New York workers, injured in New York, while in transit to their work site in New Jersey.

¹⁴ The employee in *Braud* was a diver working off a barge in a river.

workers' compensation statute applies; (3) cases involving maritime activity but of "local concern" permitting application of a state's workers' compensation act; and (4) cases in the "twilight zone" where it is not clear whether a case falls within class (1) or class (3). *Id.* at 593-94.

To determine the appropriate class, the court analyzed Garrisey's employment and the activities of the job. Garrisey's job moving timber was found analogous to a carpenter who moves timber on land. It was not an activity "in direct aid to commerce and navigation." *Id.* at 596.

The nature of the workman's activities rather than the place where the accident occurs determines into which class the workman's claim for relief falls. Accordingly, the 'local concern' doctrine may apply even if the accident occurs on navigable water.

Id. at 726 (citing *Puget Sound Bridge & Dredging Co. v. Dep't of Labor & Indus.*, 185 Wash. 349, 54 P.2d 1003 (1936)). The court ultimately found that Garrisey's activities were a matter of local concern and affirmed the application of the workers' compensation bar.

This case too, is a matter of purely local concern. Maziar was a corrections officer who's job was in the prison. CP at 30. His duties did not involve any work on the vessel. *Garrisey*, 2 Wn. App. at 726. In terms of *Garrisey*, he falls squarely into class (3); Washington's workers' compensation act applies to his case.

Even if this case could be considered a “twilight zone” or class (4) case, Washington’s statute is not preempted. In cases, as here, where the employee has applied for and received workers’ compensation benefits, the U.S. Supreme Court determined long ago that Washington’s workers’ compensation law was not preempted by federal law. *See Garrisey*, 2 Wn. App. at 724 (citing *Davis v. Dep’t of Labor & Indus.*, 317 U.S. 249, 63 S. Ct. 225, 87 L. Ed. 246 (1942) (Washington workers’ compensation statute not preempted by federal maritime law under local facts of case.)).

Maziar relies on two cases to argue that the workers’ compensation bar is preempted, one from Washington and one from Alaska. Both are distinguishable from his lawsuit. *State v. Daggett*, 87 Wn. 253, 151 P. 648 (1915), concerned an able bodied seaman.

The case presents the question of whether a seaman, employed upon a boat operating upon Puget Sound and engaged in intrastate commerce, is covered by the provisions of the Industrial Insurance or Workmen’s Compensation Act.

Id. at 255. This presented the classic case of federal maritime preemption and the court so held. “Sailors are historically the wards of admiralty, and the courts have long accorded them special protection.” *Brown v. State*, 816 P.2d 1368 (Alaska 1991) (citing *Gordon*, 11 F.Cas. 480, 485 (C.C.D. Me 1823)). In keeping with this, *Daggett* was acknowledged by the court

in *Garrisey* as illustrative of a class (1) case. *Garrisey*, 2 Wn. App. at 722, n.4.

The second case, *State, Dept. of Public Safety v. Brown*, 794 P.2d 108 (Alaska 1990), is also a class (1) case under the *Garrisey* reasoning. The plaintiff, Brown, was employed as the First Mate aboard the patrol vessel Vigilant. *Id.* The court properly held that the state's exclusive remedy provision could not preclude Brown's admiralty remedies. *Id.* at 111.

5. If A Federal Maritime Claim Exists, Washington Has Not Waived Its Sovereign Immunity To Such A Claim

Even if this court should find that Maziar has a federal maritime claim, he would be barred from bringing such a claim in state court because of the state's sovereign immunity.¹⁵ In *Gross v. Wash. State Ferries*, 59 Wn.2d 241, 367 P.2d 600 (1961), the court held that the state is "immune from tort liability except as immunity has been waived by

¹⁵ He would also likely be barred from bringing such a claim in federal court. Federal maritime claims are subject to a state's Eleventh Amendment immunity. *In re State of New York*, 256 U.S. 490, 497, 41 S.Ct. 588, 65 L.Ed. 1057 (1920). Congress has not acted to abrogate the state's Eleventh Amendment immunity for claims in admiralty. *See Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 55, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996) (to abrogate a state's Eleventh Amendment immunity, Congress must unequivocally express such intent pursuant to a valid grant of constitutional authority).

statute[.]” *Id.* at 244. “The doctrine of a state’s sovereign immunity from suit without its consent applies in actions in admiralty.” *Id.*

The State of Washington has waived sovereign immunity for certain maritime claims. However, as shown by the exclusive worker’s compensation remedy, it has not waived immunity for any maritime claim by Maziar.

In *Gross*, the court recognized that the state had, with certain limitations, waived its sovereign immunity for certain maritime claims against what was then the Toll Bridge Authority.¹⁶ *See* RCW 47.60.200, *et seq.* RCW 47.60.200 expressly provides that: “Any consent to liability given under the provisions of this chapter creates liability of the department [of transportation] only and does not create any general liability of the state.” Maziar’s case does not fall within this waiver.

Maziar argues that RCW 4.92.090, the state’s general waiver of sovereign immunity for liability in tort, constitutes a waiver of the state’s immunity for his maritime claims in this case. He relies on *Savage v. State*, 127 Wn.2d 434, 899 P.2d 1270 (1995), to argue that the state is

¹⁶ The functions of the former Toll Bridge Authority subject to the maritime claims discussed in *Gross* are now subsumed within the responsibilities of the Washington State Ferry System, operated by the Department of Transportation under RCW 47.60.

liable for its tortuous conduct as are private persons, unless the Legislature has indicted otherwise.

But the Legislature *has* indicated otherwise. The only waiver of sovereign immunity for suits against the state brought under federal admiralty law is specifically limited in RCW 47.60.200, *et seq.*, to suits against the Department of Transportation in its operation of the state ferry system. While enacted prior to the 1961 enactment of RCW 4.92.090, the transportation statutes effecting a limited waiver of immunity for maritime claims against the Department of Transportation have been amended subsequent to the enactment of RCW 4.92.090.¹⁷ In 1984, the Legislature made broad changes to RCW 47.60. While primarily aimed at reorganizing departments under the Department of Transportation, the act specifically amended the language of RCW 47.60.200.¹⁸ The Legislature did not remove the limitation of waiver of sovereign immunity to cases against the Department of Transportation only. This restriction would be surplusage if RCW 4.92.090 was construed as a waiver of immunity against the state in general, and all of its agencies including DOC, for all maritime claims.

¹⁷ Even though RCW 4.92.090 was enacted prior to the December 1961 decision in *Gross*, the court did not discuss the statute.

¹⁸ See Laws of 1984, ch. 7, § 314.

In ascertaining legislative intent, the court looks to the sequence of all statutes relating to the same subject matter. *Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 150, 736 P.2d 265 (1987). There is a presumption that the Legislature is aware of its prior enactments and judicial construction of them. *Chandler v. Otto*, 103 Wn.2d 268, 274, 693 P.2d 71 (1984). It is also presumed that the Legislature does not engage in meaningless or unnecessary acts. *State v. Wanrow*, 88 Wn.2d 221, 228, 559 P.2d 548 (1977).

In *Sim v. Parks & Rec. Comm'n*, 90 Wn.2d 378, 583 P.2d 1193 (1978), the court addressed the 1973 amendments to RCW 4.92.010, removing venue restrictions. The court determined that this action did not alter venue restrictions for declaratory judgments in RCW 34.04.070. “We presume therefore the legislature was familiar with it when it enacted the 1973 amendments to RCW 4.92.010. The legislature did not amend or repeal RCW 34.04.070 when it passed the 1973 amendments. Thus, it is reasonable to infer a legislative intent to continue in effect the exclusive venue provision of RCW 34.04.070.” *Sim*, 90 Wn.2d at 382 (citations omitted). When the Legislature amended RCW 47.60.200 in 1984, it left intact the limitation of the waiver of immunity for maritime claims only as against the Department of Transportation. Therefore, RCW 4.92.090 does not operate as a waiver of immunity for federal maritime claims against

the Department of Corrections. Maziar's maritime claims, if any, are thus barred by sovereign immunity. Summary judgment dismissing those claims should be affirmed.

V. CONCLUSION

Appellant Maziar was within the scope of his employment with his employer and covered under Washington's workers' compensation statute when he was injured. He is subject to the exclusive remedy provision of that statute. The fact that he was sitting on a boat at the time of his injury does not alter this result. There is no exception for a land-based worker on employer furnished transportation that removes him from the statute. Federal maritime law does not preempt the statutory bar in this local case merely because Maziar was physically on a boat at the time of his injury. Finally, even if Maziar would have had a maritime claim, the state has Eleventh Amendment immunity from this claim. The state respectfully requests this court affirm the trial court's decision.

RESPECTFULLY SUBMITTED this 26th day of September, 2008.

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PROOF OF SERVICE

I certify that I served a copy of *Brief of Respondent* on all parties or their counsel of record on the date below via United States Mail, proper postage affixed, as follows:

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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 26th day of September, at Tumwater, Washington.



HILARY GALLIGAN