

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

No. 37597-4

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

FRANTZ G. SCHILLER,

Appellant,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent,

APPELLANT'S OPENING BRIEF

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A. BRIEF INTRODUCTION

The appellant, Frantz Schiller is an injured worker in the State of Washington. As an injured worker, he falls under the umbrella of the Industrial Insurance Act (Act) which was developed and intended to benefit injured workers and their beneficiaries, not employers or the Department of Labor and Industries. The respondent, Department of Labor and Industries is charged with administering claims of injured workers in the State of Washington. Frantz's claim is somewhat out of the ordinary because he was injured on the job, but in a motor vehicle accident caused by a negligent third party. Frantz's claim was allowed as an industrial injury by the Department of Labor and Industries (Department). Frantz also pursued the negligent third party in a civil tort action. He was represented by Smith Alling Lane in the tort action. Frantz was successful in his tort action against the third party and was awarded damages in the amount of \$305,000.00. By Department order dated July 18, 2003, \$104,622.42 was allotted for attorney fees, \$135,723.20 was allotted to Frantz, and \$64,654.38 was allotted to the Department. The Department paid out \$98,416.03 in benefits administering Frantz's claim prior to resolution of the tort action.

The Department ordered that in addition to payment of its \$64,654.38 allotment from the third party recovery, no further benefits would be paid to Frantz until an excess of \$56,250.83 has been further expended by him or his beneficiaries for costs otherwise payable as benefits under the administration of his industrial injury claim. In other words, despite his entitlement to benefits under the Act, no actual monies will be paid by the Department until the third party excess has been completely consumed.

On October 30, 2003 about three months after the Department's disbursement of damages Frantz was found disabled by the Social Security Administration and entitled to Social Security Disability benefits with an onset date of September 6, 2000. His Social Security disability payments were reduced because of his entitlement to worker's compensation time loss compensation benefits. On October 28, 2005 the Department ordered an adjustment in Frantz's time loss compensation benefit payment calculation because he was also receiving Social Security disability benefits. Although Frantz was entitled to time loss compensation benefits, he was not actually being paid these benefits because the third party excess was still being consumed.

Because he was not receiving actual payment of the time loss compensation benefits, Frantz appealed the Department's order to adjust

his time loss compensation rate calculation. This matter went before the Board of Industrial Insurance Appeals (Board), which decided that the Department was correct in offsetting Frantz's time loss compensation payment amount due to his receipt of Social Security disability benefits. Frantz appealed the matter to the Superior Court in and for Pierce County (Superior Court) which affirmed the Board's prior ruling. Frantz now appeals that decision.

Through this appeal, Frantz seeks a reversal of the the Superior Court order and a remand of this matter to the Department level with direction to cease application of the Social Security offset until such time as the third party excess is consumed, as well as an award of attorney fees and costs pursuant to RCW 51.52.120.

B. ASSIGNMENTS OF ERROR

1. The conclusion that the Department of Labor and Industries correctly applied the provisions of the social security offset ruling statute RCW 51.32.220 to Frantz Schiller's time loss compensation even though he was not receiving actual payments due to his third party recovery is an error of law and interprets the law contrary to clear intent. CP at 35-38 (Conclusions of Law No. 2.2).

2. The conclusion that Frantz Schiller is “receiving compensation” from the Department through time loss compensation orders because his excess third-party recovery is being exhausted is an error of law and interprets the law contrary to clear intent. CP at 35-38 (Conclusions of Law No. 2.3).
3. The conclusion that the August 30, 2006 Department order which affirmed the October 28, 2005 and May 9, 2006 orders, that adjusted Frantz Schiller’s time-loss compensation because of his receipt of social security disability benefits is correct and should be affirmed is an error of law and interprets the law contrary to clear intent. CP at 35-38 (Conclusions of Law No. 2.4).
4. The conclusion that the Board’s June 18, 2007 order that adopted the April 16, 1007 Proposed Decision and Order is correct and should be affirmed is an error of law and interprets the law contrary to clear intent. CP at 35-38 (Conclusions of Law No. 2.5).

C. ISSUES

Under RCW 51.32.220 and WAC 296-20-023 is the Department entitled to apply a Social Security offset, thereby

reducing Frantz Schiller's time-loss compensation benefit amount, when the Department is **simultaneously** issuing no payment warrants, until Frantz Schiller exhausts the third party excess?

D. FACTS

On September 6, 2000, Frantz Schiller suffered an industrial injury during the course of his employment with North Western Landscaping Company. (Certified Appeal Board Record – CABR at p. 62). His industrial injury occurred when Frantz was involved in a motor vehicle accident (MVA) with a third party. On September 12, 2000, Frantz and Dr. C. Waffles completed a Department application for benefits. (CABR at p. 62). On October 2, 2000, Frantz also completed a third party election form. (CABR at p. 62). On December 12, 2000, the Department issued an order allowing Frantz's claim. (CABR at p. 63). On January 1, 2001 the Department received a notice of representation from Smith Alling Lane for the third party claim. (CABR at p. 63). On January 1, 2002 a David B. Vail and Associates submitted a notice of representation to the Department along with a protest to any adverse orders issued in the prior 60 days. (CABR at p.63).

On **July 18, 2003** the Department issued an order concerning the third party claim. Since Frantz was awarded \$305,000.00 in damages from the third party claim, under RCW 51.24.060, the recovery distribution was: (1) \$104,622.42 net share to the attorney; (2) \$135,723.20 net share to the claimant; (3) \$64,654.38 net share to the Department. However, the Department had already paid benefits totaling \$98,416.03 administering Frantz's claim up to the time the third-party recovery distribution was established. As a result, the Department demanded that Frantz pay the Department its \$64,654.38 from the third-party recovery. Additionally, since the Department expended \$56,250.83 on Frantz's claim which was in excess of the \$64,654.38 allotted to the Department from the third party claim, the Department further ordered that no additional compensation or benefits would be paid until the \$56,250.83 excess has been expended by the Frantz or his beneficiaries for costs incurred as a result of the conditions, injuries or death related to his industrial injury. The Department retained the right to reimbursement against any further recoveries from this injury. (CABR at pp. 63-64 and 77-78).

On **October 30, 2003** the Social Security Administration found Frantz disabled and entitled to Social Security Disability Benefits with an onset date of September 6, 2000. His Social Security payments were

reduced on March 1, 2001 to \$654.10 per month because he was also **entitled** to time-loss compensation benefits under the Act at that time. In November 2003, Frantz's Social Security benefits increased to \$970.00 per month because his entitlement to time-loss compensation benefits had ended. (CABR at p. 64). **No warrants** (monetary payment) **were issued** on time-loss compensation benefits because of the Department's reimbursement share of the third party and excess recovery.

On December 6, 2004 the Department issued an order closing Frantz's claim and awarding a Category II permanent partial disability totaling \$14,027.22. Here too, **no warrant was issued** because a deduction was taken for the third party excess. (CABR at p. 65-66). On June 20, 2005 the Department issued an order reversing the December 6, 2004 closing order and the April 11, 2005 order was held for naught. (CABR at p.67). Frantz's claim remained open.

On **October 28, 2005** the Department issued an order which adjusted Frantz's time-loss compensation rate **because he was receiving Social Security benefits** effective March 1, 2004. Under this order, any time loss compensation benefits payable for that date, or subsequent dates, would be based on a new compensation rate of \$764.20 per month to offset the \$963.00 per month in Social Security benefits Frantz was now receiving. Because Frantz's highest year's earnings were \$1,727.20 per

month, his time-loss compensation rate was offset to ensure that he was not receiving in excess of eighty percent of his highest year's earnings from the combination of the monthly time-loss compensation benefits he was **entitled to but not receiving**, and his Social Security disability benefits, which he was actually receiving. (CABR at pp. 67-68).

On November 11, 2005 the Department issued an order which paid time loss benefits from October 22, 2003 to February 29, 2004 at a rate of \$1,130.70 per month and \$764.20 per month for the period from March 1, 2004 to November 1, 2005. These benefits totaled \$20,499.56 but again, no warrant was issued due to ongoing consumption the third party excess. (CABR at p.68). Despite the pending appeal, the Department has continued to "pay" Frantz his time-loss compensation benefits every fourteen days. **No warrants have been issued** while third party excess is consumed; the amounts Frantz is entitled to for time-loss compensation benefits have been applied to reducing the third party excess amount.

On December 12, 2005 Frantz timely protested the October 28, 2005 order. (CABR at p.68). On May 9, 2006 the Department issued an order affirming the October 28, 2005 order. (CABR at p.68). Frantz then appealed the May 9, 2006 order to the Board. On July 31, 2006 the Board remanded the matter to the Department for further action on the appeal to the May 9, 2006 order. On August 30, 2006, the Department issued an

order affirming the October 28, 2005 and May 9, 2006 orders. (CABR at p.68). Frantz appealed the August 20, 2006 order to the Board. The Board heard arguments based upon stipulated facts and by briefing; no testimony was presented by either party and there was no oral argument. On April 16, 2007, Industrial Appeals Judge Craig Stewart issued a Proposed Decision and Order concluding that the Department correctly applied RCW 51.32.200 despite the fact that no warrants have been issued, that Frantz is receiving compensation from the Department through time loss compensation orders because that rate determines when his third party excess is exhausted, and that the August 30, 2006 Department order was correct and affirmed it. (CABR at P. 23).

In response, Frantz filed a Petition for Review with the Board on May 25, 2007. (CABR at p. 15). On June 18, 2007 the Board issued an order denying his petition. (CABR at p. 1). Frantz appealed this matter to Superior Court. Oral argument was heard on February 8, 2008 by the Honorable Judge Lisa Worswick. On March 14, 2008, Judge Worswick entered findings of fact and conclusions of law and judgment essentially affirming the Board's prior conclusions. (CP at p. 35-38). Frantz timely appealed to this court.

E. ARGUMENT

The Department is not entitled to apply the Social Security offset to Frantz's time-loss compensation amount calculation because: **(1)** the Industrial Insurance Act is to be liberally construed in favor of the injured

worker with ambiguities construed in a light most favorable to the injured worker; (2) applying the Social Security offset at this time is not consistent with the purpose behind the statute allowing for a Social Security offset since (a) the accident fund is not affected until after the third party excess has been consumed and (b) the injured worker receives no benefits from this fund until **after** the third party excess has been consumed. For the period in question, since Frantz was not currently receiving time-loss compensation benefits as a result of the application of a third party excess resulting from a tort recovery made from the third party at fault, the social security offset **should not apply until such time as the third party excess has been consumed and the Department begins/resumes payment of time-loss compensation benefits.**

I. STANDARD OF REVIEW

Below, as the appealing party Frantz had the burden to prove by preponderance of evidence that the Board's findings were incorrect. RCW 51.52.110; *Frazier v. Dept. of Labor & Indust.*, 101 Wn. App. 411, 3 P.3d 221 (2000). The Board's findings are presumed correct. RCW 51.52.100. This court reviews questions of law, including statutory construction, de novo. *City of Pasco v. Pub. Employment Relations Comm'n*, 119 Wash.2d 504, 507, 833 P.2d 381 (1992). The court construes statutory language according to its plain and ordinary meaning. *Flanigan v. Department of*

Labor & Industries, 123 Wash.2d 418, 423-24, 869 P.2d 14 (1994). Finally, when the Board reviews a case on stipulated facts, any remaining issues are questions of law, which this court reviews de novo. *Tunstall v. Bergeson*, 141 Wash.2d 201, 209-10, 5 P.3d 691 (2000), *cert. denied*, 532 U.S. 920, 121 S.Ct. 1356, 149 L.Ed.2d 286 (2001).

II. ANY AMBIGUITIES IN THE INDUSTRIAL INSURANCE ACT SHOULD BE RESOLVED IN FAVOR OF THE INJURED WORKER

a. Ambiguities in the Industrial Insurance Act Should be Resolved in Favor of the Injured Worker, not the Department or Employers.

The Act was established to protect and provide benefits for injured workers, not employers or the Department. It has been held for many years that the courts and the Board are committed to the rule that the Act is remedial in nature and the beneficial purpose should be liberally construed in favor of the beneficiaries—the injured workers. *Wilber v. Department of Labor and Industries*, 61 Wn.2d 439, 446, 378 P.2d 684 (1963); *Hastings v. Department of Labor and Industries*, 24 Wn.2d 1, 12, 163 P.2d 142 (1945); *Nelson v. Department of Labor and Industries*, 9 Wn.2d 621, 628, 115 P.2d 1014 (1941); and *Hilding v. Department of Labor and Industries*, 162 Wash. 168, 175, 298 P. 321 (1931). Furthermore, as noted by the Washington Supreme Court in *Clauson v. Department of Labor and Industries*, 130 Wn. 2d 580 (1996) it is

mandated that any doubt as to the meaning of the workers' compensation law be resolved in favor of the worker. *Id.* at 586. As an injured worker, Frantz falls under the umbrella of the Act and any ambiguities should be resolved in his favor.

b. RCW 51.32.220 is Ambiguous as to the Meaning of "Receiving Compensation".

RCW 51.32.220 states in pertinent part:

For persons receiving compensation for temporary or permanent total disability pursuant to the provisions of this chapter, such compensation shall be reduced by an amount equal to the benefits payable under the federal old-age, survivors, and disability insurance act as now or hereafter amended not to exceed the amount of the reduction established pursuant to 42 U.S.C. Sec. 424a. However, such reduction shall not apply when the combined compensation provided pursuant to this chapter and the federal old-age, survivors, and disability insurance act is less than the total benefits to which the federal reduction would apply, pursuant to 42 U.S.C. 424a. Where any person described in this section refuses to authorize the release of information concerning the amount of benefits payable under said federal act the department's estimate of said amount shall be deemed to be correct unless and until the actual amount is established and no adjustment shall be made for any period of time covered by any such refusal.

Clearly, when a person is "receiving compensation for temporary or permanent total disability", that compensation should be reduced by an amount equal to the benefits payable under social security disability insurance. However, the statute is **ambiguous** as to what "receiving"

means. There is no definition or explanation given for the meaning of “receiving compensation” under RCW 51.32.220.

If no statutory definition exists and absent a contrary legislative intent, statutory language is construed according to its plain and ordinary meaning. *Flanigan v. Department of Labor and Industries*, 123 Wash.2d 418, 426, 869 P.2d 14 (1994); *In re Estate of Little*, 106 Wash.2d 269, 283, 721 P.2d 950 (1986). According to the Merriam-Webster Online Dictionary, to “receive” means “to come into possession of: acquire”. (<http://www.m-w.com/cgi-bin/dictionary?va=receive>. May 25, 2007 10:10 am.) Therefore, giving this statutory language its plain meaning, an injured worker does not receive compensation until he or she **comes into possession** of that compensation. *Potter v. Department of Labor and Industries*, 101 Wash.App. 399, 407, 3 P.3d 229 (2000).

c. Under RCW 51.32.220 Mr. Schiller is not Receiving Compensation.

As noted above, while it has been determined that Frantz is entitled to receive time-loss compensation benefits; he has not actually received these benefits because **no warrants have been issued**; he has received no actual monetary payments. No warrants have been issued because the Department continues to receive a total of \$120,905.21 from the Department’s reimbursement share of the tort recovery **and** third party excess consumption (\$64,654.38 and \$56,250.83 respectively). Reading RCW 51.32.220 Frantz’s favor, the Department has been completely compensated for any and all benefits paid out of the accident fund on his

claim. Furthermore, for this period Frantz has received **no actual monetary** compensation from the Department and will continue to receive **no actual monetary** compensation from the Department until the Department has been paid its share of the tort recovery *and* Frantz has consumed the third party excess recovery. **In short, Frantz will receive no monetary compensation under RCW 51.32.220 until a total of \$120,905.21 has been expended on his claim.**

Therefore, because Frantz is not receiving compensation under the plain meaning of RCW 51.32.220 (which should also be construed in his favor), the social security offset should not apply until he begins actually **receiving** monetary compensation from the accident fund after the \$120,905.21 third party excess has been expended and consumed.

III. IT IS CONTRARY TO THE PURPOSE OF THE SOCIAL SECURITY OFFSET FOR IT TO BE APPLIED DURING CONSUMPTION OF THE THIRD PARTY EXCESS RECOVERY.

RCW 51.24.030(1) permits injured workers to pursue tort claims “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.” Under RCW 51.24.060(1)(a)-(c), any recovery made from a tort claim is divided and distributed as follows:

(1) Attorney fees and costs are paid, (2) twenty-five percent of the balance goes to the injured workers or their beneficiaries, and (3) the balance of the recovery made goes to the Department, but only to the extent necessary to reimburse the Department for benefits paid.

The injured workers or their beneficiaries are not entitled to receive additional workers' compensation benefits until such time as the benefits equal the remaining balance of the recovery paid to the injured workers or their beneficiaries. RCW 51.24.060(1)(e). This system serves a dual purpose to (1) spread responsibility for compensating injured workers and their beneficiaries to third parties who are legally and factually responsible for the injury, and (2) permit the injured worker to increase his or her compensation beyond the Act's limited benefits. *Flanigan*, 123 Wash.2d at 424, 869 P.2d 14 (citing *Maxey v. Dep't of Labor & Indus.*, 114 Wash.2d 542, 549, 789 P.2d 75 (1990)). The Department's ability to recover from the proceeds of a third party recovery also serves two purposes to (1) ensure the accident fund is not charged for damages caused by third parties, and (2) ensure injured workers do not make a double

recovery. *Flanigan*, 123 Wash.2d at 425, 869 P.2d 14 (citing *Maxey*, 114 Wash.2d at 549, 789 P.2d 75).

a. The Purpose of the Social Security Offset and Reverse Offset Statutes are NOT Advanced by Applying an Offset While the Third Party Excess Recovery and Excess are Still Being Consumed.

Courts generally apply RCW 51.32.220 in conjunction with 42 U.S.C. § 424a (1991), which Congress passed to coordinate the federal and state disability benefits that an injured worker may receive. Specifically, 42 U.S.C. § 424a addresses “the problem of overlapping state and federal disability benefits.” *Regnier v. Department of Labor & Industries*, 110 Wash.2d 60, 62, 749 P.2d 1299 (1988). It allows the federal government to reduce an injured worker's social security disability benefits if the worker also receives state disability benefits. “It is the purpose of the statutory scheme to see that a disabled person is fully compensated for his disability, but not permitted to collect overlapping awards.” *Ravsten v. Department of Labor & Industries*, 108 Wash.2d 143, 149, 736 P.2d 265 (1987).

Federal law contains an exception to this general rule allowing the federal government to take the offset. 42 U.S.C. § 424a(d). The federal statute provides for a “reverse offset,” whereby the State may reduce the amount of disability compensation it pays out if the worker is receiving

Social Security disability benefits and if the state has a statute allowing for such an offset. “The effect of this provision is that it allows the state to shift costs to the federal government through its reverse offset program.” *Harris v. Department of Labor & Industries*, 120 Wash.2d 461, 469, 843 P.2d 1056 (1993). Washington enacted RCW 51.32.220 (see statutory language above) to take advantage of this exception. *Herzog v. Department of Labor & Industries*, 40 Wash.App. 20, 22, 696 P.2d 1247 (1985).

The purpose of the offset and reverse offset language is to prevent an injured worker from making a double recovery from both federal social security disability insurance and state worker’s compensation benefits. However, there is no offset applied to persons with disabilities who have made third party tort recoveries. In fact, while not a reported decision, the evaluation made by the court in *Tanner v. Sullivan* (United States District Court in Maine) should be viewed as persuasive authority because it is a United States District Court interpretation of the federal statute. According to the court in *Tanner*, where a third party suit for negligence succeeds and an individual actually repays workers' compensation resulting in claimant being in the same position he would have been in if he had never received workers' compensation, an offset will not apply and claimant is entitled to retroactive reimbursement for any benefits withheld;

but payment of attorneys' fees out of proceeds of third party settlement does not constitute repayment of workers' compensation. *Tanner v Sullivan* (1990, D Me) CCH Unemployment Ins Rep; 15,403A. Further, Chapter 9 of the Social Security Disability Claims: Practice and Procedure, citing *Tanner*, recognizes that instances exist in which offset does not apply:

For example, if a worker receives payment of damages on a products liability claim for the injury which caused his disability, and for which he receives or received workers' compensation payments, and if he stops receiving workers' compensation and repays any workers' compensation which he accepted, his disability benefits will not be reduced, and he will be reimbursed for any reduced amount of social security disability payments he got while on workers' compensation. 1 Soc. Sec. Disab. Claims Prac. & Proc. § 9:25 (2nd ed.)

Tanner applies to Frantz's case because here the Department is being fully reimbursed out of the third party excess recovery for any costs of administering Frantz's claim. The Department is benefiting from the fact that this industrial injury was caused by a third party; the accident fund is not taxed until the excess had been consumed. Therefore, it is unfair and unjust for the social security reverse offset to be applied in Frantz's case while the Department is at the same time reimbursed; **the reverse offset should not apply until the Department actually begins issuing warrants paying Frantz's time-loss compensation benefits.** By

applying the offset prior to the consumption of the third party excess recovery, the Department itself is double dipping by applying the offset while paying nothing from the accident fund because all of the initial administration costs of Frantz's claim—up to \$120,905.21—are covered by the third party tort recovery. Application of the Department's reverse offset through social security benefits to benefits to Frantz that are currently 100% offset by the third party excess recovery (and thus not received by Frantz) constitute a double offset that results in a windfall for the Department.

b. The Purpose of RCW 51.32.225, Reverse Offset Legislation is NOT Advanced by Applying the Reverse Offset While the Third party Excess Recovery is Still Being Consumed.

RCW 51.32.225 was enacted in 1986 and allows the State to reduce disability payments for persons who receive federal social security **retirement** benefits. It provides, in pertinent part:

- (1) For persons *receiving compensation* for temporary or permanent total disability under this title, the compensation shall be reduced by the department to allow an offset for social security *retirement benefits* payable under the federal social security, old age survivors, and disability insurance act, 42 U.S.C....
- (2) Reductions for social security retirement benefits under this section shall comply with the procedures in RCW 51.32.220(1) through (6), except those that relate to computation, and with any other procedures established by the Department to administer this section. RCW 51.32.225 (emphasis added).

Like RCW 51.32.220, a major factor behind the enactment of RCW 51.32.225 was to avoid duplication in benefits or “double dipping.” *Harris*, 120 Wash.2d at 479, 843 P.2d 1056. The *Harris* court held that both disability and retirement benefits are forms of wage-loss protection and that the termination of one of those sources of benefits is a rational way of avoiding duplicative benefits. According to the courts, the purpose of the statutory scheme is “to see that a disabled person is fully compensated for his disability, but not permitted to collect overlapping awards.” *Ravsten*, 108 Wash.2d at 149, 736 P.2d 265; *see also Harris*, 120 Wash.2d at 471, 843 P.2d 1056 (finding that because intent of 42 U.S.C. § 424a is to avoid duplication of benefits and RCW 51.32.225 also avoids duplicative benefits, it is consistent with federal policy). In other words, the goal is to prevent the claimant to collect an award that amounts to a windfall. *Herzog*, 40 Wash.App. at 25, 696 P.2d 1247.

In the present case, Frantz cannot make a double recovery while the Department is in the process of being reimbursed from third party tort recovery for the first \$120,905.21 in costs of administering Frantz’s claim. The Department is expending no monies from the accident fund administering Frantz’s claim until the cost of administering his claim exceeds \$120,905.21. Frantz is currently receiving Social Security disability benefits because he is disabled and unable to work under the

Federal Social Security laws, he is also receiving compensation through the third party tort recovery. The Department should not be entitled to apply an offset because of Frantz's receipt of Social Security disability benefits when the accident fund is not being depleted for administration costs.

While the offset statutes have been designed to prevent a claimant from double dipping by collecting disability benefits from both the Social Security administration and the State accident fund, these statutes have no applicability where both the State and Federal funds are not simultaneously being utilized by the claimant. As was the case in *Tobin* a case recently decided by this court, the Department's position in Frantz's case would give the Department an "unjustified windfall" at Frantz's expense because the Department is simultaneously benefitting from the fact that Frantz successfully pursued both the third party tort claim and Social Security Disability benefits. *Tobin v. Department of Labor & Industries*, Wash.App. , Division 2, 2008, 187 P.3d 780, 784 (2008). Under the Department's current stance, the accident fund is not taxed because it is being reimbursed out of the third party recovery **and** the Department is further benefitting because the length of time it will take Frantz to consume the excess is significantly increased by the reduction in his compensation rate due to the offset thus resulting in a windfall for the

Department. Because the third party tort recovery—through reimbursement to the Department and excess—is covering the cost of administering Frantz’s claim, the State accident fund is not reduced by the administration of his claim, and the reverse offset should not be applied until the cost of administering his claim exceeds \$120,905.21.

F. CONCLUSION

For all of the aforementioned reasons, Frantz Schiller respectfully requests that this Court *reverse* the judgment and order of the Superior court, *reverse* the Department order of August 20, 2006; *reverse* the Department order of October 28, 2005; and *remand* this matter to the Department with direction that the reverse offset should not be applied until the cost of administering Frantz Schiller’s claim exceeds the amount of the Department’s share of the third party tort recovery and excess recovery and to reimburse Frantz Schiller for the amounts already offset.

Dated this 28th day of August, 2008.

Respectfully submitted,

VAIL-CROSS & ASSOCIATES

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CERTIFICATE OF SERVICE

I certify under penalty of perjury that I hand delivered/mailed this day the document referenced below to the following, postage paid:

CAUSE NO.: 37597-4
APPELLANT: FRANTZ G. SCHILLER
RESPONDENT: Dept. of Labor and Industries, State of Washington
DOCUMENT: Appellant's Opening Brief
ORIGINAL TO: Court of Appeals – Division II
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M/S TB-06
Tacoma, WA 98402-4454 (hand delivered)

COPIES TO: Director
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DATED this 28 day of August, 2008.



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