

FILED
COURT OF APPEALS
DIVISION II

09 MAR -9 AM 8:42

STATE OF WASHINGTON
BY  DEPUTY

No. 38527-9-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

THE WASHINGTON STATE DEPARTMENT OF
LABOR AND INDUSTRIES, *et al.*,

Appellants/Defendants,

vs.

SHARON DAVIS, *et al.*,

Respondents/Plaintiffs.

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 MAR -4 PM 3:36

BRIEF OF RESPONDENTS

Michael David Myers, WSBA No. 22486
Ryan C. Nute, WSBA No. 32530
MYERS & COMPANY, P.L.L.C.
1809 Seventh Avenue, Suite 700
Seattle, Washington 98101
(206) 398-1188

Attorneys for Respondents/Plaintiffs

ORIGINAL

TABLE OF CONTENTS

I. RESPONSE TO ASSIGNMENTS OF ERROR.....4

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....4

III. STATEMENT OF THE CASE.....5

IV. STANDARD OF REVIEW.....8

V. AUTHORITY AND ARGUMENT.....8

VI. CONCLUSION.....22

APPENDICES 1 – 5

TABLE OF AUTHORITIES

Cases

<i>Boeing Co. v. Heidy</i> , 147 Wn.2d 78, 86, 51 P.3d 793 (2002).....	13
<i>Cena v. State</i> , 121 Wn. App. 352, 358, fn. 13, 88 P.3d 432 (2004).....	14
<i>Chea v. Men's Warehouse, Inc.</i> , 85 Wn. App. 405, 414, 932 P.2d 1261(1997), amended on reconsideration in part, 971 P.2d 520, review denied 134 Wn.2d 1002, 953 P.2d 96.....	12
<i>Chisholm v. U.S. Postal Service</i> , 665 F.2d 482, 490 (4 th Cir. 1981).....	18
<i>City of Ferndale v. Friberg</i> , 107 Wn.2d 602, 605, 732 P.2d 143 (1987).....	9
<i>Dils v. Department of Labor & Industries</i> , 51 Wn. App. 216, 752 P.2d 1357 (1988).....	19, 20
<i>Forsman v. Employment Sec. Dep't</i> , 59 Wn. App. 76, 83, 795 P.2d 1184 (1990), review denied, 116 Wn.2d 1005, 803 P.2d 1309 (1991).....	17
<i>Hanson v. Hutt</i> , 83 Wn.2d 195, 517 P.2d 599 (1974).....	15-16
<i>Kingery v. Department of Labor and Industries of the State of Wash.</i> , 132 Wn.2d 162, 173, 937 P.2d 565 (1997).....	12
<i>Marley v. Department of Labor and Industries of State</i> , 125 Wn.2d 533, 886 P.2d 189 (1994).....	15
<i>Oatis v. Crown Zellerbach Corp.</i> , 398 F.2d 496, 498-99 (5 th Cir. 1968).....	18
<i>Oda v. State</i> , 111 Wn. App. 79, 86, 44 P.3d 8 (2002).....	21
<i>Orion Corp. v. State</i> , 103 Wn.2d 441, 455-460, 693 P.2d 1369 (1985)...	18
<i>Prisk v. City of Poulsbo</i> , 46 Wn. App. 793, 797-98, 732 P.2d 1013 (1987).....	17

<i>Robinson v. City of Seattle</i> , 119 Wn.2d 34, 77, 830 P.2d 318 (1992).....	9
<i>Seattle-First Nat. Bank v. Shoreline Concrete Co.</i> , 91 Wn.2d 230, 588 P.2d 1308 (1978).....	11-12
<i>Tobin v. Department of Labor & Industries</i> , 145 Wn. App. 607, 187 P.3d 780 (2008).....	passim
<i>Valentin v. Hospital Bella Vista</i> , 254 F.3d 358 (1 st Cir. 2001).....	10
<i>Wolf v. Scott Wetzel Services, Inc.</i> , 113 Wn.2d 665, 782 P.2d 203 (1989).....	14
<i>Wright v. Colville Tribal Enterprise Corp.</i> , 159 Wn.2d 108, 120, fn. 3, 147 P.3d 1275 (2006).....	10
<i>Wright v. Schock</i> , 742 F.2d 541, 545 (9 th Cir. 1984).....	20

Statutes

RCW 51.04.010.....	11
RCW 51.12.010.....	12
RCW 51.48.017.....	14
RCW 51.52.110.....	6, 5, 13

Rules

RAP 7.3.....	21
CR 56.....	8, 11

I. RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR

Respondents filed a class action in the Thurston County Superior Court against the Department on behalf of injured workers seeking refunds of amounts collected by the Department to which it was not entitled pursuant to *Tobin v. Department of Labor & Industries*, 145 Wn. App. 607, 187 P.3d 780 (2008).

The trial court has subject matter jurisdiction over the class action, which does not fall within and is not inimical to the Industrial Insurance Act (the "Act"). The exhaustion of remedies doctrine does not warrant dismissal on summary judgment; Respondents have exhausted their administrative remedies and the majority of putative class members simply do not have administrative remedies to exhaust.

The trial court did not err in ruling the Department had failed to show there were no genuine issues of material fact and that it was entitled to judgment as a matter of law and accordingly denying its motion for summary judgment.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court err in denying the Department's summary judgment motion on the issue of subject matter jurisdiction?
2. Does the trial court have subject matter jurisdiction over this class action?

3. Does the exhaustion of remedies doctrine apply though Ms. Davis and Ms. Chliek have exhausted their administrative remedies?
4. Should the exhaustion of remedies doctrine apply though the *Tobin* decision was issued after the class members' third-party distribution orders became final?

III. STATEMENT OF THE CASE

A. Industrial Insurance Claims of Davis and Chliek

1. *Sharon Davis*

Following Ms. Davis' administrative appeal the Department successfully moved for summary judgment.¹ Ms. Davis' Petition for Review to the Board of Industrial Insurance Appeals was filed and review was granted; the Department's order was affirmed by the Board on March 2, 2009.²

2. *Batyah Chliek*

Following Ms. Davis' administrative appeal the Department successfully moved for summary judgment.³ On February 2, 2009 the

¹ Appendix 1. The Appendices attached to this Response are modeled upon the parties' prior agreement to designate the Appendices supplied by Appellants as the official record in lieu of designating clerk's papers. See letter from Steve Puz to David Ponzoha, Court Clerk dated January 16, 2009. Respondents request that the Court accept their Appendices for the same reasons.

² Appendix 2. Ms. Davis' appeal to the superior court pursuant to RCW 51.52.110 is being prepared and will be filed within thirty days of the Board's ruling.

³ Appendix 3.

Board denied Ms. Chliek's Petition for Review.⁴ On February 25, 2009 Ms. Chliek filed a Notice of Appeal in the Snohomish County Superior Court pursuant to RCW 51.52.110.⁵

B. Superior Court Procedural History

Respondents filed the Class Action Complaint on July 11, 2008. Ms. Davis, Ms. Chliek and Mr. Booth were named as class representatives. The class action was filed on behalf of all persons whose third-party recoveries had been subjected to the Department's lien without excluding general damages from the reimbursement calculus, as described in *Tobin*.

Less than three weeks after the suit was filed the Department moved for summary judgment seeking dismissal with prejudice.⁶ Insofar as the issues on appeal are concerned, the trial court denied summary judgment on the issues of subject matter jurisdiction and exhaustion.

⁴ Appendix 4.

⁵ Appendix 5.

⁶ The Department made the following arguments: (1) Plaintiffs' third-party recoveries did not allocate between general and other damages and therefore *Tobin*, even if correct, did not apply; (2) the order in Mr. Booth's case was final and not appealed; (3) the trial court lacked subject matter jurisdiction based on RCW 51.04.010; (4) the plaintiffs had not exhausted administrative remedies; (5) damages were not available under 42 U.S.C. § 1983; (6) damages were not available for a state constitutional violation; (7) extraordinary writs were unavailable and (8) the plaintiffs had not filed tort claim forms under RCW Ch. 4.92.

“The problem area,” the trial court described, is “what about injured workers that did not file an appeal within the 60-day period but, nevertheless, have a claim about pain and suffering money being taken by L&I.”⁷ It continued to explain:

It seems that this would kind of be in the twilight zone if that has to be handled as an administrative matter but they’ve already exhausted or, I should say, they’ve already not filed a claim within the 60 days, where do those claims go? And that’s the reason that I’m not going to grant summary judgment yet.⁸

The trial court further commented that (1) it was not deciding at the time whether it had jurisdiction, as *Tobin* had not yet been reviewed by the Washington Supreme Court⁹ and (2) “now is not the time for this Court to be considering” the exhaustion defense on summary judgment (as the third-party distribution orders in Ms. Davis and Ms. Chliek’s individual cases were being administratively litigated).¹⁰

The trial court’s order (entered after further briefing) stated that it declined to rule on the issue of subject matter jurisdiction at that time (and therefore would not grant the Department’s motion for summary judgment on that basis) but would permit the Department to raise the issue at a later

⁷ Appendix N:21-22.

⁸ *Id.* at 22.

⁹ *Id.*

¹⁰ *Id.* at 23.

time.¹¹ The trial court's order further provided summary judgment was inappropriate on the exhaustion issue at that time as the Department had not met its burden under CR 56.¹²

IV. STANDARD OF REVIEW

Respondents do not object to the Department's recital of the applicable standards of review.

V. AUTHORITY AND ARGUMENT

A. The Industrial Insurance Act

The Department is wrong when it contends that the only issues remaining in this case are Ms. Davis and Ms. Chliek's challenges to their third-party distribution orders in their individual cases. This lawsuit was brought as a class action and the putative class members' interests were properly considered by the trial court in denying the Department's motion for summary judgment.¹³ The trial court left no question that the claims remained vital if *Tobin* was affirmed by the Supreme Court.

The ultimate issue is this: if *Tobin* was correctly decided, what to do about the injured workers from whose recoveries the Department has

¹¹ Appendix Y:3, ¶ iv.

¹² *Id.*, ¶ ii.

¹³ The trial court's caution was particularly justified in that the Department filed a motion for summary judgment with a proposed order seeking dismissal with prejudice.

taken too much money? If there's a right, what's the remedy and who provides it?¹⁴

The Department tries to make the class members' *Tobin*-based unjust enrichment claims for refunds fit the Procrustean bed of the Industrial Insurance Act. But the Act—which, it should be remembered, is for the benefit of injured workers, not the Department—simply doesn't apply.

The trial court has subject matter jurisdiction over the class action. The trial court also correctly ruled that the exhaustion of remedies doctrine didn't preclude maintenance of the class action. The trial court's order should be affirmed.

B. The Trial Court Has Subject Matter Jurisdiction and the Exhaustion of Remedies Doctrine is Inapplicable

1. *Subject Matter Jurisdiction*

The Department's argument that it (and the Board) have exclusive jurisdiction leaves a major question unanswered. Assuming *arguendo* that the superior courts lack jurisdiction, what procedures do the Department

¹⁴ Another issue—which wasn't brought up in the Department's motion or considered by the trial court—is whether *Tobin* has retroactive effect. This issue is not briefed in this response as the issue was not raised below and is not addressed in the Department's brief. Respondents note generally that (1) once an appellate court has applied a rule retroactively to the parties in the case announcing a new rule, it will apply the new rule to all others not barred by procedural requirements, such as the statute of limitation or res judicata (*Robinson v. City of Seattle*, 119 Wn.2d 34, 77, 830 P.2d 318 (1992) and (2) the general rule is that a remedial statute may be applied retroactively if such an application will further its purpose. *City of Ferndale v. Friberg*, 107 Wn.2d 602, 605, 732 P.2d 143 (1987).

and the Board have for adjudicating the claims of workers whose third-party distribution orders were entered pre-*Tobin*? The answer is none. The Department does not reference any administrative procedures that are available to those workers. But if such workers have rights based on *Tobin*, they must have a remedy.

a. The Trial Court Did Not Err in Declining to Rule on the Issue of Subject Matter Jurisdiction.

When the merits of the jurisdictional issue are inextricably tied to the merits of the claim itself, a court generally should either apply a summary judgment standard or permit the plaintiff to develop the relevant jurisdictional facts at trial. *Wright v. Colville Tribal Enterprise Corp.* 159 Wn.2d 108, 120, fn. 3, 147 P.3d 1275 (2006), citing *Valentin v. Hospital Bella Vista*, 254 F.3d 358 (1st Cir. 2001).

The trial court observed that *Tobin* was pending before the Washington Supreme Court and that it would decline to rule on the question of jurisdiction at that time, though would permit the Department to raise the issue later. Jurisdiction and the merits of the class members' claims under *Tobin* are intertwined. The trial court did not err in declining to rule on the issue of jurisdiction at the time of the Department's motion.

b. The Department Failed to Carry its Burden on Summary Judgment.

The Department elected to file a motion for summary judgment rather than a motion under CR 12. Therefore, summary judgment standards applied to the trial court's ruling on the question of jurisdiction. The second requirement of CR 56 is that the moving party must show that it is entitled to judgment as a matter of law. For the reasons explained below, the trial court properly denied the Department's motion.

- c. The Industrial Insurance Act Does Not Oust the Superior Court of Jurisdiction Over the Class Members' Claims.

RCW 51.04.010 recites the Legislature's finding that "the common law system governing the remedy of workers against employers for injuries received in employment" was neither fair nor effective. Accordingly, the Legislature adopted the Act. In doing so it took away the courts' jurisdiction over all civil actions and civil causes of action "for such personal injuries."

The Act—which, it should be recalled, is a remedial statute and construed in workers' favor—is meant to govern the workers' compensation claims process. It was not meant to provide a framework for injured workers to collect pain and suffering awards that the Department wrongfully took from them. The Department has effectively mis-construed the statute to create an immunity where none exists.

i. *Governing Law*

“In effect, the Act ‘immunizes,’ from judicial jurisdiction, all tort actions which are premised upon the ‘fault’ of the employer vis-a-vis the employee.” *Seattle-First Nat. Bank v. Shoreline Concrete Co.*, 91 Wn.2d 230, 588 P.2d 1308 (1978).

The Act does not abolish a common law remedy unless it provides a substitute remedy. *Chea v. Men’s Wearhouse, Inc.*, 85 Wn. App. 405, 414, 932 P.2d 1261(1997), *amended on reconsideration in part*, 971 P.2d 520, *review denied* 134 Wn.2d 1002, 953 P.2d 96.

“[T]he Act did not, and could not, alter the constitutional equity power of Washington’s courts over industrial injury cases.” *Kingery v. Department of Labor and Industries of the State of Wash.*, 132 Wn.2d 162, 173, 937 P.2d 565 (1997).¹⁵

The Act “shall be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment.” RCW 51.12.010. All doubts about the meaning of Act must be resolved in favor of workers’

¹⁵ Admittedly the exception is “narrow.” *Id.* at 175. However, Plaintiffs submit this case does not involve the exercise of jurisdiction over “industrial injury cases” coming directly within the purview of the Act—like the failure to appeal an order denying benefits in *Kingery*. The fact that the equitable exception applies even in such cases tends to reinforce the conclusion that jurisdiction exists over the class members’ unjust enrichment claims (not falling within the scope of the Act).

compensation claimants. *Boeing Co. v. Heidi*, 147 Wn.2d 78, 86, 51 P.3d 793 (2002).

ii. *The Act Does Not Deprive the Courts of Jurisdiction Over the Class Members' Claims for Refunds Based on Tobin*

It's true that Ms. Davis and Ms. Chliek filed the lawsuit before appealing their third-party distribution orders.¹⁶ But there are several reasons why the Department's arguments ring hollow.

First, Ms. Davis and Ms. Chliek have reached the end of their administrative appeals. They have appealed (or will be appealing) to the superior court based on the Department and the Board's refusal to apply *Tobin* in their individual cases. They're now back at the same place they started. Their administrative remedies were an exercise in futility and inefficiency.¹⁷

¹⁶ Respondents note that *Tobin* was issued a short time after their orders in their cases were entered. Having filed the class action, Ms. Davis and Ms. Chliek were in a Catch-22—in order to preserve their individual claims, they were arguably required to pursue administrative appeals (though *Tobin* was not in effect when the orders in their individual cases were entered). Prudence counseled this course of action.

¹⁷ If the Court concluded that jurisdiction over Ms. Davis and Ms. Chliek's individual claims is lacking based on the pending superior court appeals from the administrative orders, there are alternatives to a dismissal of the entire case (and all putative class members' claims) on summary judgment. These include:

1. Consolidation of their individual appeals to the superior court with this class action;
2. A stay of further proceedings pending the outcome of their individual superior court appeals under RCW 51.52.110;

Second, the “exclusive remedy” provision of the Act only acts as a bar where the Act actually provides a remedy.¹⁸ The Department did not show the trial court that there was a remedy for workers who could no longer appeal their third-party distribution orders, assuming *arguendo* that *Tobin* was correct. It appears no administrative remedy is available to workers if *Tobin* applies retroactively.

Third, the putative class members’ third-party recoveries were administratively adjudicated before *Tobin* was decided. (This includes Ms. Davis and Ms. Chliek’s cases.) While Ms. Davis and Ms. Chliek were fortunate to have adequate time to file their administrative appeals after *Tobin* was decided, other workers had no reason to appeal the orders on the basis that their general damages weren’t subject to the

-
3. The dismissal of Ms. Davis and Ms. Chliek’s claims only without prejudice, so that their claims may be determined in the individual superior court appeals; and
 4. A stay of further proceedings pending the selection of alternate class representatives who lacked the ability to appeal their third-party distribution orders issued pre-*Tobin*.

¹⁸ This case is therefore unlike *Cena v. State*, 121 Wn. App. 352, 358, fn. 13, 88 P.3d 432 (2004) (holding negligent administration claims were barred by the exclusive remedy provision because the Act provided a remedy for resolving disputes regarding the administration of claims). *Cena* and *Wolf v. Scott Wetzel Services, Inc.*, 113 Wn.2d 665, 782 P.2d 203 (1989) make clear that the basis for their holdings is that the Act only “preempts” claims where it expressly provides a remedy. *Id.* at 668 (holding no civil cause of action for the wrongful delay or termination of benefits existed due to remedy under RCW 51.48.017). Moreover, unlike those cases, Respondents’ claims do not sound in tort, but equity (unjust enrichment). Further, their unjust enrichment claim does not arise out of their workplace injuries (as their claims for benefits in the first instance do) but the Department’s retention of funds which it’s not entitled to.

Department's lien because the Department's position was (and is) that its lien attached to all damages recovered. The orders in their cases became final. There is no procedural appellate remedy for them.

The Court's order granting review noted that it was "undoubtedly true" that putative class members would have no remedy at the administrative level, but that even erroneous decisions had finality (citing *Marley v. Department of Labor and Industries of State*, 125 Wn.2d 533, 886 P.2d 189 (1994)); therefore, the Court implied, there were no claims. Respondents respectfully submit this conclusion is inaccurate as applied to this case. First, it fails to take into account the potential retroactive effect of the *Tobin* decision. Second, unlike the claims in *Marley* and progeny, the class members' unjust enrichment claims do not fall within the scope of the Act. Third, whether the exclusive remedy bar applies is an issue distinct from the validity of third-party distribution orders entered pre-*Tobin*. Finally, the legal error in *Marley* inhered in the order based on the law at the time it was entered (and thus Mrs. Marley could have appealed); here, the legal error only became known after *Tobin* was decided.

The courts' jurisdiction over class actions against the State despite objections to subject matter jurisdiction was addressed in *Hanson v. Hutt*, 83 Wn.2d 195, 517 P.2d 599 (1974) (superseded by constitutional amendment on other grounds). *Hanson* involved a pregnancy

discrimination class action against the State¹⁹ challenging the constitutionality of a statute on equal protection grounds. The State argued the trial court lacked jurisdiction because the claimants had not timely filed appeals. The Supreme Court rejected this argument; one of its reasons was that “the Department caused claimants to conclude that further claims for benefits were pointless or unnecessary” and there was “the existence of a class of women who were disqualified in the past without having received an official notice of the reasons for disqualification and without having been advised by the Department of their right to claim these benefits and to appeal the Department’s denial of their claims.” *Hanson*, 83 Wn.2d at 203.

Similarly, the Department’s misinterpretation of the law gave claimants no reason to appeal its reimbursement orders on the basis that pain and suffering shouldn’t be included in the distribution formula. *Hanson* suggests jurisdiction is therefore proper.

If the courts lack jurisdiction, the Department would retain the money it collected through its misinterpretation of the third-party recovery statute. *Tobin* would be rendered illusory. The class members’ claims do not come within the Act’s purview. The trial court did not err in declining to grant summary judgment on this basis.

¹⁹ Strictly speaking, the commissioner of the employment security department.

2. *Exhaustion of Remedies*

The exhaustion of remedies doctrine is not one of inflexible application, but discretion. The trial court determined that the Department had not met its burden on summary judgment that exhaustion of remedies doctrine required dismissal.

a. *Governing Law.*

Whether to apply the exhaustion of remedies doctrine involves the exercise of discretion:

...when addressing problems involving the exhaustion of remedies rule, reviewing courts necessarily exercise a great deal of discretion. The exhaustion rule is one of restraint, requiring courts to weigh and balance many factors in order to decide whether requiring exhaustion is desirable.

Our Supreme Court has recognized that, although a strong bias exists toward requiring exhaustion before resort to the courts, when considerations of fairness and practicality outweigh the policies underlying the doctrine, compliance with the rule is unnecessary.

Prisk v. City of Poulsbo, 46 Wn. App. 793, 797-98, 732 P.2d 1013 (1987).

Whether a claimant exhausted all reasonable alternatives is a question of fact. *Forsman v. Employment Sec. Dep't*, 59 Wn. App. 76, 83, 795 P.2d 1184 (1990), *review denied*, 116 Wn.2d 1005, 803 P.2d 1309 (1991).

Exhaustion is not required if resort to the administrative procedures would be futile. *Orion Corp. v. State*, 103 Wn.2d 441, 455-460, 693 P.2d 1369 (1985).

The exhaustion of remedies requirement is satisfied for a class action if the named plaintiff representing the class exhausted his or her remedies. *Chisholm v. U.S. Postal Service*, 665 F.2d 482, 490 (4th Cir. 1981); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496, 498-99 (5th Cir. 1968).

- b. Exhaustion (a) No Longer Applies or (b) Shouldn't be Required.

The Department notes one reason for the exhaustion doctrine is deference to administrative agencies. This is not a case in which deference is due. As *Tobin* makes clear, the Department has misinterpreted the third-party recovery statute for years and has received a significant windfall at injured workers' expense.

Ms. Davis and Ms. Chliek had not completed the process of exhausting their administrative remedies when the case was filed. But their administrative remedies have been exhausted. They've been forced to resort to the superior courts because the Department and the Board declined to apply *Tobin* to their third-party distribution orders. Since the

class representatives have exhausted their remedies, class members are not required to do the same.

In the case relied on by the Department, *Dils v. Department of Labor & Industries*, 51 Wn. App. 216, 752 P.2d 1357 (1988), the claimants were not precluded from resorting to administrative remedies because they still had time to do so but hadn't. Here, (a) the named plaintiffs have exhausted their administrative remedies and (b) that time has come and gone for the vast majority of the class members. As the trial court observed, there will be many claims falling within a "twilight zone"—workers simply won't be able to exhaust administrative remedies because they are no longer available.

Applying the exhaustion doctrine to bar the claims in this case would serve neither the purpose of the doctrine nor "considerations of fairness and practicality." The trial court did not err in declining to grant summary judgment on this basis.

C. The Trial Court Properly Considered Class Members' Interests in Declining to Issue Summary Judgment

The Department's first argument appears to be that the Act's exclusive remedy provision strips the courts of jurisdiction over class actions against the Department. But that's clearly not the case based on the authority cited in support of subject matter jurisdiction, *supra*.

The Department's second argument is that a class action cannot survive if the class representatives have not exhausted their administrative remedies.²⁰ *Dils*, 51 Wn. App. 216, is distinguishable because, as explained above, Ms. Davis and Ms. Chliek have done so and the putative class members have no more administrative remedies to exhaust.

The Department's remaining policy-based doomsday arguments are unpersuasive. The class members are not "bypassing" the Act's nonexistent administrative remedies. This case does not involve the "type, level and extent" of benefits awarded to workers, but the Department's unjust enrichment resulting from its misinterpretation of the third-party recovery statute. The suggestion that employers have class action rights is ill-defined and confusing. Workers' compensation benefits are not implicated in this case, which concerns the refund of monies the Department unlawfully retained. The courts will not be swamped with new claims, since the Department is undeniably required to follow *Tobin* in third-party distribution orders adjudicated after that decision was issued and any such orders which do not are subject to administrative and superior court appeals under RCW Ch. 51.52. A class action is a far

²⁰ Respondents note that dismissal of an uncertified class action does not have any effect on the putative class members' claims. See, e.g., *Wright v. Schock*, 742 F.2d 541, 545 (9th Cir. 1984) (precertification motions for summary judgment do not have res judicata effect on putative class members).

superior method of adjudication than hundreds or thousands of piecemeal appeals in the Department and at the Board for cases determined before *Tobin* was issued.

The argument that permitting this particular class action to proceed involves “judicial legislation” is particularly unpersuasive. The Legislature provided a method for injured workers to obtain third-party recoveries and recover not only the benefits paid by the Department but all of the damages they are entitled to under tort law. This Court, as is its function, definitively interpreted the law and concluded that the Department’s misconstrued the relevant statute. There is no legislation by which workers who were subjected to the Department’s overreaching have a remedy to recover the money the Department kept. It’s the courts’ job to provide it. “A class suit is a valuable procedure....This is no less true for claims against the State than for claims against other defendants.” *Oda v. State*, 111 Wn. App. 79, 86, 44 P.3d 8 (2002) (internal citation omitted).

D. In the Alternative, the Court Should Stay Further Appellate Proceedings Pending the Washington Supreme Court’s Determination of *Tobin*

The parties agree that the Supreme Court’s decision in *Tobin* will have a significant if not conclusive effect on this case. Therefore, judicial economy counsels that appellate proceedings should be stayed pursuant to RAP 7.3 until the Supreme Court’s decision is issued.

VI. CONCLUSION

The Department collected money it wasn't owed. A class action is the most efficient way to ensure this money is refunded to injured workers.

The trial court has subject matter jurisdiction and the exhaustion of remedies doctrine does not apply to bar the claims. The trial court's order should be affirmed. In the alternative, the Court should stay further proceedings pending the final outcome of the appellate proceedings in *Tobin*.

DATED this 4th day of March, 2009.

Attorneys for Respondents/Plaintiffs

By: _____



Michael David Myers
WSBA No. 22486
Ryan C. Nute, WSBA No. 32530
Myers & Company, P.L.L.C.
1809 Seventh Avenue, Suite 700
Seattle, Washington 98101
(206) 398-1188

APPENDICES

Appendix 1

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

1 **IN RE: SHARON A. DAVIS**) **DOCKET NO. 08 17213**
2 **CLAIM NO. Y-433962**) **PROPOSED DECISION AND ORDER**

3
4 **INDUSTRIAL APPEALS JUDGE: Sally R. Sawtell**

5 **APPEARANCES:**

6 Claimant, Sharon A. Davis, by
7 Myers & Company, P.L.L.C., per
8 Michael D. Myers

9 Employer, Four Winds Services, Inc.,
10 None

11 Department of Labor and Industries, by
12 The Office of the Attorney General, per
13 Michael Hall, Assistant

14 The claimant, Sharon A. Davis, filed an appeal with the Board of Industrial Insurance
15 Appeals on August 1, 2008, from an order of the Department of Labor and Industries dated June 9,
16 2008. In this order, the Department distributed the claimant's third-party recovery of \$75,000 and
17 made demand for the claimant to reimburse the Department \$24,133.98, with excess recovery
18 totaling \$8,907.01 that the claimant must expend for costs incurred as a result of the injury covered
19 under the claim. The Department order is **AFFIRMED**.

20 **PROCEDURAL AND EVIDENTIARY MATTERS**

21 On October 30, 2008, the parties agreed to include the Jurisdictional History in the Board's
22 record. That history establishes the Board's jurisdiction in this appeal.

23 On October 20, 2008, the Department of Labor and Industries (Department) filed a Motion
24 for Summary Judgment and a Memorandum in Support of the Motion with the Board of Industrial
25 Insurance Appeals. The motion contained the declaration of James Nylander, which included a
26 copy of the June 2, 2008 settlement agreement resolving Ms. Davis's third-party claim, a copy of
27 the Department's June 9, 2008 order setting out the distribution of Ms. Davis's third-party recovery
28 from this settlement, the third-party recovery worksheet that shows how the Department applied the
29 statutory distribution formula, and a copy of the July 29, 2005 order that paid Ms. Davis two
30 permanent partial disability awards totaling \$18,490.41, and closed the claim.

1 On October 27, 2008, the Board received Ms. Davis's Response to the Motion for Summary
2 Judgment that contained the Declaration of Michael David Myers, that included the Department's
3 third-party distribution order, the Department's Motion for Summary Judgment filed in a class action
4 claim in Thurston County Superior Court, a copy of the transcript of the hearing of the Department's
5 Motion for Summary Judgment in the class action claim containing the Superior Court's oral ruling,
6 a copy of the demand letter in the third-party claim, and the Department's history profile for
7 Ms. Davis showing payments made by the Department under the industrial insurance claim as of
8 February 20, 2008.

9 On October 29, 2008, the Board received the Department's Reply Brief and Motion to Strike
10 the claimant's settlement demand letter contained in Ms. Davis's response. With this motion was
11 the Department's Reply in Support of Motion for Summary Judgment submitted to Superior Court,
12 and Judge Tabor's Order. On October 30, 2008, the undersigned heard the parties on the
13 Department's Motion for Summary Judgment at the Board. At the hearing on the motion, the
14 Department pointed out that the claimant's contention concerning the third-party settlement, if
15 correct, would result in a deficiency judgment pursuant to RCW 51.24.090(1), and would thereby
16 cause the settlement to be void. I requested further briefing on that issue, and thereafter received
17 from Ms. Davis her Supplemental Briefing, and then on November 21, 2008, I received the
18 Department's Response to Supplemental Briefing. The Department's motion to strike the
19 settlement demand letter is denied. The demand letter, however, provides the trier-of-fact with no
20 relevant, probative evidence supporting allocation for pain and suffering.

21 In addition to appealing the third-party distribution order of the Department to the Board, the
22 claimant is a plaintiff in a class action suit filed in Thurston County Superior Court involving the
23 same contentions of the applicability of *Tobin v. Dept. of Labor & Indus.*, 145 Wn. App. 607 (2008),
24 to the distribution of her third-party settlement. The Department brought a Motion for Summary
25 Judgment to the Superior Court action, which was not granted at the hearing. At the hearing on the
26 Motion for Summary Judgment at the Board, the parties agreed that the Superior Court judge had
27 not issued a stay of the Board proceedings and I found that the Board, not Superior Court, has
28 jurisdiction to decide whether the Department's third-party distribution order pursuant to
29 RCW 51.24.060 is correct.

30 RCW 51.04.010 provides that benefits under the Act are the exclusive remedy for the injured
31 worker, with limited exceptions. *Bankhead v. Aztec Constr. Co.*, 48 Wn. App. 102 (1987). The Act
32 removes all actions arising out of an industrial injury from private controversy except those

1 specifically set forth by the Act. RCW 51.24 provides that injured workers and beneficiaries may
2 proceed with actions at law against liable third-parties to be more fully compensated, but any
3 recovery under the third-party provisions is subject to reimbursement by the Department to the
4 extent necessary to reimburse the industrial insurance fund in the amount of the cash value of
5 compensation and benefits already paid. Thus, one purpose of the third-party provisions allowing
6 injured workers to pursue civil lawsuits against third-party tortfeasors, who cause the industrial
7 injury, is to shift the cost of the industrial insurance benefits paid under the claim from the industrial
8 insurance funds onto the liable tortfeasor.

9 In making the election to pursue a tort action against a third-party without jeopardizing rights
10 to benefits under the Industrial Insurance Act, the injured worker must notify the Department or the
11 self-insured employer when the action is filed, and serve all notices and pleadings on the
12 Department or self-insured employer. The Department and self-insured employer have a statutory
13 interest in the third-party recovery made by the injured worker if compensation and benefits for the
14 same injury were paid or were payable under the Act. Section 5 of RCW 51.24.030 identifies that
15 "[f]or the purposes of this chapter, 'recovery' includes all damages except loss of consortium."
16 RCW 51.24.060 provides a mandatory formula for the distribution of "any recovery" made in a
17 third-party action.

18 In spite of this clear language in the third-party distribution scheme set out in
19 RCW 51.24.060, the Court of Appeals in the recent *Tobin* decision determined that pain and
20 suffering damages should not be included in the "recovery", and thus, not be subject to distribution
21 under RCW 51.24.060. However, Mr. Tobin's third-party settlement specifically allocated a part of
22 the recovery to represent damages for pain and suffering, while Ms. Davis received a lump sum
23 recovery, which failed to allocate any portion of the settlement for pain and suffering. This is a
24 material, crucial distinction between Mr. Tobin's third-party recovery and Ms. Davis's that leads me
25 to the conclusion that the *Tobin* case has no applicability to the distribution of Ms. Davis's
26 third-party recovery. The entirety of her third-party settlement must be included in the distribution
27 formula to repay the Department for the benefits provided her for her industrial injury. *Gersema v.*
28 *Allstate Ins. Co.*, 127 Wn. App. 687 (2005); and *Mills v. Department of Labor & Indus.*, 72 Wn. App.
29 575 (1994).

30 In *Mills*, the injured worker and his spouse settled a third-party action, but did not allocate
31 any portion of the settlement proceeds to the wife's claimed loss of consortium damages. On
32 appeal, *Mills* argued that Labor and Industries should designate some portion of their third-party

1 recovery as compensation for loss of consortium, which would insulate that portion of the recovery
2 from distribution. The Court rejected that argument, concluding for a number of reasons that the
3 parties' failure to allocate subjected the entire settlement award to distribution. The *Mills* Court was
4 concerned that ordering the Department to allocate recoveries, where none was made in the
5 third-party action, would increase cost to the fund by potentially leading to additional litigation on an
6 issue that the Department had no responsibility in the first place.

7 Division II adopted *Mills* in *Gersema*, and extended it to pain and suffering. Mr. Gersema
8 argued that his damages for pain and suffering, which were not specifically allocated in his
9 settlement agreement, should not be considered in the third-party distribution formula. The Court of
10 Appeals disagreed, noting that the undifferentiated award received by Mr. Gersema made it
11 impossible to determine from the record what portion was attributable to general damages and what
12 portion to special damages. Instead the Court adopted the *Mills* rationale "that neither public policy
13 nor the statute compelled (L&I) to generate such an allocation where the parties themselves have
14 failed to do so". *Gersema* at 696.

15 Like Mr. Mills and Mr. Gersema, Ms. Davis allocated no portion of her settlement to pain and
16 suffering or loss of consortium. Thus, *Tobin*, with its differentiated award, does not apply, and the
17 entire amount of Ms. Davis's settlement is subject to the third-party distribution formula.

18 Furthermore, if a portion of Ms. Davis's third-party settlement were allocated by the Court to
19 represent pain and suffering, and thus not be subject to distribution, there is a strong likelihood that
20 the Department would have to void the settlement as it would result in a deficiency. The Act
21 provides that "[a]ny compromise or settlement of the third-party cause of action by the injured
22 worker or beneficiary which results in less than the entitlement under this title is void unless made
23 with the written approval of the department . . . PROVIDED, That for the purposes of this chapter,
24 'entitlement' means benefits and compensation paid and estimated by the department to be paid in
25 the future." RCW 51.24.090(1). It appears to me that Ms. Davis's proposed allocation would make
26 her settlement deficient, and because the Department did not approve the deficiency, would make
27 her settlement void. Ms. Davis received benefits from the Department totaling \$36,991.21, and
28 proposes an allocation that would result in the distribution of \$20,634. No industrial insurance
29 beneficiary may enter into a settlement agreement where the net amount actually received by the
30 beneficiary is less than his or her entitlement. *In re Estate of Kinsman*, 44 Wn. App. 174 (1986).

31
32

1 appeal assigning it Docket No. 08 17213, and agreed to hear the
2 appeal.

3 2. Sharon A. Davis filed a third-party claim for damages from the
4 August 22, 2002 industrial injury. The claim was settled for a lump sum
5 amount of \$75,000. The recovery made no allocation of any portion of
6 the settlement to general damages such as pain and suffering. The
7 Department distribution order dated June 9, 2008, distributed
8 \$25,007.02 to the claimant's attorney, \$25,859 to the claimant,
9 Sharon A. Davis; \$24,133.98 to the Department, with an excess
10 recovery lien of \$8,907.01.

11 3. No genuine issue as to a material fact has been shown in Ms. Davis's
12 appeal from the Department distribution order dated June 9, 2008.

13 **CONCLUSIONS OF LAW**

14 1. The Board of Industrial Insurance Appeals has jurisdiction over the
15 parties to and the subject matter of this appeal.

16 2. The entire amount of Ms. Davis's third-party recovery is subject to the
17 Department's distribution formula contained in RCW 51.24.060.

18 3. The order of the Department of Labor and Industries dated
19 June 9, 2008, is correct and hereby affirmed.

20 DATED: JAN 14 2009

21 *Sally R. Sawtell*
22 for Sally R. Sawtell
23 Industrial Appeals Judge
24 Board of Industrial Insurance Appeals

Appendix 2

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 IN RE: SHARON A. DAVIS) DOCKET NO. 08-17213

2 CLAIM NO. Y-433962) DECISION AND ORDER

3 APPEARANCES:

4 Claimant, Sharon A. Davis, by
5 Myers & Company, P.L.L.C., per
6 Michael D. Myers

7 Employer, Four Winds Services, Inc.,
8 None

9 Department of Labor and Industries, by
10 The Office of the Attorney General, per
11 Michael Hall, Assistant

12 This is an appeal filed by the claimant, Sharon A. Davis, on August 1, 2008, from an order of
13 the Department of Labor and Industries dated June 9, 2008. In this order, the Department
14 distributed the claimant's third-party recovery of \$75,000, and made demand for the claimant to
15 reimburse the Department \$24,133.98, with excess recovery totaling \$8,907.01, that the claimant
16 must expend for costs incurred as a result of the injury covered under the claim. The Department
17 order is **AFFIRMED**.

18 **DECISION**

19 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review
20 and decision on a timely Petition for Review filed by the claimant to a Proposed Decision and Order
21 issued on January 14, 2009, in which the industrial appeals judge affirmed the order of the
22 Department dated June 9, 2008.

23 The Board has reviewed the evidentiary rulings in the record of proceedings and finds that
24 no prejudicial error was committed. The rulings are affirmed.

25 The issue presented by this appeal and the evidence presented by the parties are
26 adequately set forth in the Proposed Decision and Order.

REPORT THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 After consideration of the Proposed Decision and Order and the Petition for Review filed
2 thereto, and a careful review of the entire record before us, we are persuaded that the Proposed
3 Decision and Order is supported by the preponderance of the evidence and is correct as a matter of
4 law.
5

6
7 **FINDINGS OF FACT**

8
9 1. On September 27, 2002, Sharon A. Davis filed an Application for
10 Benefits with the Department of Labor and Industries, for an Industrial
11 injury that occurred on August 22, 2002, while in the course of
12 employment with Four Winds Services, Inc. On October 8, 2002, the
13 Department issued an order in which it allowed the claim for industrial
14 injury. Time-loss compensation benefits and medical benefits were paid
15 by the Department. On July 29, 2005, the Department issued an order
16 in which it closed the claim with awards for permanent partial
17 impairment equal to a Category 2 permanent cervical and cervico-dorsal
18 insertion or by disarticulation at the shoulder.

19 On June 9, 2008, the Department issued an order in which it held that
20 the claimant's third-party settlement proceeds of \$75,000 were to be
21 distributed as follows: net share to attorney for fees and costs
22 \$25,007.02; net share to the claimant \$25,859, and net share to
23 Department \$24,133.98. In its order, the Department further noted that
24 it had paid benefits of \$36,991.21, and asserted \$36,207.37 against the
25 recovery, further ordering that no benefits or compensation will be paid
26 to the claimant until such time as the excess recovery totaling \$8,907.01
27 had been expended by the claimant for costs incurred as a result of the
28 conditions, injuries, or death covered under this claim. On

29 August 1, 2008, the claimant filed a Notice of Appeal with the Board of
30 Industrial Insurance Appeals from the Department order dated June 9,
31 2008. On September 8, 2008, the Board issued an order in which it
32 granted the appeal, under Docket No. 08 17213, and agreed to hear the
33 appeal.

34 2. Sharon A. Davis filed a third-party claim for damages from the
35 August 22, 2002 industrial injury. The claim was settled for a lump sum
36 amount of \$75,000. The recovery made no allocation of any portion of
37 the settlement to general damages such as pain and suffering. In its
38 distribution order dated June 9, 2008, the Department distributed
39 \$25,007.02 to the claimant's attorney; \$25,859 to the claimant,
40 Sharon A. Davis, and \$24,133.98 to the Department, with an excess
41 recovery lien of \$8,907.01.

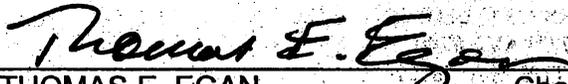
42
43 3. No genuine issue as to a material fact has been shown in Ms. Davis's
44 appeal from the Department distribution order dated June 9, 2008.
45
46
47

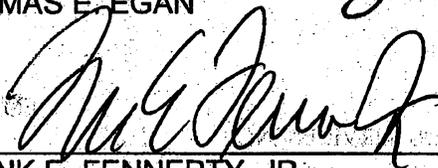
CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.
2. The entire amount of Ms. Davis's third-party recovery is subject to the Department's distribution formula contained in RCW 51.24.060.
3. The order of the Department of Labor and Industries dated June 9, 2008, is correct and is affirmed.

Dated: March 2, 2009.

BOARD OF INDUSTRIAL INSURANCE APPEALS


THOMAS E. EGAN Chairperson


FRANK E. FENNERTY, JR. Member

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47

Appendix 3

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

IN RE: BATYAH E. CHLIEK) **DOCKET NO. 08-17459**
)
CLAIM NO. AD-57718) **PROPOSED DECISION AND ORDER ON**
MOTION FOR SUMMARY JUDGMENT

INDUSTRIAL APPEALS JUDGE: Sally R. Sawtell

APPEARANCES:

**Claimant, Batyah E. Chliek, by
Myers & Company, P.L.L.C., per
Michael D. Myers**

**Employer, Volt Management Corp., by
Penser North America, Inc., per
Amy Sutton, Claims Examiner**

**Department of Labor and Industries, by
The Office of the Attorney General, per
Michael Hall & Steve Puz, Assistants**

The claimant, Batyah E. Chliek, filed an appeal with the Board of Industrial Insurance Appeals on August 1, 2008, from an order of the Department of Labor and Industries dated June 26, 2008. In this order, the Department distributed the claimant's third party recovery in the amount of \$46,250 in accordance with RCW 51.08.020 as follows: Claimant's attorney, \$16,566.22; claimant \$21,823.44; Department \$7,863.94, with excess recovery totaling \$9,244.13 that the claimant must expend for costs incurred as a result of the injury covered under the claim. The Department order is **AFFIRMED**.

DECISION

On September 5, 2008, the Department of Labor and Industries (Department) filed a Motion for Summary Judgment and a Memorandum in Support of the Motion with the Board of Industrial Insurance Appeals. The motion contained the declaration of James Nylander, that included copies of: (1) the June 19, 2008 settlement agreement resolving Ms. Chliek's third party claim against Sterling Realty Organization; (2) the June 26, 2008 Labor and Industries order setting out the distribution of Ms. Chliek's third party recovery from this settlement, and the third party recovery worksheet showing how the Department applied the statutory distribution formula; (3) a June 24, 2008 letter from Ms. Chliek's legal representative confirming the Department's reimbursement

1 share; and (4) the Court of Appeals' Division 2 decision, *Tobin v. Department of Labor & Indus.*,
2 (July 1, 2008).
3 On September 22, 2008, the Board received Ms. Chliek's response to the Motion for
4 Summary Judgment containing the declaration of Michael David Myers that included:
5 (1) Ms. Chliek's response to the Department's Motion for Summary Judgment filed with Thurston
6 County Superior Court No. 08-2-01647-9 in the *Davis* class action with Ms. Chliek named as a
7 plaintiff; (2) Mr. Myers' declaration submitted in support of the plaintiff's response to the
8 Department's Motion for Summary Judgment filed in the *Davis* action; (3) a copy of the demand
9 letter sent to the third party tortfeasor in Ms. Chliek's case; and (4) a copy of the payment ledger
10 itemizing benefits paid by the Department in Ms. Chliek's industrial injury claim as of March 17,
11 2008. Other documents included in Mr. Myers' declaration are orders of the Department and letters
12 from the Department.

13 In addition to appealing the third party distribution order of the Department to the Board,
14 Ms. Chliek is a plaintiff in a class action suit filed in Thurston County Superior Court regarding the
15 same contentions of the applicability of *Tobin v. Department of Labor & Indus.*, a case recently
16 decided by the Court of Appeals. Just prior to hearing the Department's Motion for Summary
17 Judgment, I was advised that a Motion for Summary Judgment brought by the Department to the
18 Superior Court action was heard. The parties advised that Superior Court Judge Tabor did not
19 grant the Department's Motion for Summary Judgment, but neither did the court issue a stay of the
20 action before the Board. At the hearing on the Motion for Summary Judgment at the Board, I held
21 that the jurisdiction lies with the Board to hear the claimant's appeal from the Department order
22 dated June 26, 2008, that distributes the third party recovery in accordance with RCW 51.24.060

23 and finds an excess recovery. The parties presented arguments concerning the Department's
24 Motion for Summary Judgment at the Board. Having reviewed the various arguments made at the
25 hearing, the materials presented by the Department in support of the Motion for Summary
26 Judgment and by the claimant in response to the motion, and the applicable case law, including
27 *Tobin*, I must conclude that there is no remaining issue of material fact in this matter and that the
28 Department's motion is properly granted.

29 RCW 51.24 provides for actions at law against employers and third persons under restricted
30 circumstances. The statute provides that an injured worker can elect to pursue a tort action against
31 a third party without jeopardizing rights to benefits under the industrial insurance system. However,
32 in making the election to pursue such a tort action, the injured worker must notify the Department or

1 self-insured employer when the action is filed, and serve all notices and pleadings on the
2 Department or self-insured employer. The Department and self-insured employer have a statutory
3 interest in the third party recovery made by the injured worker if compensation and benefits for the
4 same injury were paid or were payable under the Act. Under Section 5 of RCW 51.24.030, the
5 statute identifies that for the purposes of this chapter, "recovery" includes all damages except loss
6 of consortium. (In RCW 51.24.060, the legislature established a mandatory formula for the
7 distribution of "any recovery" made in a third party action. In spite of this clear language that appears twice in the third party distribution scheme set out
8 in RCW 51.24.060, the Court of Appeals in the recent *Tobin* decision determined that pain and
9 suffering damages should not be included in the "recovery" and thus, not be subject to distribution
10 under RCW 51.24.060. However, Mr. Tobin's third party settlement specifically allocated a part of
11 the recovery as representing damages for pain and suffering. Ms. Chliek contends that *Tobin* is
12 applicable to her third party recovery, in spite of the fact that her third party settlement makes no
13 specific allocation for damages due to pain and suffering. This is a material, crucial distinction
14 between Mr. Tobin's third party recovery and Ms. Chliek's that leads me to the conclusion that the
15 *Tobin* case has no applicability to Ms. Chliek's third party recovery. Ms. Chliek's entire third party
16 settlement must be included in the distribution formula. *Gersema v. Allstate Ins. Co.*, 127 Wn. App.
17 687 (2005); *Mills v. Department of Labor & Indus.*, 72 Wn. App. 575 (1994).
18 Ms. Chliek argues that the Board should allocate a portion of her lump sum recovery, using
19 her demand letter that initiated the third party claim and applying a ratio representing the "alleged"
20 pain and suffering damages to the lump sum settlement to formulate an amount representing pain
21 and suffering. The Board is without authority to designate some portion of the settlement proceeds
22 as "pain and suffering". The *Mills* Court rejected the argument that the Department of Labor and
23 Industries should designate some portion of a third party recovery as compensation for loss of
24 consortium when the injured worker and his spouse had settled the third party action without
25 allocating any portion of the settlement proceeds to the wife's claimed loss of consortium damages.
26 The Court concluded that the parties' failure to allocate a portion of the recovery as loss of
27 consortium subjected the entire settlement award to distribution.

28
29 Part of the ratio proposed by Ms. Chliek to be used by the Board to designate general
30 damages are the Department's treatment billing records for her claim. As the Assistant Attorney
31 General argues, this proposed method fails to take into account the possibility of her receiving a
32 permanent partial disability award in the future.

1 The Court of Appeals, Division 2, adopted *Mills* in *Gersema*, and extended it to pain and
2 suffering. Mr. Gersema had failed to specifically allocate in his settlement agreement any amount
3 that represented damages for pain and suffering. The Court held that his undifferentiated
4 settlement award made it impossible to determine what, if any, portion could be attributable to
5 general damages such as pain and suffering, and contrasted Mr. Gersema's undifferentiated
6 recovery with *Flanigan v. Department of Labor & Indust.* 123 Wn.2d 418 (1994) where the recovery
7 had differentiated an award for loss of consortium. The Court adopted the rationale of the *Mills*
8 court which had reasoned that neither public policy nor the statute compelled (L&I) to generate
9 such an allocation where the parties themselves have failed to do so. *Gersema* at 696. W.O.R. # 10
10 *Gersema*. Like the workers in *Mills* and *Gersema*, Ms. Chliek allocated no portion of her settlement to
11 pain and suffering damages. Thus, *Tobin*, with its differentiated award, does not apply, and the
12 entire amount of Ms. Chliek's settlement is subject to the third party distribution formula.
13 Summary judgment is appropriate where the evidence, viewed in the light most favorable to
14 the nonmoving party, demonstrates there are no genuine issues of material fact and the moving
15 party is entitled to judgment as a matter of law. To defeat summary judgment, the nonmoving party
16 must come forward with specific admissible evidence to sufficiently rebut the moving party's
17 contentions and support all necessary elements of the party's claims. *White v. State*, 131 Wn.2d 1
18 (1997); *Young v. Key Pharmaceuticals, Inc.* 112 Wn.2d 246 (1989). If the nonmoving party fails to
19 make a showing sufficient to establish the existence of a necessary element to that party's case,
20 summary judgment must be granted. Here, Ms. Chliek does not dispute that her third party
21 settlement agreement does not allocate any amount for pain and suffering. Thus, *Tobin* does not
22 apply, and the Department's third party distribution order should be affirmed as a matter of law.
23 Having reviewed the entire record, I must conclude that there is no genuine issue of material fact,
24 and the Department's motion for summary judgment is properly granted.

FINDINGS OF FACT

25 **1.** Batyah E. Chliek filed an Application for Benefits with the Department of
26 Labor and Industries for an injury that occurred on November 30, 2006,
27 while working for Voit Temp Services. Ms. Chliek received benefits
28 under the Industrial Insurance Act for this claim. On June 26, 2008, the
29 Department issued an order distributing her third party distribution
30 recovery of \$46,250 in accordance with RCW 51.24.060. On August 1,
31 2008, the Board of Industrial Insurance Appeals received the claimant's
32 appeal from the Department order dated June 26, 2008.

2. Batyah Chliek filed a third party claim for damages from the
November 30, 2006 industrial injury. The claim was settled for a lump

sum amount of \$46,250. The recovery made no allocation of any portion of the award to general damages such as pain and suffering. The Department distribution order distributed \$16,562.62 to the claimant's attorney; \$21,823.44 to the claimant; \$7,863.94 to the Department, with an excess recovery lien of \$9,244.13.

3. No genuine issue as to any material fact has been shown in Ms. Chliek's appeal from the Department distribution order dated June 26, 2008.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.
2. The entire amount of Ms. Chliek's third party recovery is subject to the Department's distribution formula contained in RCW 51.24.060.
3. The order of the Department of Labor and Industries dated June 26, 2008, is correct and hereby affirmed.

DATED: JAN 05 2009

Sally R. Sawtell
Sally R. Sawtell
Industrial Appeals Judge
Board of Industrial Insurance Appeals

Appendix 4

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

2430 Chandler Court SW, P.O. Box 42401
Olympia, Washington 98504-2401 • www.biiia.wa.gov
(360) 753-6824

In re: **BATYAH E CHLIEK**

Docket No. 08 17459

Claim No. AD-57718

**ORDER DENYING PETITION
FOR REVIEW**

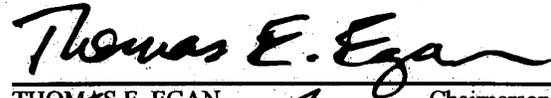
A Proposed Decision and Order was issued in this appeal by Industrial Appeals Judge **SALLY R. SAWTELL** on **January 5, 2009**. Copies were mailed to the parties of record.

A Petition for Review was filed by the Claimant on **January 14, 2009**, as provided by RCW 51.52.104.

The Board has considered the Proposed Decision and Order and Petition(s) for Review. The Petition for Review is denied (RCW 51.52.106). The Proposed Decision and Order becomes the Decision and Order of the Board.

Dated: February 02, 2009.

BOARD OF INDUSTRIAL INSURANCE APPEALS



THOMAS E. EGAN

Chairperson



FRANK E. FENNERTY, JR

Member

c: DEPARTMENT OF LABOR AND INDUSTRIES

Appendix 5

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

FILED

FEB 25 2009

SONYA KRASKI
SNOHOMISH COUNTY CLERK
EX-OFFICIO CLERK OF COURT

SNOHOMISH COUNTY SUPERIOR COURT FOR THE STATE OF WASHINGTON

BATYAH E. CHLIEK, an individual,
Appellant,

vs.

THE WASHINGTON STATE DEPARTMENT
OF LABOR AND INDUSTRIES, an agency of
the State of Washington,

Appellee.

No. 09 2 03159 1

NOTICE OF APPEAL OF DECISION
AND ORDER (RCW 51.52.110)

BIIA Docket No. 08-17459

L&I Claim No. AD-57718

Appellant Batyah E. Chliek appeals the Decision and Order of the Board of Industrial Insurance Appeals dated January 5, 2009 (a true and correct copy of which is attached hereto as *Exhibit "A"*), as made final pursuant to the Board of Industrial Insurance Appeal's Order Denying Petition for Review dated February 2, 2009 (a true and correct copy of which is attached hereto as *Exhibit "B"*).

The basis for venue pursuant to RCW 51.52.110 is that the Appellant's industrial injury occurred in Snohomish County, Washington, upon property located at 44th Avenue West, Mukilteo, Washington, 98275.

NOTICE OF APPEAL OF DECISION AND ORDER
(RCW 51.52.110) - 1

MYERS & COMPANY, P.L.L.C.
1809 SEVENTH AVENUE, SUITE 700
SEATTLE, WASHINGTON 98101
TELEPHONE (206) 398-1188

COPY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

DATED this 17th day of February, 2009.

MYERS & COMPANY, P.L.L.C.

Attorneys for Appellant

By: 

Michael David Myers
WSBA No. 22486
Ryan C. Nute
WSBA No. 32530

Exhibit “A”

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

1 **IN RE: BATYAH E. CHLIEK**) **DOCKET NO. 08-17459**
2 **CLAIM NO. AD-57718**) **PROPOSED DECISION AND ORDER ON**
3 **MOTION FOR SUMMARY JUDGMENT**

4 **INDUSTRIAL APPEALS JUDGE: Sally R. Sawtell**

5 **APPEARANCES:**

6
7 **Claimant: Batyah E. Chliek, by**
8 **Myers & Company P.L.L.C., per**
9 **Michael D. Myers**

10 **Employer: Volt Management Corp., by**
11 **Penser North America, Inc., per**
12 **Amy Sutton, Claims Examiner**

13 **Department of Labor and Industries, by**
14 **The Office of the Attorney General, per**
15 **Michael Hall & Steve Puz, Assistants**

16 The claimant, Batyah E. Chliek, filed an appeal with the Board of Industrial Insurance
17 Appeals on August 1, 2008, from an order of the Department of Labor and Industries dated
18 June 26, 2008. In this order, the Department distributed the claimant's third party recovery in the
19 amount of \$46,250 in accordance with RCW 51.08.020 as follows: Claimant's attorney, \$16,56.62;
20 claimant \$21,823.44; Department \$7,863.94, with excess recovery totaling \$9,244.13 that the
21 claimant must expend for costs incurred as a result of the injury covered under the claim. The
22 Department order is **AFFIRMED**.

23 **DECISION**

24 On September 5, 2008, the Department of Labor and Industries (Department) filed a Motion
25 for Summary Judgment and a Memorandum in Support of the Motion with the Board of Industrial
26 Insurance Appeals. The motion contained the declaration of James Nylander, that included copies
27 of: (1) the June 19, 2008 settlement agreement resolving Ms. Chliek's third party claim against
28 Sterling Realty Organization; (2) the June 26, 2008 Labor and Industries order setting out the
29 distribution of Ms. Chliek's third party recovery from this settlement, and the third party recovery
30 worksheet showing how the Department applied the statutory distribution formula; (3) a June 24,
31 2008 letter from Ms. Chliek's legal representative confirming the Department's reimbursement

BEFORE THE BOARD OF INDUSTRIAL INJURY APPEALS
STATE OF WASHINGTON

1 share; and (4) the Court of Appeals' Division 2 decision, *Tobin v. Department of Labor & Indus.*,
2 (July 1, 2008).
3 For September 22, 2008, the Board received Ms. Chliek's response to the Motion for
4 Summary Judgment containing the declaration of Michael David Myers that included
5 (1) Ms. Chliek's response to the Department's Motion for Summary Judgment filed with Thurston
6 County Superior Court No. 08-2-01647-9 in the *Davis* class action with Ms. Chliek named as a
7 plaintiff, (2) Mr. Myers' declaration submitted in support of the plaintiff's response to the
8 Department's Motion for Summary Judgment filed in the *Davis* action, (3) a copy of the demands
9 letter sent to the third party tortfeasor in Ms. Chliek's case, and (4) a copy of the payment ledger
10 itemizing benefits paid by the Department in Ms. Chliek's industrial injury claim as of March 17,
11 2008. Other documents included in Mr. Myers' declaration are orders of the Department and letters
12 from the Department.

13 In addition to appealing the third party distribution order of the Department to the Board,
14 Ms. Chliek is a plaintiff in a class action suit filed in Thurston County Superior Court regarding the
15 same contentions of the applicability of *Tobin v. Department of Labor & Indus.*, a case recently
16 decided by the Court of Appeals. Just prior to hearing the Department's Motion for Summary
17 Judgment, I was advised that a Motion for Summary Judgment brought by the Department to the
18 Superior Court action was heard. The parties advised that Superior Court Judge Tabor did not
19 grant the Department's Motion for Summary Judgment, but neither did the court issue a stay of the
20 action before the Board. At the hearing on the Motion for Summary Judgment at the Board, I held
21 that the jurisdiction lies with the Board to hear the claimant's appeal from the Department order
22 dated June 26, 2008, that distributes the third party recovery in accordance with RCW 51.24.060,

23 and finds an excess recovery. The parties presented arguments concerning the Department's
24 Motion for Summary Judgment at the Board. Having reviewed the various arguments made at the
25 hearing, the materials presented by the Department in support of the Motion for Summary
26 Judgment and by the claimant in response to the motion, and the applicable case law, including
27 *Tobin*, I must conclude that there is no remaining issue of material fact in this matter and that the
28 Department's motion is properly granted.

29 RCW 51.24 provides for actions at law against employers and third persons under restricted
30 circumstances. The statute provides that an injured worker can elect to pursue a tort action against
31 a third party without jeopardizing rights to benefits under the industrial insurance system. However,
32 in making the election to pursue such a tort action, the injured worker must notify the Department or

1 self-insured employer when the action is filed, and serve all notices and pleadings on the
2 Department on self-insured employer. The Department and self-insured employer have a statutory
3 interest in the third party recovery made by the injured worker. If compensation and benefits for the
4 same injury were paid or were payable under the Act. Under Section 5 of RCW 51.24.030, the
5 statute identifies that for the purposes of this chapter, "recovery" includes all damages except loss
6 of consortium. In RCW 51.24.060, the legislature established a mandatory formula for the
7 distribution of "any recovery" made in a third party action.
8 In spite of this clear language that appears twice in the third party distribution scheme set out
9 in RCW 51.24.060, the Court of Appeals in the recent *Tobin* decision determined that pain and
10 suffering damages should not be included in the "recovery" and thus, not be subject to distribution
11 under RCW 51.24.060. However, Mr. Tobin's third party settlement specifically allocated a part of
12 the recovery as representing damages for pain and suffering. Ms. Chliek contends that *Tobin* is
13 applicable to her third party recovery, in spite of the fact that her third party settlement makes no
14 specific allocation for damages due to pain and suffering. This is a material, crucial distinction
15 between Mr. Tobin's third party recovery and Ms. Chliek's that leads me to the conclusion that the
16 *Tobin* case has no applicability to Ms. Chliek's third party recovery. Ms. Chliek's entire third party
17 settlement must be included in the distribution formula. *Gersema v. Allstate Ins. Co.*, 127 Wn. App.
18 687 (2005); *Mills v. Department of Labor & Indus.*, 72 Wn. App. 575 (1994).
19 Ms. Chliek argues that the Board should allocate a portion of her lump sum recovery, using
20 her demand letter that initiated the third party claim and applying a ratio representing the "alleged"
21 pain and suffering damages to the lump sum settlement to formulate an amount representing pain
22 and suffering. The Board is without authority to designate some portion of the settlement proceeds
23 as "pain and suffering". The *Mills* Court rejected the argument that the Department of Labor and
24 Industries should designate some portion of a third party recovery as compensation for loss of
25 consortium when the injured worker and his spouse had settled the third party action without
26 allocating any portion of the settlement proceeds to the wife's claimed loss of consortium damages.
27 The Court concluded that the parties' failure to allocate a portion of the recovery as loss of
28 consortium subjected the entire settlement award to distribution.
29 Part of the ratio proposed by Ms. Chliek to be used by the Board to designate general
30 damages are the Department's treatment billing records for her claim. As the Assistant Attorney
31 General argues, this proposed method fails to take into account the possibility of her receiving a
32 permanent partial disability award in the future.

1) The Court of Appeals, Division 2, adopted *Mills* in *Gersema*, and extended it to pain and
2) suffering. Mr. Gersema had failed to specifically allocate in his settlement agreement any amount
3) that represented damages for pain and suffering. The Court held that his undifferentiated
4) settlement award made it impossible to determine what, if any, portion could be attributable to
5) general damages such as pain and suffering, and contrasted Mr. Gersema's undifferentiated
6) recovery with *Flanigan v. Department of Labor & Indust.* 123 Wn.2d 418 (1994) where the recovery
7) had differentiated an award for loss of consortium. The Court adopted the rationale of the *Mills*
8) court which had reasoned that neither public policy nor the statute compelled (L&I) to generate
9) such an allocation where the parties themselves have failed to do so. *Gersema* at 696. WSR # 10
10) and like the workers in *Mills* and *Gersema*, Ms. Chliek allocated no portion of her settlement to
11) pain and suffering damages. Thus, *Tobin*, with its differentiated award, does not apply, and the
12) entire amount of Ms. Chliek's settlement is subject to the third party distribution formula.
13) Summary judgment is appropriate where the evidence, viewed in the light most favorable to
14) the nonmoving party, demonstrates there are no genuine issues of material fact and the moving
15) party is entitled to judgment as a matter of law. To defeat summary judgment, the nonmoving party
16) must come forward with specific admissible evidence to sufficiently rebut the moving party's
17) contentions and support all necessary elements of the party's claims. *White v. State*, 141 Wn.2d 1
18) (1997); *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 246 (1989). If the nonmoving party fails to
19) make a showing sufficient to establish the existence of a necessary element to that party's case,
20) summary judgment must be granted. Here, Ms. Chliek does not dispute that her third party
21) settlement agreement does not allocate any amount for pain and suffering. Thus, *Tobin* does not
22) apply, and the Department's third party distribution order should be affirmed as a matter of law.
23) Having reviewed the entire record, I must conclude that there is no genuine issue of material fact,
24) and the Department's motion for summary judgment is properly granted.

FINDINGS OF FACT

25) Bayah E. Chliek filed an Application for Benefits with the Department of
26) Labor and Industries for an injury that occurred on November 30, 2006,
27) while working for Volt Temp Services. Ms. Chliek received benefits
28) under the Industrial Insurance Act for her claims. On June 26, 2008, the
29) Department issued an order distributing her third party distribution
30) recovery of \$46,250 in accordance with RCW 51.24.060. On August 1,
31) 2008, the Board of Industrial Insurance Appeals received the claimant's
32) appeal from the Department order dated June 26, 2008.

2. Bayah Chliek filed a third party claim for damages from the
November 30, 2006 industrial injury. The claim was settled for a lump

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

sum amount of \$46,250. The recovery made no allocation of any portion of the award to general damages such as pain and suffering. The Department distribution order distributed \$16,562.62 to the claimant's attorney; \$21,823.44 to the claimant; \$7,863.94 to the Department, with an excess recovery lien of \$9,244.13.

- 3. No genuine issue as to any material fact has been shown in Ms. Chliek's appeal from the Department distribution order dated June 26, 2008.

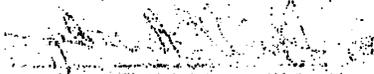
CONCLUSIONS OF LAW

- 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.
- 2. The entire amount of Ms. Chliek's third party recovery is subject to the Department's distribution formula contained in RCW 51.24.060.
- 3. The order of the Department of Labor and Industries dated June 26, 2008, is correct and hereby affirmed.

DATED: JAN 05 2009


 Sally R. Sawtell
 Industrial Appeals Judge
 Board of Industrial Insurance Appeals

STATE OF WASHINGTON


 [Illegible Title]
 [Illegible Department]

CERTIFICATE OF SERVICE BY MAIL

I certify that on this day I served the attached Order to the parties of this proceeding and their attorneys or authorized representatives, as listed below. A true copy thereof was delivered to Consolidated Mail Services for placement in the United States Postal Service, postage prepaid.

BATYAH E CHLIEK
PO BOX 371
EDMONDS, WA 98020

WA 10 2009 1000

MICHAEL D MYERS, ATTY
MYERS & CO LLC
1809 7TH AVE #700
SEATTLE, WA 98101

HMI

VOLT MANAGEMENT CORP
2421 N GLASSELL ST
ORANGE, WA 92855

AMY SUTTON
PENSER NORTHAMERICA INC
700 SLEATER KINNEY RD SE STE B #170
LACEY, WA 98503

AGI

MICHAEL HALL, AAG
OFFICE OF THE ATTORNEY GENERAL
LABOR & INDUSTRIES
PO BOX 40121
OLYMPIA, WA 98504-0121

Dated at Olympia, Washington 1/5/2009
BOARD OF INDUSTRIAL INSURANCE APPEALS

By: *David E. Threedy*
DAVID E. THREEDY
Executive Secretary

In re: **BATYAH E CHLIEK**
Docket No. 08 17459

8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40

CERTIFICATE OF SERVICE BY MAIL

I certify that on this day I served the attached Order to the parties of this proceeding and their attorneys or authorized representatives, as listed below. A true copy thereof was delivered to Consolidated Mail Services for placement in the United States Postal Service, postage prepaid.

MICHAEL D MYERS, ATTY
MYERS & CO LLC
1809 7TH AVE #700
SEATTLE, WA 98101

CA1

VOLT MANAGEMENT CORP
2421 N GLASSELL ST
ORANGE, CA 92865

EM1

AMY SUTTON
PENSER NORTHAMERICA INC
700 SLEATER KINNEY RD SE STE B #170
LACEY, WA 98503

ELR1

MICHAEL HALL, AAG
OFFICE OF THE ATTORNEY GENERAL
LABOR & INDUSTRIES
PO BOX 40121
OLYMPIA, WA 98504-0121

AG1

BATYAH E CHLIEK
PO BOX 371
EDMONDS, WA 98020

CL1

Dated at Olympia, Washington 1/5/2009
BOARD OF INDUSTRIAL INSURANCE APPEALS

By: 

DAVID E. THREEEDY
Executive Secretary

In re: **BATYAH E CHLIEK**
Docket No. 08 17459

Exhibit “B”

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON**

2430 Chandler Court SW, P.O. Box 42401
Olympia, Washington 98504-2401 • www.bifa.wa.gov
(360) 753-6824

In re: **BATYAH E CHLIEK**

Docket No. 08 17459

Claim No. AD-57718

**ORDER DENYING PETITION
FOR REVIEW**

A Proposed Decision and Order was issued in this appeal by Industrial Appeals Judge **SALLY R. SAWTELL** on **January 5, 2009**. Copies were mailed to the parties of record.

A Petition for Review was filed by the Claimant on **January 14, 2009**, as provided by RCW 51.52.104.

The Board has considered the Proposed Decision and Order and Petition(s) for Review. The Petition for Review is denied (RCW 51.52.106). The Proposed Decision and Order becomes the Decision and Order of the Board.

Dated: **February 02, 2009**.

BOARD OF INDUSTRIAL INSURANCE APPEALS



THOMAS E. EGAN

Chairperson



FRANK E. FENNERTY, JR.

Member

c: **DEPARTMENT OF LABOR AND INDUSTRIES**

CERTIFICATE OF SERVICE BY MAIL

I certify that on this day I served the attached Order to the parties of this proceeding and their attorneys or authorized representatives, as listed below. A true copy thereof was delivered to Consolidated Mail Services for placement in the United States Postal Service, postage prepaid.

CA1
MICHAEL D MYERS, ATTY
MYERS & CO LLC
1809 7TH AVE #700
SEATTLE, WA 98101

EM1
VOLT MANAGEMENT CORP
2421 N GLASSELL ST
ORANGE, CA 92865

ELR1
AMY SUTTON
PENSER NORTHAMERICA INC
700 SLEATER KINNEY RD SE STE B #170
LACEY, WA 98503

AGI
MICHAEL HALL, AAG
OFFICE OF THE ATTORNEY GENERAL
LABOR & INDUSTRIES
PO BOX 40121
OLYMPIA, WA 98504-0121

CL1
BATYAH B CHLIEK
PO BOX 371
EDMONDS, WA 98020

Dated at Olympia, Washington 2/2/2009
BOARD OF INDUSTRIAL INSURANCE APPEALS

By David E. Threedy
DAVID E. THREEDY
Executive Secretary

FILED
COURT OF APPEALS
DIVISION II
09 MAR -9 AM 8:42
STATE OF WASHINGTON
BY [Signature]
DEPUTY

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 MAR -4 PM 3:36

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

THE WASHINGTON STATE DEPARTMENT
OF LABOR AND INDUSTRIES, *et al.*,

Petitioners/Defendants,

vs.

SHARON DAVIS, *et al.*,

Respondents/Plaintiffs.

No. 38527-9-II

CERTIFICATE OF SERVICE

CERTIFICATION

I, Tianna J.H. Pak, certify under penalty of perjury under the laws of the State of Washington and the United States that on the 4th day of March, 2009, I caused to be served via legal messenger and via electronic mail, a true and accurate copy of the (1) *Brief of Respondents* and (2) *Certificate of Service* upon the following person(s):

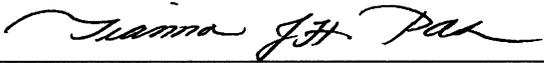
Attorney for Petitioners (*via Legal Messenger and e-mail*)

Steve Puz
Michael K. Hall
Attorney General of Washington
Labor & Industries Division
7141 Cleanwater Drive SW
Olympia, Washington 98504-0121
SteveP@ATG.WA.GOV
michaelk@atg.wa.gov

ORIGINAL

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

DATED at Seattle, Washington this 4th day of March, 2009.

By: 
Employee, MYERS & COMPANY, P.L.L.C.