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## I. INTRODUCTION

Dennis Jones was injured in the course of his employment as a firefighter and has an accepted claim for workers' compensation benefits administered by the Department of Labor and Industries (Department) and paid for by his self-insured employer, the City of Olympia. He was injured in a ditch negligently created by third parties (meaning people who were not his employer or a co-worker).

The Industrial Insurance Act allows a worker to sue liable third parties subject to the Department's statutorily mandated distribution of money obtained as a result of the third party lawsuit. Under RCW 51.24.060, the Department or self-insured employer receives a share of the third party "recovery." This shifts the costs of the claim to the negligent third party and prevents a double recovery.

The statutorily defined "recovery" includes all damages except loss of consortium and pain and suffering. Here, Jones failed to specify in the settlement agreement an amount for pain and suffering damages. Case law has held that if the settlement agreement does not allocate the damages then the entire lump sum settlement is considered part of the recovery.

The Department, Board of Industrial Insurance Appeals (Board), and superior court all properly used the unallocated lump sum settlement as the recovery.

## II. ISSUE

*Mills v. Department of Labor & Industries*, 72 Wn. App. 575, 577, 865 P.2d 41 (Div. 1, 1994); *Gersema v. Allstate Insurance Co.*, 127 Wn. App. 687, 695-96, 112 P.3d 552 (Div. 2, 2005), held that when the settlement agreement does not specify the amount of compensation for damages that are not included in the recovery, the lump sum settlement amount is considered the recovery.

Did the Department properly consider the “recovery” to include the entire amount of Jones’s third party settlement (subject to the statutory distribution formula under RCW 51.24.060) when the settlement agreement did not allocate pain and suffering damages?

## III. STATEMENT OF THE CASE

### A. Jones Did Not Differentiate Any Damages In His Settlement

Jones sustained an industrial injury while in the course of his employment with the City of Olympia as a firefighter. Certified Appeal Board Record (BR) Ex. 2; BR 26.<sup>1</sup> He was injured in a ditch that had not been properly backfilled. *See* BR Ex. 2 at 2-3. The ditch was created by Capital Christian Center and Life Skills. BR Ex. 2 at 2.

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<sup>1</sup> Jones alleges several facts regarding the circumstances surrounding his injury, citing only to a brief he filed at the Board. Appellant’s Opening Brief (AB) 3-4 (citing BR 5-6). These alleged facts are not supported by the evidentiary record. *Compare* BR Ex. 1-10 *with* AB 3-4. The record is extremely sparse as to the facts involved in this case. The Department will rely on the uncontested facts found in the Board’s findings of fact at BR 26 (as affirmed by the superior court at CP 146), as well as the exhibits considered at the Board.

Jones sued Capital Christian Center and Life Skills, claiming negligence. BR Ex. 2 at 3. Jones also filed a claim for workers' compensation benefits with the Department. BR 26.

On July 24, 2009, Jones settled his civil lawsuit for the lump sum of \$250,000. BR 26; BR Ex. 4 at 1. He agreed in his settlement to hold Capital Christian Center and Life Skills harmless for "all actions . . . demands, costs, loss of services, expenses, and compensation on account of, or in any way growing out of any and all known and unknown personal injuries" that resulted from the incident in the ditch. BR Ex. 4 at 1. He also agreed to a release of "all unknown, unforeseen, unanticipated and unsuspected injuries, damages, losses, and liability and the consequences thereof resulting from the incident . . . ." BR Ex. 4 at 1.

Jones, Capital Christian Center, and Life Skills did not differentiate between special and general damages in the settlement. BR Ex. 4 at 1-3.<sup>2</sup> It is unknown the value, if any, of pain and suffering damages in the settlement. *See* BR Ex. 4. James Nylander, a Department expert in third party adjudication, stated that the Department could not speculate how much of a settlement, if any, the worker and the third party defendant intended to allocate to pain and suffering and to special

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<sup>2</sup> This was notwithstanding this Court's 2008 decision in *Tobin v. Department of Labor & Industries*, 145 Wn. App. 607, 613, 187 P.3d 780 (2008), *aff'd* 169 Wn.2d 396 (2010), which held that the recovery under RCW 51.24.060 does not include pain and suffering damages.

damages. BR 132. The settlement valuation process involves many variables. See BR 132. To arrive at settlements, parties take into consideration such factors as: the credibility and strength of the parties' respective damage experts; the type, nature and extent of injuries claimed; the relative fault of the injured worker and third party defendant; the risks and costs of litigation; and the relative skill and experience of the worker's and defendant's respective counsel. BR 132. The Department cannot quantify what damages were contemplated by the parties in the absence of an allocation by the parties to the agreement. See BR 132-33.<sup>3</sup>

**B. The City Paid Benefits On The Claim**

On the workers' compensation claim, the City paid \$82,188.86 in benefits. BR 26; BR Ex. 7. This included \$29,094.75 in time loss compensation, \$43,240.72 in medical care, \$7,726.50 in permanent partial disability, and \$2,126.89 in vocational costs. BR Ex. 1 at 2. The time loss compensation is not Jones's total lost past and future wages. Time loss compensation is paid at 60 percent (for unmarried workers) of the wages, with a cap based on the statewide average of wages. RCW 51.32.090(1), .060(1)(g), .060(5)(a). Similarly, the medical benefits paid are not necessarily medical expenses incurred, the Department and self-insured

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<sup>3</sup> The parties are free to allocate as they wish (*Mills*, 72 Wn. App. at 577), subject to the Department's right to void any settlement that is deficient. RCW 51.24.090.

employers pay at the rates established in the Department's fee schedule.

WAC 296-20-010(1).

**C. The Department Entered An Order Distributing The Settlement**

After the parties settled the civil lawsuit, the Department issued an order that calculated the third party distribution based on the statutory distribution formula under RCW 51.24.060. BR 26, 29. A distribution order is based on the statutorily defined "recovery." RCW 51.24.060, .030(5). The order was based on a recovery of \$250,000, the full amount of the settlement. BR 26, 29; BR Ex. 7, 4. The order calculated the benefits paid as \$82,188.86. BR 26, 29. Attorney fees and costs in the third-party settlement were \$110,333.57. BR 26, 29. The City's share was calculated as \$45,916.10 and the order provided that further benefits or compensation would not be paid on behalf of Jones until an excess amount totaling \$32,868.38 had been expended by Jones as a result of a condition covered by the claim. BR 26, 29. Jones's net share of the settlement was \$93,750.33. BR 26, 29.

Jones appealed to the Board, arguing that the recovery amount should be \$82,188.86 (the amount expended by the City), not \$250,000. BR 24, 104. The Board judge granted summary judgment to the City and the Department. BR 27. The full Board adopted the Board judge's

decision as its own. BR 2. Jones appealed to superior court. CP 5. After a bench trial, the superior court affirmed the Board decision. CP 146.

#### IV. STANDARD OF REVIEW

This case was decided in a bench trial at the superior court. CP 147. The superior court considered the record of the Board. RCW 51.52.115. The case at the Board was decided upon summary judgment and therefore the summary judgment standard applies. “Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Bennerstrom v. Dep’t of Labor & Indus.*, 120 Wn. App. 853, 858, 86 P.3d 826 (2004); CR 56. There are no disputed facts in this case.

The questions of law raised by this appeal are reviewed de novo. *Bennerstrom*, 120 Wn.2d at 858. The Department is a subject matter expert in third party distributions (RCW 51.24.060) and the Court should defer to its expertise. *See Dep’t of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000).

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## V. ARGUMENT

### A. Under *Gersema* and *Mills*, The Department Properly Distributed The Lump Sum Settlement Because No Amount Was Allocated As Pain And Suffering Damages

“[A]ny recovery” obtained from a third party suit “shall be distributed” according to the statutory distribution formula. RCW 51.24.060(1). The distribution formula requires payment in the following order: (a) attorney fees and costs, (b) 25 percent to the injured worker free of any claim by the Department, (c) to the Department “the balance of the recovery made, but only to the extent necessary to reimburse [the Department] for benefits paid” and (d) to the injured worker “[a]ny remaining balance.” RCW 51.24.060(1); *Tobin v. Dep’t of Labor & Indus.*, 169 Wn.2d 396, 400-401, 239 P.3d 544 (2010). The Department or self-insured employer has a lien on its share of the recovery. RCW 51.24.060(2).

“Recovery” is defined to include “all damages except loss of consortium.” RCW 51.24.030(5). The Supreme Court recently held that pain and suffering damages are also excluded from this definition of recovery and thereby excluded from distribution under RCW 51.24.060. *Tobin*, 169 Wn.2d at 404. In *Tobin*, Tobin was injured in the course of his employment and successfully recovered damages from the negligent third party. *Tobin*, 169 Wn.2d at 398. Notably, Tobin’s settlement expressly

allocated a portion of his recovery as pain and suffering. *Id.* The Supreme Court concluded that an injured worker's pain and suffering damages may not be included in the RCW 51.24.060 distribution formula. *Tobin*, 169 Wn.2d at 404.

Jones concedes that his settlement agreement did not allocate between general and special damages. AB 10. The Court of Appeals has twice reviewed an injured worker's argument that a portion of his or her unallocated third party recovery should be excluded from distribution. *Gersema*, 127 Wn. App. at 692; *Mills*, 72 Wn. App. at 577. In both instances, the court affirmed the Department's distribution of the entire settlement because the settlement documents did not reveal what amount, if any, the parties intended as compensation for categories of damages that might be excluded from the recovery. *See Gersema*, 127 Wn. App. at 695-96; *Mills*, 72 Wn. App. at 577.

In *Mills*, the court was presented with a single settlement that resolved an injured worker's claims against the third party and his wife's separate action for loss of consortium. *Mills*, 72 Wn. App. at 576. The settlement documents made no allocation for the wife's loss of consortium, but resolved her claim. *Id.* The court affirmed the Department's distribution of the entire settlement amount, holding "the parties' failure to allocate a portion of the lump sum recovery to

Mrs. Mills' loss of consortium claim in the settlement documents subjects the entire award to the Department's lien." *Id.* at 577.

Years after *Mills*, the Court of Appeals was presented with an appeal nearly identical to Jones's in *Gersema*. Gersema's settlement agreement "neither differentiated between nor specified separate amounts for special and general damages." *Gersema*, 127 Wn. App. at 690. Gersema argued that applying RCW 51.24.060 to his general damages amounted to an unconstitutional taking of his general damages. *Id.* at 692. The court declined to hold that Gersema's pain and suffering damages were improperly distributed because it could not discern from the settlement "what portion was attributable to general damages, such as pain and suffering, and what portion was attributable to special damages . . . ." *Gersema*, 127 Wn. App. at 696. The court also declined Gersema's suggestion that his general damages should be determined through a court-imposed process of elimination. *Id.* at 697-98, 699 n.21. In an instance of foreshadowing the *Tobin* decision, the *Gersema* Court stated that, had Gersema clearly allocated a portion of his recovery to general damages, it might be inclined to agree with his arguments regarding exclusion of general damages. *Id.* at 695, 699 n.21.

Jones suggests that the rulings requiring allocation in these cases are dicta because there had not yet been rulings at the time of each case on

whether loss of consortium or pain and suffering was included in the recovery. See AB 11-12. The problem with this argument is that both *Mills* and *Gersema* presented the same facts of an unallocated settlement agreement. See *Gersema*, 127 Wn. App. at 690; *Mills*, 72 Wn. App. at 576. *Gersema* emphasized that “[t]he dispute here . . . arises from Gersema’s failure to differentiate industrial insurance compensable special damages and non-compensable general damages in his settlement with Titus-Will.” *Gersema*, 127 Wn. App. at 693. And *Mills* held that “the parties’ failure to allocate a portion of the lump sum recovery to Mrs. Mills’ loss of consortium claim in the settlement document subjects the entire award to the Department’s lien.” *Mills*, 72 Wn. App. at 577. Both *Mills* and *Gersema* rejected the attempt to have an after-the-fact allocation of the sort that Jones’s attempts. *Mills*, 72 Wn. App. at 577; *Gersema*, 127 Wn. App. at 697-98. The decisions to consider the unallocated lump sum settlements as part of the recovery disposed of these cases and are not dicta. See *Wagg v. Estate of Dunham*, 146 Wn.2d 63, 73, 42 P.3d 968 (2002) (language essential to a decision is not dicta).

Jones also claims that *Tobin* overruled *Mills* and *Gersema*. AB 13. In *Tobin*, the parties settled for \$1.4 million in damages, \$793,083.16 of which was categorized as pain and suffering. *Tobin*, 169 Wn.2d at 398. The Court was not presented with what to do with a lump sum settlement

that did not categorize any damages as pain and suffering. Thus, *Tobin* does not affect the holdings of *Mills* and *Gersema*. In fact, these three decisions act in harmony to reinforce the clear rule first set forth by the court in *Mills*: unless the settling parties clearly allocate what portion the settlement agreement the injured worker seeks to exclude from the recovery, the full amount of the recovery is subject to the statutory distribution formula set out in RCW 51.24.060. *Mills*, 72 Wn. App. at 577; see also *Maxey v. Dep't of Labor & Indus.*, 114 Wn.2d 542, 545, 789 P.2d 75 (1990) (Department has vested right to reimbursement for benefits paid under statutory distribution scheme under RCW 51.24.060).

**B. The Formula Distributes The Entire Settlement Amount (Excluding Loss of Consortium And Pain And Suffering); The Share Received By The Department Under This Formula Does Not Exceed Benefits Paid**

To calculate the recovery, Jones argues that this Court can ascertain what the special damages were because the City paid \$82,188.86 on the claim. See AB 10.<sup>4</sup> He presupposes that the special damages were only \$82,188.86, arguing that “basing the lien upon the entire settlement of \$250,000.00 goes far beyond special damages of \$82,188.86.” AB 10.

Using the benefits paid by the City is not an accurate way to determine the damages for three fundamental reasons. First, the definition

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<sup>4</sup> Jones casts his arguments in terms of determining the City’s lien. AB 10-11. However, before determining the lien, the threshold question is determining the amount of the recovery. See RCW 51.24.060(1), (2).

of recovery in RCW 51.24.030 does not limit the recovery to benefits paid. Second, the benefits paid did not cover all of Jones's medical expenses, wage loss, and other special damages. Third, the statutory distribution formula in RCW 51.24.060 specifically treats benefits paid as a subset of the formula and does not use it to define the recovery.

**1. RCW 51.24.030(5) Addresses How The Recovery Is Determined**

The settlement sums that are subject to the statutory distribution formula are defined in RCW 51.24.030(5). Under RCW 51.24.030(5), "recovery" "includes all damages" except loss of consortium and, under case law, pain and suffering. RCW 51.24.030(5); *Tobin*, 169 Wn.2d at 404. Patently under this definition, damages are not limited to benefits paid.

Jones points to the language in the *Tobin* decision that said "where the Department has not paid out benefits for a type of damages, it cannot seek reimbursement from that type of damages." AB 13 (quoting *Tobin*, 169 Wn.2d at 401). The Department is not seeking repayment from pain and suffering damages because none have been specified in the settlement agreement. It is speculative to conjecture that he had pain and suffering damages in any amount.

The Department is seeking repayment from all other damages (excluding pain and suffering and loss of consortium). See RCW 51.24.060(1), .030(5). These are his economic damages or special damages. The recovery includes the types of damages that match to the types of benefits that either the Department or self-insured employer pays in workers' compensations cases. See *Tobin*, 169 Wn.2d at 401. Note these are the types of benefits that are paid generally in workers' compensation cases and are not limited to what is paid in an individual case. What has been paid simply determines the Department's share of reimbursement under RCW 51.24.060, not the recovery under RCW 51.24.030, as discussed further below in Part VI.B.3.

The types of benefits that match to the types of damages subject to the recovery would include past medical costs, future medical expenses, permanent physical injury, vocational expenses, past loss of earning and working time, and permanent impairment of the ability to earn in the future, and death benefits. RCW 51.36.010 (medical aid); RCW 51.32.080 (permanent partial disability), .090(1) (time loss – temporary total disability), .095 (vocational rehabilitation benefits), .090(3) (loss of

earning power benefits – temporary partial disability), .060 (pension – total permanent disability), .050 (death benefits).<sup>5</sup>

**2. Jones’s Special Damages Include More Than The Time Loss and Medical Expenses That Were Paid**

Jones claims that his special damages are limited to “what [the City] paid in medical and wage recoveries.” AB 12, 10. Jones’s special damages include more than the time loss compensation and medical expenses paid by the City.

Here, time loss compensation was paid to Jones. BR Ex. 1 at 2. Time loss compensation benefits are a wage replacement benefit. *See Kaiser Alum. & Chem. Corp. v. Overdorff*, 57 Wn. App. 291, 295, 788 P.2d 8 (1990); RCW 51.32.090. They are paid when someone is temporarily incapable of performing any gainful employment. *Hubbard v. Dep’t of Labor & Indus.*, 140 Wn.2d 35, 43, 992 P.2d 1002 (2000). This time loss does not compensate Jones for his total lost past and future wages. Time loss is for temporary period of time. *See* RCW 51.32.090. It does not include future loss of earnings; it is for a finite period of time. *See In re Mark Billings*, BIIA Dec., 70,883, 1986 WL 31854, \*2-\*3. (1986).

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<sup>5</sup> This is not meant to be an exhaustive list. The Department reimburses for other types of out of pocket expenses. *E.g.* WAC 296-20-1103. Jones’s description of the special damages as limited to “medical and wage recoveries” at AB 12 is too narrow.

Jones had more lost wages than he received in benefits. The additional lost wages are evidenced by his receipt of time loss benefits. Time loss is not paid for the first three days of disability. RCW 51.32.090(5). Time loss compensation is paid at 60 percent (for unmarried workers) of the wages, with a cap based on the statewide average of wages. RCW 51.32.090(1), .060(1)(g), .060(5)(a). Thus, the “benefits paid” amount, on its face, does not constitute all of Jones’s special damages that are included in the recovery.

Jones received medical benefits. BR Ex. 1 at 2. However, the medical benefits paid by his employer are not necessarily the same as medical expenses incurred. The Department and self-insured employers pay at the rates established in the Department’s fee schedule. WAC 296-20-010(1). In this lawsuit, Jones was entitled to special damages based on the “reasonable” cost of his medical care (*Patterson v. Horton*, 84 Wn. App. 531, 543, 929 P.2d 1125 (1997)), rather than the amount the City paid for that care under the Department’s fee schedule. It is likely that he had more medical damages than what was actually paid by the City. He also has the possibility of future medical expenses. *See* RCW 51.32.160 (worker may apply to reopen claim if condition becomes aggravated).

Jones also received a permanent partial disability. BR Ex. 1 at 2. This does not compensate for future wage loss, but rather loss of function.

Although the Legislature takes loss of future earning capacity into account when determining the amounts of permanent partial disability (*McIndoe v. Dep't of Labor & Indus.*, 144 Wn.2d 252, 261, 26 P.3d 903 (2001)), individual awards of permanent partial disability are awarded based on loss of bodily function. *See Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 736, 57 P.3d 611 (2002).

When Jones released Capital Christian Center and Life Skills they were forever discharged from any liability regarding Jones's injury. *See* BR Ex. 4 at 1. In contrast, the City of Olympia is never released from liability as Jones may reopen his claim for workers' compensation benefits if his condition worsens. *See* RCW 51.32.160 (may apply for reopening for aggravation of condition); *Phillips v. Dep't of Labor & Indus.*, 49 Wn.2d 195, 197, 298 P.2d 1117 (1956). For this reason, the statute provides not only for reimbursement of past benefits, but for offset of future benefits from any recovery. RCW 51.24.060(1)(c), (e).

Jones's settlement agreement covered all damages, known or unknown. BR Ex. 4 at 1. This included the wage loss, impairment, and medical expenses at the time of the settlement, and also included all future loss of earning power, future impairment, and future medical expenses.

### **3. RCW 51.24.060's Mandatory Distribution Formula Takes Into Account The Benefits Paid**

The Legislature established a detailed formula that describes how “any recovery” made by an injured worker in a third party lawsuit “shall be distributed.” *See* RCW 51.24.060(1). That formula involves a five-step process:

- 1) The costs and reasonable attorneys’ fees shall be paid proportionately by the injured worker and the department or self-insured employer. RCW 51.24.060(1)(a).
- 2) The injured worker shall be paid twenty-five percent of the balance of the award. RCW 51.24.060(1)(b).
- 3) The Department or self-insured employer “shall be paid the balance of the recovery made, but only to the extent necessary to reimburse the department and/or self-insurer for benefits paid.” RCW 51.24.060(1)(c).
- 4) Any remaining balance shall be paid to the injured worker. RCW 51.24.060(1)(d).
- 5) “Thereafter no payment shall be made to or on behalf of an injured worker . . . by the department and/or self-insurer for such injury until the amount of any further compensation and benefits shall equal any such remaining balance minus the department’s and/or self-insurer’s proportionate share of the costs and reasonable attorneys’ fees in regards to the remaining balance. . . .” RCW 51.24.060(1)(e).

Thus, “any recovery” that an injured worker makes under the third party recovery statute “shall be distributed” as follows: attorneys’ fees and costs are paid first; the worker receives 25 percent of the recovery (after fees and costs) free and clear of any Department or self-insured employer

claim; the Department or self-insured employer is then paid from the “recovery” to the extent necessary to “reimburse” it “for benefits paid” (less its proportionate share of fees and costs); and the worker receives the “remaining balance” against which future workers’ compensation benefits are offset (with, again, the Department or self-insured employer responsible for its proportionate share of fees and costs for the offset benefits). RCW 51.24.060(1). “Benefits paid” under this scheme are just one component of distribution of the recovery.

Jones appears to argue that the “benefits paid” language in RCW 51.24.060(1)(c) means the “recovery” may be calculated on the amount of benefits paid. *See* AB 17. This confuses the concepts of “reimbursement” and “recovery.” RCW 51.24.060(1)(c) provides that the Department or self-insured employer “shall be paid the balance of the *recovery* made, but only to the extent necessary to *reimburse* the department and/or self-insurer for benefits paid.” (Emphasis added.) The recovery as a whole is determined and then, as a separate calculation, the Department’s or self-insured employer’s reimbursement is determined based on benefits paid.

Adoption of Jones’s position that the recovery can only include the benefits paid would make it impossible for the Department or self-insured employer to ever recover the money spent on the claim and workers would receive a double recovery. For example, in this case, the Department

would be forced to use \$82,188.86 as the recovery under RCW 51.24.060(1). From there, the attorney would take his contingency fee under RCW 51.24.060(1)(a) and the claimant would take his 25 percent share under RCW 51.24.060(1)(b). The Department or self-insured employer could seek its benefits paid under RCW 51.24.060(1)(c) only from the remaining balance which would be far less than the amount of benefits it paid under the claim or might pay in the future if the claim was reopened. This would frustrate the intent of the legislative scheme to reimburse the Department and self-insured employer for benefits paid. *See Maxey*, 114 Wn.2d at 549.

**C. Jones Had The Burden Of Proof To Show The Department's Order Was Incorrect And To Show Entitlement To Compensation**

In challenging the Department's order at the Board, Jones carried the "burden of proceeding with the evidence to establish a prima facie case for the relief sought in [his] appeal." RCW 51.52.050(2)(a). A worker seeking relief under the Industrial Insurance Act "must prove his claim by competent evidence." *Lightle v. Dep't of Labor & Indus.*, 68 Wn.2d 507, 510, 413 P.2d 814 (1966); *see also Clausen v. Dep't of Labor & Indus.*, 15 Wn.2d 62, 68, 129 P.2d 777 (1942). Jones failed to produce evidence in the form of an allocated settlement that supported his claim that his settlement damages included pain and suffering damages.

Jones, however, argues that “any burden of proof of allocation of the settlement should have been placed upon the City / Department.” AB 18. He proposes that “the City should have produced proof that its benefits paid under the statute exceeded \$82,188.86, rather than require Jones to do the opposite (e.g. prove which portions of his settlement represent special and general damages.)” AB 18. As authority he relies on the principle that statutes in derogation of the common law are strictly construed and then argues RCW 51.24.060 should be construed in favor of the worker. *See* AB 17.

The provisions of RCW 51.04.010 withdraw work place injuries from the common law. The Industrial Insurance Act is liberally construed in favor of the worker. RCW 51.12.010; *Harris v. Dep’t of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993). But liberal construction and the principle that statutes in derogation of the common law are strictly construed are principles of statutory construction applied only when there is an ambiguity in the statute. *See Harris*, 120 Wn.2d at 474 (liberal construction not applied when statute unambiguous). This not a case involving an ambiguous statute. Jones points to no ambiguity in RCW 51.24.060 and none exists. Neither is RCW 51.52.050’s placement of the burden of proof upon Jones ambiguous.

To the extent that Jones alleges that some amount of pain and suffering was present in his case, even though his settlement did not make such a distinction, this is an issue of fact rather than a question of how to interpret a statute. Liberal construction “does not apply to questions of fact but to matters concerning the construction of the statute.” *Ehman v. Dep’t of Labor & Indus.*, 33 Wn.2d 584, 595, 206 P.2d 787 (1949). It does not change the burden of proof in a workers’ compensation case. *Lightle*, 68 Wn.2d at 510.

Jones posits that he should not have the burden to show what portions of his settlement represent special and general damages and seeks to place the burden on the City and Department. *See* AB 18. But he offers no explanation as to how the City and Department should do this other than his incorrect theory that the recovery is limited to the benefits paid. In any event, it is unworkable for the Department to allocate in a post-hoc fashion, which would involve the Department speculating about the intentions of the parties. The settlement valuation process is a complex one and cannot be discerned retrospectively. *See* BR 132. Nor should there be a need to engage in a retrospective allocation when the worker could have included such information in his or her settlement but failed to do so.

Indeed the *Mills* Court, in discussing why the Department should not be required to establish allocations for the parties, emphasized that

there was no reason to “require the Department to do something over which the parties had complete control.” *Mills*, 72 Wn. App. at 577-78. The *Mills* Court also believed that to require the Department to allocate recoveries would detract from its primary responsibility to minimize cost to the industrial insurance fund by “creating another bureaucratic responsibility which would hinder rather than foster the Department’s goal of minimizing the costs to the fund.” *Mills*, 72 Wn. App. at 578.

Placing the burden on the worker to allocate his or her settlement furthers the goals of RCW 51.24. Third party lawsuits reimburse the workers’ compensation funds so they “are not charged for damages caused by a third party.” *Maxey*, 114 Wn.2d at 549. Thus, by shifting the costs of these of the benefits onto the liable third party tortfeasor, workers and employers who pay into the workers’ compensation fund or self-insured employers who pay claim costs are relieved from the responsibility of underwriting the damages caused by the third party who, by definition, never purchased industrial insurance coverage for the worker he or she injured. The statute is also interpreted to prevent a double recovery by the worker (*id.* at 549), which would occur if Jones’s scheme were adopted.

It was within Jones’s control to negotiate for a settlement agreement that specified an amount for pain and suffering damages. *See*

*Tobin*, 169 Wn.2d at 398 (allocated settlement to include pain and suffering damages). It is particularly noteworthy that he settled in 2009 (BR 26) without such an allocation given the lessons he could take from *Tobin* (Court of Appeals) in 2008, *Gersema* in 2005, and *Mills* in 1994. See *Tobin*, 145 Wn. App. at 610, 615 (settlement allocated and court held pain and suffering damages is not part of the recovery); *Gersema*, 127 Wn. App. at 695, 699 n.21 (settlement unallocated, but if it was court may not have considered full settlement amount in calculating excess recovery); *Mills*, 72 Wn. App. at 577-78 (settlement unallocated and court would not place the burden on the Department to allocate it). Based on these cases, Jones should have been aware that he needed to allocate his settlement amount in order to preserve his argument that a portion of his settlement should be excluded from statutory distribution as “pain and suffering” damages.

**D. The United States Supreme Court’s Decision In *Ahlborn* Does Not Apply To This Appeal**

Jones argues that *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d. 459 (2006), provides authority for this Court to allocate his settlement between special and general damages. This argument fails for several reasons. *Ahlborn* involves the interpretation of federal Medicaid law, which is

distinct from the third party recovery statute under RCW 51.24 that applies to Jones's recovery. *Mills* and *Gersema*, which interpret the Washington laws invoked in Jones's appeal, control and their precedential value and direct application to Jones's appeal are not diminished by the *Ahlborn* Court's interpretation of an unrelated federal law.

In any event, *Ahlborn* does not reach the question of what to do with an unallocated settlement because in *Ahlborn* the parties stipulated to an allocation in litigation. *Ahlborn*, 547 U.S. at 274. In *Ahlborn*, Medicaid paid Ahlborn's medical expenses, and Arkansas asserted a lien for third party recovery for all amounts it paid on behalf of the Medicaid recipient, claiming the right to recover against portions of the settlement that included damages other than the medical expenses, such as lost wages. *Id.* at 278-79. The United States Supreme Court held that the federal Medicaid statute only allowed a lien on the portion of the settlement that represented paid medical expenses. *Id.* at 280, 291-92.

The *Ahlborn* Court did not engage in allocation as Jones suggests at AB 15. The parties stipulated that Ahlborn's entire claim was reasonably valued at \$3,040,708.12; that the settlement equaled one-sixth of that sum; and, that, if Ahlborn's reasoning was used, Arkansas would be entitled to that portion of the settlement (\$35,581.47) that constituted reimbursement for medical payments made. *Ahlborn*, 547 U.S. at 274.

Thus, the parties stipulated to an allocation. In Jones's case, the parties did not enter into any stipulation on the reasonable value of Jones's claim or the portion of the settlement that represents special damages payments.

Also, in *Ahlborn*, the statute involved only allowed for a lien on services paid by Medicaid. *Ahlborn*, 547 U.S. at 277. Contrary to Jones's contention at AB 15, the recovery amount in RCW 51.24.060 is not just limited to medical bills paid. *See supra* Part VI.B.

*Ahlborn*, with its interpretation of federal law in the context of factual stipulations that create a post-settlement allocation, does not apply to Jones's appeal, which is rooted in a dispute over Washington law in which the parties have not stipulated to any damages allocation. *Mills* and *Gersema* remain the law directly applicable to Jones's appeal.

**E. The Court Should Not Consider Jones's Unsupported Constitutional Argument**

Jones argues that considering the entire unallocated settlement as subject to the Department's or City's lien would constitute the taking of Jones's private property because his general damages are a property interest belonging solely to him. AB 16. He relies on RCW 4.08.080, which discusses assignments of choses in action, and *Woody's Olympia Lumber, Inc. v. Roney*, 9 Wn. App. 626, 513 P.2d 849 P.2d 849 (1973),

and *In re Marriage of Brown*, 100 Wn.2d 729, 675 P.2d 1207 (1984), which stand for the proposition that a tort claim is property. AB 16.

None of Jones's authority discusses constitutional takings issues. In fact, he has provided no authority for his contention that the distribution order constituted a takings other than citing to article I, section 16 of the Washington Constitution and amendment 14 of the United States Constitution. AB 16.

The Court should not consider his constitutional argument because he has failed to provide relevant authority and argument for his proposition. “[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion.” *United States v. Phillips*, 433 F.2d 1364, 1366 (8th Cir. 1970), *quoted in State v. Blilie*, 132 Wn.2d 484, 493 n. 2, 939 P.2d 691 (1997). To adequately present a constitutional argument, a party must cite to authority and present argument. RAP 10.3(a)(6); *Nor-Pac Enter., Inc. v. Dep't of Licensing*, 129 Wn. App. 556, 570-71, 119 P.3d 889 (2005).

The heavy burden of establishing that a statute results in a constitutional violation is on the party challenging the statute. *See Orion Corp. v. State*, 109 Wn.2d 621, 658, 747 P.2d 1062 (1987). Jones has not provided a factual record that allows for review of the constitutional takings claim. No takings exists when the party cannot show there was a

property or property interest that was taken. *Pierce v. Ne. Lake Wash. Sewer & Water Dist.*, 123 Wn.2d 550, 560, 870 P.2d 305 (1994). The *Maxey* Court held that a worker has no property right or interest in any funds that represent the amount to be reimbursed to the Department under Title 51. *Maxey*, 114 Wn.2d at 545.

Jones claims a taking of his general damages (AB 16), but he has provided no competent proof that quantifies them. This is insufficient to form the factual basis of a constitutional taking argument. *See Gersema*, 127 Wn. App. at 696-99. In a similar context, *Gersema* decided that RCW 51.24.060 did not result in a takings of *Gersema's* property.<sup>6</sup> *Gersema*, 127 Wn. App. at 696-99. The record and briefing presents no reason why that ruling should be revisited here.

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<sup>6</sup> A takings issue was raised at the Court of Appeals in *Tobin*, however, the court decided the issue on the notice requirement of due process. *Tobin*, 145 Wn. App. at 618-19. The Supreme Court disagreed with the reasoning of the Court of Appeals on the notice issue and the Court did not reach the takings issue as it decided the case on statutory grounds. *Tobin*, 169 Wn.2d at 405.

## VI. CONCLUSION

For the reasons discussed above, the Department respectfully requests that the Court affirm the March 14, 2011 judgment of the superior court.

RESPECTFULLY SUBMITTED this 21st day of November, 2011.

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NO. 41988-2-II  
COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

NOV 22 2011 11:17

DENNIS JONES,

Plaintiff,

v.

CITY OF OLYMPIA and  
DEPARTMENT OF LABOR AND  
INDUSTRIES OF THE STATE OF  
WASHINGTON,

Respondents.

CERTIFICATE OF  
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, certifies that on November 21, 2011, she caused to be served the Department's Brief of Respondent and this Certificate of Service in the below-described manner.

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