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Case No. 53885-7-II

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

JOSHUA PETERSON, Appellant

v.

DEPARTMENT OF LABOR & INDUSTRIES, Respondent

APPELLANT'S BRIEF

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INTRODUCTION

At the heart of this appeal are two original sins. Both were created by the Department's own inaction: failure to file a petition for review with the Board of Industrial Insurance Appeals. RCW 51.52.104. The Clark County Superior Court erred when it failed to address the consequences of that failure in the application of the law to the facts. The Department's failure and waiver means this Court must accept as true two conclusions of law made by Industrial Appeals Judge Yeager in his Proposed Decision & Order: Conclusion of Law No. 2 that the December 23, 2011 order allowing this claim is final and Conclusion of Law No. 6 that the Department's attempt to reject Mr. Peterson's claim was done in error. This also means the Court must reverse the Department's attempt to assess an over \$70,000 overpayment against Mr. Peterson because it conceded below that overpayment was solely based upon its rejection order.

ASSIGNMENTS OF ERROR

1. The Superior Court erred when it affirmed the decision of the Board of Industrial Insurance Appeals that the Department of Labor and Industries can issue an order rejecting Mr. Peterson's claim despite the fact that the court found the Department's December 23, 2011 allowance order is final and not void.
2. The Superior Court erred when it affirmed the decision of the Board of

Industrial Insurance Appeals, because RCW 51.52.104 prohibits the Board from altering unchallenged conclusions of law; yet the Board did exactly that with Conclusion of Law No. 6 after the Department failed to file a Petition for Review below.

3. In the alternative, the Superior Court erred when it affirmed the Department's overpayment for benefits paid to Mr. Peterson after April 20, 2016 because the Department is limited to only recouping benefits previously paid at the time of concurrent receipt of maritime benefits per RCW 51.12.100(4).
4. After affirming the decision of the Board of Industrial Insurance Appeals, the Clark County Superior Court erred when it awarded the Department's request for prevailing party fees and costs.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Where an IAJ makes a Conclusion of Law, adverse to the Department, that its December 23, 2011 allowance order is final, then the Board affirms that Conclusion, the Superior Court affirms that finding at the request of the Department, and at no point does the Department appeal any of these decisions, was the Superior Court correct when it also affirmed the Department's order rejecting Mr. Peterson's claim?

Answer: No, unappealed Conclusions of Law are verities on appeal and it does not flow naturally that the Department may reject Mr. Peterson's

claim when the allowance order has been adjudicated as final, which also means the order is not void, from which no parties has taken exception.

2. Where the Department conceded its right to assess an overpayment is solely based upon its rejection order, yet failed to appeal Industrial Appeals Judge (IAJ) Yeager's decision that the Department could not reject Mr. Peterson's claim and where the Superior Court affirmed the allowance order as final, was the Superior Court correct when it affirmed the Department's order rejecting Mr. Peterson's claim and ordering the repayment of benefits?

Answer: No, RCW 51.52.104 explicitly provides that failure to file a Petition for Review or to raise an issue therein constitutes a waiver, which removes the authority of the Board to alter such conclusions. Additionally, CR 2A binds parties to concessions made in open court and the Court must also cancel the Department's overpayment, per RCW 51.32.240(3), if it holds the Department erred when it issued an order rejecting Mr. Peterson's claim. *Upjohn v. Russel*, 33 Wn. App. 777 (1983); *Clark Cty. v. Maphet*, 10 Wn. App. 2d 420, 451 P.3d 713 (2019).

3. Where the Superior Court holds that an order allowing a claim is final, and therefore not void, was the Superior Court correct when it also held

the Department may still issue a new order rejecting the claim?

Answer: No, because no party has challenged the Superior Court's holding that the allowance order is final, then this Court must find that allowance order is not void and that the Department erred with it issued its rejection order. *Abraham v. Dep't of Labor & Indus.*, 178 Wash. 160, 34 P.2d 457 (1934); *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 886 P.2d 189 (1994); *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 937 P.2d 565 (1997).

4. In the alternative, where Mr. Peterson received workers compensation benefits up through and after April 20, 2016, the date his Longshore settlement was approved, was the Superior Court correct when it refused to cancel the overpayment on and after April 21, 2016?

Answer: No, RCW 51.12.100(4) provides that in the event of concurrent payments, only the state benefits paid prior to the Longshore settlement may be repaid, but the Department wrongly assessed an overpayment for benefits paid on and after April 21, 2016.

5. Where the Department prevails in Superior Court and where RCW 51.52.130 only permits injured workers to obtain prevailing party fees and costs and where RCW 51.52.150 requires the Department to only pay its attorney fees and costs out of funds established by the legislature, may the Court award such fees and costs to the Department to be paid

by the injured worker per RCW 51.52.140?

Answer: No, because the Chapter 51.52 RCW does otherwise provide for how fees and costs on appeal are paid for, the rules for civil cases does not apply. *cf Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415 (1992).

STATEMENT OF THE CASE

On December 20, 2011, the Department received an application for benefits from Mr. Peterson. (Certified Appeal Board Record p. 302¹). On December 23, 2011, the Department issued an order allowing Mr. Peterson's workers compensation claim. (CABR p. 302; Exhibit 51). No protest, appeal, or further order modifying the December 23, 2011 order was received or issued in the next 60 days. (CABR pp. 302-303).

In the Spring of 2016, Mr. Peterson negotiated and settled his two maritime claims, to which the Department was a party.² On September 21, 2016, the Department issued an order rejecting Mr. Peterson's claim and

¹ The jurisdictional history lists all Department orders (except orders paying time loss benefits), all protests per RCW 51.52.050, all appeals per RCW 51.52.060, and all decisions of the Board. The parties stipulated to its accuracy and completeness. (CABR p. 308).

² Below, the parties litigated whether or not the Department had agreed to limit its recovery from those settlements to only \$25,000. These arguments included mixed questions of law and fact over the scope of the negotiations, the apparent authority of the Department's negotiator, the terms of the settlement contracts, and application of different types of estoppel. The Superior Court ruled in favor of the Department on these mixed questions of law and fact. Mr. Peterson is not challenging whether substantial evidence supports the Court's findings and conclusions on these issues.

assessing an overpayment. That order stated in relevant part:

This claim is rejected because the worker was a federal employee at the time of injury and not subject to the provisions of Industrial Insurance Laws.

(CABR p. 306). The Department then affirmed the September 21, 2016 order on December 9, 2016. Mr. Peterson appealed this order to the Board of Industrial Insurance Appeals where hearings were held before IAJ Steven Yeager.

In his Proposed Decision and Order, the IAJ's Conclusion of Law No. 2 held that the December 23, 2011 allowance order was final. Conclusion of Law No. 6 held the Department's order rejecting this claim was incorrect, because the allowance order was final. (CABR p. 65). Only Mr. Peterson appealed the Proposed Decision and Order, disagreeing with the overpayment and closure of Mr. Peterson's claim. (CABR p. 21). The Department filed a two-page response, in which it did not object to Conclusion of Law No. 2 or No. 6. (CABR p. 11). Mr. Peterson also filed his Supplemental Petition for Review, arguing the Department has waived any objection to Conclusion of Law No. 6 by failing to file its own Petition for Review. (CABR p. 15). In other words, Mr. Peterson did not waive any of his current waiver argument before the Board.

Despite this, the Board still altered Conclusion of Law No. 6. The Board held that the Department was within its rights to still reject Mr.

Peterson's claim and order him to repay just over \$70,000 in benefits. Mr. Peterson appealed that decision to the Clark County Superior Court.

However, the Board, with Conclusion of Law No. 2, also held that the December 23, 2011 allowance order was final. (CABR pp. 7-8). Mr. Peterson agrees with this Conclusion. The Department did not appeal from the Board's Conclusion of Law No. 2.

After a bench trial, the Clark County Superior Court affirmed the Board's decision in its entirety. This means the court held that the December 23, 2011 allowance order is final. In addition, the court held the Department could, nonetheless, still issue a rejection order and seek reimbursement from Mr. Peterson. Furthermore, over objection of Mr. Peterson, the Court awarded prevailing party attorney fees and costs to the Department payable by Mr. Peterson. Mr. Peterson now appeals the latter two holdings, but not the former.

The Department has never challenged Conclusion of Law No. 2 holding the allowance order is final. To the contrary, it wrote the proposed judgment wherein that Conclusion was affirmed by the Superior Court. It is a verity on appeal.

STANDARD OF REVIEW

“When reviewing the Board proceedings, [the appellate court] only examine[s] ‘the record to see whether substantial evidence supports the

findings made after the superior court's de novo review, and whether the court's conclusions of law flow from the findings.” *Gorre v. City of Tacoma*, 184 Wn.2d 30, 36 (2015), quoting *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5-6 (1999). “However, statutory interpretation remains a question of law [the appellate court] determine[s] de novo.” *Gorre*, 184 Wn.2d at 36, citing *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 807 (2001). Unchallenged conclusions of law are verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42 (2002); RCW 51.52.104.

ARGUMENT

1. The Court must affirm the consequences of the Department's failure to seek review of IAJ Yeager's Proposed Decision & Order.

Throughout this appeal, this Court must keep in the forefront of its analysis the fact that, per the Board's Conclusion of Law No. 2, the December 23, 2011 allowance order is final. This unchallenged legal conclusion was made by IAJ Yeager, the Board, and the Clark County Superior Court. In addition, it was made by the Department when it failed to seek review of IAJ Yeager's decision, the decision of the Board, and proposed to the Superior Court that it affirm this conclusion of law.

All of the legal error created below is directly linked to the Department's, the Board's, and the Superior Court's failure to understand

the natural consequences that flow from this verity: Mr. Peterson's claim is allowed and that allowance is final and therefore the allowance order is not void.

This error is further compounded by the Department's decision not to file its own Petition for Review when IAJ Yeager reversed its December 9, 2016 order, the only order on appeal, with his Conclusion of Law No. 6. (Appendix A). This order rejected Mr. Peterson's claim. RCW 51.52.104 is clear: failure to file such petition is a waiver. Despite this, the Board altered Conclusion of Law No. 6 by holding the Department could reject Mr. Peterson's claim. (Appendix B). The Superior Court affirmed this holding at the Department's request. (Appendix C & D).

This Court must decide what legal consequences flow from these two Conclusions of Law made by IAJ Yeager. The former never challenged by any party and the latter only challenged by Mr. Peterson. The most obvious consequence is that a claim cannot be simultaneously finally allowed and rejected; the latter must fail. The second consequence is the Department cannot assess an overpayment of benefits, as conceded by the Department below, if it cannot reject Mr. Peterson's claim. This Court must conclude the Department's December 9, 2016 order is entirely incorrect and must be reversed.

a. The December 23, 2011 allowance order is final and, as such,

this Court cannot permit the Department to reject Mr. Peterson's claim.

IAJ Yeager's and the Board's Conclusion of Law No. 2 states, "The Department's December 23, 2011 order allowing the claim became final." (CABR pp. 8, 64; Appendix A & B). Mr. Peterson agrees with this Conclusion. The Department did not challenge this conclusion in any Petition for Review and did not appeal to the Superior Court. It is a verity on appeal.

Regardless, in superior court the Department still argued against its own, final allowance order despite its multiple waivers. First, it argued that it had the authority to cancel the December 23, 2011 allowance order. (CP p. 55, ln. 4-5; Appendix E). Second, the Department relied upon *Rhodes v. Dep't of Labor & Indus.*, 103 Wn.2d 895, 700 P.2d 729 (1985), when it argued:

The disability award [claim allowance] in this case was never adjudicated or final since RCW 51.12.100 expressly provides benefits shall be repaid if recovery is subsequently made under the federal maritime law. That is exactly what happened here. This case is squarely on all fours with *Rhodes*.

(CP p. 55, ln. 10-13; Appendix E). Both arguments primarily fail because the Department failed to preserve them below.

These arguments also fail because the December 23, 2011 allowance

order was adjudicated as final. IAJ Yeager's and the Board's Conclusion of Law No. 2 each state, "The Department's December 23, 2011 order allowing the claim became final." (CABR pp. 8, 64; Appendix A & B). The Department neither filed a Petition for Review of the partially adverse decision of IAJ Yeager, per RCW 51.52.104, nor cross-appealed the decision of the Board. *See below*.

With its Conclusion of Law 2.2, the Clark County Superior Court affirmed the Board's Conclusion of Law No. 2. (CP p. 76; Appendix D). Mr. Peterson is not aggrieved by the Board's Conclusion of Law No. 2 and does not challenge it. The Department not only failed to administratively challenge Conclusion of Law No. 2, it drafted the Court's proposed judgment affirming that Conclusion. (Appendix C). The order allowing the claim has, unlike the claim in *Rhodes*, been adjudicated as final in this appeal.

This Court is required to accept as true the finality of that allowance order and decide that rejection of a claim does not flow naturally after such an adjudication. A workers compensation claim cannot be, simultaneously, finally allowed and finally rejected. But here the Department has conceded, over and over again, that this claim is definitely, finally allowed. Therefore, any conclusion that it is also rejected must fail. IAJ Yeager was correct in this one respect, the Department cannot now reject this claim.

There is another consequence that flows naturally from the finality of the December 23, 2011 allowance order: that it was not void. Returning to the *Rhodes* case, Conclusion of Law No. 2 represents an important difference from the decision in *Rhodes*. The *Rhodes* decision rests, wrongly as will be argued below, upon a holding that a) the Department does not have the ability to determine its own subject matter jurisdiction and b) under the law of judgments, final decisions of administrative bodies may not have preclusive effects in other tribunals or other proceedings. *Rhodes*, 103 Wn.2d at 899-900. In other words, *Rhodes* rested on the fact that the allowance order in that case was not necessarily final for subsequent proceedings because it was voidable.

In *Rhodes*, the superior court held the allowance was final reversing the decision of the Board. The Department appealed and the Supreme Court reversed the superior court's judgment. In other words, the finality or voidability of the *Rhodes* allowance order remained a live issue.

Here, the Board and the Superior Court found that the allowance order was final. Here, only Mr. Peterson appealed the decision of the Superior Court, but does not challenge its conclusion (and the Board's) that Mr. Peterson's allowance order is final. Here, the Department agreed Mr. Peterson's allowance order was final.

Again, we know this because the Department drafted the Superior

Court's conclusion of law 2.2. Even if the Department were to now claim error, it would be an invited error that this Court cannot reverse. *City of Seattle v. Patu*, 147 Wn.2d 717, 720-21, 58 P.3d 273 (2002). Instead, the adjudicated finality of the allowance order is *res judicata*. *Singletary v. Manor Healthcare Corp.*, 166 Wn. App. 774, 783-84, 271 P.3d 356 (2012). Therefore, this Court must accept as true that the Department did, in fact and law, have the subject matter jurisdiction to allow Mr. Peterson's claim and the Department cannot now seek to void it. To void that order means it is not final, but the Clark County Superior Court held it was final from which no party has assigned error.

Additionally, In light of this procedural history and unlike in *Rhodes*, the Court is no longer addressing the finality of an administrative decision in a different proceeding, but the finality of part of a decision of the superior court in the present appeal. This court's review is to determine whether or not the superior court's challenged conclusions of law flow naturally from its findings of fact and unchallenged conclusions of law. *Ruse*, 138 Wn.2d at 5. It is not natural for this Court to hold that the Department can legally issue a rejection order where, in fact and in law, the December 23, 2011 allowance order is final.

Assuming, *arguendo*, the Department's December 23, 2011 was not final, in fact and law, then the Department does have the authority to later

reject the claim. This is the core holding of *Rhodes*³. However, the Department has repeatedly conceded that the December 23, 2011 allowance order was final in fact and in law through its failure to file petitions for review, appeals, and the drafting of judgments adopted by the superior court. The Department cannot now argue and this court cannot now hold that the December 23, 2011 allowance order is not final. Unlike *Rhodes*, here no one has taken the position the December 23, 2011 allowance of Mr. Peterson's state workers compensation claim is not final.

Again, if the Department now argues that this Court must change or alter the Superior Court's affirmation of the Board's Conclusion of Law No. 2, those arguments must fail. "Respondents must cross appeal to obtain affirmative relief." *Singletary*, 166 Wn. App. at 787 citing *State v. Sims*, 171 Wn.2d 436, 442-43, 256 P.3d 285 (2011). The Department did not cross-appeal at the administrative level or from the superior court judgment. This Court should not grant them affirmative relief. The finality of the December 23, 2011 allowance order is not at issue before this Court. The issue is what consequences flow from the finality of that order?

The Court must reverse the decision of the Superior Court, the Board of Industrial Insurance Appeals, and the Department of Labor & Industries.

³ As will be argued below, *Rhodes* has been effectively overruled by later Supreme Court decisions.

This Court must reverse the Department's December 9, 2016 order rejecting Mr. Peterson's claim and ordering repayment of benefits.

b. The Department's failure to file a Petition for Review below was a binding waiver.

In his Proposed Decision & Order, Industrial Appeals Judge Yeager also concluded in the Proposed Decision & Order (PD&O) that the Department of Labor & Industries lacked the authority to set aside or void its final allowance order. The PD&O's Conclusion of Law No. 6 reads,

The Department's December 9, 2016 order is incorrect, and this matter is remanded to the Department to issue an order closing rather than rejecting the claim.

(CABR p. 65; Appendix A). The Department, despite being aggrieved by this finding, did not file its own Petition for Review per RCW 51.52.104. Its failure to Petition robbed the Board, and by extension, the Superior Court and this Court of the jurisdiction to alter the PD&O's Conclusion of Law No. 6; yet that is exactly what was done by the Board and affirmed by the Clark County Superior Court.

RCW 51.52.104 specifically provides that once a Proposed Decision and Order is issued, any parties disagreeing with it may file a Petition for Review. The statute holds,

Such petition for review shall set forth in detail the grounds therefor and the party or parties filing the same shall be deemed to have waived all objections or irregularities not

specifically set forth therein.

(Emphasis added). In other words, failure to seek review of any adverse holdings, which Conclusion of Law No. 6 qualifies as one for the Department, constitutes waiver of all objections or irregularities to that finding.

The language of RCW 51.52.104 is very similar to RCW 51.52.070, which governs the contents of all notices of appeal filed with the Board seeking review of Department orders, “The worker, beneficiary, employer, or other person shall be deemed to have waived all objections or irregularities concerning the matter on which such appeal is taken other than those specifically set forth in such notice of appeal.” (Emphasis added). It is this language that the Supreme Court in *Brakus v. Dep’t of Labor & Indus.*, 48 Wn.2d 218 (1956) relied upon when it ruled, “We have held that, although the evidence before the board might take a wide range, the board cannot enlarge the lawful scope of the proceedings, which is limited strictly to the issues raised by the notice of appeal.” *Id.* at 220.

If the Board cannot increase its scope of review beyond the issues presented in the notice of appeal per RCW 51.52.070, then it cannot increase its scope of review beyond the issues not waived in a petition for review per RCW 51.52.104. *Upjohn*, 33 Wn. App. 777. In *Upjohn*, the Department denied the injured worker’s claim. The injured worker then appealed to the

Board. The IAJ reversed the Department's order and allowed the claim, similar to what the IAJ below did here. The Department filed a Petition for Review, but the employer did not.

The Board either denied the petition or affirmed the proposed decision and order. The Department did not appeal to superior court because of its statutory limitations on appealing factual matters. However, the Employer filed an appeal to superior court. After summarizing the procedural history noted above, The *Upjohn* Court held,

Although an appeal by any party to superior court may lie when there has been a petition for review of the hearing examiner's proposed decision, only those matters not waived may be reviewed. Since here the failure by the employer to file a petition for review of the hearing examiner's proposed order amounts to a waiver of all errors now sought to be reviewed, there is nothing for the court to review and the lower court's dismissal is affirmed.

Id. at 778. This means where an aggrieved party fails to file a petition for review, it has waived its legal objections. *Id.* at 780-81. This is not limited to mere evidentiary objections; but includes waiving legal issues that were previously litigated.

Again, below the Department failed to file its own Petition for Review of the PD&O, despite being clearly aggrieved⁴ by Conclusion of Law No. 6. Per the plain holding of *Upjohn* and the plain language of RCW

⁴ It reversed the Department's order.

51.52.104 can be directly used to resolve this appeal, “Since here the failure by the [department] to file a petition for review of the hearing examiner’s proposed order amounts to a waiver of all errors now sought to be reviewed.” *Upjohn*, 33 Wn. App. at 778. By failing to file a Petition for Review, the Department conceded that its attempt at voiding the final order allowing the claim with a rejection order was issued in error.

Even where a petition for review has been filed but an issue is not raised, the Court of Appeals in *Allan v. Dep’t of Labor & Indus.*, 66 Wn. App. 415, 422 (1992) held such failure also constitutes waiver. In *Allan*, the injured worker filed a petition for review, but failed to raise an issue regarding a social security offset notice. The Court held, “Allan waived her right to contest the offset in this case on the grounds of insufficient notice.” *Id.* at 422. Again, this was not a mere evidentiary objection, but failure to raise a legal issue.

While not interpreting RCW 51.52.104 directly, our Supreme Court has also held that failure to raise an issue before the Board constitutes waiver and it cannot be reraised in superior court. If the courts were to permit such a practice,

[it] would encourage counsel to reserve their objections until the time of appeal; or at least until it would be too late for an opponent to correct or complete the record. The effect of such a procedure would be to force the trial court to remand numerous cases to the Board for the completion of records

made deficient by delayed objections. This alternative is not desirable.

Sepich v. Dep't of Labor & Indus., 75 Wn.2d 312, 317, 450 P.2d 940 (1969). Below, the Department unambiguously waived any objection to IAJ Yeager's Proposed Conclusion of Law No. 6 when it failed to seek review of it per RCW 51.52.104. The Superior Court erred when it refused to correct the Board's clear error when it changed that conclusion of law.

Recently, Division One addressed the application of RCW 51.52.104 in *Value Village v. Vasquez-Ramirez*, Case No. 78629-6-I (December 30, 2019). The Court affirmed that the employer's failure to raise an issue in its petition for review prevented it from considering it per RCW 51.52.104. "A party does not raise an issue by quoting a statute without providing any explanation of its relevance to its appeal." *Id.* Here, the Department did less than the employer in *Value Village*. This is clear waiver under RCW 51.52.104.

In summary, the Superior Court erred when it affirmed the Board's altered Conclusion of Law No. 6. Despite being aggrieved, the Department declined to seek review. This robbed the Board of the statutory authority to alter an unchallenged Conclusion of Law, but it did so anyway. The Court should reverse, holding that the Board lack jurisdiction to alter IAJ Yeager's Conclusion of Law No. 6. The Court should hold the Department's

December 9, 2016 order rejecting the claim is reversed.

c. The Department conceded that it can only assess an overpayment if it can reject the claim.

The Court's analysis does not end with the rejection order, it must also decide whether the Department can still assess an overpayment. Even though the Department waived any objections to the PD&O's Conclusion of Law No. 6, Mr. Peterson did file his own Petition for Review objecting to any findings or conclusions that he was obligated to repay the Department the approximately \$70,000. *See*, Conclusion of Law No. 5 (CABR pp. 8, 65; Appendix A & B).

In its brief to the bench, the Department addressed the statutory basis for its overpayment. "[RCW 51.12.100] becomes effective only when the Department cancels an allowed claim and is seeking to recoup benefits already paid." (CP p. 55 ln. 23 – 25; Appendix E). In other words, the Department may only recoup such benefits through claim rejection and use of RCW 51.32.240(3). That statute permits the Department to assess an overpayment of benefits following claim rejection.

During oral arguments in Superior Court, the Department agreed that it lacked the authority to assess any overpayment against Mr. Peterson unless the claim is rejected. Mr. Barnes said as follows:

The Department could not have asserted a lien against the

Longshore portion [of Mr. Peterson's settlements]. They have the right to seek an overpayment once they cancel their allowance order, but that didn't come until later.

(Report of Proceedings p. 39, ln. 16-20). This was said in open Court during a bench trial. This make sense because RCW 51.32.240(3) expressly provides that if a claim is rejected, then the worker is required to repay all benefits.

Our Supreme Court has held that in these appeals, the superior court is sitting in its appellate capacity. *Sepich*, 75 Wn.2d at 316. As such, this Court must be mindful of what arguments were preserved or waived below. The Court should not permit parties to raise new or different objections or errors. *Id.* at 317. When courts sit in their appellate capacity, they should “not consider alleged errors that have not been pointed out in the assignments of error” or argued in its briefing. *Id.* at 319.

Also, in a recent decision by this Court, one of the issues raised was whether or not statements made by a party to the jury shall be considered a binding stipulation per CR 2A. This Court held that they are. *Maphet*, 10 Wn. App. 2d at 443-44. CR 2A provides, “No agreement or consent between parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will be regarded by the court unless the same shall have been made and assented to in open court on the record.”

The Department's concession makes sense, because overpayments

are governed by RCW 51.32.240. Subsection 3 is the relevant section, because it governs what happens when a claim is rejected,

Whenever the department issues an order rejecting a claim for benefits paid pursuant to RCW 51.32.190 or 51.32.210, after payment for temporary disability benefits has been paid by a self-insurer pursuant to RCW 51.32.190(3) or by the department pursuant to RCW 51.32.210, the recipient thereof shall repay such benefits and recoupment may be made from any future payments due to the recipient on any claim with the state fund or self-insurer, as the case may be.

Therefore, as conceded by the Department below, Mr. Peterson's obligation to repay the approximately \$70,000 is inextricably tied to rejection of Mr. Peterson's claim.

If this Court finds that the order rejecting Mr. Peterson's claim was incorrect, then it must also reverse the overpayment assessed by the Department on December 9, 2016. The Department has conceded that the two parts of the order under appeal are linked. Yet the Department failed to challenge IAJ Yeager's conclusions that the Department lacked the authority to reject the claim. With this waiver and concession, the Court must reverse the decision of the Clark County Superior Court. This Court must reverse the Department's December 9, 2016 order.

2. The Department has the clear authority to determine its own subject matter jurisdiction.

If this Court holds the Department did not waive its objection to the

Board's Conclusion of Law No. 2 and that its finality has not yet be fully adjudicated, then it must decide whether our Supreme Court has effectively overruled its decision in *Rhodes* with its subsequent thirty years of jurisprudence on the Department's authority to decide its own subject matter jurisdiction. The Court must hold it was within the scope of the Department's subject matter jurisdiction on December 23, 2011 to decide for itself whether Mr. Peterson's claim for benefits could be rejected on the basis of RCW 51.12.100. The Department cannot now void its own decision to allow Mr. Peterson's claim, because it retrospect it committed legal error on December 23, 2011.

That allowance order was issued pursuant to the Department's authority granted by RCW 51.52.050(1), which states in relevant part,

Whenever the department has made any order, decision, or award . . . [such] order, decision, or award, shall bear on the same side of the same page on which is found the amount of the award, a statement, set in black faced type of at least ten point body or size, that such final order, decision, or award shall become final within sixty days from the date the order is communicated to the parties unless a written request for reconsideration is filed with the department of labor and industries.

The Department admitted that no such protest was received by it. Even if this is a legal error, it cannot be corrected now unless the Department lacked the subject matter jurisdiction to issue the December 23, 2011 order. *Singletary, supra.*

- a. **The Department has the subject matter jurisdiction, to decide for itself whether to rely upon or ignore RCW 51.12.100(1) when deciding whether or not to allow a claim.**

The foundational case on the Department's subject matter jurisdiction is *Abraham*, 178 Wash. 160 (1934). *Abraham* was an allowed widow's pension claim through a final order allowing benefits. Several years later, the Department reversed course, deciding the claim should be rejected because it determined it had made an error of law in allowing the claim. As occurred here, the Department simply rejected the claim without also cancelling the allowance order. *Id.* at 161-62. The widow appealed.

The Department's decision was reversed by the Board. On appeal, the Department argued, as it does here, that it was without jurisdiction to award the benefits in the first place and that the original order was void. *Id.* at 162. The *Abraham* Court rejected this argument holding, "the department has original and exclusive jurisdiction, in all cases where claims are presented, to determine the mixed question of law and fact as to whether a compensable injury has occurred." *Id.* at 163. The Court added that it is the duty of the Department to decide, at the time of the injury, whether a worker is covered by the protections of the Industrial Insurance Act. *Id.*

The Court concluded that such orders are binding upon the parties, including the Department because it "is the original and sole tribunal with

power to so determine the facts.” *Id.* Such orders can only be set aside if “equity recognizes as sufficient to vacate a judgment, has intervened.” *Id.* But the burden is upon the Department, “to appeal to equity and give opportunity for a full inquiry before its judgment could be vacated.” *Id.* Of course, equitable remedies must be proven by clear and convincing evidence. *Mut. of Enumclaw Ins. Co. v. Myong Suk Day*, 197 Wn. App. 753, 770, 393 P.3d 786 (2017). Here, the Department has failed to appeal to equity and has not proved by clear and convincing evidence it qualifies for equitable relief.

The Supreme Court in *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 537, 886 P.2d 189 (1994), updating *Abraham*, decided the circumstances in which a final order can be set aside or voided. In *Marley*, the issue was a 1984 Department order that rejected Mrs. Marley’s claim for widow benefits. *Id.* at 536. In November 1990, Mrs. Marley’s attorney protested the 1984 order, which was beyond the 60 days permitted by RCW 51.52.050. The Court first held that final Department orders become the law of the case, even though they contain errors of law. *Id.* at 541. The Court also held an order is void if the Department lacks personal or subject matter jurisdiction over the claim. *Id.* at 537. Below, no one argued the Department lacked personal jurisdiction over Mr. Peterson.

Therefore, this Court must determine whether or not the Department

lacked subject matter jurisdiction over Mr. Peterson's injury. The *Marley* Court noted that "[a] tribunal lacks subject matter jurisdiction when it attempts to decide a type of controversy over which it has no authority to adjudicate." *Id.* at 539. Addressing the Department's specific subject matter jurisdiction, the Supreme Court ruled

The Legislature has granted the Department broad authority to decide claims for workers' compensation. *See* RCW 51.04.020 (listing the director of Labor and Industries' powers and duties). Sixty years ago we concluded that the Department has "original and exclusive jurisdiction, in all cases where claims are presented, to determine the mixed question of law and fact as to whether a compensable injury has occurred."

Marley, 125 Wn.2d at 539-40, *citing Abraham*.

Stated positively, the Department has been broadly granted subject matter jurisdiction over all claims for on-the-job injuries occurring within the state. In *Marley*, the question was whether an order containing legal error was voidable. The Court affirmed it is not. A few years later, the Supreme Court addressed whether final Department orders can be set aside under equitable doctrines. *Kingery*, 132 Wn.2d 162.

In *Kingery*, the Court identified the first issue as, "Does Title 51 RCW confer authority on the Department, Board, or superior court to set aside an unappealed Department order?" *Id.* at 165. The Court plainly held, "The Act provides finality to decisions of the Department. An unappealed

Department order is res judicata as to the issues encompassed within the terms of the order, absent fraud in the entry of the order. *Id.* at 169, *relying on Abraham.*, 178 Wash. 160. The Court also affirmed its holding in *Marley*. *Id.* at 170. Again, the Court recognized the limited circumstances in which the Department can set aside its own final orders:

Where the Department has both personal and subject matter jurisdiction over the claim, even an error in the Department's unappealed order does not render it void. Under the system for handling industrial claims and the principles enunciated in *Marley*, the Department has exceedingly limited authority to set aside its own unappealed orders. The Department may set aside an order if it was void ab initio, that is, if it lacked either personal jurisdiction over the parties or subject matter jurisdiction over the claim.

Id. at 170.

In 2011, the Department had sufficient evidence and opportunity to reject Mr. Peterson's claim for state benefits by finding his injury was subject to the federal Longshore and Harbor Workers Compensation Act (LHWCA) per RCW 51.12.100(1). Multiple courts have concluded that it was within the Department's jurisdiction to decide, independent of any action by federal agencies, to reject applications for benefits per RCW 51.12.100(1).

The first is *Lindquist v. Dep't of Labor & Indus.*, 36 Wn. App. 646, 649 (1984). In *Lindquist*, the worker was killed on or near the Port of Bellingham and his estate filed claims under the IIA and LHWCA. 36 Wn.

App. at 649. The Court noted the LHWCA claim was placed in abeyance pending the outcome of the state claim. *Id.* The Department rejected the claim, which was appealed by the worker.

Division 1 first analyzed and concluded the Department was correct to reject this claim, because at the time of his death, he had the right to benefits under the LHWCA. *Id.* at 650. In reaching this conclusion, the Court analyzed the application of RCW 51.12.100(1) to Mr. Lindquist's death. Despite being a state court proceeding, Division 1 analyzed and applied federal law as to whether or not the death was subject to the LHWCA, independent of any rulings or holdings by a federal agency or court. *Id.* at 652-655. It concluded the death was subject to the LHWCA under the Situs and Status tests and affirmed the decision of the Department. *Id.*

This shows the Department has the jurisdiction, through application of the IIA, to reject a claim for benefits because it has independently determined the claim can or should qualify for maritime coverage under the LHWCA. Under *Marley* or *Kingery*, the Department had the subject matter jurisdiction in *Lindquist* to apply or not apply RCW 51.12.100(1) to an application for benefits; it had the jurisdiction to accept or reject, per RCW 51.12.100(1), an application for benefits. The Department knows how to apply the Act its empowered to administer (e.g. subject matter jurisdiction),

just like it did in 2011 when it accepted Mr. Peterson's application for benefits, despite RCW 51.12.100(1).

In 2011, Division 3 also held the Department had the power to know and had subject matter jurisdiction to decide, whether a worker was covered by federal maritime law in an asbestos case: *Olsen v. Dep't of Labor & Indus.*, 161 Wn. App. 443 (2011). The court wrote,

Considering the statute directs the Department to decide, among other things, whether a claim is subject to a federal statute, and because our Supreme Court has recognized that federal and state jurisdiction coexist, the Department had subject matter jurisdiction over Ms. Olsen's claim.

Olsen, 161 Wn. App. at 448, referencing *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 207 (2005). The *Olsen* Court explicitly held the Department has the authority to decide whether to accept or reject a claim through application of RCW 51.12.100(1). Here the Department used that authority to allow Mr. Peterson's claim; *res judicata* prevents it from relitigating that decision.

The *Gorman* case also involved a question of concurrent jurisdiction between the IIA and LHWCA, but only through application of the right to sue for intentional torts per RCW 51.24. 155 Wn. 2d at 202-203. After disposing of other arguments, the Court addressed whether the worker had coverage under the IIA under the last injurious exposure rule provided for by *Dep't of Labor & Indus. v. Fankhauser*, 121 Wn.2d 304 (1993). *Gorman*,

155 Wn. 2d at 216. After analyzing Department regulation and provisions of the IIA, the Court concluded the worker was covered by the LHWCA, which excluded him from coverage of the IIA. *Id.* at 218.

The Supreme Court's ruling made it clear that it was possible for the Department to decide for itself whether the worker was covered by the LHWCA and therefore excluded from IIA coverage. While the Court does not engage in an explicit subject matter analysis, it is implicit within its decision. The Department does not have to wait to decide whether to allow or deny a claim under the IIA because it believes there is coverage under the LHWCA. It can exercise its own independent jurisdiction.

Elsewhere, the Supreme Court has recognized that federal maritime claims can be brought in state courts. *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 76 (2012). The state court has the jurisdiction over the claim, but must apply federal law. *Id.* Again, the Supreme Court held that it is possible for state authorities, such as the Department, to know whether someone is covered by the LHWCA. Like in *Gorman*, the *Clausen* Court's analysis implicitly affirms the Department's subject matter jurisdiction to accept claims, despite potential application of RCW 51.12.100(1), or to reject claims through application of RCW 51.12.100(1). Here, the Department chose to accept Mr. Peterson's claim; the Court below erred by letting the Department relitigate its decision.

The Board of Industrial Insurance Appeals has consistently decided questions of concurrent coverage by applying the LHWCA *Situs* and *Status* Tests. This demonstrates that the Board also finds the Department has the subject matter jurisdiction to decide these issues for itself. As an appellate agency, the Board's scope of review cannot exceed the Department's subject matter jurisdiction. *Brakus v. Dep't of Labor & Indus., supra.*

In *In re Mark A. Miller*, Dckt. No. 11 11806 (2012), the Board relied upon *Lindquist* to decide the injured worker did not meet the Situs and Status Tests. (Appendix F). The Board found, in another appeal, it was possible for the Department to know (subject matter jurisdiction) whether a claim was covered by the LHWCA, "The Department therefore correctly followed the mandate of RCW 51.12.102(1) and rendered 'a decision as to the liable insurer', i.e., the federal program insurer under the Longshore and Harbor Workers' Compensation Act." *In re Dorothy L. Gula, Dec'd*, BIIA Dec. 88 2196 (1990). (Appendix G).

In yet another appeal the Board held, "In our opinion, the provisions of RCW 51.12.100 make it incumbent upon the Department in those cases involving maritime employment to make its own determination as to federal coverage for the purpose of determining if our Act is applicable to the claim." *In re David L. Buren*, BIIA Dec. 65,127 (1984) (emphasis in original). (Appendix H). More recently the Board ruled, "The Department

asserts that Ms. Adamson was excluded from Title 51 coverage as a crew member of a vessel pursuant to RCW 51.12.100 (1). We agree.” *In re Shannon C. Adamson*, Dckt. No. 16 11000 (2017). (Appendix I). Then without much analysis, the Board affirmed a Department order that had rejected a claim for benefits because the injury occurred under LHWCA coverage, which again shows it is possible for the Department to know whether a worker is covered by the LHWCA. *In re Lorenzo Arcivar*, Dckt. No. 17 11179 (2018). (Appendix J).

What each of these appellate decisions establish is that it is firmly within the Department’s subject matter jurisdiction to reject a claim because it falls under federal coverage per RCW 51.12.100(1). This is true independent of any decision by a federal agency. If this is true, then the corollary must also be true: that the Department has the subject matter jurisdiction to allow a claim, even if it may fall under federal coverage per RCW 51.12.100(1). And if the Department issues such an order, which goes final per RCW 51.52.050, then the Department may not relitigate that decision per *Marley and Kingery*. Furthermore, it may not relitigate that decision, even if the allowance order contains an error of law. *Singletary v. Manor Healthcare Corp.*, 166 Wn. App. 774.

In *Singletary*, the Department issued an order closing a claim; however, it was not communicated to the injured worker. Despite this, the

worker filed a reopening application, per RCW 51.32.160, which was granted. The order reopening her claim became final. When the worker learned the closing order was not final, she applied for benefits predating her reopening application arguing the claim was never closed.

This Court rejected that argument, relying in large part upon *Marley* and *Kingery*. This Court agreed the order reopening the claim was issued in error. 166 Wn. App. at 782. But it held, “However, even if the Department enters a legally incorrect order, that order becomes final and binding on all parties if they do not appeal it within the specified time frame.” *Id. citing Marley*, 125 Wn.2d 542-43. This Court further wrote, “Legal errors in unappealed orders do not render that order void.” *Id. citing Kingery*, 132 Wn.2d 170. This Court reasoned that legal errors are not synonymous with jurisdictional errors. *Id.* at 783-84.

Returning to Mr. Peterson’s claim, the Department issued an allowance order on December 23, 2011. Per the Board’s unchallenged Finding of Fact No. 3 and Conclusion of Law No. 2, and affirmed by the Superior Court at the Department’s request, that order is final and not void. (CABR pp. 7-8). At the time, the Department had information that Mr. Peterson’s injured occurred on a vessel in the Puget Sound, but issued the allowance order anyway.

Even assuming, *arguendo*, that the Department’s December 23,

2011 was issued in error, that does not given it the authority to cancel the allowance order. From *Marley*, to *Kingery*, to *Singletary* our Courts have held that so long as this was within the Department's subject matter jurisdiction, final orders are final even if they contain errors of law. See also, *Birrueta v. Dep't of Labor & Indus.*, 186 Wn.2d 537, 379 P.3d 120 (2016) (the Department cannot seek overpayments based upon orders with adjudicator errors past 60 days, per RCW 51.32.240(1)(b)). Multiple courts and the Board of Industrial Insurance Appeals have held the Department has the subject matter jurisdiction to deny claims per RCW 51.12.100(1).

However, 10 years before *Marley* and *Kingery* and one year after *Lindquist*, our Supreme Court issued its decision in *Rhodes*, 103 Wn.2d 895. In *Rhodes*, the Department issued an allowance order in June 1977, after which no protest was filed. In April 1978, the allowance order was cancelled, after a Longshore claim was allowed, from which the injured worker appealed. Regarding the Department's jurisdiction, the *Rhodes* Court wrote:

Abraham and Knestis [v. Unemployment Comp. & Placement Div., 16 Wn.2d 577 (1943)] are distinguishable. In those cases the administrative agencies actually made factual or legal determinations as to whether, and to what extent, the claimants were covered by the particular disability statute. The administrative decisions in *Abraham* and *Knestis* were "adjudicated" and "final". There the administrative agencies adjudicated something which was within their power to adjudicate: whether the administrative agency had jurisdiction

over a claim.

In this case, however, the Department did not, and could not, determine Rhodes' case was "final" for purposes of *res judicata* since, at the time the June 22, 1977 order was issued, the Department had no way of knowing whether he was covered by the LHWCA.

Rhodes at 899. This suggests, but does not explicitly hold, the Department lacked subject matter jurisdiction. But here as argued above, allowance of Mr. Peterson's is "final" for purposes of *res judicata* because the Superior Court, at the Department's request, ruled that order is final.

The *Rhodes* Court then relies upon the Second Restatement of Judgments for the proposition that the decisions of administrative tribunals does not preclude relitigation in another tribunal. This is because one administrative agency is not presumed to know how to apply a different agency's substantive law. *Id.* at 899-900.

First, here we are not relitigating the Department's decision to allow Mr. Peterson's claim in some other tribunal. Instead, the Department chose to re-litigate the issue before itself by issuing a rejection order. All of the proceedings from December 23, 2011 through today have been under the auspices of Washington's Industrial Insurance Act, Title 51 RCW.

Second, our Courts have expressly held that the Department is presumed to know how to apply Longshore's *Situs* and *Status* tests whenever it rejects applications for benefits prior to a determination by a

federal agency. This is exactly what happened in *Lindquist*, and in *Olsen*, and in *Gorman*, and in *Clausen*.

The last line of *Rhodes*, quoted above, presents this Court with the fundamental question of this appeal: Can the Department know, or decide for itself, whether Mr. Peterson's claim was subject to the LHWCA? Since *Rhodes*, multiple decisions have all held the Department can know, it can decide for itself, whether or not Mr. Peterson's claim was subject to the LHWCA. If the Department can know, then it had subject matter jurisdiction to decide the matter for itself in December 2011, which it did by allowing the claim of Mr. Peterson. Under *Abraham*, *Marley*, *Kingery*, and *Singletary* the December 23, 2011 order must then be *res judicata*. The Department cannot relitigate, seven years later, that Mr. Peterson's claim should have actually been denied.

Affirming the decision below means that we have a non-neutral rule of law in Washington that discriminates against injured workers. Orders rejecting claims because of potential Longshore coverage are final, even if coverage is later rejected; but orders allowing claims despite potential Longshore coverage are never final. This one-sided application is simply not justified by RCW 51.12.100(1): either the Department knows how to apply federal coverage or it does not.

To affirm the status quo would violate a fundamental principle of

our Act: that it is to be liberally interpreted to reduce to a minimum the suffering and economic harm of injured workers. RCW 51.12.010. The conflicting precedents outlined herein renders the meaning of RCW 51.12.100 ambiguous. Our courts are mandated to always interpret ambiguous statutes in favor of injured workers, despite other canons of construction. *Crabb v. Dep't of Labor & Indus.*, 181 Wn. App. 648, 658 (2014).

Next, this Court does not have the authority to overrule *Rhodes*. But the Supreme Court has effectively overruled it. It started with *Marley* and *Kingery*: Department orders are final unless they were void from the start. Department orders are void from the start if it lacked subject matter jurisdiction.

It completed it when it issued *Clausen* and *Gorman*. There the Court affirmed that it was fully within the Department's authority to reject claims, like in *Lindquist*, merely because the Department believes the claim qualifies for federal coverage. The Court decided that the Department has the authority, the subject matter jurisdiction, to decide everything under its purview, which is the application of the Industrial Insurance Act, Title 51 RCW. The legislature made it explicitly within the Department's authority to apply the *Situs* and *Status* tests of LHWCA, when it adopted RCW 51.12.100(1).

In short, *Rhodes* is no longer good law. As such, the Court should reverse the decision of the Clark County Superior Court and the Board of Industrial Insurance Appeals. The Court should order the Department to reinstate its December 23, 2011 order allowing Mr. Peterson's claim for state workers compensation benefits.

b. Despite *Rhodes*, the Superior Court held that the December 23, 2011 allowance order is final, which means it was not void and was issued within the Department's subject matter jurisdiction.

As argued above, IAJ Yeager, the Board of Industrial Insurance Appeals, and the Clark County Superior Court all concluded the December 23, 2011 allowance order was final. Not only did the Department never appeal any of these decisions, it wrote the proposed judgment, adopted by the Superior Court, that affirmed the finality of the Board's Conclusion of Law No. 2. (CABR pp. 7-8; C.P. pp. 74-77).

In *Rhodes*, the question of whether or not the allowance order was final remained a live issue. Here it is not a live issue. This Court must accept as true the December 23, 2011 allowance order is final. This important distinction places Mr. Peterson's claim outside of the holding of *Rhodes*.

By holding the allowance order final, the Superior Court effectively held that the Department acted within the scope of its subject matter

jurisdiction under the *Abraham*, *Marley*, and *Kingery* line of cases. This is an adjudication that the allowance order was final, not void, and therefore was issued within the Department's subject matter jurisdiction. For the Superior Court to have concluded otherwise, it would have entered a conclusion of law voiding the December 23, 2011 allowance order. It did not.

As such, this Court does not need to decide whether or not *Rhodes* has been implicitly overturned because our courts have not followed it. Instead, it should simply reverse the decisions below and reverse the Department's order that attempted to reject this claim. The Department cannot reject what has been finally allowed.

This also means the Court must reverse the overpayment orders too. As conceded by the Department below, those orders were solely predicated on claim rejection and RCW 51.32.240(3). If the rejection order fails, as it must because the December 23, 2011 allowance order is final, then so to must the overpayment order fail.

3. In the alternative, the Department's right of reimbursement of reimbursement is limited to benefits paid to Mr. Peterson prior to April 20, 2016.

On April 20, 2016, the Department issued its order accepting and approving Mr. Peterson's maritime settlements. (Board Exhibit No. 31,

CABR p. 550). It is at the point in time Mr. Peterson had concurrent receipt of workers compensation and maritime compensation benefits. RCW 51.12.100(4) provides:

In the event payments are made both under this title and under the maritime laws or federal employees' compensation act, such benefits paid under this title shall be repaid by the worker or beneficiary. For any claims made under the Jones Act, the employer is deemed a third party, and the injured worker's cause of action is subject to RCW 51.24.030 through 51.24.120.

(Emphasis added). The unappealed April 20, 2016 order addressed the second sentence of RCW 51.12.100(4) regarding the Jones Act settlement. The first sentence applies to the LHWCA settlement by Mr. Peterson, which is the subject of the various overpayment orders on appeal that total just over \$70,000. That September 21, 2016 Order assessed an overpayment for benefits paid to Mr. Peterson from January 7, 2012 through July 19, 2016.

Per the plain language of RCW 51.12.100(4), the Department did not have the statutory authority to assess an overpayment for anything paid after April 20, 2016⁵. As written, the statute is triggered when a worker has concurrent receipt: In the event payments are made under both titles. Once

⁵ This argument is being made in the alternative. It is Mr. Peterson's position that the Department waived this argument by failing to raise it to the Superior Court below in its briefing or at oral argument to the bench. *Sepich*, 75 Wn.2d 312. As argued above, the Department's legal position before the Superior Court was that its overpayment orders were solely premised upon claim rejection and RCW 51.32.240(3).

triggered, Mr. Peterson's obligation to repay is then retroactive from the point of concurrent receipt back to when he first received state benefits, "such benefits paid under this title shall be repaid by the worker or beneficiary." RCW 51.12.100(4) (emphasis added).

Nothing in the plain language permits the Department to require repayment past the point where, as here, Mr. Peterson received his singular payment pursuant to his maritime settlement. Yet, the Department's order assessed an overpayment for three months after April 20, 2016. The words "paid" and "repaid" are both past tense, not future or present tense. Therefore, the plain language limits the Department's authority to order repayment past April 20, 2016.

If the Court does not overturn the overpayment orders in their entirety, then it should overturn them in part. With the claim allowed and open for benefits, the Court should find the Department cannot assess any overpayments, per RCW 51.12.100(4) after the Department ratified its agreement to these settlements with its April 20, 2016 order.

Alternatively, the Court should find the application of RCW 51.12.100(4) ambiguous in situations like this where injured workers have a final, allowed state workers compensation claim and settled a Longshore claim. The statute is ambiguous as to whether or not Mr. Peterson is entitled to receive additional benefits after the singular Longshore payment.

If the Court finds RCW 51.12.100(4) is ambiguous, then the Court must still find for Mr. Peterson. “If the statutory language is susceptible to more than one reasonable interpretation, then a court may resort to statutory construction, legislative history, and relevant case law for assistance in discerning legislative intent.” *Christensen v. Ellsworth*, 162 Wn.2d 365, 373 (2007). In other words, if “both parties offer reasonable, conflicting interpretations of the text and purpose of the statutory scheme at issue,” then the Court must find the statute ambiguous. *Crabb*, 181 Wn. App. at 657.

The Legislature has mandated courts to liberally construe the Act in favor of the injured worker. RCW 51.12.010. This means, “All doubts as to the meaning of the Act are to be resolved in favor of the injured worker.” *Clauson v. Dep't of Labor & Indus.*, 130 Wn.2d 580, 584 (1996). The recent *Crabb* decision further explained what this requirement means:

The Supreme Court has commanded that this legislative directive requires that we resolve all reasonable doubt in favor of the injured worker. Because *Crabb* makes at least a reasonable case for his entitlement to the higher benefit rate, we must resolve the Department's appeal in his favor, *despite* the canons of construction invoked by the Department.

Crabb, 181 Wn. App. at 658 (emphasis added, citations omitted). The Industrial Insurance Act must be interpreted by the Court to further, not frustrate, this purpose. *Bostain v. Food Express*, 159 Wn. 2d 700, 712 (2007) (interpreting Title 49 RCW, which has a similar liberal construction

requirement). So long as this Court finds it reasonable the workers in Mr. Peterson's situation could continue to receive workers compensation benefits, then it must so find for Mr. Peterson.

Finally, the Court should not follow the decision of IAJ Yeager that ordered Mr. Peterson's claim closed. That decision was beyond the scope of the Board's authority to order as the Department never passed on whether Mr. Peterson's claim should be closed. *Lenk v. Dep't of Labor & Indus.*, 3 Wn. App. 977, 982, 478 P.2d 761 (1970). The Board cannot go beyond what Mr. Peterson asked for in his appeal and the Board cannot place him in a worse position. *Brakus*, 48 Wn.2d 218. If this Court finds the Department's reject order was issued in error, then this claim remains open for benefits owed to the injured worker and until such a time the Department concludes that Mr. Peterson is medically stationary and able to work on a continuous, full-time basis.

4. The Industrial Insurance Act clearly provides that only injured workers may seek a prevailing party award of fees and costs.

RCW 51.52.140 states, "Except as otherwise provided in this chapter, the practice in civil cases shall apply to appeals prescribed in this chapter." Two appellate decisions have wrongly interpreted RCW 51.52.140 to permit awarding prevailing party fees and costs to the

Department.

The first was *Allan v. Dep't of Labor & Indus.*, 66 Wn. App. 415, 832 P.2d 489 (1992). This Court's analysis was limited to RCW 51.52.140 and RCW 4.84.030 in awarding prevailing party attorney fees. Nowhere in its analysis did the *Allan* Court ask whether or not the Industrial Insurance Act otherwise provided for the award of prevailing party attorney fees.

The second case is *Cooper v. Dep't of Labor & Indus.*, 188 Wn. App. 641, 352 P.3d 189 (2015). In *Cooper*, this Court addressed the awarding of deposition costs per RCW 4.84.010, citing to *Black v. Dep't of Labor & Indus.*, 131 Wn.2d 547, 933 P.2d 1025 (1997) and to *Allan, supra*. Yet neither the Supreme Court in *Black* nor this Court in *Cooper*, addressed RCW 51.52.130 or RCW 51.52.150 in its analysis and instead immediately relied upon the general rules of civil actions. With all due respect, the legal analysis in *Allan*, *Cooper*, and *Black* are wrong.

Instead of immediately resorting to the court's general rules, this Court must first determine whether the Industrial Insurance Act otherwise provides for the award of attorney fees and costs, before it then resorts to application of the general court rules. This is the plain meaning of RCW 51.52.140.

The Industrial Insurance does otherwise provide for the award and

payment of attorney fees and costs in the statutes preceding and following RCW 51.52.140. First, there is RCW 51.52.130, entitled “Attorney and witness fees in court appeal.” As this Court is well aware, the legislature limited the award of prevailing party attorney fees, prevailing party witness fees, and prevailing party costs only to injured workers, under limited circumstances.

While RCW 51.52.130 does not specifically deny such awards to the Department, the maxim *expressio unius est exclusio alterius*, must be applied. The inclusion of prevailing party fees and costs to injured workers by the legislature, must mean that the Department is not entitled to such awards. It is notable that neither *Allan* nor *Black* nor *Cooper* cite to and analyze RCW 51.52.130.

In addition, RCW 51.52.150 provides how the Department is to pay for its own costs on appeal:

All expenses and costs incurred by the department for board and court appeals, including fees for medical and other witnesses, court reporter costs and attorney's fees, and all costs taxed against the department, shall be paid one-half out of the medical aid fund and one-half out of the accident fund.

(Emphasis added). “Shall” is a non-delegable obligation created by the legislature. *In re Parental Rights to K.J.B.*, 187 Wn.2d 592, 601, 387 P.3d 1072 (2017) (citations omitted). The Department’s only source it can use

to pay for its attorney fees, witness fees, and court reporter fees is its medical aid fund and accident fund. There is no exception or proviso that permits the Department to have injured workers pay a portion of its attorney fees, witness fees, and court reporter fees. There is no exception or proviso such as, “except where ordered by the court pursuant to RCW 4.84.” The inclusion of the one, must be the exclusion of the other. The Department is literally prohibited from seeking payment of its costs from any source other than the two funds listed in RCW 51.52.150.

Again, RCW 51.52.140 states, “Except as otherwise provided in this chapter . . .” The chapter plainly otherwise provides the Department may not seek an award of attorney fees and costs and such costs are only payable out of its accident and medical aid funds. This Court’s analysis should stop there. The Superior Court’s award of attorney fees and costs below was in error because it is not permitted by RCW 51.52.130 and should be reversed.

Finally, there are good policy reasons for why the Department should not be permitted to seek an award of attorney fees and costs from injured workers. First, it violates the remedial purpose of the Act to give “sure and certain relief for workers, injured in their work, and their families and dependents.” RCW 51.04.010. The Act is entirely premised on ensuring injured workers receive benefits. It defies the fundamental

premises of the Act to punish injured workers for pursuing their legal rights by forcing them to pay even a portion of the Department's attorney fees and costs. It is bad enough that their rights to benefits are denied, but to then pay the Department adds insult to injury.

Second, this Court is required to "liberally [construe this Act] 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. Even aside from questions of ambiguity of RCW 51.52.140, the public policy of the Act is to minimize the economic suffering of injured workers. A judicial interpretation that allows the Department to punish injured workers with prevailing party fees and costs for seeking judicial review of their rights is contrary to the Act.

Here, RCW 51.52.130, 51.52.140, and 51.52.150 are plain. The Department has zero statutory authority to seek such payment of their costs from injured workers, yet they do so anyway. Judgments, such as the one here, merely give the Department further opportunity to inflict additional economic losses upon workers. First, these judgments carry interest. Second, they attach to real property. Third, they can be the basis for harming the credit rating of workers.

While the legislature gave the Department clear authority to pursue such actions for overpaid benefits per RCW 51.32.240, adding prevailing

party attorney fees and costs is a violation. It violates the morality of the Industrial Insurance Act. As that morality is defined in RCW 51.04.010 and RCW 51.12.010.

The third public policy violated by these decisions is that the purpose our Act is to award compensation without workers having to resort to litigation. As the Supreme Court wrote in the years following its adoption,

By the working class, the new legislation was craved [sic] from a horror of lawyers and judicial trials. What they wanted, as this act expressly recites in its first section, was compensation, not only safe, but sure. To win only after litigation, to collect only after the employment of lawyers, to receive the sum only after months or years of delay, was to the comparatively indigent claimant little better than to get nothing.

Stertz v. Indus. Ins. Comm'n, 91 Wash. 588, 591, 158 P. 256 (1916).

While this may seem quaint as the volume of such appeals have grown nearly exponentially over the years, it's central point remains: To win only after litigation is like not winning at all. But to not win after litigation and to then have to pay the Department for not winning, is even worse for injured workers.

The Clark County Superior Court erred when it awarded prevailing party fees and costs to the Department. The decisions to the contrary were wrongly decided and did not consider the Industrial Insurance Act as a

whole. The Court should reverse.

5. Attorney Fees

If the Court of Appeals finds in favor of Mr. Peterson, he is entitled to reasonable attorney fees and costs pursuant to RCW 51.52.130. RAP 18.1. As was admitted below, the Department's right to seek an overpayment is predicated upon its ability to reject this claim. (VRP p. 39, ln. 16-20). As such, finding for Mr. Peterson will affect the medical or accident fund, triggering the award of attorney fees per RCW 51.32.130. Also, if the Court finds the Department cannot now reject Mr. Peterson's claim, then he remains entitled to further treatment and compensation on his open claim. This will also affect the medical or accident funds. Furthermore, the *Brand* Court held that it does not matter whether or not the injured worker prevailed on all issues. So long as Mr. Peterson prevails on at least one issue on appeal, all attorney fees are payable. *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 674, 989 P.2d 1111 (1999).

CONCLUSION

The Clark County Superior Court erred in affirming the decision of the Board of Industrial Insurance Appeals. The Department has failed to preserve and/or waived multiple, important issues of law and fact in its defense of this appeal. It failed to file a Petition for Review of an adverse Proposed Decision & Order. It conceded that it may only assess an

overpayment if it can reject Mr. Peterson's claim, but asked the Superior Court to affirm that the December 23, 2011 allowance order is final. The Superior Court erred in when it found the Department had the authority to reject Mr. Peterson's claim despite these waivers. Also, the Superior Court erred when it awarded the Department prevailing party attorney fees and costs, despite RCW 51.52 being clear that only injured workers can be awarded such fees and costs and the Department shall only pay for its fees and costs out of established funds. Finally, Mr. Peterson is entitled to an attorney fee.

Dated: February 19, 2020.



Douglas M. Palmer, WSBA No. 35198
Attorney for Respondent

Appendix A

Board of Industrial Insurance Appeals
Proposed Decision & Order
Findings of Fact
Conclusions of Law

1 overpayment of compensation paid from January 7, 2012, through July 19, 2016, in the amount of
2 \$72,450.89. This order is incorrect, and is reversed and remanded.
3

4 **FINDINGS OF FACT**

- 5
6 1. On March 9, 2017, an industrial appeals judge certified that the parties
7 agreed to include the Jurisdictional History in the Board record solely for
8 jurisdictional purposes.
9
10 2. Mr. Peterson injured his back on December 9, 2011, while working for the
11 employer, Barnhart Crane and Rigging Co., on a barge in navigable
12 waters when he leapt and fell to avoid a shifting load.
13
14 3. The Department issued an order allowing the claim on December 23,
15 2011. The order was not protested, appealed, held in abeyance,
16 cancelled, or modified by the Department within 60 days.
17
18 4. On May 9, 2016, the Department of Labor approved settlement of Mr.
19 Peterson's claim under the Longshore & Harbor Workers' Compensation
20 Act.
21
22 5. Mr. Peterson settled his maritime claims for \$900,000.
23
24 6. Leading up to the settlement, Mr. Dore, Mr. Peterson's maritime attorney,
25 in his correspondence with Mr. Covey, the Department's third party
26 adjudicator, indicated the Jones Act portion of the global settlement was
27 worth \$90,000.
28
29 7. Based upon this representation, Mr. Covey, agreed that \$25,000 would
30 satisfy the Department's third party distribution share of the \$90,000
31 Jones Act claim.
32
33 8. The Department, through Mr. Covey or otherwise, did not represent or
34 promise that the \$25,000 paid to the Department satisfied the entire lien
35 for all compensation paid.
36
37 9. After receipt of the \$25,000 as its third party distribution share of the
38 Jones Act claim, the outstanding balance of the Department's lien was
39 \$72,450.89.
40
41

42 **CONCLUSIONS OF LAW**

- 43 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
44 and subject matter in this appeal.
45
46 2. The Department's December 23, 2011 order allowing the claim became
47 final.
48
49 3. Mr. Peterson received payment under his worker's compensation claim
50 from the Department of Labor and Industries and under the maritime laws
51 or federal employees compensation act within the meaning of
52 RCW 51.12.100(4).

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- 4. The Department is not estopped from seeking repayment of benefits paid to Mr. Peterson.
- 5. Pursuant to RCW 51.12.100(4), the Department is entitled to repayment of the balance of time-loss compensation paid to Mr. Peterson in the amount of \$72,450.89.
- 6. The Department's December 9, 2016 order is incorrect, and this matter is remanded to the Department to issue an order closing rather than rejecting the claim.

Dated: February 6, 2018



Steven R. Yeager
Industrial Appeals Judge
Board of Industrial Insurance Appeals

Appendix B

Board of Industrial Insurance Appeals
Decision & Order
Findings of Fact
Conclusions of Law

1 ordered the Department to allow the claim and to take such further action as is required by the law
2 and the facts. This process ensures sure and certain relief to an injured worker consistent with our
3 statutory scheme.

4 Accordingly, we are convinced that it was appropriate for the Department to initially allow the
5 claim. However, the settlement of Mr. Peterson's maritime claims established that Mr. Peterson was
6 entitled to federal coverage rather than coverage through Washington's industrial insurance laws. At
7 that point, the Department was correct in rejecting the claim that had previously been allowed.

8 **DECISION**

9 In Docket No. 16 22797, the claimant, Joshua W. Peterson, filed an appeal with the Board of
10 Industrial Insurance Appeals on December 15, 2016, from an order of the Department of Labor and
11 Industries dated December 9, 2016. In this order, the Department affirmed an order rejecting the
12 claim and assessing an overpayment in the amount of \$72,450.89. This order is correct and is
13 affirmed.

14 **FINDINGS OF FACT**

- 15 1. On March 9, 2017, an industrial appeals judge certified that the parties
16 agreed to include the Jurisdictional History in the Board record solely for
17 jurisdictional purposes.
- 18 2. Joshua Peterson injured his back on December 9, 2011, while working
19 for the employer, Barnhart Crane and Rigging Co., on a barge in
20 navigable waters when he leapt and fell to avoid a shifting load.
- 21 3. The Department issued an order allowing the claim on December 23,
22 2011. The order was not protested, appealed, held in abeyance,
23 canceled, or modified by the Department within 60 days.
- 24 4. On May 9, 2016, the U.S. Department of Labor approved settlement of
25 Mr. Peterson's claim under the Longshore & Harbor Workers'
26 Compensation Act.
- 27 5. Mr. Peterson settled his maritime claims for \$900,000.
- 28 6. Leading up to the settlement, Mr. Dore, Mr. Peterson's maritime attorney,
29 in his correspondence with Mr. Covey, the Department's third-party
30 adjudicator, indicated that the third-party portion of the global settlement
31 was worth \$90,000.
- 32 7. Based upon this representation, Mr. Covey agreed that \$25,000 would
33 satisfy the Department's third-party distribution share of the \$90,000
34 third-party settlement with Foss.

- 1 8. The Department, through Mr. Covey or otherwise, did not represent or
2 promise that the \$25,000 paid to the Department satisfied the entire lien
3 for all compensation paid.
4 9. After receipt of the \$25,000 as its third-party distribution share of the third-
5 party claim against Foss, the outstanding balance of the Department's
6 lien was \$72,450.89, recoverable under RCW 51.12.100(4) from his
33 U.S.C. 908(i) settlement of his LHWCA entitlement.

CONCLUSIONS OF LAW

- 7 1. The Board of Industrial Insurance Appeals has jurisdiction over the parties
8 and subject matter in this appeal.
9 2. The Department's December 23, 2011 order allowing the claim became
10 final.
11 3. Mr. Peterson received payment under his workers' compensation claim
12 from the Department of Labor and Industries and under the maritime laws
13 or federal employees' compensation act within the meaning of
14 RCW 51.12.100(4).
15 4. The Department is not estopped from seeking repayment of benefits paid
16 to Mr. Peterson.
17 5. Pursuant to RCW 51.12.100(4), the Department is entitled to repayment
18 of the balance of time-loss compensation paid to Mr. Peterson in the
19 amount of \$72,450.89.
20 6. The settlement of Mr. Peterson's maritime claims established that he was
entitled to federal coverage rather than coverage through Washington's
industrial insurance laws. Thereafter, the Department was correct in
rejecting the claim that had previously been allowed. RCW 51.12.100.
The Department's order dated December 9, 2016, is affirmed.

21 Dated: May 29, 2018.

22 BOARD OF INDUSTRIAL INSURANCE APPEALS

23 

LINDA L. WILLIAMS, Chairperson

26 

JACK S. ENG, Member

Appendix C

Department of Labor & Industries'
Proposed Judgment

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FILED

JUL 12 2019 10:44

Scott G. Weber, Clerk, Clark Co.

The Honorable Daniel Stahnke
Hearing Date: 7/26/2019
Hearing Time: 9:00 AM
Hearing Location: Dept 1

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**SUPERIOR COURT OF WASHINGTON
FOR CLARK COUNTY**

JOSHUA PETERSON,

Petitioner,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

NO. 18-2-01258-2

(PROPOSED)
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT

Clerk's Action Required

JUDGMENT SUMMARY (RCW 4.64.030)

- 1. Judgment Creditor: Washington State Department of Labor and Industries
- 2. Judgment Debtor: Joshua Peterson
- 3. Principal Amount of Judgment: - 0 -
- 4. Interest to Date of Judgment: - 0 -
- 5. Statutory Attorney Fees: \$200.00
- 6. Costs: \$469.55
- 7. Other Recovery Amounts: \$0
- 8. Principal Judgment Amount shall bear interest at 0% per annum.
- 9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.
- 10. Attorney for Judgment Creditor: John Barnes, AAG
- 11. Attorney for Judgment Debtor: Douglas Palmer

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT

0-000000063

1 This matter came on regularly before the Honorable Daniel L. Stahnke, in open court on
2 June 7, 2019. The Petitioner, Joshua Peterson, appeared by his counsel, Douglas Palmer; the
3 Respondent, Department of Labor and Industries (Department), appeared by its counsel,
4 Robert W. Ferguson, Attorney General, per John Barnes, Assistant Attorney General. The Court
5 reviewed the records and files herein, including the Certified Appeal Board Record, and briefs
6 submitted by counsel, and heard argument of Counsel. A Workers Compensation Appeal Ruling
7 was entered on June 26, 2019. Therefore, being fully informed, the Court makes the following:

8 I. FINDINGS OF FACT

9 1.1 Hearings were held at the Board of Industrial Insurance Appeals (Board) on
10 September 27, 2017 and October 4, 2017 and the testimony of other witnesses was
perpetuated by deposition.

11 Thereafter an Industrial Appeals Judge issued a Proposed Decision and Order on
12 February 6, 2018, from which Joshua Peterson filed a timely Petition for Review on
13 February 27, 2018. Having considered Joshua Peterson's Petition for Review, the Board
granted review and issued its Decision and Order on May 29, 2018.

14 Petitioner thereupon timely appealed the Board's May 29, 2018 Decision and Order to
this Court.

15 1.2 A preponderance of evidence supports the Board's Findings of Fact. The Court adopts
16 as its Findings of Fact, and incorporates by this reference, the Board's Findings of Facts
17 Nos. 2 through 9 of the May 29, 2018 Decision and Order. Those findings were as
follows:

18 1.2.1 Joshua Peterson injured his back on December 9, 2011, while working for the
19 employer, Barnhart Crane and Rigging Co., on a barge in navigable waters when he leapt
and fell to avoid a shifting load.

20 1.2.2 The Department issued an order allowing the claim on December 23, 2011. The
21 order was not protested, appealed, held in abeyance, canceled, or modified by the
Department within 60 days.

22 1.2.3 On May 9, 2016, the U.S. Department of Labor approved settlement of
23 Mr. Peterson's claim under the Longshore & Harbor Workers' Compensation Act.

24 1.2.4 Mr. Peterson settled his maritime claims for &900,000.

25 1.2.5 Leadin up to the settlement, Mr. Dore, Mr. Peterson's maritime attorney, in his
26 correspondence with Mr. Covey, the Department's third-party adjudicator, indicated that
the third-party portion of the global settlement was worth &90,000.

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1.2.6 Based upon this representation, Mr. Covey agreed that \$25,000 would satisfy the Department's third-party distribution share of the \$90,000 third-part settlement with Foss.

1.2.7 The Department, through Mr. Covey or otherwise, did not represent or promise that the \$25,000 paid to the Department satisfied the entire lien for all compensation paid.

1.2.8 After receipt of the \$25,000 as its third-party distribution share the third-party claim against Foss, the outstanding balance of the Department's lien was \$72,450.89, recoverable under RCW 51.12.100(4) from his 33 U.S.C. 908(i) settlement of his LHWCA entitlement.

Based upon the foregoing Findings of Fact, the Court now makes the following

II. CONCLUSIONS OF LAW

- 2.1 This Court has jurisdiction over the parties to, and the subject matter of, this appeal.
- 2.2 The Court adopts as its Conclusions of Law, and incorporates by this reference, the Board's Conclusions of Law Nos. 1 through 6 of the May 29, 2018 Decision and Order.
- 2.3 The Board's May 29, 2018 Decision and Order is correct and is affirmed.

Based on the foregoing Findings of Fact and Conclusions of Law the Court enters judgment as follows:

III. JUDGMENT

- 3.1 The May 29, 2018 Board of Industrial Insurance Appeals' Decision and Order which affirmed the Department of Labor and Industries December 9, 2016 order, be and the same is hereby affirmed.
- 3.2 The Department is awarded, and Joshua Peterson is ordered to pay, costs and disbursements herein in the amounts of \$469.55 for transcription of depositions used at trial.
- 3.3 The Department is awarded, and Joshua Peterson is ordered to pay, a statutory attorney fee of \$200.00.
- 3.4 The Department is awarded interest from the date of entry of this judgment as provided by RCW 4.56.110.

DATED this ____ day of July 2019.

JUDGE

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Presented by:
ROBERT W. FERGUSON
Attorney General

JOHN BARNES, WSBA #19657
Assistant Attorney General

Copy received,
Approved as to form and
notice of presentation waived:

DOUGLAS PALMER, WSBA #35198
Attorney for Petitioner

Appendix D

*Clark County Superior Court
Judgment*

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The Honorable Daniel Stahnke
Hearing Date: 7/26/2019
Hearing Time: 9:00 AM
Hearing Location: Dept 1

FILED

JUL 26 2019

Scott G. Weber, Clerk, Clark Co

9:41 AM

**SUPERIOR COURT OF WASHINGTON
FOR CLARK COUNTY**

JOSHUA PETERSON,

Petitioner,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

NO. 18-2-01258-2
~~(PROPOSED)~~
FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT

Clerk's Action Required

JUDGMENT SUMMARY (RCW 4.64.030)

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- 2. Judgment Debtor: Joshua Peterson
- 3. Principal Amount of Judgment: - 0 -
- 4. Interest to Date of Judgment: - 0 -
- 5. Statutory Attorney Fees: \$200.00
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- 7. Other Recovery Amounts: \$0
- 8. Principal Judgment Amount shall bear interest at 0% per annum.
- 9. Attorney Fees, Costs and Other Recovery Amounts shall bear Interest at 12% per annum.
- 10. Attorney for Judgment Creditor: John Barnes, AAG
- 11. Attorney for Judgment Debtor: Douglas Palmer

FINDINGS OF FACT AND
CONCLUSIONS OF LAW
AND JUDGMENT

1 This matter came on regularly before the Honorable Daniel L. Stahnke, in open court on
2 June 7, 2019. The Petitioner, Joshua Peterson, appeared by his counsel, Douglas Palmer; the
3 Respondent, Department of Labor and Industries (Department), appeared by its counsel,
4 Robert W. Ferguson, Attorney General, per John Barnes, Assistant Attorney General. The Court
5 reviewed the records and files herein, including the Certified Appeal Board Record, and briefs
6 submitted by counsel, and heard argument of Counsel. A Workers Compensation Appeal Ruling
7 was entered on June 26, 2019 Therefore, being fully informed, the Court makes the following:

8 I. FINDINGS OF FACT

9 1.1 Hearings were held at the Board of Industrial Insurance Appeals (Board) on
10 September 27, 2017 and October 4, 2017 and the testimony of other witnesses was
perpetuated by deposition.

11 Thereafter an Industrial Appeals Judge issued a Proposed Decision and Order on
12 February 6, 2018, from which Joshua Peterson filed a timely Petition for Review on
13 February 27, 2018. Having considered Joshua Peterson's Petition for Review, the Board
granted review and issued its Decision and Order on May 29, 2018.

14 Petitioner thereupon timely appealed the Board's May 29, 2018 Decision and Order to
this Court.

15 1.2 A preponderance of evidence supports the Board's Findings of Fact. The Court adopts
16 as its Findings of Fact, and incorporates by this reference, the Board's Findings of Facts
Nos. 2 through 9 of the May 29, 2018 Decision and Order. Those findings were as
17 follows:

18 1.2.1 Joshua Peterson injured his back on December 9, 2011, while working for the
employer, Barnhart Crane and Rigging Co., on a barge in navigable waters when he leapt
19 and fell to avoid a shifting load.

20 1.2.2 The Department issued an order allowing the claim on December 23, 2011. The
order was not protested, appealed, held in abeyance, canceled, or modified by the
21 Department within 60 days.

22 1.2.3 On May 9, 2016, the U.S. Department of Labor approved settlement of
Mr. Peterson's claim under the Longshore & Harbor Workers' Compensation Act.

23 1.2.4 Mr. Peterson settled his maritime claims for \$900,000.

24 1.2.5 Leading up to the settlement, Mr. Dore, Mr. Peterson's maritime attorney, in his
25 correspondence with Mr. Covey, the Department's third-party adjudicator, indicated that
the third-party portion of the global settlement was worth \$90,000.
26

1 1.2.6 Based upon this representation, Mr. Covey agreed that \$25,000 would satisfy the
2 Department's third-party distribution share of the \$90,000 third-part settlement with
Foss.

3 1.2.7 The Department, through Mr. Covey or otherwise, did not represent or promise
4 that the \$25,000 paid to the Department satisfied the entire lien for all compensation paid.

5 1.2.8 After receipt of the \$25,000 as its third-party distribution share the third-party
6 claim against Foss, the outstanding balance of the Department's lien was \$72,450.89,
recoverable under RCW 51.12.100(4) from his 33 U.S.C. 908(i) settlement of his
LHWCA entitlement.

7 Based upon the foregoing Findings of Fact, the Court now makes the following

8 **II. CONCLUSIONS OF LAW**

- 9 2.1 This Court has jurisdiction over the parties to, and the subject matter of, this appeal.
10 2.2 The Court adopts as its Conclusions of Law, and incorporates by this reference, the
Board's Conclusions of Law Nos. 1 through 6 of the May 29, 2018 Decision and Order.
11 2.3 The Board's May 29, 2018 Decision and Order is correct and is affirmed.

12 Based on the foregoing Findings of Fact and Conclusions of Law the Court enters
13 judgment as follows:

14 **III. JUDGMENT**

- 15 3.1 The May 29, 2018 Board of Industrial Insurance Appeals' Decision and Order which
16 affirmed the Department of Labor and Industries December 9, 2016 order, be and the
same is hereby affirmed.
17 3.2 The Department is awarded, and Joshua Peterson is ordered to pay, costs and
18 disbursements herein in the amounts of \$469.55 for transcription of depositions used at
trial.
19 3.3 The Department is awarded, and Joshua Peterson is ordered to pay, a statutory attorney
20 fee of \$200.00.
21 3.4 The Department is awarded interest from the date of entry of this judgment as provided
by RCW 4.56.110.

22 DATED this 26 day of July 2019.

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25 JUDGE
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Presented by:
ROBERT W. FERGUSON
Attorney General
John Barnes
JOHN BARNES, WSBA #19657
Assistant Attorney General

Copy received,
Approved as to form and
notice of presentation waived:

DOUGLAS PALMER, WSBA #35198
Attorney for Petitioner

Appendix E

*Department of Labor & Industries
Superior Court Trial Brief*

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The Honorable Daniel L. Stahnke
Hearing Date: 6/07/2019
Hearing Time: 1:30 PM
Hearing Location: Dept. 1

FILED

JUN 07 2019 11:07

Scott G. Weber, Clerk, Clark Co.

**SUPERIOR COURT OF WASHINGTON
FOR CLARK COUNTY**

JOSHUA PETERSON,

Petitioner,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

NO. 18-2-01258-2

DEPARTMENT'S
TRIAL BRIEF

I. INTRODUCTION

This is a workers' compensation appeal. The Board of Industrial Insurance Appeals (Board) affirmed Department order dated December 9, 2016. That order rejected Peterson's state workers' compensation claim that was previously accepted because Peterson was covered under the Longshore and Harborworkers' Compensation Act (LHWCA) at the time of the injury and not subject to the provisions of the industrial insurance laws. The order also assessed an overpayment of disability benefits in the amount of \$72,450.89.

Peterson argues that the Department is prohibited from cancelling an allowance order once it has become final after 60 days. Fortunately, there is a Washington State Supreme Court maritime decision on point that concludes that while RCW 51.52.050 declares disability decisions not appealed within 60 days become "final", the disability award in this case was never "adjudicated" or "final" since RCW 51.12.100(4) expressly provides benefits shall be repaid if

DEPARTMENT'S
TRIAL BRIEF

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1 recovery is subsequently made under the federal maritime law. *Rhodes v. Dep't of Labor &*
2 *Indus.*, 103 Wn.2d 895, 700 P.2d 729 (1985). The Department cannot "adjudicate" something
3 the statutory scheme provides it may not adjudicate at that time.

4 Peterson next argues that the Department agreed to accept \$25,000 in full satisfaction of
5 its third party lien of \$102,143.73. The Department's third party lien applied against the \$90,000
6 Jones Act settlement and not the \$810,000 Longshore Harbor Workers Compensation Act
7 (LHWCA) claim. Third party liens also have their own statutory distribution scheme. Under that
8 scheme the Department's statutory share of the \$90,000 Jones Act settlement was \$42,492.67.
9 The Department reduced its share of the proceeds to \$25,000 during negotiations. The difference
10 between the third party lien of \$102,143.73, and the Department's original statutory share of
11 \$42,492.67, was never discussed nor negotiated because it was above the Department's statutory
12 share. Representations and recitals in a series of documents making up a global settlement are
13 self-serving and contrary to representations made negotiating the Jones Act claim. Furthermore,
14 the Department was not included in the global settlement negotiations outside the third party
15 Jones Act claim and never signed the settlement documents that Peterson now claims binds the
16 Department.

17 Peterson next argues that the Board cannot take up an issue not specified in a petition for
18 review. This is untrue. Under RCW 51.52.104 a party not filing a petition for review shall be
19 deemed to have waived all objections or irregularities arising from the Proposed Decision and
20 Order (PD&O). The same cannot be said for the Board itself. The scope of the Board's review
21 extends to all contested issues of law and fact and is not limited to the specific issues raised by
22 the petition for review. RCW 51.52.020; *Dep't of Labor & Indus. v. Tacoma Yellow Cab*, 31
23 Wn. App. 117, 639 P.2d 843 (1982) (RCW 51.52.104 does not deprive the Board of its
24 nondelegable statutory duty of interpreting the testimony and making the final decision and order
25 on all appeal cases).

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II. FACTS

Peterson was injured while working for Barnhart Crane & Rigging Company on December 9, 2011. According to Peterson's report of accident, he fell to avoid a falling hazard. There was nothing in the report of accident to identify this claim as a maritime claim. The Department accepted the claim for lumbar sprain/strain, post traumatic stress disorder and major depressive disorder. Thereafter, the Department paid Peterson benefits. Years later the Department learned that Peterson was injured while employed as a longshoreman/harbor worker. The Department issued an order cancelling the claim allowance and issuing an overpayment. Peterson appealed and the parties entered into an Order on Agreement of Parties on December 18, 2015, that required the Department to continue to pay provisional benefits pending the outcome of his maritime claim per RCW 51.12.100. The order cancelling claim allowance was reversed. When the maritime claim was eventually decided, the Department cancelled its allowance order and issued a repayment order to recoup the benefits it had already paid Peterson under his industrial insurance claim. Peterson appeals from this order.

Outside the industrial insurance system, Mr. Peterson, through his attorney Jim Dore, pursued a LHWCA claim against his employer Barnhart Crane & Rigging Co. and a third party Jones Act claim for negligence against the tug boat company (Foss Tugs) that was assisting in the effort. AR 251. In the spring of 2016, the parties entered into settlement negotiations under the third party Jones Act claim. The Department designated, third party recovery agent, Michael Covey, to represent the Department in the settlement negotiations. Mr. Covey corresponded with Beth Whitton, paralegal for the Dore Law Group, PLLC to obtain the amount of benefits the Department had provided Peterson under the claim. This was a moving target since benefits including Time-Loss Compensation (TLC) was ongoing. AR 235-265.

On March 31, 2016, Mr. Nielsen, an attorney representing a defendant in the maritime proceeding, wrote Mr. Covey that he wished to discuss the Department's lien being asserted and berated the Department for continuing to pay Peterson benefits under the Washington State

1 workers' compensation act. It became obvious that Mr. Nielsen knew little about the workers'
2 compensation system and the fact that the Board had ordered the Department to continue to pay
3 benefits to Peterson until such time as Peterson's maritime claim was resolved.

4 On April 12, 2016, Mr. Dore wrote a settlement demand letter to the Department.
5 AR 266. In the demand letter, Mr. Dore correctly identified that this case involves two types of
6 claims. An LHWCA claim and a Jones Act third party negligence claim. Mr. Dore was correct
7 that the Department had a lien under only the Jones Act claim against Foss Tugs (Foss). Mr. Dore
8 wanted to settle both claims. He proposed that both claims be settled for \$900,000. He indicated
9 that it is the parties' belief that the LHWCA claim is worth ninety percent of the Settlement and
10 the third party Jones Act claim against Foss for negligence is worth ten percent. Applying these
11 percentages to the \$900,000 Settlement means that \$90,000 was allocated to the Jones Act claim
12 and \$810,000 was allocated to the LHWCA claim. Mr. Dore then proposed the Department settle
13 for \$10,103.69, not realizing that RCW 51.24 provides a statutory distribution scheme for third
14 party recoveries.

15 On April 14, 2016, Mr. Covey sent Beth Whitton an email (AR 271) accepting
16 Mr. Dore's percentage assigned to the Jones Act claim as being ten percent of the \$900,000
17 settlement, or \$90,000. Mr. Covey rejected Mr. Dore's offer to settle the Department's third
18 party recovery explaining that the Department's lien is statutory. Mr. Covey then ran the
19 statutory distribution formula on the Department's lien of \$102,143.73 resulting in \$42,492.67
20 being the Department's share of the \$90,000 Jones Act settlement. The Department's share of
21 the \$90,000 was far less than the actual benefits the Department paid Peterson. Mr. Covey ended
22 his email by explaining that he was willing to compromise some of the Department's share and
23 proposed splitting the \$90,000 settlement into three equal portions. AR 271. There is no evidence
24 in the record that the balance of the Department's lien (\$102,143.73 - \$25,000) was ever the
25 subject of negotiation or affirmatively waived by Mr. Covey. Later that day, Mr. Covey agreed
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1 to accept \$25,000 as its share of the settlement with Foss. AR 273. This was a reduction from
2 the Department's statutory share of the Foss proceeds.

3 Consistent with the agreement, on April 20, 2016, Mr. Covey prepared an Order and
4 Notice and Third Party Recovery Worksheet. AR 275-276. The Order and Notice specifically
5 stated that: pursuant to the agreement between the Department and the Claimant, the Claimant
6 shall reimburse the Department in the sum of \$25,000; and pursuant to RCW 51.24.060, any
7 unpaid amount shall bear the maximum rate of interest. The Order and Notice also stated that:
8 The Department retains its right of reimbursement against any further recoveries from this injury
9 under RCW 51.24.060. Mr. Covey forwarded the third party distribution order to Ms. Whitton
10 that same day. Nowhere did Ms. Whitton, Mr. Dore or Mr. Nielsen express disagreement with
11 the distribution order. Nowhere did Ms. Whitton, Mr. Dore or Mr. Nielsen prepare or have the
12 Department sign an agreement that varied from the Order and Notice. In fact, the Department
13 was never consulted or been asked to sign any form of global settlement that is now being used
14 against it.

15 The Department's involvement in any global settlement ended with the issuance of the
16 Order and Notice. The Department did not sign either of the two written contracts that comprised
17 the global settlement. In fact, Mr. Covey signed no lien waiver or any legal document that would
18 even suggest the Department was foregoing its right to recovery. The global settlement also
19 included terms inconsistent with the negotiations between Mr. Dore and the Department. The
20 Department had earlier accepted the \$90,000 allocation to the Jones Act claim. Negotiations
21 were based on this amount and the Department calculated its statutory share from this amount.
22 The global settlement allocates all of the \$900,000 to the Jones Act claim. If this is indeed the
23 case, the Department's statutory share of the \$900,000 would have been much higher.

24 Mr. Covey and Mr. Dore correctly understood that the Department's third party lien
25 applied only to the Jones Act claim and not to the LHWCA claim. In other words, the Department
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1 had no claim to any of the proceeds from the LHWCA claim. The Department did through
2 Mr. Covey, reduce its share of the statutory distribution for the \$90,000 Jones Act claim from
3 \$42,492.67 to \$25,000, but it was never aware that Mr. Dore and Mr. Nielsen intended for the
4 Department to waive the remainder of its lien.

5 III. ARGUMENT

6 A. **When a Petition for Review Is Filed, the Scope of the Board's Review Extends To** 7 **All Contested Issues of Law and Fact and Is Not Limited To the Specific Issues** 8 **Raised by the Petition for Review**

9 Peterson argues for placing limits on the Board's scope of review when a petition for
10 review is filed. Peterson argues that because the Department did not challenge the decision to
11 affirm claim allowance in the PD&O, it has waived this issue and the Board has no independent
12 authority to review this issue on its own. That is incorrect. Under RCW 51.52.104 a petition for
13 review shall set forth in detail the grounds therefore and the **party** or **parties** filing the same
14 shall be deemed to have waived all objections or irregularities not specifically set forth therein.
15 Peterson correctly argues that if a **party** does not file a petition for review, it has waived all
16 objection or irregularities arising from the PD&O. The same cannot be said for the Board itself.
17 The scope of the Board's review extends to all contested issues of law and fact and is not limited
18 to the specific issues raised by the petition for review. *In re Richard Sims*, BIIA Dec., 85 1748
(1986).

19 In *Sims*, the claimant contended that when the Board reviews a case following a petition
20 for review of a PD&O, its review is strictly limited to the specific issues raised in the petition
21 for review and can go no further. Thus, according to the claimant in *Sims*, the Board is without
22 authority to correct errors made by its employee Industrial Appeals Judge and is required to
23 adopt incorrect Findings and Conclusions which the Board views as unsupported by the
24 evidence. The Board strenuously disagreed.

1 The Board pointed to RCW 51.52.020 as authority that the Legislature had no intention
2 of tying the Board's hands in the fashion suggested by the claimant. RCW 51.52.020 provides:
3 "the board may not delegate to any other person its duties of interpreting the testimony and
4 making the final Decision and Order on appeal cases." That clear and unambiguous language
5 has been relied on by the courts in defining the broad scope of the Board's authority to review
6 the record and issue its own final Decisions and Orders. *Dep't. of Labor & Indus. v. Tacoma*
7 *Yellow Cab*, 31 Wn. App. 177, 639 P.2d 843 (1982).

8 In *Tacoma Yellow Cab*, the court examined the nature of the Board and its relationship
9 to its employee hearing officers. The Court stated: "In effect, the board necessarily concluded:
10 (1) all matters pending before the board, from the moment an aggrieved party files an appeal of
11 a departmental order until a final board order is promulgated, properly lie within the bosom of
12 the board for appropriate action; (2) hearing examiners are subordinate employees who have no
13 jurisdictional authority independent of the board's authority; (3) the board cannot delegate to
14 others its duty to make a final decision and issue an order based thereon; and (4) accordingly,
15 we (the Board) choose to review the merits of this appeal. In making that choice the board acted
16 well within its statutory authority."

17 The *Tacoma Yellow Cab* opinion further stated: "In the case at bench, the board took the
18 . . . position . . . that it never lost jurisdiction to act upon a petition to review a decision of one of
19 its employees until it (the Board) made and entered its final decision. In short, we hold that
20 RCW 51.52.104 does not deprive the board of its nondelegable statutory duty of interpreting the
21 testimony and making the final decision and order on all appeal cases."

22 Nothing in RCW 51.52.104 or RCW 51.52.106 undermines the basic grant of authority
23 contained in RCW 51.52.020. RCW 51.52.104 merely provides for the automatic adoption of a
24 PD&O when no petition for review has been filed. It does not limit the Board's review in the
25 situation where a petition for review has in fact been filed. Indeed, RCW 51.52.106 authorizes
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1 the Board to consider any and all issues properly raised by the Department order and the notice
2 of appeal from that order. To interpret RCW 51.52.104 and RCW 51.52.106 in any other way
3 would be to violate the clear language of RCW 51.52.020 and to permit a Board employee to
4 bind the Board to an incorrect decision. The legislature did not intend that result.

5 The *Sims* case also considered the case of *Homemakers Upjohn v. Russell*, 33 Wn.
6 App. 777, 658 P.2d 27 (1983), which is relied upon by Peterson. However, *Homemakers Upjohn*
7 does not derogate from the court's holdings in *Tacoma Yellow Cab. Homemakers Upjohn*
8 involved the issue of the effect of an employer, who was aggrieved by the PD&O, and failed to
9 petition for review, on that party's right to a superior court appeal from the Board's final decision
10 on the case. It made no observations on the scope of matters and issues which are properly within
11 "the bosom of the board" during the entire time an appeal is before the Board.

12 **B. The Department Was Correct in Cancelling Its Allowance Order and Assessing an**
13 **Overpayment**

14 The Department has the power and authority to determine whether an injured worker is
15 subject to the Industrial Insurance Act. On December 23, 2011, the Department exercised its
16 authority and accepted Peterson's injury claim and paid benefits. The order was not protested.
17 Under *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 886 P.2d 189 (1994), a Department
18 order is final and binding unless the Department lacked either personal or subject matter
19 jurisdiction.

20 The Department was not aware until years later that Peterson's claim was actually a
21 maritime claim. RCW 51.12.100(1) provides that if an injured worker's claim is compensable
22 under federal maritime laws, then the injured worker is not covered under the State's Industrial
23 Insurance Act. In that event, RCW 51.12.100(4) allows the Department to recoup from the
24 worker all such benefits paid.

25 RCW 51.12.100(4) specifies: In the event payments are made both under this title and
26 under the maritime laws or federal employees' compensation act, such benefits paid under this

1 title shall be repaid by the worker or beneficiary. This provision is self-explanatory. If an injured
2 worker receives benefits under both the workers compensation system and under the maritime
3 laws for the same claim, then the worker must repay the Department. This provision does not
4 appear to be in dispute. RCW 51.12.100(4) goes on to state: For any claims made under the Jones
5 Act, the employer is deemed a third party, and the injured worker's cause of action is subject to
6 RCW 51.24.030 through RCW 51.24.120. The latter provisions allow an injured worker to seek
7 a third party recovery from a negligent tortfeasor. Any third party recovery is distributed
8 according to a statutory distribution scheme. Recoveries made under the LHWCA are not subject
9 to the provisions of RCW 51.24.030 through RCW 51.24.120. The Department has no third party
10 lien against the proceeds from a LHWCA claim.

11 This tribunal's issue is how to reconcile *Marley* with RCW 51.12.100. Fortunately, there
12 is a case on point. *Rhodes v. Dep't of Labor & Indus.*, 103 Wn.2d 895, 700 P.2d 729 (1985). In
13 *Rhodes*, the Department issued an allowance order in June 1977 and began paying benefits. No
14 protest to the allowance order was filed. In April 1978, the allowance order was cancelled, after
15 a LHWCA claim was allowed. Mr. Rhodes appealed the cancellation order arguing that since
16 the payments in question were made under final order and were not timely appealed, the doctrine
17 of res judicata applies, regardless of the statutes. The *Rhodes* court upheld the Department's
18 cancellation order. The court concluded the Department did not, and could not, determine
19 Rhodes' case was final for purposes of res judicata since, at the time the order was issued, the
20 Department had no way of knowing whether he was covered by the LHWCA. While
21 RCW 51.52.050 declares disability decisions not appealed within 60 days become final, the
22 disability award in this case was never adjudicated or final since RCW 51.12.100 expressly
23 provides benefits shall be repaid if recovery is subsequently made under the federal maritime
24 law. The Department cannot adjudicate something the statutory scheme provides it may not
25 adjudicate at that time.
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1 Similar to *Rhodes*, Peterson's claim was allowed based upon his application for benefits
2 that did not indicate or suggest it was properly a maritime claim. When the Department
3 determined otherwise, it cancelled its allowance order. Peterson appealed that decision to the
4 Board and there the Parties entered into an agreement of parties that remanded the claim to the
5 Department to pay provisional benefits pending the outcome of his maritime claim. When the
6 maritime claim was eventually decided, the Department cancelled its allowance order and issued
7 a repayment order to recoup the benefits it had already paid Peterson under his industrial
8 insurance claim. Similar to *Rhodes*, the disability award in this case was never adjudicated or
9 final since RCW 51.12.100 expressly provides benefits shall be repaid if recovery is
10 subsequently made under the federal maritime law. That is exactly what happened here. This
11 case is squarely on all fours with *Rhodes*.

12 Peterson attempts to contrast the *Rhodes* decision with the decision in *Lindquist v. Dep't*
13 *of Labor & Indus.*, 36 Wn. App. 646, 677 P.2d 1134 (1984). In *Lindquist*, Division I decided the
14 Department could reject an application for benefits because the injury should be compensable
15 under the LHWCA. The court did not require the injured worker to actually have an allowed
16 LHWCA claim as a condition precedent to the Department rejecting coverage. The court found
17 the Department was competent and had the authority to make its own independent determination
18 of whether an injury should be covered by the LHWCA, regardless of whether it actually is
19 covered. Peterson argues unpersuasively that it is logically inconsistent to hold that the
20 Department has the subject matter jurisdiction to reject a claim, because of its application of
21 maritime laws, but it lacks the subject matter jurisdiction to allow a claim, because some other
22 adjudicative body later finds the worker is covered by federal maritime law. However, the
23 disparate treatment is logical when you factor in RCW 51.12.100. That statute becomes effective
24 only when the Department cancels an allowed claim and is seeking to recoup benefits it has
25 already paid. The Washington State Supreme Court has reconciled the two statutes by finding
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1 that the Department's allowance order is not a final or adjudicative order until the maritime
2 question is resolved. In contrast, the *Lindquist* court was never faced with reconciling RCW
3 51.12.100 with an allowed claim. In *Lindquist*, the court was clear that you must appeal a
4 rejection order within 60 days or the order becomes final. There was no conflicting statute for
5 the *Lindquist* court to apply.

6 **C. The Department Agreed To Accept \$25,000 as Its Share of the Jones Act Recovery**
7 **but Did Not Waive the Remainder of Its Lien**

8 Throughout this litigation, reference has been made to a global settlement. The
9 Department has never been part of any global settlement with Peterson. The Department
10 negotiated its third party lien recovery against the Jones Act claim but that was the extent of the
11 Department's involvement. The Department is not a signatory to the global settlement and is not
12 bound by any provision thereof. Peterson asserts that the Department's overpayment orders
13 violates his contractual agreement with the parties. He insists his only remedy is specific
14 enforcement limiting the Department's recovery. However, he cites to no authority for the
15 proposition that a non-party to a global settlement can be required to specifically perform a
16 recital in the agreement that he/she was not a party to. Moreover, the global settlement contains
17 provisions that are inconsistent with the Department's own negotiations on its third party lien.

18 The Department has a third party lien against Peterson's recovery in his Jones Act claim
19 but not his LHWCA claim. RCW 51.12.100. The Department had not issued an overpayment
20 order at the time and was still paying out benefits. Mr. Covey correctly focused on the Jones Act
21 claim and the amount allocated to it. Mr. Covey's e-mail correspondence makes it clear that
22 regarding third party distribution, the Department could only share in the third party recovery.
23 All distribution discussions addressed the \$90,000 Foss settlement and the distribution order is
24 based upon recovery of \$90,000 not \$900,000. The Department accepted Mr. Dore's suggestion
25 that ten percent of the \$900,000 settlement be attributed to the Jones Act claim and ninety percent
26 of the settlement be attributed to the LHWCA claim. The Department's distribution order

1 reflected this payout. Peterson's parol evidence argument is without merit. The distribution order
2 of the Department was an exhibit and Mr. Covey's testimony confirmed the numbers in the order.
3 Mr. Covey's testimony was not necessary to prove the terms of the order; the order was already
4 an exhibit. Peterson's arguments about the Department failing to present a copy of a contract
5 that it was not a party too, is also without merit. The Department's distribution order is the only
6 order that the Department prepared or signed. The Department relied on Mr. Dore's breakdown
7 of the settlement proceeds attributing \$90,000 to the Jones Act claim. That is the number used
8 in the distribution order. Since the Department did not sign, nor was consulted on, the wording
9 of the global settlement, the Department was not in a position to object to a different allocation
10 used in it. Peterson's parol evidence argument is without merit.

11 Using the third party recovery statutory scheme, the Department's share of the \$90,000
12 Jones Act settlement, was \$42,492.67. The Department eventually agreed to take \$25,000 as its
13 share. Consistent with the agreement, on April 20, 2016, Mr. Covey prepared an Order and
14 Notice and Third Party Recovery Worksheet. Exs. 31 & 32. The Order and Notice specifically
15 stated that: pursuant to the agreement between the Department and the Claimant, the Claimant
16 shall reimburse the Department in the sum of \$25,000; and pursuant to RCW 51.24.060, any
17 unpaid amount shall bear the maximum rate of interest. The Order and Notice also stated that:
18 The Department retains its right of reimbursement against any further recoveries from this injury
19 under RCW 51.24.060. Mr. Covey forwarded the third party distribution order to Ms. Whitton
20 that same day. Nowhere did Ms. Whitton, Mr. Dore or Mr. Nielsen express disagreement with
21 the distribution order. Nowhere did Ms. Whitton, Mr. Dore or Mr. Nielsen prepare or have the
22 Department sign an agreement that varied from the Order and Notice. However, it is clear from
23 the exhibits that negotiations with the Department concerned only the \$90,000 Jones Act
24 recovery and not the LHWCA recovery. The Department had no lien or right to recoup against
25 the LHWCA recovery. No overpayment order had been issued at the time and the only right the
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1 Department had was the third party recovery against proceeds of the Jones Act settlement. This
2 is probably the reason the difference between the Department's lien of \$102,143.73 and the
3 original statutory share of \$42,492.67 was never discussed or negotiated because it exceeded the
4 amount of the Department's statutory share. This is also the reason Peterson can produce no
5 signed document waiving any of the Department's lien rights. This is a case where attorneys
6 were acting outside their expertise and have no one to blame but themselves for their sloppy
7 work. Why was the Department not a party to the global agreement? Why did any of the attorneys
8 not get a signed lien waiver from the Department? These are questions only Mr. Dore and
9 Mr. Nielsen can answer.

10 Peterson asserts that Mr. Dore testified that he was well aware that the Department could
11 seek reimbursement against the LHWCA. He is wrong. A third party lien claim can be satisfied
12 out of Jones Act recovery but not a LHWCA claim. Because the Department had not cancelled
13 the allowance order or issued an overpayment order, there was no way for the Department to
14 assert a claim against the LHWCA recovery. Having no right to recovery against LHWCA
15 proceeds, the Department was in no position to extract a payout from the LHWCA recovery and
16 is why a waiver was never discussed. Mr. Dore admits there are two claims and the Department
17 has a lien against the third party claim against Foss. AR 266-267. Nowhere in that exhibit does
18 Mr. Dore state his belief that the Department has any right of reimbursement against the proceeds
19 from the LHWCA recovery.

20 Equitable estoppel is also inapplicable here. Peterson claims the Department should be
21 barred from enforcing its overpayment order because the April 20, 2016 order told Peterson the
22 Department was only going to ask for \$25,000 out of the global settlement and he relied on it to
23 his detriment. Peterson needs to read that order more carefully. That order (AR 275) apportioned
24 \$25,000 of the \$90,000 Jones Act settlement to the Department. The Order and Notice
25 specifically stated that: pursuant to the agreement between the Department and the Claimant, the
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1 Claimant shall reimburse the Department in the sum of \$25,000; and pursuant to
2 RCW 51.24.060, any unpaid amount shall bear the maximum rate of interest. The Order and
3 Notice also stated that: The Department retains its right of reimbursement against any further
4 recoveries from this injury under RCW 51.24.060. This just proves Peterson's reliance was
5 misplaced. The order notified him that any unpaid amount was going to bear interest and that
6 the Department retains its right of reimbursement against any further recoveries from this injury
7 under RCW chapter 51.24. The Department did not take an inconsistent position so equitable
8 estoppel does not apply.

9 Finally, Peterson's argument that because he had subpoenaed the Department's 30(b)(6)
10 representative, Jason Dickey, who did not know the particulars of what Mr. Covey was thinking
11 during the settlement negotiations, Mr. Covey should not be allowed to testify is despicable.
12 Mr. Covey was undergoing cancer treatment at the time the discovery deposition was scheduled.
13 Peterson's counsel was fully aware of the circumstances and went forward with Mr. Dickey
14 anyway. Mr. Dickey had reviewed Mr. Covey's third party file, including his emails with
15 Mr. Dore and Ms. Whitton. He answered all the questions proposed by counsel regarding third
16 party recoveries but did not know what Mr. Covey was actually thinking and intending during
17 the negotiations with Mr. Dore. No one could know, except for Mr. Covey. Regardless, one can
18 surmise what Mr. Covey was thinking from the emails exchanged with Ms. Whitton and
19 Mr. Dore. Mr. Dickey answered truthfully that he could not know what was actually in the mind
20 of Mr. Covey. Mr. Covey was still undergoing cancer treatment at the time of the hearing and
21 his testimony had to wait another six weeks until he was capable of testifying. He testified to the
22 particulars of the negotiations and what he was thinking which are consistent with his e-mails to
23 Mr. Dore and do not contradict the testimony of Mr. Dickey.
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IV. CONCLUSION

The Department's order cancelling the allowance order and assessing an overpayment is correct. The Department settled its third party claim against the proceeds from the Jones Act claim for \$25,000. The Department did not waive the remainder of its lien. The language of the 1975 amendment to RCW 51.12.100 is precise and unambiguous: "in the event payments are made under this title prior to the final determination under the maritime laws, such benefits shall be repaid if recovery is subsequently made under the maritime laws."

DATED this 6th day of June, 2019.

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Appendix F

*Board of Industrial Insurance Appeals Decision
In re Mark A. Miller, Dckt. No. 11 11806 (2012)*

2012 WA Wrk. Comp. LEXIS 165

Washington State Board of Industrial Insurance Appeals

August 02, 2012

DOCKET NO. 11 11806; CLAIM NO. AE-04828

Reporter

2012 WA Wrk. Comp. LEXIS 165 *

IN RE: MARK A. MILLER

Disposition: AFFIRMED

Core Terms

situs, terminal, plant, demolition, industrial injury, drydock, harbor, maritime law, adjoining, vessel, site

Counsel

Claimant, Mark A. Miller, by Welch & Condon, per David B. Condon

Employer, R.W. Rhine, Inc., by Schlemlein, Goetz, Fick & Scruggs, PLLC, per Robert L. Olson

Department of Labor and Industries, by The Office of the Attorney General, per Dilek F. Aral-Still, Assistant

Panel: DAVID E. THREEDY, Chairperson; FRANK E. FENNERTY, JR., Member; JACK S. ENG, Member

Opinion

[*1] DECISION AND ORDER

The employer, R.W. Rhine, Inc., filed an appeal with the Board of Industrial Insurance Appeals on March 7, 2011, from an order of the Department of Labor and Industries dated January 20, 2011. In this order, the Department affirmed a prior December 7, 2010 order in which it allowed the claim for a November 17, 2008 industrial injury that occurred while the claimant was working with R.W. Rhine, Inc. The Department order is **AFFIRMED**.

DECISION

As provided by *RCW 51.52.104* and *RCW 51.52.106*, this matter is before the Board for review and decision. The employer filed a timely Petition for Review of an April 17, 2012 Proposed Decision and Order, in which the industrial appeals judge affirmed the January 20, 2011 Department order. The

claimant filed a Reply on June 18, 2012. The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed.

The Department allowed Mr. Miller's claim for a November 17, 2008 industrial injury and R.W. Rhine, Inc., appealed, contending that the worker was covered [*2] under the Longshore and Harbor Workers' Compensation Act (LHWCA), not the Industrial Insurance Act (IIA). At hearing, there were two issues: Did Mr. Miller sustain an industrial injury on November 17, 2008; and did a right or obligation exist under the maritime laws for his injury within the meaning of RCW 51.12.100(1), and 33 U.S.C. §§ 902(3) and 903(a)? The industrial appeals judge determined that Mr. Miller had sustained the November 17, 2008 injury, and that the injury was not covered by the LHWCA.

In its Petition for Review, the employer has not challenged proposed Finding of Fact No. 2 regarding the occurrence of the injury, other than to say it is extraneous because the worker's injury is covered under the LHWCA, not the IIA. We agree with the industrial appeals judge's determination that Mr. Miller suffered an industrial injury on November 17, 2008, and will not discuss that question further. Our focus is on the issue raised by the Petition for Review, whether the injury was covered by the LHWCA. Like the industrial appeals judge, we conclude that it was not and affirm the Department order. We have [*3] granted review to correct the findings and conclusions and to clarify the rationale for our decision.

The evidence is outlined very well in the Proposed Decision and Order. There is no real dispute regarding where Mr. Miller was when he was injured or what the project he was working on entailed. Briefly, at the time of the November 17, 2008 injury, Mr. Miller was a construction laborer working on the demolition of an old steam plant that had last operated in 2000, and was purchased by the Port of Tacoma in 2005, with the intention of building a shipping container terminal. The site is located along a waterway. As part of the demolition process, Building No. 225 was slated to be removed. R.W. Rhine, Inc., contracted to do the demolition and, on the first day of the project, Mr. Miller injured his back throwing a large desk out the window of Building No. 225. After the steam plant was demolished, the terminal was never built. Instead, the site is now a gravel parking area.

RCW 51.12.100(1) provides:

Except as otherwise provided in this section, the provisions of this title shall not apply to a master or member of a crew of any vessel, or to [*4] employers and workers for whom a right or obligation exists under the maritime laws or federal employees' compensation act for personal injuries or death of such workers.

In order for coverage under the LHWCA to apply, the situs and status tests set forth at 33 U.S.C. §§ 902(3) and 903(a) must be satisfied. *Lindquist v. Department of Labor & Indus.*, 36 Wn. App. 646 (1984).

With respect to the situs test, 33 U.S.C. § 903(a) provides:

Except as otherwise provided in this section, compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel) .

With respect to the status test, 33 U.S.C. § 902(3) provides:

(3) The term "employee" means any person engaged in maritime employment, including any longshoreman [*5] or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and ship-breaker . . .

It is not relevant whether Mr. Miller has filed a timely claim under the LHWCA. *Gorman v. Garlock*, 155 Wn.2d 198, 216 (2005) (workers are within the class of "workers for whom a right . . . exists under the maritime laws" for purposes of RCW 51.12.100(1), even if they have given up their opportunity to exercise that right under the LHWCA).

33 U.S.C. § 903(a) specifically lists terminals as one of the locations that would satisfy the situs test. The employer argues that the injury occurred in a terminal because Mr. Miller was demolishing a steam plant that was intended as the future site of a marine terminal for large ocean going vessels that was never built. The employer cites cases finding that the construction of a pier or a dry dock is covered under the LHWCA. See, for example, *Healy Tibbitts Builders, Inc. v. Director, Office Of Workers' Compensation Programs (OWCP)*, 444 F.3d 1095, 1098 (9th Cir. 2006) [*6] (Court approved the Director of the OWCP's interpretation of "harbor worker" to extend coverage to any worker "directly engaged in the construction of a maritime facility, even if the worker's specific job duties are not maritime in nature.") The question here is whether the demolition of a building that is not a terminal, to make way for the potential construction of a facility that will be a terminal, satisfies the situs and status tests.

For purposes of our decision, we accept that a pier or dry dock under construction meets the situs test, so a terminal under construction could qualify as such because terminals are one of the listed situs in 33 U.S.C. § 903(a). *Trotti & Thompson v. Crawford*, 631 F.2d 1214 (5th Cir. 1980) (A pier under construction is a covered situs because it is changing from one covered situs (navigable water) into another covered situs (a pier)); *Brown & Root, Inc. v. Joyner*, 607 F.2d 1087 (4th Cir. 1979), cert. denied, 446 U.S. 981, rehearing denied, 448 U.S. 912 (1980) (dry dock under construction satisfies [*7] situs test). Likewise, under the reasoning of *Healy*, a worker performing construction work on a covered situs would likely qualify as a harbor worker, satisfying the status test.

However, we can see no good argument for finding that the abandoned power plant where the November 17, 2008 injury occurred was a terminal or any other covered situs. The facts here are not like those in *Trotti*, where the worker was employed on one protected situs (navigable water) that was being transformed into another protected situs (a pier). At most, the place where Mr. Miller was injured had the potential of becoming a covered situs in the future, and even that tenuous connection was never realized.

The fundamental flaw in the employer's argument is that the location where Mr. Miller was injured was not a covered situs at the time of injury. Thus, the injury did not occur on any of the situs listed in 33 U.S.C. § 903(a), and, because Mr. Miller was not demolishing or building a covered situs, he did not have the status of a harbor worker within the meaning of 33 U.S.C. § 902(3). As a result, no right or obligation exists [*8] under the maritime laws for the injury Mr. Miller sustained on November 17, 2008, within the meaning of RCW 51.12.100(1).

After consideration of the Proposed Decision and Order, the employer's Petition for Review, the claimant's Reply, and a careful review of the entire record before us, we are persuaded that the Proposed Decision and Order is supported by the preponderance of the evidence and is correct as a matter of law.

FINDINGS OF FACT

1. On April 12, 2011, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
2. Mark A. Miller sustained an industrial injury to his low back on November 17, 2008, during the course of his employment with R.W. Rhine, Inc., when he was removing materials from an old office building and throwing them out of a second story window of Building No. 225 located at the Port of Tacoma near Taylor Way next to the Hylebos Waterway, as part of a demolition project.
3. On November 17, 2008, Mr. Miller was employed as a construction laborer. The building where Mr. Miller was working was part of a complex that [*9] had previously been used to generate steam power. Various sources of fuel had been used at the plant over the years, such as coal, gas, and garbage, and there were piers nearby on the Hylebos Waterway that could accommodate barges that could deliver the fuel to the plant. There were waterlines running between the waterway and the plant. The plant had not been operational for years prior to Mr. Miller's injury. The plant was being demolished at the time of his injury and there were plans to build a shipping container terminal at that site, but the terminal was never built and the plant site was turned into a gravel parking lot subsequent to the plant demolition.
4. Mr. Miller's November 17, 2008 injury did not occur on the navigable waters of the United States, including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.
5. At the time of his November 17, 2008 injury, Mr. Miller was not a person engaged in maritime employment. He was not a longshoreman or other person engaged in longshoring operations, or a harbor worker, which would [*10] include a ship repairman, shipbuilder, or ship-breaker or a construction worker engaged in the demolition or construction of a pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel.

CONCLUSIONS OF LAW

- 1 Based on the record, the Board of Industrial Insurance Appeals has jurisdiction over the parties to and the subject matter of this appeal.
2. On November 17, 2008, Mr. Miller sustained an industrial injury during the course of his employment with R.W. Rhine, Inc., within the meaning of RCW 51.08.100.
3. No right or obligation exists under the maritime laws for the injury Mr. Miller sustained on November 17, 2008, within the meaning of RCW 51.12.100(1). The situs and status tests for coverage under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §§ 902(3) and 903(a), have not been satisfied.
4. The January 20, 2011 Department order is correct and is affirmed.

Appendix G

*Board of Industrial Insurance Appeals Significant Decision
In re Dorothy L. Gula, Dec 'd, BIIA Dec. 88 2196 (1990)*

1990 WA Wrk. Comp. LEXIS 79

Washington State Board of Industrial Insurance Appeals

October 15, 1990

DOCKET NO. 88 2196, CLAIM NO. K-661099

Reporter

1990 WA Wrk. Comp. LEXIS 79 *

In Re: DOROTHY L. GULA DEC'D

SIGNIFICANT DECISION

Disposition: Reversed and Remanded.

Core Terms

harbor, exposure to asbestos, fiber, occupational disease, asbestos, interim, widower, course of employment, federal jurisdiction, federal program, prima facie, exposure, shipyard, pension

Counsel

Widower-Petitioner, George Gula, by Thomas C. Phelan

Employer, Kaiser Shipyards, by None

Department of Labor and Industries, by The Office of the Attorney General, per Bonnie Y. Terada, Assistant

Panel: Sara T. Harmon, Frank E. Fennerty, Jr., Phillip T. Bork

Opinion

DECISION AND ORDER

This is an appeal filed by George Gula, surviving widower of the deceased claimant, Dorothy L. Gula, on June 6, 1988 from an order of the Department of Labor and Industries dated April 7, 1988. The Department order reaffirmed an order dated January 14, 1988, and rejected the claim for the reasons that the evidence failed to reveal any exposure to asbestos in employment covered under the industrial insurance laws of the state of Washington, and that Mrs. Gula's death on February 13, 1988 resulted from a disease (mesothelioma) arising from exposure to asbestos in the course of employment subject to federal jurisdiction under the Longshore and Harbor Workers' Compensation Act. Reversed and remanded.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the Department of Labor and Industries to a Proposed Decision and Order issued on March 7, 1990 in which the order of the Department dated April 7, 1988 was reversed, and the matter remanded to the Department with instructions to issue an order setting aside and holding for naught its April 7, 1988 order; to issue an order allowing Dorothy Gula's claim for benefits pursuant to RCW 51.12.102 and to provide claimant such benefits as she may be entitled to under Title 51; and to issue an order allowing George Gula's claim for widower's benefits pursuant to RCW 51.12.102, and to provide Mr. Gula such benefits as he may be entitled to under Title 51.

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

Although we are basically in agreement with the analysis contained in our Industrial Appeals Judge's Proposed Decision and Order, we have granted review in order to more accurately delineate the Department's responsibility regarding these claims. While we are convinced that the Department must pay interim pension benefits on these claims pursuant to RCW 51.12.102(1), the Proposed Decision and Order goes too far and directs the Department to allow the worker's and widower's claims. That is, the Proposed Decision and Order would let the federal insurer off the hook completely. It is that aspect of the Proposed Decision and Order with which we disagree.

Mr. Gula, the widower, has made a bare prima facie showing of entitlement to interim benefits. That is, he has shown that:

- (a) there are objective clinical findings to substantiate that the worker has an asbestos-related claim for occupational disease and
- (b) the worker's employment history has a prima facie indicia of injurious exposure to asbestos fibers while employed in the state of Washington in employment covered under this title.

RCW 51.12.102(1). At the same time, however, under RCW 51.12.100 as well as 51.12.102, the great preponderance of the evidence indicates that it is the federal program insurer, not the Washington State Fund, which is ultimately responsible for this claim. That is, a right or obligation exists under the maritime laws of the United States for Mrs. Gula's total permanent disability and subsequent death.

The Department therefore correctly followed the mandate of RCW 51.12.102(1) and rendered "a decision as to the liable insurer", i.e., the federal program insurer under the Longshore and Harbor Workers' Compensation Act. The error in the Department order lies not in that determination, but in the Department's failure to "continue to pay benefits until the liable insurer initiates payments . . ." RCW 51.12.102(1). The whole point of RCW 51.12.102 is to avoid delays in the payment of benefits resulting from a state/federal jurisdictional dispute. From the evidence presented to the Department and to us, Mrs. Gula's and her surviving widower's claims should ultimately be accepted under the Longshore and Harbor Workers' Compensation Act. At the same time, however, Mr. Gula is entitled to payment of pension benefits now because there is a prima facie showing, however slight, of injurious exposure to asbestos in employment covered by Title 51 RCW.

The Department's own regulation, WAC 296-14-600(4), requires this result. It provides:

- (2) Whenever the department has determined to pay benefits pursuant to chapter 271, Laws of 1988, the department shall render a decision as to the liable insurer and shall continue to pay benefits until the liable insurer initiates payments or benefits are otherwise properly terminated.

The department shall render its decision in a final order as provided in RCW 51.52.050.

Initiation of payments by a liable insurer shall be deemed to occur on the date such insurer issues a check or warrant or otherwise remits to the worker, beneficiary, or any provider any payment of any benefits owed by such insurer on the claim for asbestos.

....

(4) If benefits are paid by the department from the medical aid fund on an asbestos-related claim, and it is determined by the department that such benefits are owed to the worker or beneficiary by an insurer under the maritime laws of the United States or by another federal program other than the Federal Social Security, Old Age Survivors and Disability Insurance Act, 42 U.S.C., the department shall pursue such insurer or program to recover such benefits as may have been paid by the department.

The determination by the department shall be expressed in final order as provided by RCW 51.52.050.

The Department correctly followed the statute as interpreted by the WAC by issuing "a final order as provided by RCW 51.52.050" determining that the federal program insurer was liable. Where the Department erred was in failing to pay interim pension benefits as also required by the statute and WAC.

The Department has admitted, in the stipulated facts, Exhibit 2, that Dorothy L. Gula was exposed to airborne asbestos fibers while on land on the employer's job-site. While this exposure was much less than the exposure she suffered aboard ships, it is sufficient to establish a "prima facie indicia of injurious exposure to asbestos fibers while employed in the state of Washington in employment covered under this title." RCW 51.12.102(1)(b). As the parties had previously stipulated that there were objective clinical findings to substantiate that the worker has an asbestos-related claim for occupational disease, all the criteria contained in RCW 51.12.102(1) have been met and benefits should be paid under the provisions of this statute. While ultimate responsibility may lie with the federal government under the provisions of the Longshore and Harbor Workers' Compensation Act, the widower, George Gula, has established a right to payment of interim benefits pursuant to the provisions of RCW 51.12.102.

FINDINGS OF FACT

1. On October 12, 1987, the Department of Labor and Industries received an accident report from the claimant, Dorothy L. Gula, alleging that she had an occupational disease arising out of her employment at E. J. Bartells in 1944 and 1945. On January 14, 1988, the Department issued an order rejecting Mrs. Gula's claim for the reason that her injury (sic) occurred in the course of employment subject to federal jurisdiction (Longshore and Harbor Workers' Compensation Act).

On March 15, 1988, the Department received Mrs. Gula's protest and request that the Department reconsider its January 14, 1988 order. On March 25, 1988, the Department issued an order adhering to the provisions of its January 14, 1988 order. On March 28, 1988, the Department received a protest and request for reconsideration to the order dated March 25, 1988. On April 7, 1988, the Department issued an order affirming its January 14, 1988 order and as part of that order also denied George Gula's application for spousal benefits for the reason that Mrs. Gula's death resulted from a disease arising from exposure to substances in the course of employment subject to federal jurisdiction (Longshore and Harbor Workers' Compensation Act).

On June 6, 1988, a notice of appeal was filed with the Board of Industrial Insurance Appeals from the Department order dated April 7, 1988. On June 22, 1988, the Board issued an order granting the appeal, assigning Docket No. 88 2196 and ordering that proceedings be held on the issues raised.

2. Between February 1944 and March 1945 Dorothy L. Gula worked in the Kaiser Shipyards at Vancouver, Washington, for two employers, E. J. Bartells and Northwest Insulating.
3. Dorothy L. Gula was employed as a pipe insulator during the course of her employment at the Vancouver Shipyards, which entailed working in the hulls of ships where she would wrap pipes with asbestos insulation. During the course of her employment at the Vancouver Shipyards, Dorothy L. Gula was exposed to airborne asbestos fibers, both while she was engaged in insulating pipes on ships which were afloat on the Columbia River, a navigable waterway, and while she was at work in various parts of the shipyard on land.
4. Dorothy L. Gula died on February 13, 1988 from a condition diagnosed as malignant mesothelioma, and her death was a direct and proximate result of exposure to asbestos fibers during the course of her employment at the Vancouver Shipyards.
5. As the result of a biopsy performed on Dorothy L. Gula's lung tissue, asbestos fibers were detected significantly in excess of background levels, indicating occupational exposure to asbestos.
6. As a result of the occupational disease of malignant mesothelioma, Dorothy L. Gula was totally disabled and unable to work from April 9, 1987 until her death on February 13, 1988.
7. Dorothy L. Gula's occupational disease of malignant mesothelioma first became manifest on March 26, 1987, when she sought medical attention for her pulmonary problem.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter to this appeal.
2. There are objective clinical findings within the meaning of RCW 51.12.102(1)(a) to substantiate that Dorothy Gula has an asbestos-related claim for an occupational disease.
3. Dorothy L. Gula's employment history has a prima facie indicia of injurious exposure to asbestos fibers while employed in the state of Washington in employment covered under Title 51, within the meaning of RCW 51.12.102(1)(b).
4. The order of the Department of Labor and Industries dated April 7, 1988 affirming the order dated January 14, 1988, rejecting Dorothy L. Gula's claim for the reason that the injury occurred in the course of employment subject to federal jurisdiction (Longshore and Harbor Workers' Compensation Act), and denying George Gula's application for spousal benefits for the reason that Dorothy L. Gula's death resulted from a disease arising from exposure to substances in the course of employment subject to federal jurisdiction (Longshore and Harbor Workers' Compensation Act), is incorrect insofar as it fails to direct payment of interim pension benefits, and is reversed. This matter is remanded to the Department with directions to issue an order determining (1) that benefits are owed to the worker and beneficiary by an insurer under the maritime laws of the United States; (2) that the Department will pursue the federal program insurer on the worker's and beneficiary's behalf, to the extent required by RCW 51.12.102(4) and WAC 296-14-600(4); and directing (3) that

interim pension benefits be paid pursuant to RCW 51.12.102(1), based on the schedule of benefits in effect on March 26, 1987.

It is so ORDERED.

BOARD OF INDUSTRIAL INSURANCE APPEALS

Sara T. Harmon Chairperson

Frank E. Fennerty, Jr. Member

Phillip T. Bork Member

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Appendix H

*Board of Industrial Insurance Appeals Significant Decision
In re David L. Buren, BIIA Dec. 65,127 (1984)*

1984 WA Wrk. Comp. LEXIS 11

Washington State Board of Industrial Insurance Appeals

May 31, 1984

DOCKET NO. 65,127, Claim No. J-212034

Reporter

1984 WA Wrk. Comp. LEXIS 11 *

In re DAVID L. BUREN

SIGNIFICANT DECISION

Disposition: Affirmed.

Core Terms

claimant, maritime, trial brief, asbestosis, coverage, course of employment, occupational disease, formal adjudication, federal authority, file a claim, drydock, disability, adjoin, harbor, vessel

Counsel

Claimant, David L. Buren, by Levinson, Friedman, Vhugen, Duggan, Bland and Horowitz, per William S. Bailey

Employer, Todd Shipyards, None

Department of Labor and Industries, by The Attorney General, per Linda McQuaid and William A. Garling, Jr., Assistants

Panel: Michael L. Hall, Frank E. Fennerty, Jr., Phillip T. Bork

Opinion

DECISION AND ORDER

This is an appeal filed by the claimant on June 14, 1983, from an order of the Department of Labor and Industries dated May 25, 1983, which adhered to the provisions of a prior order rejecting the claim for the reason that the injury occurred while in the course of employment subject to federal jurisdiction (Longshore and Harbor Workers Act). Affirmed.

DECISION

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the Department of Labor and Industries to a Proposed Decision

and Order issued on January 25, 1984, in which the order of the Department dated May 25, 1983 was reversed, and the claim remanded to the Department for further action as indicated, authorized or required by law.

The general nature and background of this appeal are as set forth in the Proposed Decision and Order, and shall not be reiterated herein.

Quite clearly, we think, the claimant was engaged in a maritime occupation. For that matter, it does not appear that there is really any dispute herein as to that proposition. His job was that of a shipscaler which involved scraping, chipping and clean-up aboard ships which, the claimant's trial brief states, were "in the water as well as on land (in dry dock or being constructed on the ways)." The federal Longshoremen's and Harbor Workers' Compensation Act (the federal Act) provides:

"Compensation shall be payable under this Chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel)." (Emphasis supplied) 33 U.S.C.A. § 903(a).

Thus, it would appear to be indisputable that Mr. Buren's claim is covered under the federal Act. In point of fact, the claimant's trial brief notes that he has filed a claim for benefits for his asbestosis under the federal Act. This being the case, the claimant's claim for asbestosis under our state's Workers' Compensation Act is foreclosed by RCW 51.12.100, to wit:

"The provisions of this title shall not apply to a master or member of a crew of any vessel, or to employers and workers for whom a right or obligation exists under the maritime laws for personal injuries or death of such workers." (Emphasis added)

The fact that the claim herein is predicated on an "occupational disease" rather than an "injury" is of no legal consequence inasmuch as the two terms are synonymous under the federal Act. Specifically 33 U.S.C.A. § 902(2) provides:

"The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment . . ." (Emphasis supplied) .

The claimant, however, contends that RCW 51.12.100, supra, cannot legally bar his claim for benefits under our state Act prior to a formal adjudication of his claim under the federal Act by the federal authorities. The claimant's position in this regard is set forth in his trial brief as follows:

"Until such time as Mr. Buren is adjudicated to have a remedy under the federal statute, RCW 51.12.100 cannot act as a bar to his recovery under the Washington Workmen's [sic] Compensation Act. By definition, no right or obligation exists under the federal maritime laws for the loss of pulmonary function sustained by the claimant until there is a formal adjudication. Mere filing for benefits under the federal law does not mean he will receive them."

We do not agree. In our opinion, the provisions of RCW 51.12.100 make it incumbent upon the Department in those cases involving maritime employment to make its own determination as to federal

coverage for the purpose of determining if our Act is applicable to the claim. Our decision in this regard accords with the court's disposition in the most recent case of *Lindquist v. Department of Labor and Industries*, 36 Wn. App. 646 (1984), wherein the court made its own determination as to coverage of the claim therein under the state and federal Act despite the fact that the claimant therein had also filed a claim under the federal Act which was pending before the federal authorities.

In sum, we hold and conclude that the claimant's remedy for coverage of his asbestosis condition properly lies under the Federal Longshoremen's and Harbor Workers' Act, 33 U.S.C.A. § 901 et seq. Therefore the provisions of Title 51, RCW, are inapplicable to his claim herein.

The facts herein having been stipulated, and therefore uncontested, no findings will be entered. RCW 51.52.106.

It is so ORDERED.

BOARD OF INDUSTRIAL INSURANCE APPEALS

Michael L. Hall Chairman

Frank E. Fennerty, Jr. Member

Phillip T. Bork Member

Appendix I

Board of Industrial Insurance Appeals Decision
In re Shannon C. Adamson, Dekt. No. 16 11000 (2017)

2017 WA Wrk. Comp. LEXIS 153

Washington State Board of Industrial Insurance Appeals

September 12, 2017

DOCKET NO. 16 11000; CLAIM NO. ZB-14753

Reporter

2017 WA Wrk. Comp. LEXIS 153 *

IN RE: SHANNON C. ADAMSON

Disposition: AFFIRMED

Core Terms

vessel, crew, industrial insurance, crew member, maritime, third mate, ferry

Counsel

Claimant, Shannon C. Adamson, by Beard Stacey & Jacobsen, LLP, per James P. Jacobsen

Employer, Alaska Marine Highway, None

Department of Labor and Industries, by Office of the Attorney General, per William F. Henry

Panel: LINDA L. WILLIAMS, Chairperson; JACK S. ENG, Member

Opinion

[*1] DECISION AND ORDER

In November 2012, the M/V Columbia, a car ferry, was docked at the Port of Bellingham. The State of Alaska operated the ferry between Washington State and Alaska. Shannon Adamson was in uniform and performing her duties as the Columbia's third mate. As she adjusted the passenger gangway leading from the port to the ship, the gangway fell, injuring her head and face. The Department denied her claim for benefits because she was an Alaskan worker at the time of injury. Ms. Adamson appealed, arguing that because she was injured ashore, outside of federal maritime jurisdiction, and not covered by any Federal maritime remedies, she was entitled to Washington State's workers' compensation coverage. Our industrial appeals judge concluded that the Department improperly denied her claim based on her status as an Alaskan worker. The Department asserts that Ms. Adamson was excluded from Title 51 coverage as a crew member of a vessel pursuant to RCW 51.12.100 (1). We agree. The December 2, 2015 Department order denying benefits is **AFFIRMED**.

DISCUSSION

The parties stipulated to the material facts in the case. On November 12, [*2] 2012, Ms. Adamson worked for the state of Alaska as a member of the crew of the M/V Columbia, a car ferry owned and operated by the state of Alaska. She was the ship's third mate in charge of security. The parties agreed that the sole issue was whether Washington's Industrial Insurance Act applies to cover Ms. Adamson under the circumstances of her injury.

At the motion for summary judgment, the Department argued that because she was a member of a crew of a vessel, she was not entitled to benefits. Ms. Adamson disagreed and argued that pursuant to RCW 51.08.80, she was an "employee" and the state of Alaska was an "employer" as defined by RCW 51.08.070. She also argued that the crew exception did not apply because she did not have a double recovery, and the Jones Act did not cover her industrial injury.

RCW 51.12.100(1) reads in part:

Except as otherwise provided in this section, the provisions of this title shall not apply to a master or member of a crew of any vessel, or to employers and workers for whom a right or obligation exists under the maritime laws or federal employees' compensation act for [*3] personal injuries or death of such workers.

The plain language of this statute categorically excludes masters and members of a crew of any vessel from the provisions of the Washington State Industrial Insurance Act.

Within this statute, two classes are excluded: (1) masters and members of a crew of any vessel, and (2) workers for whom a right or obligation exists under the maritime laws. Ms. Adamson argued the first exemption did not apply to her; however, the stipulated facts indicate that as a crew member of M/V Columbia, she was the third mate in charge of security. While this is a harsh result, the plain reading of the statute allows for no other conclusion.

In 1960, the Washington Attorney General interpreted the statute to mean that certain crew members of vessels were excluded by this provision even though they could not be awarded damages under maritime law. ¹ In 1975, the Legislature amended the statute to add a disjunctive "or" between the categories of masters and members [*4] of crews of vessels on the one hand and workers with rights under maritime laws on the other hand. The current statute retains the disjunctive "or." The statute is clear in its exclusion of members of crews of vessels from the worker's compensation system.

As the third mate of a ferry sailing between Alaska and Washington, Ms. Adamson was within the categorical exclusion. She was a member of a crew, on a vessel, and therefore the provisions of the Act do not apply to her. If a worker is deemed to be a member of a crew, that individual should be able to pursue a federal remedy. The absence of a federal remedy does not change her from a crew member to a non-crew member. The parties agreed she was a crew member of a vessel, and therefore the provisions of the Industrial Insurance Act do not apply.

DECISION

In Docket No. 16 11000, the claimant, Shannon C. Adamson, filed an appeal with the Board of Industrial Insurance Appeals on January 28, 2016, from an order of the Department of Labor and Industries dated

¹ A copy of the 1960 opinion is attached to the Declaration of William F. Henry as Exhibit C.

December 2, 2015. In this order, the Department denied Ms. Adamson's claim for benefits because she was an Alaska worker at the time of injury and is not covered under the industrial [*5] insurance laws of the state of Washington. This order is correct, and is affirmed.

FINDINGS OF FACT

1. On March 1, 2017, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
2. On November 12, 2012, Ms. Adamson was employed as a crew member of the Columbia, a ferry owned and operated by the state of Alaska.
3. On November 12, 2012, Ms. Adamson was injured while performing her duties as the Columbia's third mate.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.
2. On November 12, 2012, Ms. Adamson sustained an injury during the course of her employment with the state of Alaska while working as a member of a crew of any vessel, within the meaning of RCW 51.12.100(1).
3. Pursuant RCW 51.12.100(1), Ms. Adamson is not entitled to Washington State industrial insurance benefits.
4. The December 2, 2015 Department order is correct and is affirmed.

BOARD OF INDUSTRIAL INSURANCE APPEALS

Addendum to Decision and [*6] Order

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The Department filed a timely Petition for Review of a Proposed Decision and Order issued on June 28, 2017, in which the industrial appeals judge reversed and remanded the Department order dated December 2, 2015. The claimant filed a response on August 31, 2017.

Evidentiary Rulings

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

Appendix J

Board of Industrial Insurance Appeals Decision
In re Lorenzo Arcivar, Dekt. No. 17 11179 (2018)

2018 WA Wrk. Comp. LEXIS 67

Washington State Board of Industrial Insurance Appeals

May 23, 2018

DOCKET NO. 17 11179; CLAIM NO. BB-19333

Reporter

2018 WA Wrk. Comp. LEXIS 67 *

IN RE: LORENZO ARCIVAR

Disposition: REVERSE AND REMAND

Core Terms

harbor, preempt, occupational disease, navigable waters, exclusive remedy provision, subsequent employment, covered employment, evidentiary ruling, issue an order, incorrect, claimant

Counsel

Claimant, Lorenzo M. Arcivar, by Casey & Casey, P.S., per Gerald L. Casey

Employer, Nova Group, Inc., None

Department of Labor and Industries, by Office of the Attorney General, per David I. Matlick

Panel: LINDA L. WILLIAMS, Chairperson; FRANK E. FENNERTY, JR., Member

Opinion

[*1] DECISION AND ORDER

Mr. Arcivar filed a claim for benefits for an occupational disease related to his hands and wrists, which he alleged arose from his employment with Nova Group in Washington and New Mexico. The Department denied the claim because it determined the claim was preempted by the Longshore and Harbor Workers' Compensation Act. The industrial appeals judge affirmed the Department order. Mr. Arcivar contends his work in Washington was not preempted by the Longshore and Harbor Workers' Compensation Act, and that his work in New Mexico was covered under Washington's Industrial Insurance Act because the employment was principally in Washington. While we agree with our industrial appeals judge that Mr. Arcivar's employment with Nova Group in Washington was preempted by the Longshore and Harbor Workers' Compensation Act, we **REVERSE AND REMAND** the Department order and direct the Department to determine whether Mr. Arcivar's employment with Nova Group in New Mexico was covered by Washington's Industrial Insurance Act.

DISCUSSION

We agree with our industrial appeals judge that that Mr. Arcivar's employment with Nova Group in Washington was preempted by the Longshore [*2] and Harbor Workers' Compensation Act. However, the determination in the Department's order does not end the question as to whether Mr. Arcivar's occupational disease is covered under Washington's Industrial Insurance Act because the order on appeal does not address Mr. Arcivar's subsequent employment with Nova Group in New Mexico, per RCW 51.12.120. This employment was not on navigable waters, and therefore is not preempted by the Longshore and Harbor Workers' Compensation Act.

RCW 51.12.120 allows for extraterritorial coverage in certain circumstances, and the Department has not yet passed on whether Mr. Arcivar's employment with Nova Group in New Mexico is covered employment under Washington's Industrial Insurance Act. Because this issue must still be decided, we reverse and remand the Department order on appeal. The Department is directed to determine whether Mr. Arcivar's employment with Nova Group in New Mexico was covered employment under Washington's Industrial Insurance Act per RCW 51.12.120.

DECISION

In Docket No. 17 11179, the claimant, Lorenzo [*3] M. Arcivar, filed an appeal with the Board of Industrial Insurance Appeals on February 3, 2017, from an order of the Department of Labor and Industries dated January 24, 2017. In this order, the Department rejected the claim because it determined the injury occurred while in the course of employment subject to federal jurisdiction (Longshore and Harbor Workers' Compensation Act or Jones Act). This order is incorrect and is reversed and remanded to the Department to issue an order finding Mr. Arcivar's employment for Nova Group in Washington was preempted by the Longshore and Harbor Workers' Compensation Act, and to determine whether Mr. Arcivar's subsequent employment with Nova Group in New Mexico was covered under Washington's Industrial Insurance Act per RCW 51.12.120.

FINDINGS OF FACT

1. On April 19, 2017, an industrial appeals judge certified that the parties agreed to include the Jurisdictional History in the Board record solely for jurisdictional purposes.
2. Nova Group is a California company that contracts with the federal government to perform utilities construction and repair work on military bases. Nova Group has an office [*4] in Port Orchard, Washington with four employees.
3. All of Lorenzo Arcivar's work for Nova Group within Washington State was located on the navigable waters (including piers, docks, and adjoining areas) at Bangor Naval Base and Puget Sound Naval shipyard.
4. Mr. Arcivar's subsequent work for Nova Group at Holloman Air Force Base in New Mexico was not on navigable waters.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and subject matter in this appeal.
2. Mr. Arcivar's employment for Nova Group in Washington State and any injury or occupational disease claim arising from this employment falls under the exclusive remedy provision of the Longshore and Harbor Workers' Compensation Act, as provided by RCW 51.12.100(1) and 33 U.S. Code § 905.
3. Mr. Arcivar's employment for Nova Group operating in the state of New Mexico does not fall under the exclusive remedy provision of the Longshore and Harbor Workers' Compensation Act.
4. The Department order dated January 24, 2017, is incorrect and is reversed. This matter remanded to the Department to issue an order [*5] finding Mr. Arcivar's employment in Washington State for Nova Group was preempted by the Longshore and Harbor Workers' Compensation Act, and to determine whether Mr. Arcivar's employment in Washington for Nova Group operating in the state of New Mexico was covered under the Washington Industrial Insurance Act, as provided by RCW 51.12.120.

Addendum to Decision and Order

Petition for Review

As provided by RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision. The claimant filed a timely Petition for Review of a Proposed Decision and Order issued on February 22, 2018, in which the industrial appeals judge affirmed the Department order dated January 24, 2017. The Department filed a response to the Petition for Review.

Evidentiary Rulings

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

WASHINGTON STATE COURT OF APPEALS

DIVISION II

JOSHUA
PETERSON,)
)
Appellant,)
)
v.)
)
DEPARTMENT OF)
LABOR AND)
INDUSTRIES,)

No. 53885-7-II

PROOF OF SERVICE

Respondent.

I, the undersigned, certify that on the 19th day of February, 2020, I served the Appellant's Brief, via electronically, and/or via U.S. Mail, first-class, postage prepaid, to all parties addressed as followed.

E-Filed via Washington State Appellate Courts Portal:

Derek Byrne
Court Administrator/Clerk
Court of Appeals, Division II

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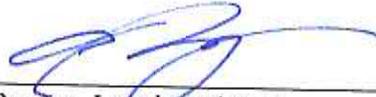
**Via First-Class U.S. Mail, Postage Pre-Paid, and E-Mail via
Washington State Appellate Courts Portal**

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I declare under penalty of perjury under the laws of the state of
Washington that the foregoing is true and correct:

Dated: February 19, 2020.



Asia Pruyne, Legal Assistant
To Douglas M. Palmer, Claimant's Attorney

HAMRICK PALMER PLLC

February 19, 2020 - 4:43 PM

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