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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 REPLY BRIEF

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ARGUMENT

This Court should hold the Department of Labor & Industries has the subject matter jurisdiction to decide whether or not Mr. Peterson's claim should have been rejected in 2011 by operation of RCW 51.12.100(1). Where the superior court holds the 2011 allowance order is final (e.g. it was within the Department's subject matter jurisdiction) and the Department does not take exception, the Court must hold the Department's subsequent order rejecting this claim fails as a matter of law.

The Court should also hold the Department's ability to recoup benefits from injured workers is limited to the provisions of RCW 51.32.240[1]. While RCW 51.12.100(4) provides for repayment, the Department's method for such recoupment is governed by RCW 51.32.240 as previously conceded by the Department below. Giving the Department *carte blanche* recoupment rights per RCW 51.12.100(4) without the limitations of RCW 51.32.240 would fail to read the Industrial Insurance Act as a whole. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9-12, 43 P.3d 4 (2002).

The Court should hold failing to take exception to a Finding of Fact in a Petition for Review with the Board of Industrial Insurance Appeals is

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[1] There is also RCW 51.24 addressing third-party settlements and judgments, which is no longer directly at issue in this appeal.

waiver as provided for by RCW 51.52.104. Adopting the Department's sole reliance upon RCW 51.52.020 reads out of existence the express language of RCW 51.52.104. Our Courts have long held that general statutory provisions (RCW 51.52.020) must always yield to more specific statutes (51.52.104). *Aventis Pharm., Inc. v. Dep't of Revenue*, 5 Wn. App. 2d 637, 656, 428 P.3d 389 (2018).

The Court should hold the Department is not entitled to a $200 prevailing party fee because the Industrial Insurance Act alone governs the award of fees and costs. No appellate Court has specifically analyzed and distinguished the express language of RCW 51.52.140, "Except as otherwise provided in this chapter," in the context of the Department seeking an award of attorney fees and costs. The existing case law has rendered RCW 51.52.130, 51.52.140, and 51.52.150 superfluous, contrary to the canons of construction. *Aventis Pharm, Inc.*, *supra*.

1. **The December 23, 2011 Allowance Order is final, which means the Department erred when it attempted to reject Mr. Peterson's claim.**

Respondents want this Court to set aside the December 23, 2011 allowance order, despite never affirmatively taking the required actions to create that outcome. The Court does not need to address the problems created by our Supreme Court's post-*Rhodes* decisions, if it holds

Respondents failed to properly preserve the question of the finality of its 2011 allowance order. Alternatively, this Court should hold the Supreme Court's decisions after *Rhodes* effectively rejects its central premise: The Department cannot decide for itself federal compensation jurisdiction.

a. The Department failed to take any affirmative actions below to preserve the question of whether its December 23, 2011 Allowance Order is final.

Respondents argue for a case they wish was presented to this Court, not the actual case presented in this appeal. They correctly cite to *Marley*, *inter alia*, for the proposition, "Obviously the power to decide includes the power to decide wrong, and an erroneous decision is as binding as one that is correct *until set aside or corrected in a manner provided by law*." *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 543, 886 P.2d 189 (1994) (emphasis added; internal quotations and citations omitted). To succeed in this argument, Respondents should be defending a Finding of Fact and/or Conclusion of Law that the Department's December 23, 2011 allowance order was not final and binding because it was void.

This Court must hold Respondents failed set aside or correct the December 23, 2011 allowance order in a manner provided by law. Respondent's failure to follow the law starts with its August 19, 2016 rejection order, which is one of the two orders under appeal. (CABR pp.

306, 321). The Court must take cognizance of what exactly what is ultimately on appeal. The December 23, 2011 allowance order is not directly or indirectly on appeal. No Department order that is the subject of this appeal, including the August 19, 2016 rejection order, expressly changed, altered, or canceled the December 23, 2011 allowance order. The rejection order states:

> This claim for benefits is hereby rejected for the following reasons: The claimant was not under the Industrial Insurance Laws at the time of the injury. Injury occurred while in the course of employment subject to federal jurisdiction (Longshore and Harbor Workers Compensation Act or Jones Act). Any and all bills for services or treatment concerning this claim are rejected, except those authorized by the department for diagnosis.

Respondents could have, in a manner provided by law, to expressly cancel, reverse, or modify the allowance order. It could have done so by stating in the rejection order, "The December 23, 2011 is cancelled and this claim is rejected." The Respondents did not, but now ask this Court to act where it failed to act.

While Appellant waived this issue with the express text of the rejection order, it did so again before the Board. IAJ Yeager expressly ruled the December 23, 2011 order is final. Respondents did not take exception to that Finding and Conclusion in its Petition for Review as required by RCW 51.52.104. Filing that Petition for Review is the manner provided by

law to set aside or correct the December 23, 2011 order. Once again, Respondents are asking this Court to provide a remedy it did not ask for below.

While the Board reinstated the rejection order, it maintained the Finding and Conclusion that the December 23, 2011 order is final. Respondents did not appeal that Conclusion of law, as they are allowed to do per RCW 51.52.110 on issues of law. The law exactly proscribes this manner as a way Respondents can fix errors. Respondents asks this Court to fix its inaction.

Respondents failure to seek redress in a manner provided by law continued in Superior Court. Where before its failure was one of omission, in Superior Court Respondents failure was one of commission: it asked the Superior Court to conclude the December 23, 2011 order is final. Yet now Respondents want this Court to take a position that is the polar opposite of what it asked the court below to do. Respondents have failed at every opportunity to set aside or correct the December 23, 2011 order in a manner provided by law.

This Court is now without the legal authority to do anything but hold the December 23, 2011 allowance order is final as a matter of law in this case. It can do so without passing on whether or not the Department exceeded its subject matter jurisdiction in 2011, because Respondents have

failed to preserve the issue. This Court should follow Respondents actions not their words.

Whether or not the December 23, 2011 order is final is a distinction with a difference. So long as the December 23, 2011 allowance order remains in full force and effect, the Department cannot reject Mr. Peterson's claim. This was the essential holding of IAJ Yeager, from which Respondents failed to take exception. Instead, Respondents have been saying one thing and doing another. They claim, per *Rhodes v. Dep't of Labor & Indus.*, 103 Wn.2d 895, 700 P.2d 729 (1985), that its allowance order is voidable, but at no point have they expressly voided it. At no point has any prior tribunal voided the December 23, 2011 allowance order. The rejection order cannot stand in the face of a final allowance order.

The claim rejection order must give way to the claim allowance order because "[a final] erroneous decision is as binding as one that is correct." *Marley*, *supra*. The final decision here is not just the December 23, 2011 allowance order by the Judgment of the Clark County Superior Court agreeing the allowance order is final. As noted previously, this was the Conclusion of Law sought by Respondents below. Respondents cannot receive exactly what they asked for below and then complain to this Court for redress.

Finally, Respondents want this Court to focus on the potential for

theoretical windfalls by Appellant and hopes it engages in an outcome-based legal analysis. But Respondents do not have clean hands. They had many opportunities to fix this legal error at the heart of their case and squandered them. They had multiple opportunities to seek a finding the December 23, 2011 is not final in manners prescribed by law and squandered them.

b. In the alternative, this Court should hold, based upon *Marley*, *Kingery*, and *Gorman*, that the Supreme Court has effectively overruled *Rhodes*.

The problem that Mr. Peterson is asking this Court to correct is a fundamental error in the legal analysis and underpinnings of the line of cases interpreting and applying RCW 51.12.100. On one hand, there is *Rhodes*, 103 Wn.2d 895, which holds the Department can never possibly know if an injured worker meets the *Situs* and *Status* test of the LHWCA. Therefore, all such orders are voidable depending on a later adjudication by the LHWCA system.

On the other hand, there is *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 118 P.3d 311 (2005) that holds the Department can know if an injured worker meets the *Situs* and *Status* tests of the LHWCA. *Citing in part, Lindquist v. Dep't of Labor & Indus.*, 36 Wn. App. 646, 649, 677 P.2d 1134 (1984). Therefore, all such Department orders are not void because they

are not dependent on a later adjudication under the LHWCA system. The Department can decide for itself, rightly or wrongly, whether federal jurisdiction applies to a workers claim. What is confusing is the *Rhodes* Court favorably cited *Lindquist*, but for other propositions, without over-ruling *Lindquist*'s central holding.

While *Rhodes* and *Lindquist* do not use the subject matter jurisdiction analysis as provided for later by *Marley*, their analysis is entirely consistent with *Marley*, but reach different holdings. *Gorman*, does use a jurisdictional analysis consistent with *Marley* and *Lindquist*'s holding, but inconsistent with *Rhodes*. *Gorman*, 155 Wn.2d at 207, 212-13. *Gorman* and *Rhodes* cannot be reconciled. The older *Rhodes* Court held the Department cannot decide for itself if federal jurisdiction applies. The more recent *Gorman* Court, relying upon *Lindquist*, held the exact opposite: the Department can decide for itself if federal jurisdiction applies.

This is best illustrated in the subsequent *Olsen v. Dep't of Labor & Indus.*, 161 Wn. App. 443, 250 P.3d 158 (2011). The issue was whether or not the Department had the jurisdiction to decide whether or not the workers' asbestos claim was covered by the LHWCA. The *Olsen* Court held, relying upon *Gorman*, the Department has the subject matter jurisdiction to make that decision independent of any federal determination. *Id*. at 448 *citing Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 207 (2005).

While *Olsen* and *Gorman* were interpreting RCW 51.12.102, the *Gorman* Court held that statute merely provides an exception to RCW 51.12.100. *Gorman*, 155 Wn.2d at 212. As noted above, the *Gorman* Court relied upon *Lindquist* over *Rhodes*, to decide the Department and our Courts are empowered to adjudicate whether or not an injured worker meets the LHWCA *Situs* and *Status* test. The *Gorman* Court implicitly overruled *Rhodes* by relying upon *Lindquist*.

Returning to *Marley*, *Kingery v. Dep't of Labor & Indus.*, 132 Wn.2d 162, 937 P.2d 565 (1997), and *Singletary v. Manor Healthcare Corp.*, 166 Wn. App. 774, 271 P.3d 356 (2012), they all hold that if the Department commits an error of law in an order, that order is still final. The Department's August 19, 2016 rejection order is an attempt to correct its original error of law: allowing Mr. Peterson's claim. This Court, pursuant to *Marley*, *Kingery*, and *Singletary* cannot now fix the Department's mistake without invalidating *Gorman*, *Lindquist*, and *Olsen* and hold the Department lacked subject matter jurisdiction. This Court has no legal authority to fix the Department's December 23, 2011 adjudicative error.

c. Policy Considerations

The Respondents want this Court to be concerned about potential windfalls to Mr. Peterson. Instead this Court should be concerned about liberally construing the Act for the purpose of reducing to a minimum the

suffering and economic harm arising from injuries. Respondents accuse Mr. Peterson of wanting his proverbial cake and eating it too, but their position falls prey to the same problem.

Respondents argue at length about how they cannot possibly know if a worker with an allowed state claim may later obtain federal benefits. They assert that allowing them to set aside otherwise final allowance orders is the right remedy. Their argument is completely divorced from the intellectual framework created by the *Marley* line of cases. Their argument is premised, although they do not acknowledge it, on the premise that they lacked the subject matter jurisdiction to allow Mr. Peterson's claim in the first place. They could not possibly know that Mr. Peterson's claim qualified for LHWCA benefits.

But our courts have repeatedly held they can know. Respondents can and do reject claims because of the Department's belief the worker qualifies under the *Situs* and *Status* tests of LHWCA. A prime example of this is found in the Board's Significant Decision, *In re David L. Buren*, 1984 WA Wrk. Comp. LEXIS 11 (1984). There, the Department rejected Mr. Buren's claim based upon RCW 51.12.100, despite no federal coverage decision. The Board wrote,

> In our opinion, the provisions of RCW 51.12.100 make it incumbent upon the Department in those cases involving maritime employment to make <u>its own</u> 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 <u>its own</u> 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.

This is a crystal-clear invocation of the Department's subject matter jurisdiction. It is bad judicial policy for this Court to find the Department has subject matter jurisdiction to reject claims because of RCW 51.12.100, but suddenly does not have the same jurisdiction to allow claims despite RCW 51.12.100.

To affirm the Respondent's position is to hold they do not have subject matter jurisdiction when they "wrongfully" allow a state claim, but they suddenly do have subject matter jurisdiction when they "wrongfully" deny a state claim. This cannot be intellectually justified especially under the doctrine of liberal construction. Respondents position is not a neutral position of law, but actively hostile to workers caught between two compensation systems.

For questions of whether or not a worker is covered by the Act, the Court is required to construe any doubts it may have in favor of Mr. Peterson. "A guiding principle of interpreting IIA provisions is to liberally construe the remedial statute 'to achieve its purpose of providing

compensation to all covered employees injured in their employment,' with all doubts resolved in favor of coverage of the worker." *Delivery Express, Inc. v. Dep't of Labor & Indus.*, 9 Wn. App. 2d 131, 143, 442 P.3d 637 (2019) *citing Dep't of Labor & Indus. v. Lyons Enters., Inc.,* 185 Wn.2d 721, 734, 374 P.3d 1097 (2016) *(quoting Dennis v. Dep't of Labor & Indus.,* 109 Wn.2d 467, 470, 745 P.2d 1295 (1987)). Also, the entire purpose of liberal construction is to reduce to a minimum the suffering and economic harm to workers arising from on-the-job injuries. RCW 51.12.010.

RCW 51.12.010 also goes to the heart of Respondent's windfall arguments. The entire purpose of the Industrial Insurance Act is to reduce the economic harm to injured workers and their families. This means that if there is uncertainty on how the law should be applied to an individual case, the Court is required to find in favor of increased benefits, despite other considerations. *Crabb v. Dep't of Labor & Indus.*, 181 Wn. App. 648, 326 P.3d 815 (2014). In short, RCW 51.12.010 means this Court should not weigh considerations of theoretical double-recovery when interpreting the Department's subject matter jurisdiction.

2. The Department's ability to recoup benefits under RCW 51.12.100(4) is limited by RCW 51.32.240.

Respondents also argue for their ability to recoup wrongfully paid benefits pursuant to RCW 51.12.100(4). What they fail to fully confront is

their rights to recoup such benefits are spelled out and contained in the more specific statute RCW 51.32.240. The Department can only recoup benefits under the following circumstances:

- A clerical error, mistake of identity, innocent misrepresentation by the injured worker. RCW 51.32.240 (1)(a).
- Adjudicator error so long as the order is not final. RCW 51.32.240 (1)(b).
- Rejection of a claim. RCW 51.32.240(3).
- An order that is appealed and then reversed. RCW 51.32.240(4).
- Willful misrepresentation (e.g. fraud) of an injured worker. RCW 51.32.240(5).

Our courts are required to read a statute as a whole and give effect to all parts of it and to avoid interpretations rendering other parts superfluous. *Dep't of Ecology*, 146 Wn.2d at 9-12. Also, where there is a general and a specific provision, the specific governs the general. *Aventis Pharm., Inc.*, 5 Wn. App. 2d at 656. Here, RCW 51.12.100(4) is the general provision and RCW 51.32.240 is the specific statute.

As previously argued, below Respondents conceded the only statutory avenue by which it can recoup previously paid benefits per RCW 51.12.100(4) is through application of RCW 51.32.240(3). This Court should hold Respondents to that position, even though the Department is

legally foreclosed from rejecting Mr. Peterson's claim.

a. Unless this Court affirms rejection, the Department has no other method to recoup benefits per RCW 51.32.240.

Turning to RCW 51.32.240(1), it provides that benefits can be recouped for up to 1 year if the Department engaged in a clerical error. If, instead, the Department made an adjudicative error, they cannot seek any recoupment unless caught within 60 days of the adjudication. *Birrueta v. Dep't of Labor & Indus.*, 186 Wn.2d 537, 379 P.3d 120 (2016). Before the Board, the Department testified that the claims manager did not act in error when it issued the December 23, 2011 allowance order. (CABR pp. 470-71). This is an important factual concession when considering the application of RCW 51.32.240(1).

As argued above and previously, RCW 51.32.240(3) does not apply here unless the Court finds the Department may reject Mr. Peterson's claim despite the agreed-to finality of the December 23, 2011 allowance order. Also, Respondents conceded below that RCW 51.32.240(3) was the only statutory basis upon which they could recoup benefits from Mr. Peterson. (Report of Proceedings p. 39, ln. 16-20; CP p. 55 ln. 23 – 25). Alternatively, the Court could use RCW 51.32.240(4) on the basis of an adjudication overturned by an appeal, but this is not a situation where the Department awarded further benefits and the employer appealed and won.

b. Appellant did not waive recoupment below.

Respondents argue at page 8-9 that Appellant waived an issue regarding recoupment of benefits because he failed to challenge the IAJ's decision to close Mr. Peterson's claim. Their argument is curious. First, Appellant's Petition for Review (CABR p. 23) was unambiguous: Mr. Peterson challenged any ruling that required him to repay any funds to the Department beyond the $25,000 in the Third-Party Order.

Second, Respondents argue that RCW 51.52.020 gives the Board the right to do whatever it wants regardless of what specific issues are raised in the Petition for Review per RCW 51.52.104. The Board reinstated rejection of the claim and Appellant challenged that decision to Superior Court. Below, Appellant will argue why any RCW 51.52.104 waivers are binding upon the Board and thereby this Court.

Returning to RCW 51.32.240, it has no mechanism by which injured workers are required to repay any benefits merely because the claim is closed. The IAJ's ordering of recoupment was challenged by Appellant and such recoupment is independent of closure of the claim. To the extent recoupment is premised merely on claim closure, that is not a legally valid basis under RCW 51.32.240. As such, the Department's recoupment order must fail.

c. In the alternative, the Department is limited to seeking recoupment only for the benefits paid within 1 year of the settlement.

RCW 51.32.240(1)(a) allows the Department to recoup benefits for up to 1 year prior to the Department notifying Mr. Peterson in writing that he was overpaid due to a mistake not induced by fraud. In light of the final allowance order, which all parties agreed to below is final, the Department had a statutory obligation to pay benefits to Mr. Peterson. But to give some effect to RCW 51.12.100(4), the Court should, in the alternative, hold the Department is limited to a one-year recoupment of benefits.

However, this still means the Department is required to continue to pay benefits to Mr. Peterson until it generates sufficient evidence to close his claim. RCW 51.12.100(4) is written in the past tense, "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." On or after the settlement, then there is not concurrent receipt of benefits.

The Court should contrast the language of RCW 51.12.100(4) with the language of RCW 51.32.220, which governs the concurrent receipt of workers compensation and Social Security Disability benefits. In the latter case, the legislature uses the present-tense term "receiving benefits." This

Court previously interpreted that to mean the concurrent receipt of benefits. *Hoa Doan v. Dep't of Labor & Indus.*, 143 Wn. App. 596, 603-04, 178 P.3d 1074 (2008). Where a claim is allowed by final order, this Court should similar limit RCW 51.12.100(4) to apply to future workers compensation benefits only where there is concurrent receipt (e.g. ongoing payments from the LHWCA system). Here that is not present.

3. *Upjohn* is clear, failure to raise an issue in writing, per RCW 51.52.104, constitutes waiver of legal and factual issues.

Respondents attempt to distinguish *Upjohn v. Russell*, 33 Wn. App. 777, 658 P.2d 27 (1983) by asserting it was procedurally distinct from the present appeal. They are wrong. In *Upjohn*, the injured worker appealed a decision of the Department. The employer appeared and took part in the appeal and its position was generally aligned with the Department. The worker prevailed before the IAJ.

The Department then filed a Petition for Review, per RCW 51.52.104, challenging some issues and conceding others. The employer did not file a petition for review. The Board affirmed the decision of the IAJ. The employer then appealed to Superior Court, but the Department did not.

This Court affirmed dismissal of the employers of appeal based solely upon its failure to file a Petition for Review per RCW 51.52.104.

This Court enforced the plain meaning of that statute: it does matter if some party appeals the IAJ. If a party wants to later preserve an issue, they must also file a Petition for Review and specifically raise that issue. 33 Wn. App. at 781-82.

This is directly analogous to the present appeal. "The waiver provision in RCW 51.52.104 is only addressed to a party aggrieved by a proposed decision and order." *Id.* at 781. The Department was aggrieved, at least in part, to the IAJ's decision to affirm the finality of the allowance order and to reverse the rejection order. The Board had no authority to reinstate the order rejecting Mr. Peterson's claim.

Respondent's reliance upon *Dep't of Labor & Indus. v. Tacoma Yellow Cab Co.*, 31 Wn. App. 117, 639 P.2d 843 (1982) is misplaced. In *Tacoma Yellow Cab*, there was a procedural irregularity where the Department asked for an extension of its time to file a Petition for Review, but the Board never received that request. When the Department realized the problem, they diligently submitted a second request. The Board then permitted the Department to submit its Petition for Review, even though a formal extension was not granted prior to the deadline. RCW 51.52.104 specifically permits the Board to extend that deadline.

On appeal, the Employer challenged that extension and requested enforcement of the waiver provisions of RCW 51.52.104. This Court held,

"Because the board chose the second alternative [extension], the latter portion of RCW 51.52.104 does not apply." *Id*. at 121. This Court in *Tacoma Yellow Cab* did not hold that RCW 51.52.020 always triumphs over RCW 51.52.104, merely that the waiver provisions of the latter statute do not apply to that case based upon its specific procedural history.

This Court should enforce waiver against the Department in light of its failure to seek review of the IAJ's decision. The Department must not have been aggrieved by the IAJ's decision to reverse the rejection order because it did not file a Petition for Review. The Board lacked the authority to change that portion of the IAJ's decision because no party was aggrieved by it. Had a party been aggrieved they were statutorily obligated to notify the Board because the more specific RCW 51.52.104 governs the more general RCW 51.52.020. *Aventis Pharm., Inc.,* 5 Wn. App. 2d at 656.

4. Previous cases interpreting RCW 51.52.140 have rendered its opening statement, "Except as otherwise provided in this chapter" superfluous.

Appellant concedes there is a small handful of appellate decision interpreting RCW 51.52.140, which permit the Department to seek an award of attorney fees and costs. But those cases have never analyzed the opening phrase of RCW 51.52.140 within the context of RCW 51.32.130 and RCW 51.52.150. Respondents primarily rely upon *Black v. Dep't of*

Labor & Indus., 131 Wn.2d 547, 933 P.2d 1025 (1997). With all due respect to the *Black* Court, the sum total of their analysis of RCW 51.52.140 is a parenthetical comment. *Id*. at 557. There is zero analysis of the opening phrase of RCW 51.52.140. The Court simply notes the injured worker did not present a cogent argument why RCW 4.84.030 should not apply. I hope this Court does not reach the same conclusion.

Title 51 RCW provides for awards of attorney fees in workers compensation appeals. It only provides for such awards of fees and costs to injured workers who prevail. It expressly does not provide for the Department to receive any awards of attorney fees and costs from opposing parties. To the contrary, RCW 51.52.150 expressly prohibits the Department or the Attorney General's Office from seeking reimbursement from anyplace other than the medical-aid fund and the accident fund.

Respondents also rely upon *Ferencak v. Dep't of Labor & Indus.*, 142 Wn. App. 713, 175 P.3d 1109 (2008). It attempts to distinguish RCW 51.52.130 from RCW 4.84.030 because only the latter is a prevailing party fee statute. But this makes no sense because injured workers only receive an award of attorney fees per RCW 51.52.130 by prevailing.

But *Ferencak* commits the same error of analysis as *Black*, it never explains why its reading of RCW 51.52.140 did not render the first clause superfluous. It never answers the question: does the Industrial Insurance

Act provide for attorney fees and costs? The answer is it does in RCW 51.52.130. If the Legislature wanted to inflict further economic harm on injured workers, despite the policy of RCW 51.12.100, it could have explicitly said so in RCW 51.52.130. It did not: the inclusion of the one is the exclusion of the other.

Neither did *Ferencak* answer the question: does the Industrial Insurance Act provide for payment of the Attorney General's attorney fees and costs? The answer is it does in RCW 51.52.150. That statute does not give them the right to seek reimbursement from injured workers. Again, the inclusion of the one is the exclusion of the other.

In *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 667-68, 989 P.2d 1111, 1115 (1999), our Supreme Court held that RCW 51.52.130 is a prevailing party fee statute only for injured workers. It analyzed the legislative history, noting that the right to these prevailing party fees were expanded for injured workers. The legislature made a choice not to include the Department in RCW 51.52.130.

The legislature otherwise provided who should or should not be awarded prevailing party fees. The *Brand* Court wrote:

> Consistent with the legislative intent behind the Industrial Insurance Act, this court has repeatedly emphasized that the Industrial Insurance Act should be given a liberal interpretation. The act "is remedial in nature and is to be liberally applied to achieve its purpose of providing

> compensation to all covered persons injured in their employment." *Sacred Heart Med. Ctr. v. Department of Labor & Indus.*, 92 Wn.2d 631, 635, 600 P.2d 1015 (1979); *Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739, 743, 630 P.2d 441 (1981); *Johnson v. Weyerhaeuser Co.*, 134 Wn.2d 795, 799, 953 P.2d 800 (1998). In considering the calculation of attorney fees under RCW 51.52.130, we should attempt to give effect to the underlying purpose of RCW 51.52.130 specifically, the Industrial Insurance Act as a whole, and this court's previous interpretations of the act.

Brand, 139 Wn.2d at 668-69.

To allow the Department to obtain attorney fees and costs, no matter how small, is antithetical to the remedial purpose of the Act. It undercuts the legislative purpose of expanding RCW 51.52.130. "The purpose behind the award of attorney fees in workers' compensation cases is to ensure adequate representation for injured workers who were denied justice by the Department:

> The very purpose of allowing an attorney's fee in industrial accident cases primarily was designed to guarantee the injured workman adequate legal representation in presenting his claim on appeal without the incurring of legal expense or the diminution of his award if ultimately granted for the purpose of paying his counsel.

Brand, 139 Wn.2d at 667 *quoting Harbor Plywood Corp. v. Department of Labor & Indus.*, 48 Wn.2d 553, 559, 295 P.2d 310 (1956) (*quoting Boeing Aircraft Co. v. Department of Labor & Indus.*, 26 Wn.2d 51, 173 P.2d 164, 167 (1946)).

Allowing the Department to extract fees and costs from injured workers, despite the plain language of RCW 51.52.150, disincentivizes them from seeking justice and accessing our Courts. The entire statutory scheme is designed to encourage injured workers to seek justice in our courts contrary to the illiberal holdings relied upon by the Department.

Alternatively, the opening phrase of RCW 51.52.140 is ambiguous, susceptible to more than one meaning. As such, this Court is required to use liberal construction under RCW 51.12.010. *Crabb*, *supra*. So long as Appellant's reading of RCW 51.52.140, in concert with RCW 51.52.130 and RCW 51.52.150, is reasonable, this Court must find in favor of Appellant.

Appellant is urging this Court to find those holdings wrongly decided and ill-advised. This Court has the authority to do so in reliance upon the broad holding of *Brand* and those decisions failure to read the Industrial Insurance Act as a whole. To the extent RCW 51.52.140 is ambiguous, RCW 51.12.010 mandates finding for Appellant.

CONCLUSION

This Court need not address whether or not our Supreme Court in *Marley*, *Kingery*, and *Gorman* effectively overruled *Rhodes*, if it holds that the Superior Court's unchallenged Conclusion of Law that the December 23, 2011 allowance order is final is correct, which means the

Department cannot now reject this claim. Also, it does not need to decide this issue if the Court holds the Board exceeded its authority by reinstating the Department's rejection order after the Department failed to challenge the decision of the IAJ per RCW 51.52.104.

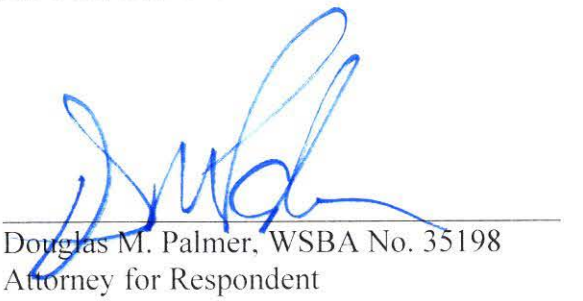
In the alternative, this Court should hold *Rhodes* is no longer good law. Our Supreme Court has firmly held the Department can decide for itself whether a claim falls under federal jurisdiction. Even if the Department erred in doing so, later receipt of federal compensation benefits does not void the Department's error. To hold otherwise would create a non-neutral rule of law contrary to liberal construction.

Where the Department's rejection order is set aside, the Court must limit the Department's ability to recoup benefits under RCW 51.12.100(4) by RCW 51.32.240. There was no innocent mistake alleged below by the Department and thus, they have no statutory basis to seek recoupment. Even if this Court finds such mistake, the recoupment orders should be limited to only benefits paid in the year prior to those orders per RCW 51.32.240(1)(a).

Finally, this Court should hold the Department cannot seek an award of attorney fees, because the Industrial Insurance Act, per RCW 51.52.130, expressly provides that only injured workers can receive an award of prevailing party fees and costs. Also, the Act expressly provides

the Attorney General's fees and costs are only payable, per RCW 51.52.150, out of the Department's medical and accident funds.

Dated: July 1, 2020.



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DIVISION II

JOSHUA PETERSON, Appellant, v. DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	))))))))))	No. 53885-7-II PROOF OF SERVICE

I certify that on June 22, 2020, I electronically served, Appellant's Reply Brief, as follows:

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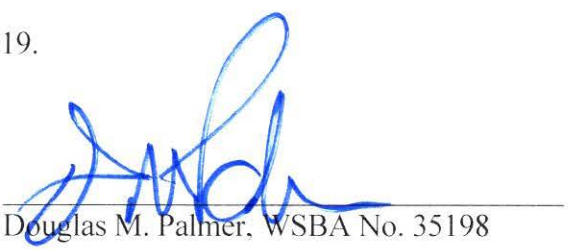
I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct:

Dated: September 11, 2019.



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