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NO. 53885-7

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

JOSHUA PETERSON,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,
STATE OF WASHINGTON

Respondent.

**RESPONDENT'S BRIEF
DEPARTMENT OF LABOR AND INDUSTRIES**

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I. INTRODUCTION

The law frowns on windfall recoveries. The Industrial Insurance Act does not apply to workers who receive compensation under federal maritime laws like the Longshore and Harbor Workers Compensation Act (LHWCA). When the Department of Labor & Industries has paid workers' compensation benefits to such a maritime worker, the worker must repay the state benefits.

Our Supreme Court has explained that even when a Department order allowing benefits has become final under RCW 51.52.050 and RCW 51.52.060, if a worker later receives benefits under the LHWCA, the Department may seek repayment of all state benefits. *Rhodes v. Dep't of Labor & Indus.*, 103 Wn.2d 895, 898-99, 700 P.2d 729 (1985). The Legislature's intent in excluding LHWCA-covered workers from the Industrial Insurance Act was "to prevent double recovery" by these workers. *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 208-09, 118 P.3d 311 (2005) (citations omitted).

Joshua Peterson seeks a double recovery here. After the Department paid him state workers' compensation benefits, he sought additional compensation for the same injury under the LHWCA. He settled his federal maritime claims for \$900,000, and the Department sought repayment of state benefits. The Board of Industrial Insurance

Appeals and the superior court rejected Peterson's arguments that *Rhodes* is no longer good law and that the Department cannot seek reimbursement because no party appealed the order allowing him state benefits within 60 days. Because Peterson's arguments lack merit, this Court should affirm.

II. ISSUES

The Industrial Insurance Act does not apply to workers covered under federal maritime law and, when a worker obtains payment under the LHWCA, the worker must repay all state benefits. Under Supreme Court precedent, a Department allowance decision is not final for res judicata purposes when the worker obtains LHWCA benefits. Here, Peterson obtained a \$900,000 LHWCA settlement five years after the Department allowed his claim. Did the Department correctly seek repayment of state benefits?

III. STATEMENT OF FACTS

A. **The Department Allowed Peterson's Claim for State Workers' Compensation Benefits Based on the Information He Provided about His Injury**

Peterson injured his back in December 2011 while working for Barnhart Crane & Rigging Company. AR 580. He was aboard a barge offshore near BP's Cherry Point refinery, helping deliver a large reactor vessel to the facility. AR 340-44. Peterson was removing chains and safety casing from the reactor vessel when it came loose and began to tip toward him. AR 341-43. As he ran to avoid the vessel, Peterson fell and injured his back. AR 343-44. He suffered post-traumatic stress disorder from the incident. AR 597, 632.

Peterson filed a workers' compensation claim with the Department. AR 580. In his report of accident, he stated that he worked for Barnhart as a rigger, performing "rigging and general labor." AR 580. He reported falling "to avoid [a] falling hazard," stating that he injured his lower back. AR 580. And he indicated the injury occurred at Cherry Point in Whatcom County. AR 580. Nothing in the report identified the claim as maritime in nature. *See* AR 580.

The Department allowed Peterson's claim and began providing benefits. AR 584. No party appealed the allowance order within 60 days. AR 7 (FF 3). Over the next several years, the Department paid Peterson \$89,480.47 in time-loss compensation for the period he could not work because of his injuries. AR 515, 638. It paid \$25,700.20 in medical bills. AR 515, 638. Peterson also filed a workers' compensation claim in Oregon, which paid for two spinal fusions in his back. AR 344, 347-48, 638.

B. Peterson Sought Compensation under Federal Maritime Laws

Peterson retained counsel to pursue federal maritime claims based on the December 2011 accident. AR 414-15, 568. In January 2015, his lawyer sent the Department a letter requesting a copy of Peterson's medical records. AR 568. Peterson sought compensation under the federal Longshore and Harbor Workers Compensation Act (LHWCA), a federal

workers' compensation program that provides compensation to injured workers employed in shore- and harbor-centered maritime occupations. AR 438; *see Gorman*, 155 Wn.2d at 205 (citing 33 U.S.C. §§ 902, 903, 905(a)). He also brought a third-party negligence claim under the federal Jones Act, which provides tort remedies to a ship's injured crew members. AR 438; *see Gibson v. Am. Constr. Co., Inc.*, 200 Wn. App. 600, 608-10, 402 P.3d 928 (2017).

Under RCW 51.12.100(1), the Industrial Insurance Act does not apply to a "master or member of a crew of any vessel" or to "workers for whom a right or obligation exists under the maritime laws" for personal injuries or death. When a worker receives compensation under the maritime laws, the worker must repay any state workers' compensation benefits that the worker has received: "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." RCW 51.12.100(4).

The Department seeks reimbursement in two ways, depending on the type of maritime claim. When the worker's claim arises under the LHWCA, the Department issues an overpayment order directly to the worker, requiring repayment of all state benefits. AR 481-82; RCW 51.12.100(4); *Rhodes*, 103 Wn.2d at 898-99. Because receiving federal

compensation establishes that the Industrial Insurance Act does not apply, the Department also reverses claim allowance. AR 481-82, 496-97. By contrast, when the worker makes a recovery 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.” RCW 51.12.100(4). Under these statutes, a Jones Act recovery is distributed among the injured worker, the worker’s attorneys, and the Department according to a statutory formula, and the Department’s share is limited to the particular recovery at issue. RCW 51.24.060.

In June 2015, the Department issued an order reversing allowance of Peterson’s claim and assessing an overpayment, explaining that his “injury occurred while in the course of employment subject to federal jurisdiction (Longshore and Harbor Workers Compensation Act or Jones Act).” AR 598. Peterson appealed to the Board. AR 587. There, he stipulated that he was seeking benefits under the maritime laws, but that no final determination had been made about his entitlement to benefits and that he had not yet made any recovery. AR 587-89.

The Board entered an agreed order requiring the Department to continue paying provisional benefits pending a determination of Peterson’s maritime claims. AR 495, 587-89. After the Board’s order, the

Department paid benefits to Peterson through interlocutory orders, subject to resolution of his maritime claims. AR 490.

C. Peterson Settled His Maritime Claims for \$900,000, and the Department Sought Repayment of State Workers' Compensation Benefits

In March 2016, James Dore, Peterson's maritime attorney, contacted a Department third-party adjudicator, James Covey, stating that a settlement was imminent. AR 541. Dore told Covey that the third-party Jones Act portion of settlement was worth \$90,000. AR 541. Based on this representation, Covey agreed that \$25,000 would satisfy the Department's third-party distribution share of the \$90,000 Jones Act recovery. CP 65 (FF 1.2.6). Covey did not suggest that the Department would not seek more reimbursement from Peterson or that the \$25,000 payment would satisfy all of Peterson's repayment obligations. CP 65 (FF 1.2.7).

Consistent with Dore's representation (and RCW 51.12.100(4)'s requirements for Jones Act recoveries), the Department entered an order distributing the \$90,000 recovery between Peterson, his attorneys, and the Department. AR 550-51. After receipt of the \$25,000, the outstanding balance of the Department's lien was \$72,450.89. CP 65 (FF 1.2.8).

In April 2016, Peterson settled his maritime claims for \$900,000. AR 573-74. The Department was not a party to the settlement. AR 393, 573-74. Besides the Jones Act claim, Peterson released his LHWCA claim

arising out of the December 2011 accident. AR 573-74. Because Peterson's claims arose in part under the LHWCA, he needed to provide the settlement to the U.S. Department of Labor, which approved it in May 2016. AR 397-98, 581.

Some time passed before the Department learned about Peterson's global settlement. AR 490. It continued to pay time-loss benefits until July 2016. AR 305. Then in September 2016, the Department sought the remaining balance of the state benefits it paid to Peterson. AR 623. Following *Rhodes*, 103 Wn.2d 895, it issued an order reversing allowance of his state workers' compensation claim and assessing an overpayment for the remaining \$72,450.89. AR 623.

D. The Board Affirmed the Department's Order Reversing Claim Allowance and Assessing an Overpayment for Benefits Paid

Peterson appealed to the Board. AR 312. There, he argued that the Department had agreed to limit its total reimbursement to the \$25,000 share of Peterson's Jones Act recovery. AR 107-23. Dore and Covey testified about their recollections of the negotiations, and the hearing judge found Covey "more persuasive," noting that his testimony was "supported by emails documenting the negotiation, and makes sense in light of RCW 51.12.100(4)." AR 62, 408-56, 630-75. In the proposed decision, the hearing judge found that "[t]he 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,” concluding that the Department was entitled to the full balance of the benefits it paid to Peterson. AR 64-65.

On the other hand, the hearing judge accepted Peterson’s argument that the Department could not cancel its allowance order when no party had appealed it within 60 days. AR 65. In the proposed decision, the hearing judge remanded the matter to the Department to issue an order “closing rather than rejecting the claim.” AR 65. This ruling preserved the Department’s right to reimbursement and ensured that Peterson would receive no further state workers’ compensation benefits. *See* AR 64-65.

The Department did not petition for review of this ruling. AR 9, 64-65. Peterson petitioned for review, arguing the hearing judge had incorrectly weighed the evidence and that the Board should limit the Department’s reimbursement right to \$25,000. AR 23-48. He did not challenge the proposed decision’s conclusion requiring the Department to close his claim. *See* AR 23-48.

The Board accepted review, and Peterson filed a “supplemental brief in further support of his petition for review.” AR 15, 21. He explained that, “[a]fter filing his Petition, Claimant’s counsel read the Board’s significant decision *In re Richard Sims*,” where the Board held

that it could review all contested issues in an appeal, including those not raised in a petition for review. AR 15. Peterson argued that this decision was incorrectly decided and that, because no party had requested review of the conclusion that the Department could not cancel the allowance order, the Board could not review this aspect of the decision. AR 15-18.

The Board adopted the majority of the proposed decision's findings of fact and conclusions of law. AR 7-8. But it reversed the hearing judge's decision to remand to the Department to close Peterson's claim, concluding instead that the Department correctly canceled the allowance order once Peterson's right to maritime benefits was established. AR 4, 8 (CL 6). The Board noted the Supreme Court's decision in *Rhodes*, where the Court held that the Department may cancel an order that has become "final" under RCW 51.52.050 when the worker later receives benefits under the maritime laws. AR 6. And it described its own longstanding precedent, requiring the Department to allow claims for state workers compensation benefits until the worker's federal benefits are allowed. AR 6-7. The Board explained that "[t]his process ensures sure and certain relief to an injured worker consistent with our statutory scheme." AR 7.

The Board concluded that "[t]he 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.” AR 8 (CL 6).

E. The Superior Court Affirmed the Board, Concluding that the Department Correctly Reversed Allowance of Peterson’s State Workers’ Compensation Claim

Peterson appealed to superior court, which affirmed the Board. CP 74-77. It rejected his argument that the Department had agreed to limit its right to reimbursement, noting the emails and documentation supporting Covey’s version of events. CP 75-76, 87-88. And it concluded the Department correctly reversed allowance of Peterson’s claim, explaining the Department’s right to reimbursement of state benefits under RCW 51.12.100(4) “presupposes the ability to reject a prior allowance order and reject the claim to enable or ensure the purpose of the reimbursement reservation.” CP 86. The Court adopted the Board’s finding of fact and conclusions of law as its own findings and conclusions. CP 75-76.

Peterson appeals.

IV. STANDARD OF REVIEW

In workers’ compensation appeals, the ordinary civil standard of review applies. RCW 51.52.140; *Raum v. City of Bellevue*, 171 Wn. App. 124, 139-40, 286 P.3d 695 (2012). The Administrative Procedure Act does not apply. RCW 34.05.030(2)(a), (c); see *Rogers v. Dep’t of Labor &*

Indus., 151 Wn. App. 174, 180, 210 P.3d 355 (2009). This Court reviews the superior court's decision, not the Board's decision. *Rogers*, 151 Wn. App. at 179-81. It limits its review to examining whether substantial evidence supports the superior court's findings and whether the court's conclusions of law flow from those findings. *Ruse v. Dep't of Labor & Indus.*, 138 Wn.2d 1, 5-6, 977 P.2d 570 (1999). The Court reviews legal conclusions de novo. *Birrueta v. Dep't of Labor & Indus.*, 186 Wn.2d 537, 542-43, 379 P.3d 120 (2016). And it defers to the Department's interpretation of the Industrial Insurance Act. *Jones v. City of Olympia*, 171 Wn. App. 614, 621, 287 P.3d 687 (2012).

V. ARGUMENT

The Department correctly sought repayment of state workers' compensation benefits after Peterson received an award under the federal LHWCA. On appeal, Peterson abandons his argument that the Department agreed to limit its right to reimbursement—his primary contention at the Board and superior court. Appellant's Brief (AB) 5 n.2. Instead, he argues that controlling Supreme Court precedent is no longer good law, that the Board could not change the decision of its hearings judge, and that the Department cannot seek repayment for any benefits paid after he received his LHWCA award.

These contentions lack merit. The Supreme Court’s decision in *Rhodes* is directly on point and allows the Department to seek repayment of benefits, even when the order allowing those benefits is otherwise final under RCW 51.52.050 and RCW 51.52.060. The Board acts within its authority to modify its hearing judge’s proposed decision to reflect the correct law. And the maritime occupations statute requires a worker to repay all state benefits, regardless of when the worker receives them. This Court should affirm.

A. Under RCW 51.12.100(4), the Department Properly Reverses Allowance of State Benefits Even When the Order Is “Final” Under RCW 51.52.050 and RCW 51.52.060

Because Peterson received federal maritime benefits, he was not entitled to state workers’ compensation benefits. The Department properly reversed allowance of his claim and sought reimbursement for the benefits it paid.

1. A worker cannot receive a double recovery of workers’ compensation benefits and federal maritime benefits

Under the maritime occupations statute, a worker must repay state workers’ compensation benefits if the worker later receives compensation under the federal maritime laws. RCW 51.12.100(4). The provisions of the Industrial Insurance Act do not apply to “a master or member of a crew of any vessel,” or to “workers for whom a right . . . exists under the maritime

laws” for personal injuries or death. RCW 51.12.100(1). When a worker receives federal maritime benefits, the worker must repay all state benefits the worker has received: “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.” RCW 51.12.100(4). The Legislature’s intent in excluding maritime workers from the Industrial Insurance Act was “to prevent double recovery” by these workers. *Gorman*, 155 Wn.2d at 208-09 (quoting *Esparza v. Skyreach Equip., Inc.*, 103 Wn. App. 916, 938, 15 P.3d 188 (2000)).

Peterson received benefits under federal maritime laws, including the LHWCA.¹ The LHWCA is a federal workers’ compensation program that provides relief to injured workers employed in shore- and harbor-centered maritime occupations. *Gorman*, 155 Wn.2d at 205 (citing 33 U.S.C. §§ 902, 903, 905(a)). In most cases, LHWCA benefits are greater than those under the Industrial Insurance Act. *Rhodes*, 103 Wn.2d at 898.

¹ Peterson also made a recovery under the Jones Act. This brief focuses on the effect of Peterson’s LHWCA compensation. In 2007, the Legislature amended RCW 51.12.100(4) to make Jones Act recoveries subject to the third-party distribution statute. Laws of 2007, ch. 324 § 1. This requirement does not apply when a worker receives compensation under the LHWCA. RCW 51.12.100(4). When a worker receives payment under this federal workers’ compensation program, the worker must repay all state benefits. RCW 51.12.100(4).

When a worker receiving state workers' compensation benefits obtains an award under the LHWCA, the Department issues an overpayment order to the worker, requiring repayment of all state benefits. RCW 51.12.100(4); *see Stevedoring Servs. of Am., Inc. v. Eggert*, 129 Wn.2d 17, 34, 914 P.2d 737 (1996) (citing *E.P. Paup Co. v. Director, Office of Workers Comp. Programs*, 999 F.2d 1341, 1351 (9th Cir.1993)). "In the event that [state workers' compensation] payments are made prior to a determination that the claim is covered by the LHWCA, the employee must repay the benefits paid." *Stevedoring Servs.*, 129 Wn.2d at 34 n.5.

2. Under *Rhodes*, a Department order allowing benefits is not final for res judicata purposes when the worker later receives compensation under the LHWCA

The Department properly seeks repayment from a maritime worker even when its order allowing state benefits has become final under RCW 51.52.050 and RCW 51.52.060. Under these statutes, a Department "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] or an appeal is filed with the [Board]." RCW 51.52.050(1). Courts generally give res judicata effect to Department orders when no party protests or appeals within 60 days.² *See*

² Res judicata, or claim preclusion, bars litigation of claims that were brought or might have been brought in a prior proceeding. *Loveridge v. Fred Meyer, Inc.*, 125 Wn.2d 759, 763, 887 P.2d 898 (1995). A party seeking to apply res judicata must

Kingery v. Dep't of Labor & Indus., 132 Wn.2d 162, 169, 937 P.2d 565 (1997). But like here, there are exceptions, including where there has been “fraud or something of like nature,” *Le Bire v. Dep't of Labor & Indus.*, 14 Wn.2d 407, 415, 128 P.2d 308 (1942), or when the Department has overpaid because of “clerical error, mistake of identity, innocent misrepresentation . . . or any other circumstance of a similar nature.” RCW 51.32.240(1); see *Birrueta*, 186 Wn.2d at 544. A final Department order likewise does not preclude entry of a second order when claims brought in the second action did not yet exist when the first order was entered. See *Weaver v. City of Everett*, 194 Wn.2d 464, 480-82, 450 P.3d 177 (2019).

The maritime occupation statute is such an exception to finality under RCW 51.52.050 and RCW 51.52.060. It provides that “the provisions of this title shall not apply to [maritime workers]” and that, “[i]n 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.” RCW 51.12.100(1), (4). In *Rhodes*, the Supreme Court rejected arguments that

establish four elements about a prior action and a subsequent challenged action: “concurrency of identity . . . (1) of subject-matter; (2) of cause of action; (3) of persons and parties; and (4) in the quality of the persons for or against whom the claim is made.” *Weaver v. City of Everett*, 194 Wn.2d 464, 480, 450 P.3d 177 (2019) (quoting *N. Pac. Ry. Co. v. Snohomish Cty.*, 101 Wash. 686, 688, 172 P. 878 (1918)).

RCW 51.52.050 and RCW 51.52.060 prevent the Department from seeking reimbursement from workers who later receive LHWCA compensation. *Rhodes*, 103 Wn.2d at 898-99. As Peterson does here, the worker in *Rhodes* contended that “since the payments in question were made under final order and were not timely appealed[,] the doctrine of res judicata applies, regardless of the [maritime occupation] statutes.” *Rhodes*, 103 Wn.2d at 898; *see* AB 22-23.

In rejecting this argument, the Court explained that Rhodes’s case was not “‘final’ for purposes of res judicata.” *Id.* at 899. When the Department allowed the claim and began paying benefits, it had no way to know that he would later receive compensation under the LHWCA. *Id.* “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 expressly provides benefits shall be repaid *if* recovery is subsequently made under the federal maritime law.” *Id.* (emphasis in original). Because the Department’s right to reimbursement would arise only if Rhodes later obtained federal compensation, its order allowing his claim and paying benefits remained subject to reversal if this occurred. *See id.* at 898-99.

The same is true here. When the Department allowed Peterson’s claim in 2011, it could not know that he would receive compensation

under the LHWCA five years in the future. The decision to grant such federal compensation was not the Department's to make. Regardless of the Department's belief about Peterson's entitlement to state benefits at the time of claim allowance, the subsequent LHWCA award established that he was not in fact entitled. The maritime occupations statute provides that workers must repay all state benefits when they later receive compensation under the LHWCA. RCW 51.12.100(4). Thus, as in *Rhodes*, the Department's orders allowing the claim and paying benefits remained subject to reversal if Peterson later obtained this federal compensation. *See Rhodes*, 103 Wn.2d at 899.

That an allowance order in maritime claim becomes "final" under RCW 51.52.050 and RCW 51.52.060 does not render the order final for res judicata purposes. Peterson makes much of the Board's conclusion that the allowance order became "final," arguing that the Board (and later the superior court) failed to understand the implications of this conclusion. AB 8-9, 10-15.³ But the finality of Department orders under RCW 51.52.050 and RCW 51.52.060 is always subject to the requirements of more specific statutes. In *Birrueta*, for instance, the Court held that

³ Peterson repeatedly asserts that unchallenged conclusions of law are "verities on appeal." AB 2, 7, 8, 9, 10. This rule of appellate procedure applies to only to factual findings, not conclusions of law. *See Dep't of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000).

RCW 51.32.240 authorized the Department to adjust a wage rate order even when the order had become “final” under RCW 51.52.050 and RCW 51.52.060. *Birrueta*, 186 Wn.2d at 544, 553-44. As in *Rhodes*, the statute granted only the right to assess an overpayment. *See* RCW 51.32.240(1). Nevertheless, the Court determined that the Department had “implied authority” to change the underlying final wage rate order—the source of the incorrect payment—as a “necessary incident to recoupment [under the statute].” *Birrueta*, 186 Wn.2d at 553-54.⁴

The Court held that RCW 51.32.240 permits the Department to modify “any order, temporary or binding, that results in an erroneous overpayment of benefits caused by an innocent misrepresentation.” *Id.* at 544, 553-54. Thus, while a Department order may be “final” under RCW 51.52.050 and RCW 51.52.060, this does not mean that the Department cannot change the order when another statute allows it.

This is precisely the situation here. While the Department’s order allowing benefits to Peterson became “final” when no party appealed it, the order remained subject to modification when and if Peterson later

⁴ The Court explained that “[t]o hold otherwise would mean that in order to ensure that *Birrueta* receives only the compensation he is statutorily entitled to, the Department would have to continuously overpay and then recoup *Birrueta*’s benefits for the rest of his life.” *Birrueta*, 186 Wn.2d at 553-54. It rejected this result, which would be “administratively burdensome to the Department” and a “hardship to *Birrueta* that would undercut his right to ‘sure and certain relief.’” *Id.* (quoting RCW 51.04.010). The Court found it “implausible that the legislature intended such an outcome.” *Id.*

received compensation under the LHWCA. RCW 51.12.100(4) operates no differently than the statute allowing the Department to change a final order when there has been an innocent misrepresentation. Consistent with *Birrueta*, the superior court explained that RCW 51.12.100(4) “presupposes the ability to reject a prior allowance order and reject the claim to enable or ensure the purpose of the reimbursement reservation.” CP 86. While an order allowing state benefits may be declared “final” under RCW 51.52.050 and RCW 51.52.060, the order remains subject to reversal if the worker later receives compensation under the federal maritime laws.

3. *Rhodes* Remains Good Law

No later decision has overruled *Rhodes*. Peterson argues that the Supreme Court has “effectively overruled” this case, AB 37, but the Court “will not overrule such binding precedent sub silentio.” *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999). Instead, when the Court has expressed a clear rule of law, it does not overrule it absent “a clear showing that [the] established rule is incorrect and harmful.” *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 280, 208 P.3d 1092 (2009) (quotations omitted). Only the Supreme Court can determine if its authority is incorrect or harmful; an intermediate appellate court must follow Supreme Court decisions. *See State v. Gore*, 101 Wn.2d 481, 487,

681 P.2d 227 (1984). Because the Court has made no finding that *Rhodes* is incorrect or harmful, this case remains binding authority in Washington.

Indeed, despite a lengthy review of case law, Peterson identifies no Supreme Court case addressing the Department's authority to modify an allowance order under RCW 51.12.100(4). *See* AB 24-38 (citing *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 272 P.3d 827 (2012); *Gorman*, 155 Wn.2d 198; *Kingery*, 132 Wn.2d 162; *Marley v. Dep't of Labor & Indus.*, 125 Wn.2d 533, 886 P.2d 189 (1994)). *Marley* and *Kingery* involved claims for widow's pension, not the maritime occupations statute. *Clausen* and *Gorman* involved maritime law, but do not discuss the Department's right to reimbursement under RCW 51.12.100(4). The Department was not even a party in *Clausen*. And the Supreme Court cited *Rhodes* with approval in *Gorman*, decided eight years after *Kingery*. *See Gorman*, 155 Wn.2d at 208-09. Had the Court thought this decision no longer good law, it would have said so.

And more importantly, none of these cases conflicts with *Rhodes*. In *Kingery*, the Court explained that "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." 132 Wn.2d at 169 (emphasis added). In *Marley*, it explained that "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.*”

125 Wn.2d at 543 (quotations removed).

These holdings are not contrary to *Rhodes*, and in fact harmonize with it. The effect of Peterson’s receipt of federal compensation was not an issue “encompassed within the terms of the [Department’s allowance] order” when he did not receive this compensation until years after the allowance decision. *See Kingery*, 132 Wn.2d at 169. As described above, the Department lacked the power to finally decide Peterson’s eligibility for state benefits when the possibility existed he would later receive compensation under the LHWCA. And RCW 51.12.100(4) allows the Department to “set aside or correct” an erroneous decision “in a manner provided by law.” *See Marley*, 125 Wn.2d at 543; *see also Birrueta*, 186 Wn.2d at 543-54 (holding that a more specific statute allows correction of an otherwise final order). Because the Department could not know when it allowed Peterson’s claim that he would receive LHWCA benefits years after this decision, the allowance order was not “‘final’ for purposes of res judicata.” *See Rhodes*, 103 Wn.2d at 899. Nothing about *Marley* or *Kingery* contradicts this holding in *Rhodes*.

4. The Department's authority to reject a claim under RCW 51.12.100(1) does not mean it cannot recoup state benefits under RCW 51.12.100(4) when a worker obtains federal maritime benefits

Finally, the fact that the Department may *reject* a claim based on its own assessment of the LHWCA's applicability does not operate to make the Department's unappealed *allowance* orders final for res judicata purposes. *See* AB 24-38. Peterson is correct that the Department may reject a worker's state claim based on its own determination that the LHWCA covers the claim. *See, e.g., Lindquist v. Dep't of Labor & Indus.*, 36 Wn. App. 646, 650-55, 677 P.2d 1134 (1984). But he is wrong that this authority implies that the Department's allowance orders are not subject to modification. It is RCW 51.12.100(4) (and the obtainment of compensation under maritime law) that operates to nullify an erroneous Department allowance order, and this subsection is simply inapplicable when the Department rejects a claim. No statute requires the Department to revisit its rejection decisions in the same way that it must reassess allowance when a worker obtains a federal maritime award. Nothing about the Department's authority to reject a claim contradicts the Court's holding in *Rhodes* that a Department order allowing benefits remains

subject to reversal under RCW 51.12.100(4) when the worker later obtains compensation through the LHWCA.⁵

B. *Rhodes* Benefits Workers, Allowing Them to Receive State Benefits While They Pursue Federal Maritime Compensation

In enacting RCW 51.12.100, the Legislature’s intent was to prevent double recoveries by maritime workers, in turn protecting “the state’s industrial insurance fund when a worker is adequately covered under the LHWCA.” *Gorman*, 155 Wn.2d at 208-09 (quoting *E.P. Paup*, 999 F.2d at 1348 n.3). Given the Legislature’s aim, the Court’s decision in *Rhodes* benefits workers. While receiving a double recovery would personally benefit Peterson, this result would work to the detriment of most workers in Washington.

Under *Rhodes*, the Department can freely allow workers’ compensation claims, even when circumstances suggest that a worker may ultimately receive maritime benefits. The Department provides salary replacement and medical treatment while the worker seeks compensation under the federal maritime laws. Workers must repay these benefits only if

⁵ Peterson recognizes this principle, noting that “[o]rders rejecting claims because of Longshore coverage are final, even if coverage is later rejected; but orders allowing claims despite potential Longshore coverage are never final.” AB 36. He complains that this results in a “non-neutral rule of law in Washington that discriminates against injured workers.” AB 36. But an allowance order is subject to reversal only if the worker seeks and obtains compensation under the LHWCA. There is nothing unfair about rejecting a worker’s claim when the worker receives compensation for the same injury under a federal statute. Indeed, the Legislature enacted RCW 51.12.100 to prevent double recoveries in these circumstances. *Gorman*, 155 Wn.2d at 208.

they obtain federal compensation. RCW 51.12.100(4). Because *Rhodes* allows the Department to reject the claim and seek repayment, an erroneous allowance decision does not place the state fund at risk. As the Board observed, “[t]his process ensures sure and certain relief to an injured worker consistent with our statutory scheme.” AR 7.

Allowing a double recovery to Peterson would undermine this available relief for injured workers. If the Department could not set aside an order allowing state benefits when the worker later obtains LHWCA compensation, it would be unlikely to ever allow claims with potential maritime issues. As the Board has explained, because the Department can recover benefits paid after a worker’s federal maritime claim is allowed, “[i]t is appropriate for the Department to allow [the worker’s] claim and pay benefits pending the adjudication of the federal claim.” *In re Campbell*, No. 07 21003, 2008 WL 6053226, *2 (Wash. Bd. Indus. Ins. Appeals Nov. 12, 2008). In fact, in this very case, the Department agreed to continue paying Peterson provisional benefits pending resolution of his federal maritime claims. AR 495, 589. If the Department could not recover these benefits, it would not be “appropriate to allow [such a] claim.” *Campbell*, 2008 WL 6053226 at *2. Because Peterson’s proposed rule would hurt workers, this Court should reject it.

C. The Board Acted Within Its Authority in Modifying Its Hearing Judge’s Proposed Decision

The Board properly modified its hearing judge’s proposed decision and reversed the allowance of Peterson’s claim. But even if the allowance order stood, the Department could still seek repayment from Peterson. Contrary to his arguments, the Department never agreed that it could not seek repayment absent reversal of claim allowance.

1. The Board’s review of proposed decisions is not limited to issues raised in a petition for review

The Board correctly reversed its hearing judge’s determination that the Department lacked authority to reverse allowance of Peterson’s claim. Peterson argues that the Board could not address this issue because neither he nor the Department raised it in a petition for review. AB 15-20. But the Board’s scope of review includes all contested issues in an appeal, and the Board correctly modified the proposed decision to reflect the Board’s own decisions and the Supreme Court’s direction in *Rhodes*.

The Board has broad authority to review the decisions of its hearing judges. RCW 51.52.020 provides that the Board “may not delegate to any other person its duties of interpreting the testimony and making the final Decision and Order on appeal cases.” A hearing judge is “merely an employee of the Board.” *Stratton v. Dep’t of Labor & Indus.*, 1 Wn. App. 77, 79, 459 P.2d 651 (1969). Proposed decisions and orders

are not the decisions and orders of the Board and “do not acquire that dignity until the Board formally adopts them.” *Stratton*, 1 Wn. App. at 79. The court has explained that until the Board issues a final decision, all matters in a case “properly lie within the bosom of the board for appropriate action” and that the Board does not lose “jurisdiction to act upon a petition to review a decision of one of its employees until it ma[kes] and enter[s] its final decision.” *Dep’t of Labor & Indus. v. Tacoma Yellow Cab*, 31 Wn. App. 117, 121-23, 639 P.2d 843 (1982).

The scope of the Board’s review is not limited to the specific issues raised in a petition for review. *In re Richard Sims*, No. 85 1748 (Wash. Bd. Indus. Ins. Appeals Oct. 29, 1986).⁶ Peterson argues that RCW 51.52.104 prevents the Board from reviewing a hearing judge’s conclusion of law when no party has sought review of that conclusion. AB 15-16. But while Peterson is correct that “party . . . waive[s] all objections or irregularities not specifically set forth [in a petition for review]” (RCW 51.52.104), nothing in the statute limits the Board’s independent authority to correct a proposed decision’s errors. Indeed, when the Board grants a petition for review (as it did here), RCW 51.52.106 authorizes it to “consider any and all issues properly raised by the Department order

⁶ A copy of this decision is available on the Board’s website at: <http://www.biiia.wa.gov/SDPDF/851748.pdf>

and the notice of appeal from that order.” *Sims*, No. 85 1748, at 3; RCW 51.52.106 (after granting review, Board may consider “the proposed decision and order, the petition or petitions for review and the record or any part thereof deemed necessary[.]”).⁷

The Board did not exceed its authority here. Courts give great weight to an agency’s interpretation of the law it administers. *Dep’t of Labor & Indus. v. Allen*, 100 Wn. App. 526, 530, 997 P.2d 977 (2000). After Peterson petitioned for review, the Board’s scope of review extended to all contested issues of law and fact and was not limited to the specific issues raised in the petition. *Sims*, No. 85 1748, at 2-3. As the Board has explained, “[t]o interpret RCW 51.52.104 and 51.52.106 in any other way would be to violate the clear language of RCW 51.52.020 and to permit a Board employee to bind this Board to an incorrect decision.” *Sims*, No. 85 1748, at 3. Because the question of whether the Department correctly rejected Peterson’s claim remained within “the bosom of the

⁷ As the claimant did in *Sims*, Peterson points to *Homemakers Upjohn v. Russell*, 33 Wn. App. 777, 658 P.2d 27 (1983), arguing this case precludes the Board from reviewing its hearing judge’s unprotested conclusions of law. AB 16-18. But *Homemakers* involved a party’s right to appeal in superior court, not the Board’s authority to review a proposed decision and order. *Homemakers*, 33 Wn. App. at 778. As the Board observed in *Sims*, nothing in *Homemakers* “derogate[s] from the court’s holdings in *Tacoma Yellow Cab*.” *Sims*, No. 85 1748, at 3.

Peterson also relies on *Sepich v. Department of Labor & Industries*, 75 Wn.2d 312, 450 P.2d 940 (1969), to support his waiver argument. AB 18-19. But this case involved the issues raised in a notice of appeal to the Board, not the Board’s authority to review proposed decisions. *Sepich*, 75 Wn.2d at 317. It also has no application here.

board,” it did not err when it corrected its hearing judge’s error of law.

Tacoma Yellow Cab, 31 Wn. App. at 121-22.

2. Even if the Board could not change the hearing judge’s conclusion about the allowance order, the Department could still seek repayment from Peterson

If the Court were to accept Peterson’s argument about unprotested conclusions of law, it would not change the outcome here. His claim would still close and the state benefits he received would remain due and owing. Peterson appears to believe that if the allowance order stands, the Department must keep his claim open, continuing to pay state benefits into perpetuity. AB 43. But in his petition for review, he failed to challenge the proposed decision’s conclusion that the Department must close his claim, instead focusing solely on the reimbursement amount. AR 15, 23-48. So if the Court were to accept his argument that the Board cannot modify unprotested conclusions of law, the proper course would be to remand the case to the Department to close the claim (as specified by the hearing judge’s unprotested conclusion). While Peterson now contends that the hearing judge’s conclusion exceeded the Board’s scope of review, AB 43, he made no such argument in his petition for review, so he has waived it on appeal. *See Value Vill. v. Vasquez-Ramirez*, 11 Wn. App. 2d 590, 606, 455 P.3d 216 (2019), *review denied sub nom.* No. 98137-0, 2020 WL 2072047 (Wash. Apr. 29, 2020).

Nor did the Department concede that it must reverse the allowance of Peterson's claim before seeking an overpayment. *See* AB 20-22. If the Court were to determine that the Department could not set aside the allowance order, nothing would prevent the Department from issuing an overpayment to Peterson. RCW 51.12.100(4) explicitly permits the Department to recoup benefits paid to workers who receive payments under the maritime laws. As in *Birrueta*, this authority implies the power to reverse an allowance order, the source of the improper state benefits. *See Birrueta*, 186 Wn.2d at 544, 554-55. This was also the Supreme Court's holding in *Rhodes*. 103 Wn.2d at 898-99. That said, if this Court held that the allowance order must stand, the Department could still issue individual overpayment orders for each payment made to Peterson.

The Department maintained this position throughout the litigation. At the Board, it explained that “[i]f the order under appeal is reversed, the Department could always issue an overpayment order and close the claim. The allowance order would still be valid, but all payments made under the claim could be recouped as an overpayment pursuant to RCW 51.12.100.” AR 87-88. Even so, Peterson argues that in superior court, the Department “agreed that it lacked the authority to assess any overpayment against Mr. Peterson unless the claim is rejected.” AB 20-21. In support of this assertion, he points to a single sentence in the Department's trial brief and

a statement by its counsel during oral argument. AB 20-21 (citing CP 55; RP 39).

The record does not support any concession by the Department. In its superior court trial brief, the Department noted that RCW 51.12.100 “becomes effective only when the Department cancels an allowed claim and is seeking to recoup benefits it has already paid.” CP 55. But this statement was made in the context of arguing that the Department’s statutory authority differs depending on whether it acts to reject or allow a claim. CP 55. As discussed above, unlike a rejection order, the Department’s allowance orders remain subject to modification under RCW 51.12.100(4). *See* Section V.A.4, *supra*. The statement in the Department’s brief was not a concession that it lacked authority to issue an overpayment order if it could not reverse claim allowance. CP 55.

Similarly, while the Department’s counsel stated during oral argument that the Department could “seek an overpayment once they cancel their allowance order,” this statement related to the Department’s differing practices for Jones Act recoveries and LHWCA awards. RP 39. For Jones Act recoveries, the Department receives only a share of the recovery under the third-party distribution statute; for LHWCA awards, the Department closes the claim and issues an overpayment order directly to the worker for all benefits paid. RCW 51.12.100(4); AR 481-82, 496-

97. Again, the statement had nothing to do with whether the Department could seek to recover overpayments despite an allowed claim. *See* RP 39-40.

These statements are hardly the concessions that Peterson alleges. Instead, they simply describe the Department's practice, consistent with *Rhodes*, of reversing claim allowance and issuing an overpayment order when a worker obtains LHWCA compensation. Contrary to Peterson's contention, the Department has never asserted that it could not seek repayment absent reversal of claim allowance. Nor does the statute support such a result.

D. The Department Is Not Limited to Reimbursement for Payments Made Before Peterson Settled His Maritime Claims

The Department's reimbursement rights are not limited to collecting benefits paid before a claimant receives a settlement under the LHWCA. *See* AB 39-43. In Peterson's view, the Department lacks "statutory authority to assess an overpayment for anything paid" after he executed his LHWCA settlement. AB 40. This is because, Peterson argues, only "concurrent receipt" triggers the Department's reimbursement right and any payments made by the Department after the settlement agreement's "singular payment" were not concurrent. AB 40-41.

This argument lacks merit. Regardless of the timing of a settlement agreement, a worker who receives payment under the federal maritime laws must repay any benefits paid under the Industrial Insurance Act. RCW 51.12.100(4). This is because the Act does not apply to “workers for whom a right or obligation exists under the maritime laws.” RCW 51.12.100(1). The Legislature’s intent was to prevent a double recovery, and this no less true when a worker receives a lump sum that resolves a maritime claim. *See Gorman*, 155 Wn.2d at 208. Nothing in the statute prevents the Department from seeking repayment of state benefits when it takes time for Department to learn of the settlement (as it did here). AR 490. Whether the worker receives state workers’ compensation benefits before or after an LHWCA settlement, there is payment under both the Act and the maritime laws, and RCW 51.12.100(4) requires the worker to repay the state benefits. The Court should reject Peterson’s strained interpretation of the statute.⁸

⁸ Peterson argues that the Court must accept his interpretation because courts resolve the Industrial Insurance Act’s ambiguities in favor of injured workers. AB 42-43. But this rule of construction applies only when ambiguities exist, and courts “will not use the liberal construction requirement to support a strained or unrealistic interpretation of the statute.” *LaRose v. Dep’t of Labor & Indus.*, 11 Wn. App. 2d 862, 882, 456 P.3d 879 (2020) (quotations removed).

E. The Superior Court Correctly Awarded Statutory Costs

The superior court properly awarded the Department its costs under RCW 4.84.010 for statutory attorney fees and deposition transcripts used at trial. The Supreme Court has held that RCW 4.84 applies to appeals in the superior court from the Board. *Black v. Dep't of Labor & Indus.*, 131 Wn.2d 547, 557-58, 933 P.2d 1025 (1997); *see also Cooper v. Dep't of Labor & Indus.*, 188 Wn. App. 641, 651-52, 352 P.3d 189 (2015). Nevertheless, Peterson argues that RCW 4.84 does not apply because the Industrial Insurance Act contains provisions about workers' attorney fees and the sources of funds for appeals. AB 43-49 (citing RCW 51.52.130, .150).

These arguments lack merit. Courts have expressly rejected Peterson's contention that RCW 51.52.130 precludes an award of statutory attorney fees to the Department. *Frecenak v. Dep't of Labor & Indus.*, 142 Wn. App. 713, 729-30, 175 P.3d 1109 (2008), *aff'd on other grounds sub nom. Kustura v. Dep't of Labor & Indus.*, 169 Wn.2d 81, 233 P.3d 853 (2010). And neither RCW 51.52.130 or RCW 51.52.150 says anything about the Department's right as a prevailing party under RCW 4.84.010. Because Peterson's arguments provide no basis to depart from binding Supreme Court precedent, this Court should affirm the award of statutory costs.

VI. CONCLUSION

Peterson was not entitled to state workers' compensation benefits when he received compensation for the same injury under federal maritime law. Our Supreme Court has held that the finality of an allowance order under RCW 51.52.050 and RCW 51.52.060 does not prevent the Department from recovering state benefits from such a worker. This Court should affirm.

RESPECTFULLY SUBMITTED this 20th day of May, 2020.

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No. 53885-7
**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

JOSHUA PETERSON,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

CERTIFICATE OF
SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Respondent's Brief and this Certificate of Service in the below described manner:

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RESPECTFULLY SUBMITTED this 20th day of May 2020.



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