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Division III  
State of Washington

Case No. 330940 & 331431

WASHINGTON COURT OF APPEALS, DIVISION III

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DEPARTMENT OF LABOR AND INDUSTRIES  
OF THE STATE OF WASHINGTON

Respondent

v.

BLANCA ORTIZ AND UNIVERSAL FROZEN FOODS,

Appellants

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**UNIVERSAL FROZEN FOODS' BRIEF**

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## I. INTRODUCTION

This appeal pertains to employer's right to recoup an overpayment of time loss compensation that it incurred when Ortiz was placed on the pension rolls and Second Injury Fund Relief was granted. The trial court agreed with the Board of Industrial Insurance Appeals (hereinafter, "the Board") that employer overpaid time loss compensation and that the Department of Labor and Industries (hereinafter, "the Department") incorrectly denied a timely request for an overpayment order. But the trial court then stepped outside the bounds of the law by holding the Department had no obligation to reimburse employer for the overpayment.

The Department administers the Second Injury Fund—a fund with the purpose of relieving employers from the burden of paying for disability that derives from a combination of a work-related injury and a preexisting disability. Upon the Department's determination that Ortiz was entitled to a pension and employer was entitled to Second Injury Fund Relief, it had an obligation to reimburse employer from that fund for the time loss employer had paid. Instead of reimbursing employer, the Department issued a check to Ortiz and created a double payment to Ortiz. It refused to issue an overpayment order—a refusal it later conceded was an error. It continues to contend that it has no obligation to reimburse employer in full for the overpayment.

The trial court eschewed the law and legal principles in favor of its personal judgment that the Department was “less wrong” regarding the overpayment because the parties created the overpayment by entering into an agreement. That characterization is wholly false and irrelevant to the Department’s obligation to reimburse employer for an established overpayment. The trial court erred; its decision should be reversed.

## **II. ASSIGNMENT OF ERROR AND ISSUES RELATIVE TO ASSIGNMENT**

### **A. Assignment of Error**

The trial court erred as a matter of law in its interpretation and application of RCW 51.32.240 and RCW 51.44.040, when it held the Department could not reimburse employer’s overpayment of time loss compensation.

### **B. Issues Relative to Assignment of Error**

1. The trial court found and the Department concedes that the Department erred in not issuing an overpayment order. As an uncontested matter of law, the Second Injury Fund, and not employer, is liable for payments to Ortiz from October 1, 2002 to July 6, 2011.

2. The trial court erred in finding the overpayment was created by the Agreement of the Parties. As a matter of law, the

overpayment was created by the Department's orders placing Ortiz on pension and granting Second Injury Fund Relief.

3. RCW 51.32.240 obligates the Department to seek recoupment of the overpayment on behalf of employer.

4. RCW 51.44.040 and case law authorizes and obligates the Department to reimburse employer for its overpayment in a lump sum from the Second Injury Fund, which is legally liable for the payments to Ortiz.

### **III. STATEMENT OF THE CASE**

#### **A. Factual Summary**

The facts regarding this injury claim were stipulated by the parties. Blanca Ortiz was injured while working at Universal Frozen Foods (hereinafter, "employer") on May 13, 1988. CP 101. Employer made timely payments of time loss compensation benefits to Ortiz, starting on September 9, 2003 and continuing through July 7, 2011. CP 102.

The Department issued a closing order on May 12, 2010, and affirmed this order on August 3, 2010, without an award of permanent partial disability but with time loss through May 12, 2010. CP 101. Ortiz appealed the closing order to the Board. The Department, although a party to all such matters, chose not to actively participate in the litigation. On May 31, 2011, Ortiz and employer entered into an Agreement of the

Parties which indicated that due to the combined effects of the injury and a preexisting mental health condition, Ortiz had been permanently and totally disabled since October 1, 2002, and was entitled to a pension.

CP 119-124. On June 2, 2011, the Board issued an order reversing the closing order, approving the Agreement of the Parties, and remanding the case to the Department to place Ortiz on a pension and consider Second Injury Fund Relief. CP 117. The Department issued an order on July 6, 2011, placing Ortiz on pension with an effective date of October 1, 2002. CP 25. The next day, on July 7, 2011, the Department issued an order granting employer Second Injury Fund Relief under RCW 51.16.120, and directing employer to pay \$8,784.75 into the pension reserve for the part the work-related injury played in Ortiz's permanent total disability. The balance of the pension was ordered to be charged against the Second Injury Fund. CP 165.

On September 23, 2011, the Department issued a check to Ortiz in the amount of \$149,066.27 representing pension payments retroactive to October 1, 2002. CP 167. Employer contacted Ortiz's counsel and learned of the payment by the Department, and learned Ortiz did not intend to repay the overpayment of time loss benefits without an overpayment order. CP 169. Employer then timely requested the issuance of an overpayment order for time loss it paid September 9, 2003 through

July 7, 2011. CP 169-70. The Department denied this request; employer filed a protest, but on July 18, 2012, the Department issued an order affirming its decision. CP 172, 174-76. Employer timely appealed the July 18, 2012 order to the Board. CP 102, 177-78.

An Industrial Appeals Judge issued a Proposed Decision and Order on November 27, 2013, finding that the Department erred in denying the request to issue an overpayment order and refusing to reimburse employer for overpaid time loss for the period of September 9, 2003 through July 7, 2011. The Department was directed to repay the employer the overpayment. CP 47. The Department filed a timely Petition for Review, which the Board denied on February 3, 2014 by adopting the IAJ's decision as the final Decision and Order of the Board. CP 15. The Department timely appealed the Board's order to the Benton County Superior Court.

Judge Alex Ekstrom presided over a bench trial on November 17, 2014. Counsel for the Department conceded in closing arguments that it did not contest the issuance of an overpayment order. RP 28-29. The trial court entered Judgment on January 7, 2015, ruling that the Department did error by refusing to issue an overpayment order. However, the trial court reversed the Board, concluding the Department was not authorized by

statute to reimburse employer for the overpayment of time loss, and employer had to seek recoupment from Ortiz on its own. CP 223-226.

Both Ortiz and employer timely appealed this Judgment to Division III of the Washington Court of Appeals. CP 229-230, 238-240. These appeals were consolidated into the present action.

#### IV. ARGUMENT

The narrow question on appeal is whether the Department must repay employer for an overpayment of time loss from the Second Injury Fund. The answer requires interpretation and application of RCW 51.32.240 in the context of Second Injury Fund Relief under RCW 51.44.040. Although it initially refused to issue an overpayment order, by the time of trial the Department conceded an overpayment existed and an overpayment order was appropriate. RP 28-29. The Department only disputed whether that overpayment should be advanced out of the Second Injury Fund or paid only when monies were recovered from Ortiz. Ignoring the final order granting Second Injury Fund Relief and the Department's concessions, the trial court arrived at an untenable conclusion: an overpayment order existed but the Department had no obligation to seek recovery on behalf of employer. Not only does the Department have such an obligation, it has the obligation to reimburse

employer in a lump sum from the Second Injury Fund. The trial court committed errors of law, and its Judgment cannot stand.

**A. Contextual Background of Pensions, Second Injury Relief and Overpayments Under the Statute**

**1. Pensions**

As part of the policy of prompt compensation to an injured worker, time loss (also called temporary disability or wage-replacement benefits) is paid to a worker temporarily unable to work due to injury. Such payments continue until a final closing order outlines the dates of time loss. At the time of a closing order, a worker may be found capable of work effective a specified date, and time loss would end on that date. However, those workers found permanently and totally disabled from work would be placed on a pension effective the date the evidence establishes they were permanently and totally disabled. RCW 51.32.060(1), RCW 51.32.070(1). Pensions are paid from a pension reserve fund by the Department, but a self-insured employer would continue to pay into that fund when the pension is due to its work-related injury. *Id.*

**2. Second Injury Fund Relief**

In some cases, a worker is not disabled because of an injury alone, but because of an injury combined with another preexisting physical or

mental disability. An injured worker is entitled to full compensation, even if some disability can be attributed to preexisting conditions. *Tomlinson v. Puget Sound Freight Lines, Inc.*, 166 Wn.2d 105, 117, 206 P.3d 657 (2009). The combined effect of the injury and “second injury” can be permanent and total disability. In such a case, a worker would be placed on a pension, but payments would be paid from the Second Injury Fund. A self-insured employer makes payments to the Second Injury Fund only to the extent the disability resulted only from the injury, not the separate disability. RCW 51.16.120(1); *Boeing Co. v. Doss*, --- Wn.2d ---, 347 P.3d 1083 (2015). “The second injury fund is a component of the state workers’ compensation system and is used to partially relieve an employer’s costs related to an injured worker’s pension.” *Crown, Cork & Seal v. Smith*, 171 Wn.2d 866, 873, 259 P.3d 151 (2011). Its purposes include encouraging the hiring/retaining of disabled workers, encouraging safety, and preventing unfair financial burden on an employer for costs not associated with its own injury. *Id.*

The Department has sole authority to determine Second Injury Fund Relief and administer the Second Injury Fund. Even when both the worker and the employer agree a worker is totally and permanently disabled as a result of the combined effects of an injury and preexisting disability, the Department can refuse Second Injury Fund Relief and will

do so when the statutory requirements for granting such relief are not met. *See e.g. Smith* at 873, 879-80 (finding, despite parties agreement that injury plus worker's CTS condition entitled the worker to a pension, the requirements for Second Injury Fund were not met). When a worker is placed on a pension retroactively, and Second Injury Fund Relief is granted by the Department, the Department reimburses the employer for the overpayment of time loss from the Second Injury Fund. *See e.g. In re Frederic Cuendet*, BIIA Dec., 99 21825 (2001) (recognizing this fact); *Jensen v. Dep't of Ecology*, 102 Wn.2d 109, 113, 685 P.2d 1068 (1984)(courts give substantial weight to the Board's interpretation of law).

### **3. Recovery of Overpayments**

In 1949, the Washington legislature first added a provision to the Industrial Insurance Act that allowed recoupment of overpaid benefits. *Stuckey v. Dept. of Labor & Indst.*, 129 Wn.2d 289, 298, 916 P.2d 399 (1996). RCW 51.32.240 was enacted in 1975 to grant statutory authority to recover overpayments created by mistake, fraud, adjudication errors or similar scenarios. *Id.* at 299; *Weyerhaeuser Co. v. Bradshaw*, 82 Wn. App. 277, 280, 918 P.2d 933 (1996) (recognizing amendment to grant such authority). RCW 51.32.240, among other statutes, authorizes recoupment of overpaid benefits. *Stuckey v. Dept. of Labor & Indst.*, 129 Wn.2d at 298 (discussing RCW 51.32.240 and other statutes authorizing

recoupment in different scenarios). As pertinent here, RCW 51.32.240 discusses recoupment of overpayments:

(1)(a) Whenever any payment of benefits under this title is made because of clerical error, mistake of identity, innocent misrepresentation by or on behalf of the recipient thereof mistakenly acted upon, or any other circumstance of a similar nature, all not induced by willful misrepresentation, the recipient thereof shall repay it 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. The department or self-insurer, as the case may be, must make claim for such repayment or recoupment within one year of the making of any such payment or it will be deemed any claim therefore has been waived.

(4) Whenever any payment of benefits under this title has been made pursuant to an adjudication by the department or by order of the board or any court and timely appeal therefrom has been made where the final decision is that any such payment was made pursuant to an erroneous adjudication, the recipient thereof shall repay it and recoupment may be made from any future payments due to the recipient on any claim whether state fund or self-insured.

RCW 51.32.240(4)(a) vests discretion to waive recoupment from a worker solely in the Department. When the Department waives recoupment of an overpayment made by a self-insured employer, the Department must still reimburse that employer. Similarly, RCW 52.32.240(4)(b) places an affirmative duty on the Department to collect information about overpayments resulting from decisions of the Board and recoup such payments on behalf of the self-insured employer:

(4)(b) The department shall collect information regarding self-insured claim overpayments resulting from final decisions of the board and the courts, and recoup such overpayments on behalf of the self-insurer from any open, new, or reopened state fund or self-insured claims. The department shall forward the amounts collected to the self-insurer to whom the payment is owed. The department may provide information as needed to any self-insurers from whom payments may be collected on behalf of the department or another self-insurer. Notwithstanding RCW 51.32.040, any self-insurer requested by the department to forward payments to the department pursuant to this subsection shall pay the department directly. The department shall credit the amounts recovered to the appropriate fund, or forward amounts collected to the appropriate self-insurer, as the case may be.

Together, the provisions of RCW 51.32.240 instruct that an overpayment may be recouped from a worker or the worker's future benefits, and the Department has an affirmative obligation to recover a recoupment on behalf of a self-insured employer. These provisions align with the Second Injury Fund statute because in such a case, all future benefits come from the fund as administered by Department. In such a case, both because of the purpose of Second Injury Fund Relief and practicality of administration, the Department must reimburse the self-insured employer for any overpayments from the Second Injury Fund.

*Cuendet, BIIA Dec., 99 21825.*

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**B. Trial Court Erred in Finding an Overpayment was Created by the Agreement of the Parties.**

In Finding of Fact 1.5, the trial court found (referring to the Agreement of the Parties): “The agreement resulted in Universal Frozen Foods incurring an overpayment of time loss for the time period September 9, 2003 through July 7, 2011.” CP 225. This led the trial court to enter a second erroneous Finding of Fact 1.10: “\*\*\* Universal Frozen Foods, as the payor of time loss compensation, is in a better position to know when a settlement agreement between an employee and a self-insured employer creates an overpayment. Universal Frozen Foods—and not the Department—should be the party to try to collect any overpayment created by its settlement.” CP 255. It also led to an inaccurate Conclusion of Law 2.3, in which the trial court again characterized the agreement as creating an overpayment. CP 226. These findings and conclusions are both legally and factually incorrect and demonstrate a fundamental error in the trial court’s understanding of Second Injury Fund Relief.

As a factual matter, the Agreement of the Parties and the resulting Board order placed Ortiz on pension rolls only “with consideration for second injury fund relief”. CP 123, 117. Placing Ortiz on pension did not create an overpayment because the time loss payments already made by

employer would simply be credited as pension payments; no double payments to Ortiz would occur. Unless the Department ordered Second Injury Fund Relief, employer would remain liable for the pension and thus would have no basis to claim an overpayment. Factually, until the Department issued its July 7, 2011 order granting Second Injury Fund Relief, employer had not overpaid benefits. This final order, however, indicated employer's contribution to the pension was \$8,784.75 and "the balance of the pension reserve required to pay this pension shall be charged against the Second Injury Fund." CP 165. As of that order, employer had overpaid time loss compensation for the amount of those payments made from October 1, 2002 forward, less its ordered contribution to the pension.

Legally, neither the Agreement nor the Board's order could grant Second Injury Fund Relief. As outlined above, the Department has sole authority to consider and determine that Second Injury Fund Relief was applicable. It had the sole authority to issue an order granting Second Injury Fund Relief. The Department's written briefs below reveal that it knows it had the obligation to independently consider Second Injury Fund Relief. It admits it issued orders applying Second Injury Fund Relief consistent with the statute. CP 185. It noted that the Department "found Ortiz to be eligible" and its actions "follow the statutory requirements".

Throughout the proceedings and particularly at trial, the Department used incendiary but inaccurate characterizations to paint itself as a vulnerable and powerless party in these events. It wrongly cried that it was being asked to “indemnify” employer. Contrary to its unfounded characterizations, the Department is a party to every litigation and at its own discretion chooses its level of participation. It was not bound by the parties’ desire to have Second Injury Fund Relief. The *Smith* case demonstrates that the Department can and will refuse Second Injury Fund Relief even when the parties support it, if the statutory requirements for such relief are not met. *Smith* at 873, 879-80. In cases where the requirements under RCW 51.16.120 are not met, the Department does not grant Second Injury Fund Relief. *Rothschild Intl. Stevedoring Co. v. Dept of Labor and Indus.*, 2 Wn. App. 967, 969-70, 478 P.2d 759 (1970); *Donald W. Lyle, Inc. v. Department of Labor & Indus.*, 66 Wn.2d 745, 746-48, 405 P.2d 251 (1965). Here, the Department seems to complain that it had to grant such relief because it was bound *by statute* because the statutory requirements were met. Employer agrees the Department has the authority and obligation to apply RCW 51.16.120 correctly; that does not mean the Department has been tricked by the parties. The Department had full access to all information in this case.

The trial court erred in its finding that the Agreement of the Parties created an overpayment in this case. The overpayment was created both factually and legally by the Department's July 7, 2011 order making the Second Injury Fund responsible for pension payments less the contribution from employer. Once the Second Injury Fund became liable for pension payments, the amount of time loss payments previously paid by employer for the same period were an overpayment by employer. The second payment of benefits to Ortiz was not necessary to create the overpayment by employer. As of the order making the Second Injury Fund liable for pension payments, employer had overpaid benefits, and was entitled to reimbursement from the Second Injury Fund. The Department, however, compounded the issue by actually issuing a check to Ortiz rather than reimbursing employer. The Department created the double recovery to Ortiz requiring recoupment from her directly or through future benefits. Regardless of the method of recoupment, the Department—as administrator of the Second Injury Fund—has an obligation to reimburse employer from that fund.

The trial court's conclusion that the Agreement of the Parties created an overpayment is fatally flawed, and undermines the balance of the trial court's decision. It should be reversed.

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**C. Trial Court Erred in Concluding the Department was not Authorized to Recover Overpayment on Behalf of Employer**

In Conclusion of Law 2.2, the trial court concluded no statute authorized the Department to reimburse employer for an overpayment of time loss out of the Second Injury Fund. CP 225. Although it concluded an overpayment existed and the Department erred in refusing to issue an overpayment, the trial court concluded the Department had no authority to reimburse employer for the overpayment. This conclusion is legal error.

**1. RCW 51.32.240 authorizes and even requires the Department to recoup employer's overpayment.**

Statutory interpretation is an issue of law, reviewed de novo by the appellate courts. *Waste Management of Seattle, Inc. v. Utilities & Transp. Comm'n*, 123 Wn.2d 621, 627, 869 P.2d 1034 (1994); *Our Lady of Lourdes Hosp. v. Franklin County*, 120 Wn.2d 439, 443, 842 P.2d 956 (1993). The courts look to the plain language of a statute and legislative history to determine legislative intent. *Cherry v. Municipality of Metro. Seattle*, 116 Wn.2d 794, 799, 808 P.2d 746 (1991).

The plain language of RCW 51.32.240 authorizes reimbursement of overpayment of benefits by an employer. Here, the Department concedes an overpayment occurred and employer is entitled to an overpayment order. The statutory basis for the existence of an overpayment or employer's right to recoup that overpayment is not at

issue. But the trial court erred in concluding the Department had no obligation or authority to recoup the overpayment or reimburse employer. RCW 51.32.240 places an obligation on the Department to seek recoupment and reimburse a self-insured employer.

The Department has an obligation under RCW 51.32.240 to at least seek recoupment on behalf of employer. For example:

“The department shall collect information regarding self-insured claim overpayments resulting from final decisions of the board and the courts, and recoup such overpayments on behalf of the self-insurer from any open, new, or reopened state fund or self-insured claims. The department shall forward the amounts collected to the self-insurer to whom the payment is owed. \*\*\*”  
RCW 51.32.240(4)(b) (emphasis added).

The July 6, 2011 and July 7, 2011 final orders (which reversed the Department’s May 12, 2010 closing order after Ortiz’s appeal) placed Ortiz on pension and granted Second Injury Fund Relief. As set out above, these resulted in an overpayment, and qualify as final decisions under RCW 51.32.240(4) that place an affirmative obligation on the Department to recoup and reimburse the overpayment. Similarly, under RCW 51.32.240(1)(a), the Department must recoup the overpayment from Ortiz from the future payments it administers under the Second Injury Fund. Even the Department conceded that it likely had an obligation under RCW 51.32.240(1) or (4) to recoup the overpayment from Ortiz and

reimburse employer as it made that recoupment; it simply disagreed it had to advance repayment. CP 188, 191.

At the minimum, the trial court erred by concluding the Department did not have an obligation to reimburse employer's overpayment of time loss. Instead of evaluating the statutes and determining if the Department had an obligation to reimburse employer, the trial court created its own analysis. It created a "more wrong" equitable evaluation of whether the Department or employer should have to recover the overpayment. In doing so, it ignored its own ruling that an overpayment existed and the statutes that outline the Department's obligation to recoup overpayments and reimburse self-insured employers.

Nothing in the statutes or case law suggest that the Department's obligation to recoup and reimburse overpayments is contingent on which party had the better opportunity to discover an overpayment. The trial court's factual finding that employer had the better opportunity is in error, but is also irrelevant. The trial court did not rely on the statute, legislative intent, or even common sense to reverse the Board's decision; rather, it relied on its judgment that the Department was "less wrong" because employer did not identify an overpayment (or more accurately the possibility of one) in the Agreement. This balancing of which party was more or less wrong in identifying the existence of an overpayment is

devoid of any connection to the statute or legislative purpose. Subjective evaluation of “wrongness” has no part in the statute; the trial court failed to properly apply the law, and its decision cannot stand. Under RCW 51.32.240, the Department has an obligation to recoup the overpayment from Ortiz and reimburse employer.

**2. Based on RCW 51.44.040, the Department has an obligation to reimburse employer in full from the Second Injury Fund.**

As set out in part IV.C.1. above, the trial court erred in the first instance simply by finding the Department had no authority or obligation to reimburse employer. That obligation is clear in the statute. The more pertinent question, and the focus of the dispute at the Board and trial, is how the Department must reimburse employer. The trial court erred in the second instance by failing to affirm the Board’s determination that the Department had the obligation to reimburse employer in a lump sum from the Second Injury Fund.

The reimbursement obligation at issue here does not turn solely on the overpayment statute RCW 51.32.240. This matter concerns an overpayment created at least in part by the granting of Second Injury Fund Relief. Thus, both the overpayment statute and RCW 51.44.040 must be considered. The Board recognized and addressed both statutes, but the trial court ignored the Second Injury Fund statute altogether. Part of the

trial court's error is traceable back to its fundamentally flawed finding that the overpayment was created by the Agreement of the Parties. This erroneous understanding of the effect of the Department's order granting Second Injury Fund Relief caused the trial court to avoid the key facts that the liable entity or fund is the Second Injury Fund, and the Department administers that fund.

The Board, in the context of the Second Injury Fund, reached a conclusion consistent with the overpayment statutes, the purpose of the fund, and administrative efficiency. As the Department has tacitly admitted, it is responsible for future payments to Ortiz, and has sole control over recouping the double payments from Ortiz. Administratively, and aligned with its obligations under RCW 51.32.240, the Department should be responsible for recouping the overpayment and reimbursing employer. But beyond these practical considerations, the Department's obligation to fully reimburse employer in a lump sum from the Second Injury Fund meets the purpose and policy behind the Second Injury Fund.

Under RCW 51.44.040, when a worker is permanently and totally disabled due to the combined effects of the injury and other impairments, an employer may seek relief from the Second Injury Fund. The purposes of the fund are to encourage hiring previously disabled workers and avoid overburdening an employer for disabilities not caused by its injury. *Smith*,

171 Wn.2d 866, 873; *Jussila v. Dept. of Labor & Indus.*, 59 Wn.2d 772, 778-79, 370 P.2d 582 (1962). Any rule that makes it easier for an employer to obtain reimbursement from the Second Injury Fund will serve the purpose of encouraging hiring of previously injured or disabled workers. *Jussila* at 778-79. Consistent with this purpose, the Board requires the Department to reimburse employers, fully and upfront, from the Second Injury Fund for any overpayments created by the retroactive application of relief.

This makes sense. When the Department grants Second Injury Fund Relief, it finds that that fund, and not the self-insured employer, is responsible for pension payments. Here, the Department's final order identifies the Second Injury Fund as the liable entity for Ortiz's pension from October 1, 2002 forward. Employer is not liable for any of those payments; the fund is liable. Failing to reimburse employer—leaving it to employer completely or limiting reimbursement only to monies as recouped from Ortiz—contradicts the purpose of the Second Injury Fund. Essentially, the Department wants self-insured employers to bear the risk of non recovery of overpayment of benefits that are rightfully the responsibility of the fund. This makes it harder, not easier, for self-insured employers to obtain reimbursement from the Second Injury Fund. Such a process would directly contradict the purpose of the fund.

The Board has recognized this concern and determined that in the context of the Second Injury Fund, the fund and not employers should bear the risk of non-recoupment. In its significant decision, *Cuendet*, BIIA Dec., 99 21825, the Board addressed a factual scenario similar to that presented here. Mr. Cuendet had an allowed injury claim from 1989 and received time loss compensation until December 1, 1998. He was then found eligible for a pension due to the combined effects of the injury and a preexisting disability and placed on pension effective September 10, 1998. The Department was granted Second Injury Fund Relief. The self-insured employer was found entitled to reimbursement by the Department from the Second Injury Fund for the time loss it paid after the effective date of the pension order. *Id.* In reaching its decision, the Board recognized this made the Department the party bearing the burden of collecting recovery from the worker, but determined that result was consistent with statutory intent and efficient administration. It noted that the Department has sole authority to administer the Second Injury Fund, and such authority includes the power to reimburse the employer. It noted that RCW 51.32.240(1), (4) place the burden on the Department to seek recoupment. Finally, it noted that in the context of Second Injury Fund Relief, the self-insured employer has no obligation to make further benefit

payments so on a practical level, only the Department has the ability to efficiently recoup overpayments from future benefits. *Id.*

Since its decision in *Cuendet*, the Board has revisited similar situations and adhered to its decision. *In re Randy H. Carras*, Dekt Nos. 02 22305 (Feb. 17, 2004). Mr. Carras received time-loss until placed on a pension and granted Second Injury Fund Relief with a retroactive effective date. The Board concluded the Department had an obligation to reimburse the self-insured employer for an overpayment in a lump sum, not as it recovered from the worker. *See also In re Debra A Jarvis*, Dekt. No. 10 16440 (Nov. 17, 2011). It reached the same decision here, finding the Department responsible to repay employer for the full overpayment of time loss when it placed Ortiz on the pension rolls retroactively and granted Second Injury Fund Relief. CP 45-46, 15.

Under RCW 51.44.040 and RCW 51.32.240, the Department has an affirmative obligation to reimburse employer for its overpayment of time loss in a lump sum from the Second Injury Fund. The trial court erred as a matter of law when it concluded the Department had no such authority or obligation.

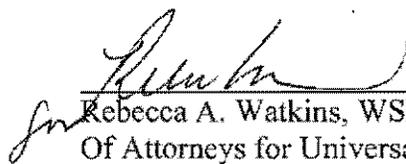
## V. CONCLUSION

The trial court erred in its application of law and findings of fact. It erred first by finding the overpayment was created by the Agreement of

the Parties. Both factually and legally, the overpayment was created by the Department's orders placing Ortiz on pension and granting Second Injury Fund Relief. The trial court also failed to correctly apply RCW 51.32.240 and RCW 51.44.040 and confirm the Board's determination that the Department had an affirmative obligation to reimburse employer in a lump sum for its overpayment of time loss from the Second Injury Fund. The weighing of "wrongness" analysis created and applied by the judge has no place in this determination. As outlined above and in its arguments before the trial court, employer respectfully asks the Court to reverse the Judgment and remand this case to the trial court for entry of an order affirming the Decision and Order of the Board.

Dated: June 11, 2015

Respectfully submitted,

  
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Rebecca A. Watkins, WSBA No. 45858  
Of Attorneys for Universal Frozen Foods

**CERTIFICATE OF SERVICE**

I hereby certify that on this date, I filed **UNIVERSAL FROZEN**

**FOODS' BRIEF** with the following:

Washington Court of Appeals - Division III  
500 N. Cedar Street  
Spokane, WA 99201-1905

I further certify that on this date, I mailed a copy of the foregoing

**UNIVERSAL FROZEN FOODS' BRIEF** via first class mail, postage prepaid, with the United States Postal Service to the following:

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