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Division III
State of Washington

NO. 33094-0 & 33143-1

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

DEPARTMENT OF LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondent,

v.

BLANCA ORTIZ & UNVERSAL FROZEN FOODS,

Appellants.

**DEPARTMENT OF LABOR & INDUSTRIES
BRIEF OF RESPONDENT**

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I. INTRODUCTION

By opting to self-insure, an employer assumes the responsibility of actively administering the claims of its own injured workers, rather than relying on the Department of Labor and Industries. No statute requires the Department to indemnify a self-insurer for an overpayment for time loss compensation paid by the self-insurer. The applicable statute requires only that the Department collect overpayments from future benefits and remit those amounts to the employer.

Here, Universal Frozen Foods (Universal) and Blanca Ortiz entered an agreement in 2011, without the Department's participation, that placed Ortiz on the pension rolls in 2002. Universal had paid Ortiz time loss compensation from 2002 through 2011, but since the agreement did not mention the resulting overpayment of time loss compensation, the Department placed Ortiz on the pension roll effective 2002 and awarded back payments to her.

The superior court correctly ruled that the Department did not have to advance Universal for the time loss compensation it had also paid Ortiz during that time. No statute requires the Department to use the second injury fund to reimburse a self-insured employer who has overpaid time loss compensation to one of its workers. This Court should affirm.

II. ISSUES

- A. Is the Department required to use the second injury fund to reimburse a self-insured employer for erroneously paid time loss compensation when none of the statutes governing the fund authorize the Department to use it for that purpose?
- B. Does Ortiz have standing to appeal, when she agrees that there was an overpayment, she does not dispute that either Universal or the Department should be entitled to collect on it, she does not seek any relief from this Court, and the outcome of the case will not affect her interests?
- C. May Universal receive reimbursement from the self-insurer overpayment reimbursement fund, when the statutes governing that fund provide that it only applies to benefits paid pending an appeal and that it may only be used if an employer ultimately prevails in showing that those benefits should not be paid, and when neither of those requirements have been met?

III. STATEMENT OF THE CASE

A. **The Second Injury Fund Pays Self-Insurers the Difference Between a Worker's Pension and the Disability the Worker Suffered, Had There Been No Prior Disability**

An injured worker can be entitled to different benefits, including paying the costs for treatment, time loss compensation (i.e., paying for lost wages), permanent partial disability, loss of earning power, or a pension, among others. RCW 51.32.010, *et seq.* A worker receives time loss compensation when she is temporarily disabled and unable to work. *See* RCW 51.32.090. A permanent partial disability is a monetary award when the worker has suffered a permanent disability to part of the body. *See* RCW 51.32.080. The award is based on different classifications. *Id.* A

worker receives a pension when she is permanently and totally disabled, thus unable to work. *See* RCW 51.32.060.

The second injury fund is a separate fund for self-insurers that applies when the combined effects of a prior injury at another employer and the industrial injury cause the worker to be totally disabled. RCW 51.16.120. In such case, the Department uses the second injury fund to create a pension reserve, which the Department uses to make monthly pension payments to the worker, and the self-insurer pays into the pension reserve an amount equal to the permanent disability caused by the industrial injury. RCW 51.16.120.

B. Blanca Ortiz Suffered an Industrial Injury, and Universal Frozen Foods, a Self-Insured Employer, Paid Benefits

Universal is a self-insured employer for purposes of workers' compensation. CP 101-02, 224. It thus agreed to pay all the benefits of its injured workers, and participates in litigation when a worker appeals. *See* RCW 51.14.010, 51.14.120, 51.52.060.

Blanca Ortiz was injured in May 1988 while working for Universal. CP 112. Universal allowed her claim, and it paid her benefits. CP 127-164. In May 2010, the Department issued an order closing her claim with no award for permanent partial disability and ending her time

loss compensation beyond May 2010. CP 113. The Department affirmed that decision in August 2010. CP 114.

C. Following Ortiz's 2010 Appeal of Claim Closure, She and Universal Entered an Agreement to Award Her a Pension Back-dated to 2002

Ortiz appealed to the Board of Industrial Insurance Appeals (Board). CP 115-16. The Department chose not to participate in the litigation, as is its customary practice in self-insured appeals where the worker is the appealing party. CP 101, 224. Universal and Ortiz reached an agreement. CP 117. The Board accepted the agreement between Ortiz and Universal and reversed the Department's May 2010 order and remanded the case to the Department. CP 117, 123. By adopting the agreement, the Board ordered the Department to place Ortiz on the pension rolls effective October 1, 2002, and to consider granting Universal second injury fund relief. CP 117, 123.

Universal and Ortiz's agreement and the resulting order make no mention about how to resolve any overpayment issues. CP 102, 117-24, 225. The Department did not participate in the settlement negotiations and did not approve the settlement agreement or the Board's order. CP 101, 124, 225. There is no signature block on the agreement for the Department. CP 124, 225.

D. Consistent with the Agreement, the Department Awarded Ortiz the Pension and Issued Her a Check for the Pension from 2002 to 2011

The Department placed Ortiz on the pension rolls, effective October 1, 2002, finding that her time loss compensation benefits terminated effective September 30, 2002. CP 125-26. The next day, consistent with the Ortiz/Universal agreement, the Department considered whether the second injury fund applied and found that it did. CP 165-66. The Department charged Universal \$13,635 total for the permanent partial disability caused by Ortiz's injury with Universal. CP 165-66. In September 2011, the Department issued Ortiz a \$149,066.27 check for backdated pension payments starting October 1, 2002. CP 167-68.

E. The Department Refused Universal's Request that the Department Issue an Overpayment Order for Time Loss Compensation Benefits Paid Between 2003 and 2011

In February 2012, five months after the Department issued the order placing Ortiz on the pension rolls, Universal asked the Department to issue an overpayment order for time loss compensation benefits paid from September 9, 2003, through July 7, 2011. CP 169-71. The Department issued a letter rejecting that request. CP 172-73. Universal protested that decision and asked the Department to reconsider. CP 174-75. The Department affirmed its decision, and Universal appealed to the Board. CP 176-80.

F. The Board Ordered the Department to Pay Universal Frozen Foods for the Overpayment Totaling Over \$237,000, But the Superior Court Reversed, Finding That No Statute Required the Department to Reimburse Universal

An industrial appeals judge issued a proposed decision and order ordering the Department to pay Universal \$237,149.28 for the overpayment of time loss compensation. CP 46. The three-member Board denied the Department's petition for review. CP 15.

The Department appealed to superior court, arguing that no legal authority required the Department to advance Universal the overpayment. CP 1-3, 20. The Department agreed that Universal should obtain an overpayment order so that the overpayment could be collected by the Department and paid to Universal from future funds, but objected to the requirement that it reimburse Universal. CP 191, 244.

The superior court agreed and reversed the Board. CP 226. The superior court ruled that no statute authorizes the Department to advance a self-insured employer's overpayment resulting from the self-insured employer's agreement to back-date a pension. CP 225. The backdated pension created a scenario where Ortiz double-dipped on her wage replacement benefits: she received both time loss compensation and retroactive pension benefits for the same time period. *See* CP 224-26.

The superior court found that there were two opportunities for the parties to discover the overpayment issue: when Ortiz and Universal entered the agreement without the Department's participation and when the Department began making pension payments from the second injury fund. CP 225. The superior court found that as the self-insured payor of time loss compensation, Universal was in the better position to know when a settlement agreement between an employee and an employer creates an overpayment. CP 225. Ortiz and Universal appeal. CP 229-247.

IV. STANDARD OF REVIEW

In workers' compensation cases, this Court applies its ordinary standards of review of the superior court's decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009); RCW 51.52.140. The standards of review under the Administrative Procedures Act thus do not apply. RCW 34.05.030(2)(a), (b); *see Rogers*, 151 Wn. App. at 180. This Court reviews the decision of the superior court, not that of the Board. *Rogers*, 151 Wn. App. at 179-81. The issues before the superior court were purely legal, including the construction of several statutes, which this Court reviews de novo. *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996).

V. ARGUMENT

When a self-insured employer erroneously overpays time loss compensation to a worker, no statute authorizes the Department to reimburse the full amount of the overpaid benefits to the employer, whether out of the second injury fund or otherwise. Rather, the Department assesses an overpayment and collects it out of future benefit payments, and remits those amounts to the self-insured employer.

This Court does not add requirements to a statutory scheme. *See City of Seattle v. Fuller*, 177 Wn.2d 263, 269, 300 P.3d 340 (2013) (courts cannot add words to a statute); *Deal v. Dep't of Labor & Indus.*, 78 Wn.2d 537, 540, 477 P.2d 175 (1970) (an overpayment is not to be recouped absent express statutory authority). This Court should not follow the Board's ruling in *In re Frederic J. Cuendet*, Bd. No. 99 21825, 2001 WL 1328460 (Bd. Ind. Ins. App. Aug. 14, 2001). In that case, the Board added terms to unambiguous language in a statutory scheme. The *Cuendet* Board thought the Department should bear the risk for an uncollected overpayment of time loss compensation, but this policy question is one for the Legislature to decide, and no statutory language supports *Cuendet*.

Ortiz is not aggrieved and has no standing to appeal. In any event, she is wrong that the payment should be out of the overpayment reimbursement fund, as that fund only applies when there has been an

appeal of an erroneous adjudication, and when the Department has made collection efforts for at least two years. Neither of those statutory requirements is met here.

A. The Second Injury Fund Statutes Do Not Provide for Payment from the Second Injury Fund for Time Loss Compensation

For workers' compensation purposes, the Legislature has given employers two options: to participate in the state fund managed by the Department or to become certified as a self-insurer. *Boeing Co. v. Doss*, 183 Wn.2d 54, 58, 347 P.3d 1083 (2015); RCW 51.14.010, .020. Upon certification, a self-insurer assumes the obligations to pay benefits as required by law. RCW 51.14.010. This obligation includes paying for medical treatment, a permanent partial disability, time loss compensation, or a pension when the worker's need for treatment or disability was proximately caused by an industrial injury or an occupational disease. RCW 51.14.020, .030; RCW 51.32.010, *et seq.* A self-insurer is directly responsible for administering its own claims and paying its injured employees' disability and medical benefits. *Doss*, 183 Wn.2d at 58; *Johnson v. Tradewell Stores, Inc.*, 95 Wn.2d 739, 742, 630 P.2d 441 (1981); RCW 51.08.173; RCW 51.14.020(1); WAC 296-15-330, -340.

To promote the hiring of previously disabled workers, self-insured employers are not responsible for the full cost of a pension if the

combined effects of a worker's prior injury and the industrial injury through the self-insurer render the worker permanently and totally disabled. RCW 51.16.120(1); see *Jussila v. Dep't of Labor & Indus.*, 59 Wn.2d 772, 777, 370 P.2d 582 (1962).

Normally, a self-insured employer must pay the full cost of the worker's estimated future pension benefits into a pension reserve, which the Department uses to provide monthly pension benefits to the worker. RCW 51.44.070, .140. When second injury fund relief is granted, however, the employer pays into the pension reserve fund only an amount equal to the permanent partial disability that the worker would have suffered from the injury alone, had the worker not suffered from a pre-existing impairment. RCW 51.16.120; RCW 51.44.040; *Doss*, 183 Wn.2d at 62-63. The remainder of the cost of the pension reserve is charged to the second injury fund. RCW 51.16.120.

But while the second injury fund covers much of the cost of the pension reserve, the second injury fund does not cover the costs associated with the self-insured employer's other responsibilities under the Industrial Insurance Act, such as paying for medical treatment resulting from the injury. See *Doss*, 183 Wn.2d at 63. This is because the statutes only authorize the second injury fund to be charged a portion of the cost of the

pension reserve, and the pension reserve is never used to provide a worker with anything other than monthly pension benefits. *See id.*

Ideally, when a self-insurer and claimant agree to backdate a second injury fund pension, the parties usually bring the issue to the Department so that they can address any overpayment issue directly. This case did not follow this ideal pattern. To begin, Universal failed to award Ortiz a pension in 2002, when the parties agree she was totally and permanently disabled. But even so, Universal and Ortiz did not consult with the Department about the agreement, they did not obtain Department approval on the agreement, and the agreement includes no provision addressing a potential overpayment. CP 101, 124. After the Board issued its order adopting the agreement, the Department followed the agreement, awarding a pension to Ortiz and considering second injury fund relief for Universal. CP 125-26, 165-66. As the agreement did not address whether there was an overpayment issue and did not direct the Department to consider that issue, the Department provided the full amount of the back pension benefits to Ortiz. CP 124, 167.

Universal asks that the Department reimburse in advance the full amount of the overpayment to Universal and that the Department be left to recover from Ortiz what it could. Universal Br. of App. at 6. The result is that the Department—not Universal—would bear the risk of collecting on

the overpayment, even though Universal chose to assume its own risks by becoming self-insured and even though Universal failed to address the overpayment issue in the settlement agreement that it reached with Ortiz.

The statutes governing use of the pension reserve make clear that the fund can only be used for specific, defined purposes, and advancing overpayments is not one of them. No legal authority requires the Department to front and to bear the risk on collecting the overpayment amount that occurs when a self-insurer agrees to back-date a pension.

Universal argues that the payment should come from the second injury fund, but Universal cannot point to any specific language in RCW 51.44.040 that establishes a requirement to pay an overpayment of time loss compensation. *See* Universal Br. of App. at 16-23. None exists. That statute creates the second injury fund, whose purpose is to encourage hiring previously disabled workers and avoid overburdening an employer for disabilities not caused by its injury, but the statute does not allow the fund to be used to be used for anything other than covering a portion of the cost of the pension reserve that is used to provide monthly pension benefits to workers. *Doss*, 183 Wn.2d at 63; *Jussila*, 59 Wn.2d at 778-79.

As *Doss* held, the second injury fund can be used only to defray the cost of the pension reserve, not to cover the cost of the employer's other responsibilities under the Industrial Insurance Act, such as the cost

of medical treatment, which was at issue in that case. *See Doss*, 183 Wn.2d at 63. Since medical treatment is not covered by the pension reserve, and since the second injury fund can only be used to help fund the pension reserve, the second injury fund does not cover medical treatment. *Id.* By the same logic, since the pension reserve is not used to either pay time-loss compensation or cover an overpayment of benefits, they cannot be charged to the second injury fund.

The plain meaning of RCW 51.44.040 must be “discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.” *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007). A close examination of the second injury fund statute demonstrates that the Legislature has carefully limited the use of that fund and has not authorized it to be used for time loss compensation.

RCW 51.44.040 creates the second injury fund, and states that it “shall be used *only* for the purpose of defraying charges against it as provided in RCW 51.16.120 and 51.32.250.” (Emphasis added). Neither statute applies here. *See Doss*, 183 Wn.2d at 63.

RCW 51.32.250 is inapplicable, as it provides for payments for job modifications that are needed to allow disabled workers to return to work. *Doss*, 183 Wn.2d at 60-61. It does not apply to time loss compensation.

RCW 51.16.120 does not apply as it allows only a charge to the second injury fund that reflects the difference between the full cost of the pension reserve and the permanent partial disability that would have resulted from the industrial injury alone:

(1) Whenever a worker has a previous bodily disability from any previous injury or disease, whether known or unknown to the employer, and shall suffer a further disability from injury or occupational disease in employment covered by this title and become totally and permanently disabled from the combined effects thereof... then the experience record of an employer insured with the state fund at the time of the further injury or disease shall be charged and a self-insured employer shall pay directly into the reserve fund *only the accident cost which would have resulted solely from the further injury or disease*, had there been no preexisting disability, and which accident cost shall be based upon an evaluation of the disability by medical experts. The *difference between the charge thus assessed to such employer* at the time of the further injury or disease and *the total cost of the pension reserve* shall be assessed against the second injury fund.

(Emphases added).

The only “charge” against the second injury fund that RCW 51.16.120 authorizes is a charge that covers “the difference” between two costs: “the total cost of the pension reserve” and “the accident cost which would have resulted solely from the further injury or disease, had there been no preexisting disability.”

The “total cost of the pension reserve” is the estimated cost of a worker’s monthly pension payments. RCW 51.44.070; RCW 51.16.120.

Whenever an injured worker is granted a pension, a one-time payment is made into the “reserve fund” in an amount equal to “the estimated present cash value of the monthly payments” that will be provided to the pensioned worker over the life of the pension, based on an annuity. RCW 51.44.070(1); *see Doss*, 183 Wn.2d at 63. The annuity is “based upon rates of mortality, disability, remarriage, and interest as determined by the Department, taking into account the experience of the reserve fund in such respects.” RCW 51.44.070(1).

Time loss compensation benefits are not part of the total cost of the pension reserve because the pension reserve is based on an annuity that estimates future payments of pension benefits. *See* RCW 51.44.070(1). Temporary total disability benefits (i.e., time loss compensation) are different than permanent total disability benefits (i.e., a pension) as temporary total disability benefits are paid before the worker is fixed and stable, and permanent total disability benefits are when a worker needs no further treatment. *See Hunter v. Dep’t of Labor & Indus.*, 43 Wn.2d 696, 699-700, 263 P.2d 586 (1953); *Franks v. Dep’t of Labor & Indus.*, 35 Wn.2d 763, 766, 215 P.2d 416 (1950); RCW 51.32.055, .060, .090.

Similarly, “the accident cost which would have resulted solely from” a worker’s injury or occupational disease does not include the cost of time loss compensation. RCW 51.16.120. The “accident costs” are

equal to the permanent partial disability that the worker would have developed, had the worker *not* suffered from a pre-existing disability. *Doss*, 183 Wn.2d at 59; *In re Fred Dupre*, No. 97 4784, 1999 WL 756236 at *4 (Wash. Bd. of Ind. Ins. App. July 21, 1999). Permanent partial disability is determined based on a worker's loss of physical function rather than a worker's lost wages or lost earning power, and a permanently and partially disabled worker receives a defined payment rather than ongoing monthly benefits. RCW 51.32.080; *Tomlinson v. Puget Sound Freight Lines, Inc.*, 166 Wn.2d 105, 110, 206 P.3d 657 (2009). A permanent partial disability award does not include the past costs of time loss compensation—it is based on statutorily set amounts and the percentage of loss of physical function. RCW 51.32.080.

Unlike in a typical case of total and permanent disability, where the self-insured employer must pay the entire amount of the pension reserve fund to the Department to fund the worker's monthly pension benefits (see RCW 51.44.070), an employer who is granted second injury fund relief pays into the pension reserve fund only an amount of money equal to the disability that the worker would have suffered had the worker *not* had a pre-existing disability. *Doss*, 183 Wn.2d at 59-60. RCW 51.16.120 reduces the amount that an employer must contribute to fund the worker's monthly pension benefits, but it does not purport to modify a

self-insurer's other legal responsibilities under the Industrial Insurance Act. *Doss*, 183 Wn.2d at 62-63.

RCW 51.16.120 does not state that when second injury fund relief is granted the employer shall have no responsibilities under the claim aside from paying the necessary amount into pension reserve fund. Rather, the only thing the employer must *directly pay into the pension reserve fund* is an amount equal to the permanent partial disability that would have resulted from the industrial injury or occupational disease alone.

Had the Legislature intended RCW 51.16.120 to excuse a self-insured employer from bearing the risk of collecting an overpayment from the claimant, it could have drafted the statute to that effect. *See Fuller*, 177 Wn.2d at 269; *Deal*, 78 Wn.2d at 540. It did not do so.

The Supreme Court recognized the fund's limited purpose under RCW 51.16.120 in *Doss*. There, the Court held that self-insured employers are not entitled to second injury fund relief for the costs of ongoing medical treatment for a worker who has been placed on a pension, even if the employer has been granted relief under the second injury fund. 183 Wn.2d 54. The Court held that medical costs are not accident costs under RCW 51.16.120 and that no other statute requires that medical treatment costs must be paid from the second injury fund. *Id.* at 62-63.

The principles underlying the *Doss* Court's view of the second injury fund apply here. RCW 51.16.120 authorizes only payments from the fund for the difference between the total cost of the pension reserve and the accident cost, and time loss compensation does not fall within that calculation. The pension reserve is only used to pay pension benefits to a worker. It is not used to pay for any other sort of benefit, such as medical treatment or time-loss compensation. *See* RCW 51.44.070.

In sum, the second injury fund can only be charged for payments into a pension reserve fund to cover "the difference" between the "total cost of the pension reserve" and "the accident cost which would have resulted solely from" the worker's industrial injury or disease alone. RCW 51.44.040; RCW 51.16.120. As neither "the total cost of the pension reserve" nor "the accident cost which would have resulted solely from" the worker's injury or disease includes the cost of the worker's past time loss compensation, the second injury fund cannot be used to pay for that benefit. Since RCW 51.16.120 does not include an advance payment to a self-insured employer for an overpayment, there is no authority to use the second injury fund to indemnify Universal for the time-loss compensation that it erroneously paid to Ortiz.

B. RCW 51.32.240 Does Not Provide for the Department to Assume the Risk and Pay an Employer an Advance for an Overpayment of Time Loss Compensation

Universal primarily relies on RCW 51.32.240 to argue that the Department must advance money to it for its overpayment. But a close reading of that statute shows that it does not support Universal's claim. While RCW 51.32.240 addresses when the Department has to repay for costs caused by erroneous decisions, none of those provisions require the Department to advance the repayment for the claimant's overpayment to the employer. RCW 51.32.240(4) sets forth methods for recouping overpayments, but it limits the recoupment to future payments:

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.

(a) The director, pursuant to rules adopted in accordance with the procedures provided in the administrative procedure act, chapter 34.05 RCW, may exercise discretion to waive, in whole or in part, the amount of any such payments, where the recovery would be against equity and good conscience. However, if the director waives in whole or in part any such payments due a self-insurer, the self-insurer shall be reimbursed the amount waived from the self-insured employer overpayment reimbursement fund.

(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.

(c) If a self-insurer is not fully reimbursed within twenty-four months of the first attempt at recovery through the collection process pursuant to this subsection and by means of process pursuant to subsection (6) of this section, the self-insurer shall be reimbursed for the remainder of the amount due from the self-insured employer overpayment reimbursement fund.

RCW 51.32.240(4). While this statute provides that the Department can collect the overpayment from Ortiz's future benefits, there is nothing in the statute requiring the Department to indemnify a self-insurer by advancing the overpayment of time loss compensation.

Express statutory authorization is required to direct an administrative agency to perform an act: the "power of an administrative tribunal to fashion a remedy is strictly limited by statute." *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit Cty.*, 135 Wn.2d 542, 558, 958 P.2d 962 (1989). The court looks to the actual words used by the Legislature to find a duty to perform an act. *See Louisiana-Pacific Corp. v. Asarco, Inc.*, 131 Wn.2d 587, 600, 934 P.2d 685 (1997) (when construing a statute, a court looks first "to the ordinary meaning of the word used by the Legislature"); *Homestreet, Inc. v. Dep't of Rev.*, 166

Wn.2d 444, 452, 210 P.3d 297 (2009) (“the better practice is to look at the words in the statute at issue to determine what the statute means”). The Court does not add words to the statute. *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003). Universal asks the Court to add words to both the second injury fund statutes and the overpayment statute.

The Department issued the orders granting the pension and awarding second injury fund relief. The Department’s orders were correct as they did exactly what the Board ordered the Department to do based on Ortiz and Universal’s settlement agreement. But even if the Department made an erroneous decision, subsection (4) requires only that the Department help the self-insurer recoup from future payments made to the claimant, not from past payments. RCW 51.32.240(4) plainly does not require the Department to advance Universal the overpayment Universal created by backdating the pension date.

RCW 51.32.240(1)(a) similarly does not create a mechanism for the Department to advance an overpayment to a self-insurer. That subsection addresses using only future payments for recoupment:

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 therefor has been waived.

RCW 51.32.240(1) does not apply because there is no evidence of any clerical error, mistake of identity, innocent misrepresentation, or any other similar circumstance. RCW 51.32.240(1). And this statute does not require the Department to advance money to a self-insurer to indemnify it from its own overpayment. To the contrary, the statute allows collection from future payments to correct an overpayment. RCW 51.32.240.

Contrary to Universal's assertions, RCW 51.32.240 supports the Department's position. *See Universal Br. of App.* at 16-20. The Department's only obligations under this statute are to assist the self-insurer in obtaining information and to collect and forward the payments to the self-insurer. RCW 51.32.240(1), (4). The Legislature carefully chose the obligations it placed on the Department, and it did not include an obligation to advance any overpayment to the self-insurer. *See Wash. Nat. Gas Co. v. Pub. Util. Dist. No. 1*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969). The plain meaning of the words that the Legislature chose to include in the statute comports with the Department's position here.

Universal's position not only lacks statutory support but is also contrary to common sense. As a practical matter, it would make no sense

to require the Department to advance or to indemnify the overpayment costs to a self-insurer because Universal chose to become a self-insurer, and it has direct responsibility for administering its own claims and paying its injured employees' disability and medical benefits. *Johnson*, 95 Wn.2d at 742; RCW 51.08.173; RCW 51.14.020(1); WAC 296-15-330, -340. This responsibility includes paying time loss compensation and keeping records of such actions.

Requiring the Department to advance the repayment of Ortiz's overpayment effectively requires the Department to indemnify Universal for any overpayment that cannot be collected. For example, if Ortiz died prior to the overpayment being completely recouped, the Department would not be repaid, but Universal, who chose to self-insure rather than shift its risk to the state fund, would remain whole. This makes no sense, which is why no statute imposes such an obligation on the Department.

The superior court properly recognized that no statute authorizes the Department to advance an overpayment to the self-insurer. CP 224-26. The superior court did not weigh the parties' acts to determine who was "more wrong," as Universal posits—the court correctly recognized that Universal's position had no statutory support. CP 224-26; *Universal Br. of App.* at 18.

C. The Court Should Not Follow the Board's Incorrect Decision in *Cuendet*

As the plain language of RCW 51.16.120 does not allow the Department to use the second injury fund to advance an overpayment of time loss compensation to an employer, this Court should decline to follow the Board's decision in *Cuendet*. *Contra Cuendet*, 2001 WL 1328460; see *Dep't of Labor & Indus. v. Slaugh*, 177 Wn. App. 439, 452, 312 P.3d 676 (2013), *review denied*, 180 Wn.2d 1007 (2014) (a court should not follow a Board decision that is contrary to the plain language of the governing statute). In *Cuendet*, the Board decided that the claimant was entitled to a second injury fund pension that began when he was receiving time loss compensation from the self-insurer. *Cuendet*, 2001 WL 1328460 at *4-5. The Board posited that the Department, rather than the self-insurer, should bear the burden of collecting any time loss compensation that was erroneously paid to the claimant. *Id.*

The Board made three errors to arrive at this conclusion. First, the Board made the illogical leap that if RCW 51.16.120(1) allows the Department to use the second injury fund to help create the pension reserve used to make pension payments to a worker, then the statute must also require the Department to use the second injury fund to reimburse an employer for time-loss compensation that was paid if it is later determined

that the worker should have been placed on a pension at that time.

Cuendet, 2001 WL 1328460 at *4-5. The Board's analysis ignores that the Department can use the second injury fund only to defray charges against it that are expressly authorized by a statute. The statute only authorizes the Department to use the second injury fund to help create the pension reserve fund that is used to make pension benefit payments to injured workers. RCW 51.16.120(1). Since the second injury fund can only be used to help create the pension reserve, it cannot be used to cover other claim costs, such as time-loss compensation or a resulting overpayment.

Second, the Board makes an improper logical leap from *Jussila*'s statement that the second injury fund's purpose is to finance incentives that encourage the hiring of disabled people to creating a rule with no express statutory support. *Cuendet*, 2001 WL 1328460 at *5 (citing *Jussila*, 59 Wn.2d 778). While the second injury fund's purpose is to incentivize hiring previously disabled workers, that purpose is met by authorizing the Department to use the second injury fund to cover a portion of the cost of the pension reserve that would otherwise have to be fully funded by the self-insurer. The statute does not authorize the Department to use the second injury fund for any other purpose, nor does it provide for any other sort of incentive for a self-insured employer in a case of this type. RCW 51.16.120. The Board erred by placing the burden

on the Department to recoup overpayments by using the second injury fund for those payments, as no statute authorizes the Department to use the second injury fund in that manner.

The Board's decision undermines the purpose of the second injury fund. Self-insurers generally bear their own risks, but the second injury fund creates a narrow exception to that rule by spreading the cost of combined effects pensions among all self-insurers. The Legislature only intended to extend risk-spreading to pensions. Using the second injury fund to cover other benefits would mean that self-insurers are not only pooling their risks for combined effects pensions but also pooling their risks for time loss compensation and overpayments, contrary to legislative intent, and contrary to the SIE's intent in opting to become self-insured. *Cuendet* thus hurts the purpose of the second injury fund.

Third, the *Cuendet* Board misreads RCW 51.32.240. *Cuendet*, 2001 WL 1328460 at *5. While the Board correctly notes that in a second injury fund pension, the self-insurer no longer makes future payments, the Board ignores that RCW 51.32.240 explicitly provides a mechanism for the Department to assist a self-insurer in obtaining information and to recoup *future* payments on the self-insurer's behalf. As the Legislature has set forth a mechanism for the Department to recoup future payments for a

self-insurer, the Legislature signaled that it was not going to go the extra step and require the Department to fully indemnify the self-insurer.

The *Cuendet* Board reads a requirement into RCW 51.44.040 and RCW 51.32.240 that the Department should be responsible for the overpayment. *Cuendet*, 2001 WL 1328460 at *4-5. Such a reading is contrary to the express terms of the statute. Courts defer to the Department's statutory interpretation (and not the Board's) because it is the agency tasked with administering the Industrial Insurance Act. *Slaugh*, 177 Wn. App. at 452 ("it would be the department's interpretation to which we would be required to defer, not the board's, because the department is the executive agency that is charged with administering the statute"); see also *Port of Seattle v. Pollution Control Hearings Bd.*, 151 Wn.2d 568, 594, 90 P.3d 659 (2004).

In any event, no deference is required because the statutes are unambiguous. See *Slaugh*, 177 Wn. App. at 452. The Department's interpretation is correct because the explicit language of RCW 51.44.040 and RCW 51.32.240 does not impose an obligation on the Department to indemnify self-insurers. Just as in *Slaugh*, when the Court declined to follow the Board's interpretation of an unambiguous statute, the Court here should not follow *Cuendet* as it reads a requirement into the RCW Title 51 that does not exist.

D. Ortiz Has No Standing to Bring Her Appeal, as She Has Not Shown She Is Aggrieved

This Court should dismiss Ortiz's appeal because she was not aggrieved by the superior court's decision. "Only an aggrieved party may seek review of a superior court decision." *In re Estate of Wood*, 88 Wn. App. 973, 976, 947 P.2d 782 (1997) (citing RAP 3.1). "An aggrieved party is someone whose proprietary, pecuniary, or personal rights are substantially affected." *Id.* (citing *In re Guardianship of Lasky*, 54 Wn. App. 841, 848, 776 P.2d 695 (1989)).

Here, Ortiz's rights are not affected by the superior court's decision. As she admits, she is obligated to pay the overpayment, regardless of this Court's disposition. Ortiz Br. of App. at 1-2, 13-14. Ortiz asks that any collection be limited to a 24 month period, but she also admits that the issue is not properly before the Court. Ortiz Br. of App. at 1-2, 13-14. The Department, Board, and superior court never addressed this collection issue, and it was not raised in the petition for review or the Department's appeal to superior court. Ortiz was not aggrieved by the superior court's decision, so this Court should dismiss her appeal.

E. The Self-Insured Employer Reimbursement Fund Does Not Apply Because Universal Did Not Prevail at the Board

Even if Ortiz had standing to appeal, the Court should reject Ortiz's argument—eschewed by Universal—that the self-insured

employer reimbursement fund should apply here to cover any uncollected funds. The Legislature explains that this fund “shall be used exclusively for reimbursement to the reserve fund and to self-insured employers for benefits overpaid *during the pendency of board or court appeals* in which *the self-insured employer prevails and has not recovered.*” RCW 51.32.242(1) (emphasis added); *see* RCW 51.44.142 (providing same). The self-insured employer reimbursement fund thus applies only when there is an appeal to the Board or courts from an order directing the employer to pay benefits to a worker, and the self-insurer prevails in establishing that the benefits should not be paid. RCW 51.32.242(1). It covers only the benefits paid during the pendency of that appeal, so it does not extend to the time period before the appeal. RCW 51.44.142.

Here, Universal seeks advance payment for time loss compensation that it paid during a time period extending well before Ortiz’s appeal to the Board. And Universal did not prevail before the Board—it became obligated to pay its part of a pension. CP 117-24. The order originally on appeal to the Board closed Ortiz’s claim with an award of only permanent partial disability. CP 119. The parties agreed instead to award Ortiz a pension, with Universal paying the equivalence of a permanent partial disability award into the pension reserve. CP 119-24. Even if Universal’s request extended to benefits paid during the pendency

of its appeal, it did not “prevail” before the Board, so it is not entitled to reimbursement from the self-insured employer reimbursement fund as a result of this appeal.

And even if this fund did apply, it is not yet ripe because it applies only after an employer has unsuccessfully attempted to collect on the debt for at least two years. *See* RCW 51.32.240(4)(c). This is not the time to decide whether this fund applies. This is likely the reason that Universal, the self-insurer contributing to and benefiting from this fund, has not advanced this argument. Because neither the second injury fund nor the self-insured employer reimbursement fund provide advance payment to self-insurers for overpayments, self-insurers must resort to the mechanism provided for in RCW 51.32.240.

VI. CONCLUSION

No statute or law authorizes the Department to indemnify Universal for the overpayment of time loss compensation it made to Ortiz. This is because, as a self-insurer, Universal takes responsibility to manage its claims, and no statute relieves Universal of that obligation here.

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The superior court correctly recognized Universal's responsibilities
and the Department's obligation to help but not to indemnify Universal.
This Court should affirm.

RESPECTFULLY SUBMITTED this 14th day of August, 2015.

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

BLANCA ORTIZ AND UNIVERSAL
FROZEN FOODS,

Appellants,

v.

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

DECLARATION OF
MAILING

DATED at Seattle, Washington:

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Brief of Respondent and this Declaration of Mailing in the below described manner.

Via E-filing to:

Renee S. Townsley, Clerk/Administrator
Clerk of the Court
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DATED this 14th day of August, 2015.



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