RECEIVED
SUPREME COURT
STATE OF WASHINGTON
2009 FEB 20 P 2:53
BY RONALD R. CARPENTER
CLERK

NO. 81986-7

SUPREME COURT OF THE STATE OF WASHINGTON

JIM A. TOBIN,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON,

Petitioner.

SUPPLEMENTAL BRIEF OF DEPARTMENT OF LABOR AND INDUSTRIES

ROBERT M. MCKENNA
Attorney General

MICHAEL HALL
Assistant Attorney General
WSBA #19871
PO Box 40121
Olympia, WA 98504-0121
(360) 586-7723

JAY D. GECK
Deputy Solicitor General
WSBA # 17916

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ISSUES 3

III. ARGUMENT 4

A. Workers' Compensation And Third Party Recoveries 4

B. "All Damages Except Loss Of Consortium" Are Subject To Distribution Under RCW 51.24.060(1) 7

1. The Court Of Appeals Decision Is Contrary to the Plain Language of RCW 51.24.030(5) and RCW 51.24.060(1) 7

2. The Court Of Appeals Decision Is Contrary to the Legislative History of RCW 51.24.030(5) 9

3. *Flanigan* Does Not Compel the Result Reached by the Court of Appeals 14

4. The Court Of Appeals Decision Defeats The Purposes of The Third Party Recovery Statute 17

C. RCW 51.24.030(5) and 51.24.060 Do Not Violate Substantive Due Process 20

D. Attorney Fees 24

IV. CONCLUSION 24

APPENDICES

A Statutory Provisions

1. RCW 51.24.030(5)
2. RCW 51.24.060 (excerpts)

B Legislative History of RCW 51.24.030(5)

1. Fiscal Note
2. Senate Labor, Commerce and Trade Committee Hearing Transcript, January 24, 1995 (Excerpts)
3. House Commerce and Labor Committee Hearing Transcript, March 22, 1995 (Excerpts)

C WAC 296-20-340

D Graph: "Tobin Combined Workers' Compensation Benefits and Tort Recovery, and Corresponding Impact on Industrial Insurance Funds"

TABLE OF AUTHORITIES

Cases

Adams v. King County
164 Wn.2d 640, 192 P.3d 891 (2008) 8

Arkansas Department of Health & Human Services v. Ahlborn
547 U.S. 268, 126 S.Ct. 1752, 164 L.Ed.2d 459 (2006) 17

Arthun v. City of Seattle
137 Wash. 228, 242 P. 16 (1926) 5

Ball-Foster Glass Container Co. v. Giovanelli
163 Wn.2d 133, 177 P.3d 692 (2008) 5

Brand v. Dep't of Labor & Indus.
139 Wn.2d 659, 989 P.2d 1111 (1999) 5

Brown v. State
155 Wn.2d 254, 119 P.3d 341 (2005) 13

Clark v. Pacificorp
118 Wn.2d 167, 822 P.2d 162 (1991) 7

Cosmopolitan Eng's Group v. Ondeo Degremont, Inc.
159 Wn.2d 292, 149 P.3d 666 (2006) 13

Davis v. Bendix
82 Wn. App. 267, 917 P.2d 586 (1996) 16

Erickson & Assocs. v. McLerran
123 Wn.2d 864, 872 P.2d 1090 (1994) 20

Flanigan v. Dep't of Labor & Indus.
123 Wn.2d 418, 869 P.2d 14 (1994) 6,12, 14, 17, 19

Fria v. Dep't of Labor & Indus.
125 Wn. App. 531, 105 P.3d 33 (2004), *review denied*, 154 Wn.2d 1018 (2005) 21

Gersema v. Allstate Ins. Co.
127 Wn. App. 687, 112 P.3d 552 (2005) 21

Gilbert H. Moen Co. v. Island Steel Erectors, Inc.
128 Wn.2d 745, 912 P.2d 472 (1996) 7

Guillen v. Pierce County
144 Wn.2d 696, 31 P.3d 628 (2001), *reversed in part*, 537 U.S. 129, 123 S. Ct. 720, 154 L Ed. 2d 610 (2003) 15

Hi-Way Fuel Company v. Estate of Allyn
128 Wn. App. 351, 115 P.3d 1031 (2005) 8

In re Lord
165 Wn.2d 172, 94 P.3d 952 (2004) 4

In re Rosier
105 Wn.2d 606, 717 P.2d 1353 (1986) 20

Kilian v. Atkinson
147 Wn.2d 16, 50 P.3d 638 (2002) 15

Longview Fibre Co. Dep't of Labor & Indus.
58 Wn. App. 751, 795 P.2d 699, *review denied*, 114 Wn.2d 1030 (1990) 14

Lutheran Day Care v. Snohomish County
119 Wn.2d 91, 829 P.2d 746 (1992) 13

Maxey v. Dep't of Labor & Indus.
114 Wn.2d 542, 789 P.2d 75 (1990) 6, 7, 19, 21

McIndoe v. Dep't of Labor & Indus.
144 Wn.2d 252, 26 P.3d 903 (2001) 17

Mountain Timber Co. v. Washington
243 U.S. 219, 37 S.Ct. 260 (1917) 4

Oltman v. Holland America Line, USA
163 Wn.2d 236, 178 P.3d 981, *cert. dismissed*, __ U.S. __(2008) 15

Presbytery of Seattle v. King County
114 Wn.2d 320, 787 P.2d 907, *cert. denied*, 498 U.S. 911 (1990)..... 21

Puget Sound Gillnetters Ass'n v. Moos
92 Wn.2d 939, 603 P.2d 819 (1979)..... 20

Rafn v. Dep't of Labor & Indus.
104 Wn. App. 947, 17 P.3d 711, *review denied*, 144 Wn.2d 1006 (2001)..... 24

Rhoad v. McLean Trucking Co., Inc.
102 Wn.2d 422, 686 P.2d 483 (1984)..... 9

Sebastian v. Dep't of Labor & Indus.
142 Wn.2d 280, 12 P.3d 594 (2000)..... 14

Smith v. Gould
918 F.2d 1361, 1364 (8th Cir. 1990) 23

State ex rel. Davis-Smith Co. v. Clausen
65 Wash. 156, 117 P. 1101 (1911) 4

State v. Anderson
94 Wn.2d 176, 616 P.2d 612 (1980)..... 14

State v. Costich
152 Wn.2d 463, 98 P.3d 795 (2004)..... 8

State v. Heiskell
129 Wn.2d 113, 916 P.2d 366 (1996)..... 13

State v. J.P.
149 Wn.2d 444, 69 P.3d 318 (2003)..... 9

State v. Turner
98 Wn.2d 731, 658 P.2d 658 (1983)..... 13

Tobin v. Dep't of Labor & Indus.
145 Wn. App. 607, 187 P.3d 780 (2008)..... passim

Williamson v. Lee Optical of Oklahoma, Inc.
348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955) 23

Willoughby v. Dep't of Labor & Indus.
147 Wn.2d 725, 57 P.3d 611 (2002) 17

Wooldridge v. Woolett
96 Wn.2d 659, 638 P.2d 566 (1981) 16

Yakima Fruit Growers Ass'n v. Henneford
187 Wash. 252, 60 P.2d 62 (1936) 15

Constitutional Provisions

U.S. Const. amend. V 20

U.S. Const. amend. XIV 20

Const. art 1, § 3 20

Statutes

RCW 4.56.250(b) 16

RCW 51.04.010 4

RCW 51.04.090 5

RCW 51.24 ..... 1, 3, 17

RCW 51.24.030 7

RCW 51.24.030(5) ..... passim

RCW 51.24.060 ..... passim

RCW 51.24.060(1) ..... passim

RCW 51.24.060(1)(a)-(e) 6

RCW 51.24.060(1)(c) 9, 10

RCW 51.24.060(1)(d) 8

RCW 51.32.010 4

RCW 51.32.080 16

RCW 51.52.130 24

Regulations

WAC 296-20-19030 16

WAC 296-20-200(4) 16

WAC 296-20-340 16

Rules

RAP 13.7 3

Other Authorities

Laws of 1911, ch. 74, § 1 4

Laws of 1911, ch. 74, § 3 5

Laws of 1977, 1st ex. sess., ch. 84, § 4 6

Laws of 1995, ch. 199, § 4 10

Laws of 2001, ch. 146, § 9 10

I. INTRODUCTION

Jim Tobin was seriously injured on his job and received workers' compensation benefits. As permitted by the Third Party Recovery Statute, RCW 51.24, he brought an action against the third party whose negligence caused his injury. He recovered $1.4 million from this third party in a settlement, allocating approximately $800,000 of the recovery to damages for pain and suffering. Board Record (BR) 70, ¶ 6. Pursuant to RCW 51.24.030(5), the Department of Labor and Industries issued an order distributing the entire recovery, with costs and attorney fees taken off the top and the balance paid to Mr. Tobin and the Department according to the statutory formula in RCW 51.24.060(1). BR 28.

Tobin appealed the distribution order, arguing that the damages he had allocated to pain and suffering were exempt from distribution under the Third Party Recovery Statute. Alternatively, Tobin claimed, it would be an unconstitutional "taking" of his property to distribute that part of the recovery. BR 85-95. The Board of Industrial Insurance Appeals affirmed the Department's distribution order. BR 2, 23-26. The Superior Court and the Court of Appeals disagreed with the Board, holding that damages allocated to pain and suffering are exempt from the Third Party Recovery Statute's distribution formula. Clerk's Papers (CP) 1-17; *Tobin v. Dep't of Labor & Indus.*, 145 Wn. App. 607, 187 P.3d 780 (2008).

The Court of Appeals decision is contrary to the plain language of RCW 51.24.060(1) and RCW 51.24.030(5).[1] Section .060(1) requires that "any recovery" in an injured worker's action against a third party "shall be" distributed under the formula set out in that section. RCW 51.24.030(5) defines "recovery" as "all damages except loss of consortium." The pain and suffering component of a tort recovery is "damages" and is not loss of consortium. It is, therefore, part of the "recovery" subject to the statutory distribution formula.

Not only is the Court of Appeals ruling contrary to this natural reading of the statute, the history of RCW 51.24.030(5) confirms that the Legislature intended to include damages for pain and suffering in the Third Party Recovery Statute's distribution formula. Subsection .030(5) was adopted immediately after this Court held that a spouse's loss of consortium claim was not subject to distribution. In response, the Legislature added explicit language stating that the "recovery" subject to distribution includes "all damages except loss of consortium."

Most significantly, the Court of Appeals decision defeats the fundamental purpose of the Third Party Recovery Statute. The Statute was enacted first and foremost to ensure that the employers and workers whose premiums support the Industrial Insurance funds do not also pay for

[1] RCW 51.24.030(5) and pertinent portions of RCW 51.24.060 are attached as Appendix A.

the negligence of third parties. The Legislature accomplished this goal by establishing a formula that defines the shares of third party recoveries for claimants, their attorneys, and the Department. The Court of Appeals construction, however, eviscerates the funds' reimbursement and offset rights, frustrating the purposes of the statute. This Court should reverse the Court of Appeals decision and affirm the Department's order.

II. ISSUES

1. RCW 51.24.060 establishes a mandatory distribution formula for "any recovery" in a tort action by an injured worker against a third party who caused the workplace injury. RCW 51.24.030(5) provides that "for purposes of [RCW 51.24], 'recovery' includes all damages except loss of consortium." Are damages allocated to pain and suffering subject to the distribution formula in RCW 51.24.060?

2. If damages recovered from a third party for pain and suffering are subject to distribution under RCW 51.24, does the statute take private property in violation of substantive due process?[2]

There is no reason to address what the Court of Appeals *sua sponte* called "the real [constitutional] issue" when it suggested that RCW 51.24 would violate procedural due process because injured workers did not receive adequate notice that the statute required the distribution of damages for pain and suffering. *See Tobin*, 145 Wn. App. at 618-619. The Department's Petition for Review at 17-19 describes the flaws in the

[2] Tobin uses the word "taking," but the only constitutional argument he makes is that the Third Party Recovery Statute violates substantive due process by mandating distribution of damages allocated to pain and suffering. *See* page 20 below. *See also* RAP 13.7; Reply to Answer to Petition for Review at 5-6, 9-12.

Court of Appeals' analysis on this point. Tobin has made no argument regarding lack of notice and does not defend that aspect of the decision below. This Court, therefore, need not address it further. *Cf. In re Tobin*, 165 Wn.2d 172, 175 n.1, 196 P.3d 670 (2008); *In re Lord*, 165 Wn.2d 172, 188 n.5, 94 P.3d 952 (2004).

III. ARGUMENT

A. Workers' Compensation And Third Party Recoveries

Nearly 100 years ago our Legislature enacted the Industrial Insurance Act, creating a self-contained system that provided "sure and certain relief" to injured workers "to the exclusion of every other remedy, proceeding or compensation." Laws of 1911, ch. 74, § 1 (*now codified as* RCW 51.04.010). Under the Act, "all phases of the premises are withdrawn from private controversy," and "all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the State over such causes are . . . abolished, except as in this title provided." *Id.*; *see also* RCW 51.32.010 (except as provided by the Act, payment of workers' compensation benefits "shall be in lieu of any and all rights of action whatsoever against any person whomsoever").[3]

---

[3] The Legislature's authority to abolish all private causes of actions for injured workers is well-established. *E.g.*, *State ex rel. Davis-Smith Co. v. Clausen*, 65 Wash. 156, 212, 117 P. 1101 (1911) ("we conclude . . . that the act in question violates no provision of either the state or federal Constitutions"); *Mountain Timber Co. v. Washington*, 243 U.S. 219, 37 S.Ct. 260 (1917) (Act does not deny federal equal protection or due process guarantees).

The heart of Washington's "self-contained" workers' compensation system is its "grand compromise," through which injured workers are entitled to benefits regardless of employer fault but, "[i]n exchange for this guaranteed compensation, the injured worker gives up her right to other legal remedies for her injury." *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 668, 989 P.2d 1111 (1999). Employers, on the other hand, "are liable for workplace injuries without regard to fault in exchange for limited liability." *Ball-Foster Glass Container Co. v. Giovanelli*, 163 Wn.2d 133, 140, 177 P.3d 692 (2008). Indeed, the Act itself would be nullified if its exclusive remedy provisions were ever found to be invalid. RCW 51.04.090 ("[i]f the provisions of this title making the compensation to the worker provided in it exclusive of any other remedy on the part of the worker shall be held invalid the entire title shall be thereby invalidated").

The Act includes a limited exception to its exclusive remedy provision for workers injured by third parties. *See* Laws of 1911, ch. 74, § 3. In its original form, this exception protected the Industrial Insurance funds by effectively reimbursing them dollar-for-dollar from recoveries made against third parties. *See* Petition for Review at 3-4; *see generally Arthun v. City of Seattle*, 137 Wash. 228, 230-231, 242 P. 16 (1926).

The Legislature subsequently developed a more complex formula for the distribution of third party recoveries. Under this formula, (a) the worker's attorney is paid; (b) the worker receives 25% of the recovery free from any Department claim; (c) the Industrial Insurance funds are reimbursed for workers' compensation benefits paid; and (d) the balance of the recovery is paid to the worker, with future workers' compensation benefits offset against that balance. *See* Laws of 1977, 1st ex. sess., ch. 84, § 4 (codified at RCW 51.24.060); RCW 51.24.060(1)(a)-(e); Petition for Review at 4-5. The Department shares in the cost as well as the benefit of the recovery, with the funds' reimbursement and future offset reduced to pay attorney fees and costs proportionate to their share of the recovery. RCW 51.24.060(1). The 1977 legislation thus provided workers with an incentive to pursue potential tort claims against third parties. *See, e.g., Flanigan v. Dep't of Labor & Indus.*, 123 Wn.2d 418, 434, 869 P.2d 14 (1994) (Madsen, J., dissenting).

Today, the Third Party Recovery Statute continues to promote several policies: (a) reimbursing the Industrial Insurance funds so that they "are not charged for damages caused by a third party," *Maxey v. Dep't of Labor & Indus.*, 114 Wn.2d 542, 549, 789 P.2d 75 (1990); (b) ensuring that third parties bear responsibility for the costs of their negligence, *Flanigan*, 123 Wn.2d at 424; (c) allowing injured workers to

"recover full damages from the party who is legally and in fact responsible," *Clark v. Pacificorp*, 118 Wn.2d 167, 185, 822 P.2d 162 (1991), *superseded by statute on other grounds as recognized in Gilbert H. Moen Co. v. Island Steel Erectors, Inc.*, 128 Wn.2d 745, 759 n.7, 912 P.2d 472 (1996); and (d) preventing injured workers from receiving "double recover[ies]," *Maxey*, 114 Wn.2d at 549.

B. "All Damages Except Loss Of Consortium" Are Subject To Distribution Under RCW 51.24.060(1)

1. The Court Of Appeals Decision Is Contrary to the Plain Language of RCW 51.24.030(5) and RCW 51.24.060(1)

In RCW 51.24.060(1), the Legislature established a mandatory mechanism for the distribution of "any recovery" made in a third party action. RCW 51.24.030(5) defines "recovery" as "all damages except loss of consortium." Damages for an injured worker's pain and suffering are not within this narrow exclusion and are therefore part of the "recovery" in a third party action subject to distribution.

This language is straightforward, and before the lower court's decision, no court found any ambiguity in this statutory language:

> RCW 51.24.030 and .060 are not ambiguous . . . . RCW 51.24.060 governs the distribution of the third-party recovery to both the Department and the worker or beneficiary, and under RCW 51.24.030(5), 'recovery includes all damages *except loss of consortium.*'"

Hi-Way Fuel Company v. Estate of Allyn, 128 Wn. App. 351, 359, 115 P.3d 1031 (2005) (emphasis in original).[4]

The Legislature also used the broadest possible language in RCW 51.24.060(1) and .030(5). "*Any* recovery" made in a third party action must be distributed in accordance with RCW 51.24.060(1). And the term "recovery" encompasses "*all* damages except loss of consortium" – including damages for pain and suffering. Substituting the definition of "recovery" for that word in RCW 51.24.060(1), the Legislature has mandated that "*All* damages except loss of consortium *shall be distributed* . . . ." *See also* RCW 51.24.060(1)(d) (after payment of attorney fees and costs, 25% worker share, and reimbursement to the Department for benefits paid, "*[a]ny remaining balance*" is paid to the injured worker) (emphasis added).

The explicit reference to a spouse's damages for loss of consortium in RCW 51.24.030(5) also confirms that the Legislature chose to carve out but one exception to the "recovery" subject to distribution under RCW 51.24.060(1). *See, e.g.*, *Adams v. King County*, 164 Wn.2d 640, 650, 192 P.3d 891 (2008) ("[u]nder expressio unius est exclusio alterius, . . . to express one thing in a statute implies the exclusion of the other")

---

[4] *See also State v. Costich*, 152 Wn.2d 463, 470, 98 P.3d 795 (2004) ("[i]f the language is unambiguous, we give effect to that language and that language alone because we presume the legislature says what it means and means what it says").

(citation omitted). Read as a whole, RCW 51.24.060(1) and .030(5) are conducive to only one meaning. The "recovery" in a third party action includes "all damages except loss of consortium," and this "recovery" is to be distributed according to the statutory formula.[5]

2. The Court Of Appeals Decision Is Contrary to the Legislative History of RCW 51.24.030(5)

Because RCW 51.24.030(5) and .060 are not ambiguous, there is no need to go beyond their plain language. *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). The history of the adoption of RCW 51.24.030(5), however, demonstrates that the Legislature intended the new law to ensure that damages for an injured workers' pain and suffering would be included in distributions made under the Third Party Recovery Statute. *See generally* Brief of Appellant at 22-31.

In 1994 this Court ruled that "the Department's right of reimbursement does not extend to a spouse's third party recovery for loss of consortium." *Flanigan*, 123 Wn.2d at 426. *Flanigan* relied on former RCW 51.24.060(1)(c)'s provision that the Department was to be paid "the balance of the recovery" after attorney fees and the worker's 25 percent

[5] Tobin may argue that equitable principles or comparison to subrogation law requires that workers retain third party recoveries in their entirety except where workers' compensation benefits precisely match the elements of the tort damages. This Court, however, has rejected application of equitable subrogation principles to the statutory mandate of the Third Party Recovery Statute's distribution formula. *See Rhoad v. McLean Trucking Co., Inc.*, 102 Wn.2d 422, 427-428, 686 P.2d 483 (1984).

share, "but only to the extent necessary to reimburse the department . . . for compensation and benefits paid . . . ."[6] The majority construed the statute to mean that there could be no "reimbursement" from a spouse's loss of consortium damages because the Industrial Insurance Act does not provide that *type* of benefit. *Flanigan*, 123 Wn.2d at 425-426.[7]

Dicta in *Flanigan* suggested that other components of third party recoveries, such as damages for pain and suffering, might similarly be exempt from distribution to the extent they were not matched by workers' compensation benefits. *See id.* at 423. This created considerable uncertainty over the distribution of third party recoveries. The Legislature responded by passing RCW 51.24.030(5) in its next session. The new law codified the result in *Flanigan*, but limited it by adding a new definition to the Third Party Recovery Statute:

> For purposes of this chapter, "recovery" includes all damages except loss of consortium.

Laws of 1995, ch. 199, § 2, *codified at* RCW 51.24.030(5). Because RCW 51.24.060(1) governs the distribution of "any recovery" made in a

---

[6] RCW 51.24.060 has been amended since 1994 in ways not material to the present matter. *See* Laws of 1995, ch. 199, § 4; Laws of 2001, ch. 146, § 9.

[7] Notably, RCW 51.24.060(1)(c) makes no mention of specific *types* of workers' compensation benefits. The statute simply requires reimbursement for "benefit*s* paid" by the funds. The Legislature's use of a collective, plural term to describe the funds' reimbursement right is consistent with its broad direction in RCW 51.24.060(1) that "*any* recovery" be distributed, and RCW 51.24.030(5)'s definition of "recovery" as including "*all* damages except loss of consortium."

third party action, RCW 51.24.030(5)'s expansive definition of "recovery" ensured that "all damages except loss of consortium" would be distributed.

The legislative history of RCW 51.24.030(5) confirms that this amendment to the Third Party Recovery Statute was a response to *Flanigan* and was intended to limit its reach.[8] This history includes:

- The Fiscal Note for the bill, including the following "Facts and Assumptions":

  Fact 2: The recent Supreme Court decision in Flanigan v. Department of Labor & Indus., 123 Wn.2d 418 (1994), excepted damages for loss of consortium from the department's right of reimbursement, and created a potential for attempts at excluding other forms of damages from the department's right of reimbursement.

  * * *

  Assumption 1: Without passage of this amendment, piecemeal attempts to exclude various forms of damages from the Trust Funds' right of reimbursement will be made resulting in increased disputes, costly litigation, and cumbersome administration of the statute.

  Assumption 2: Without passage of this amendment, the underlying purpose of the third party chapter which is replenishment of the Trust Funds will be significantly hampered.

- Senate committee hearings during which the Department's Deputy Director, the Association of Washington Business and the

[8] Pertinent excerpts from RCW 51.24.030(5)'s legislative history are attached hereto as Appendix B.

Washington Self-Insurers' Association, and labor interests (through the Washington State Trial Lawyers Association) described RCW 51.24.030(5) as a direct response to *Flanigan* and explained that the proposed law would accomplish two things: insulate loss of consortium damages from distribution under the Third Party Recovery Statute, and ensure that all other damages would be distributed.

- House committee hearings during which staff explained that RCW 51.24.030(5) had been prompted by *Flanigan* and that the proposed law "would . . . agree[] with the Supreme Court, putting the loss of consortium outside of the limits of recovery[,] *but mak[e] sure that all other damages are subject to* the right of lien by the Department or self-insurer." (Emphasis added.)

- Testimony before the House committee, with the Department, AWB, WSIA, and WSTLA explaining in response to questions from legislators that the bill would recognize and codify *Flanigan* while ensuring that its holding would be limited to damages for loss of consortium.

The Court of Appeals gave no weight to this legislative history for factually and legally incorrect reasons. First, the Court inaccurately described the history as indicative "only" of the Department's intent. Second, it dismissed the testimony from all stakeholders affected by the proposed legislation as "the testimony of [] interested part[ies]" and therefore "not suggestive of the legislature's intent in enacting the statute." Third, it disregarded the committee testimony in its entirety because it was not before the "full house or senate" and "[did] not appear in the legislative report for the bill or bill analysis." And, fourth, it ignored how the fiscal note made absolutely clear that the *only* reason for the law was

to ensure the distribution of all damages from a third party recovery except a spouse's loss of consortium. *Tobin*, 145 Wn. App. at 616-618, 618 n.9.

While the weight given to different types of legislative history certainly varies, this Court has recognized that material appearing outside the legislative journals can assist in determining legislative intent:

> It is true that we have expressed restrictions upon sources of legislative history. . . . We have never, however, limited our consideration of legislative history materials to those contained in the journals. Our focus is not on where the materials are found, but on whether they are sufficiently probative of the Legislature's intent. Therefore, it is of some assistance to our interpretation to look to such documentation as may bear on the issue.

Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 104-105, 829 P.2d 746 (1992). In prior cases this Court has identified all of the above sources as indicative of legislative intent. *E.g.*, *Cosmopolitan Eng's Group v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 304, 149 P.3d 666 (2006) (committee testimony and floor debate); *Brown v. State*, 155 Wn.2d 254, 265-266, 119 P.3d 341 (2005) (discussion among committee members and staff); *State v. Heiskell*, 129 Wn.2d 113, 119, 916 P.2d 366 (1996) (colloquy in committee hearing that is "not extensive" but "does suggest a legislative intent" and "what the law's effect would be"); *State v. Turner*, 98 Wn.2d 731, 737-738, 658 P.2d 658 (1983) (memoranda from committee staff and citizen testimony to committee); *State v. Anderson*, 94

Wn.2d 176, 187-188, 616 P.2d 612 (1980) (committee staff memorandum and committee hearing transcript were "significant evidence" of legislative intent).[9]

The legislative history of RCW 51.24.030(5) uniformly supports the plain language interpretation of the amended statute: that it was intended to exclude from distribution that portion of a third party recovery representing a spouse's damages for loss of consortium, and to include all other damages.

3. *Flanigan* Does Not Compel the Result Reached by the Court of Appeals

The Court of Appeals based its decision on *Flanigan* and that case remains the lynchpin of Tobin's arguments. *See Tobin*, 145 Wn. App. at 614-616; Answer to Petition for Review at 4-7. For at least two reasons, *Flannigan* does not compel the conclusion that damages for pain and suffering must be ignored in distributing a third party recovery.

First, as set out above, the Legislature limited *Flanigan* to a spouse's damages for loss of consortium when it enacted RCW 51.24.030(5). The plain language of this amendment to the Third

[9] *See also Sebastian v. Dep't of Labor & Indus.*, 142 Wn.2d 280, 295-297, 12 P.3d 594 (2000) (Talmadge, J., dissenting) (discussing fiscal note and legislative staff counsel memorandum as legislative history); *Longview Fibre Co. Dep't of Labor & Indus.*, 58 Wn. App. 751, 756-757, 795 P.2d 699, *review denied*, 114 Wn.2d 1030 (1990) (quoting committee testimony as evidence of legislative history of amendment to Third Party Recovery Statute, including WSTLA attorney's response to question showing that amendment "had been worked out with the Department of Labor and Industries and the Attorney General's Office").

Party Recovery Statute supports this conclusion, and its legislative history confirms it. By holding that third party tort recovery does not include all damages recovered by an injured worker, the Court of Appeals rendered RCW 51.24.030(5) meaningless, and effectively ruled that the 1995 amendment accomplished nothing. This violates two well-established rules of construction: (a) "[s]tatutes must be construed so that all the language is given effect and no portion is rendered meaningless or superfluous," *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638 (2002); and (b) "'where a law is amended and a material change is made in the wording, it is presumed that the legislature intended a change in the law.'" *Guillen v. Pierce County*, 144 Wn.2d 696, 723, 31 P.3d 628 (2001), *reversed in part*, 537 U.S. 129, 123 S. Ct. 720, 154 L Ed. 2d 610 (2003) (internal citation omitted).[10]

Second, a spouse's damages for loss of consortium and a worker's damages for pain and suffering are legally distinguishable. The former is a separate and independent claim, based on a separate and independent injury to a plaintiff's spouse. *E.g.*, *Oltman v. Holland America Line, USA*, 163 Wn.2d 236, 250, 178 P.3d 981 (2008), cert. dismissed, __ U.S. __,

[10] Although the Supreme Court reversed *Guillen* in part, it nonetheless affirmed the proposition that "[w]hen Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect." 537 U.S. at 145. *See also Yakima Fruit Growers Ass'n v. Henneford*, 187 Wash. 252, 258, 60 P.2d 62 (1936) (legislation enacted immediately after Supreme Court decision and amending statute construed in that decision was a response to that decision; to hold otherwise would mean that "the amendatory language was intended to have no effect whatsoever").

129 S. Ct. 24, 171 L. Ed.2d 927 (2008). Damages for pain and suffering, on the other hand, are part and parcel of a plaintiff's own injury claim. *Wooldridge v. Woolett*, 96 Wn.2d 659, 666, 638 P.2d 566 (1981). And unlike damages for a spouse's loss of consortium, the Industrial Insurance Act does provide benefits that reflect an injured worker's pain and suffering. For example, awards for permanent partial disability under RCW 51.32.080 attempt to compensate workers for the pain they have suffered as a result of their industrial injuries.[11]

In this regard Tobin is incorrect when he argues that all workers' compensation benefits are focused on lost earning capacity. *See* Answer to Petition at 14 (citing *Davis v. Bendix*, 82 Wn. App. 267, 917 P.2d 586 (1996) for the proposition that permanent partial disability benefits "are granted solely because such an award anticipates a certain lost earning capacity associated with a percentage of loss in any given bodily function.") This Court has "disapproved" Tobin's reading of *Davis*.

---

[11] *E.g.*, WAC 296-20-19030 ("To what extent is pain considered in an award for permanent partial disability?" "The categories used to rate unspecified disabilities incorporate the worker's subjective complaints"); WAC 296-20-200(4) ("[t]he categories also include the presence of pain, tenderness and other complaints").

The permanent partial disability award categories for mental health impairments refer almost exclusively to the type of subjective complaints that would fall under the rubric of pain and suffering in the tort context. *See* WAC 296-20-340 (see Appendix C); *cf.* RCW 4.56.250(b) (defining "noneconomic damages" as "subjective, nonmonetary losses, including, but not limited to pain, suffering, inconvenience, mental anguish, disability or disfigurement incurred by the injured party, emotional distress, loss of society and companionship, loss of consortium, injury to reputation and humiliation, and destruction of the parent-child relationship").

McIndoe v. Dep't of Labor & Indus., 144 Wn.2d 252, 262-263, 26 P.3d 903 (2001); *Willoughby v. Dep't of Labor & Indus.*, 147 Wn.2d 725, 734-736, 57 P.3d 611 (2002) (permanent partial disability benefits do not compensate for lost earning capacity). [12]

The Court of Appeals erred when it relied on *Flanigan* to support its holding that damages for pain and suffering are exempt from distribution.[13]

4. The Court Of Appeals Decision Defeats The Purposes of The Third Party Recovery Statute

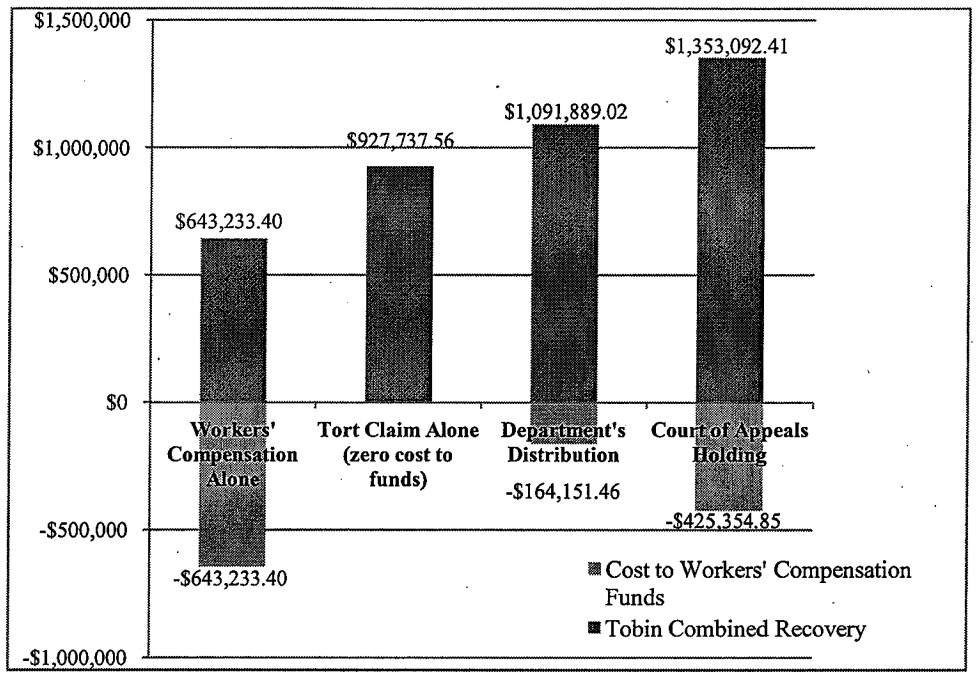
The Department's Petition for Review at pages 11-12 analyzes Tobin's workers' compensation benefits and third party recovery as an example of how the Court of Appeals decision would impact the Industrial

---

[12] Moreover, it is impractical and often impossible to "match" workers' compensation benefits and tort damages on an item-by-item basis. The benefits to which injured workers are entitled regardless of fault were never intended to mirror common law tort damages. Rather, benefits under the Industrial Insurance Act are a replacement for the entire cause of action. Any attempt to "match" their respective "elements" will therefore fail, not only because of basic differences between the type of benefits available, but also because of the core differences between the two systems.

[13] These reasons also distinguish *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268, 126 S.Ct. 1752, 164 L.Ed.2d 459 (2006), on which Tobin relies. *See* Answer to Petition at 11. *Ahlborn*, a case involving state reimbursement for Medicaid payments, is also distinguishable for a more basic reason. It was based on federal law that explicitly limited the type of third party damages from which the state could seek reimbursement. *Ahlborn*, 547 U.S. at 283-285. *Ahlborn* thus supports the department's position because it stands for the proposition that an express statutory limit is required to limit a state's statutory reimbursement rights. With the exception of RCW 51.24.030(5)'s exclusion of loss of consortium, no such limitation appears in RCW 51.24.

Insurance funds. This analysis, which Tobin did not dispute, can be depicted graphically as follows:



The Department's distribution order, which includes damages allocated to pain and suffering, provides Tobin with combined Industrial Insurance benefits and tort damages that exceed his workers' compensation payments by 70% and his personal injury recovery by 18%. The Court of Appeals holding, on the other hand, creates a recovery that exceeds Tobin's workers compensation benefits by 110% and exceeds his tort damages by 46% *See generally* Petition for Review at 12-17.[14]

[14] A more detailed version of this graph and its related figures is attached as Appendix D.

These figures demonstrate how excluding damages for pain and suffering from distribution defeats the purposes of the Third Party Recovery Statute. For example, the Industrial Insurance funds' interest in third party recoveries will be substantially reduced, a cost that can only be borne by the Washington employers and workers whose taxes finance the Industrial Insurance funds. Conversely, some injured workers can receive gross compensation that approaches the combined total of their workers' compensation benefits and tort damages, a potential for double recovery the cost of which is likewise borne by employers and workers.

The Third Party Recovery Statute allows a worker injured by a third party "to increase his or her compensation beyond the Act's limited benefits." *Flanigan*, 123 Wn.2d at 424.[15] Under the Department's construction, Tobin and similarly situated claimants receive significantly increased compensation – an increase in Tobin's case from $643,000 in workers' compensation benefits to $1.091 million in combined compensation. Under the Court of Appeals' construction, however, the funds receive only a fraction of the benefits paid, allowing workers with third party recoveries to receive compensation that dramatically exceeds the recovery available through the tort system.

---

[15] *Cf. Maxey v. Dep't of Labor & Indus.*, 114 Wn.2d 542, 549, 789 P.2d 75 (1990) (Third Party Recovery Statute "makes it possible for the worker to recover full compensation from the party which is legally and in fact responsible for his injuries and consequent damages").

C. RCW 51.24.030(5) and 51.24.060 Do Not Violate Substantive Due Process

As an alternative to his statutory argument, Tobin claims "[t]he Department's assertion of a lien against Mr. Tobin's pain and suffering recovery is an unconstitutional taking." Answer to Petition at 1. Despite using the word "taking," Tobin's sole constitutional argument is that distributing a tort recovery attributed to pain and suffering violates substantive due process. Answer to Petition at 13-16.[16]

A party challenging the constitutionality of a statute must prove that it is unconstitutional beyond a reasonable doubt. *E.g.*, *Erickson & Assocs. v. McLerran*, 123 Wn.2d 864, 869, 872 P.2d 1090 (1994). Tobin cannot do so here because he does not have an unconditional property right in a third party recovery. *See, e.g.*, *Puget Sound Gillnetters Ass'n v. Moos*, 92 Wn.2d 939, 947-948 n.5, 603 P.2d 819 (1979) (there can be no taking where the law doesn't create a property interest).

The conclusion that Tobin has no property interested affected by the Third Party Recovery Statute follows from the Legislature's authority to abolish *all* private causes of actions available to injured workers. In

[16] Tobin has cited Article 1, Section 3 of the Washington Constitution, as well as the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution, but he offers no argument apart from his substantive due process argument. *See* Answer to Petition at 12-15. A party must offer analysis and argument in order to command judicial consideration. *E.g.*, *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986).

light of this long-established power, the Legislature's decision to allow injured workers to seek damages from third parties, subject to the provisions of RCW 51.24.030(5) and .060, cannot operate to create a property right where none existed. *See Maxey v. Dep't of Labor & Indus.*, 114 Wn.2d 542, 546-548, 789 P.2d 75 (1990) ("all rights of the worker, including any 'property rights,' must be found in RCW Title 51, specifically RCW 51.24" therefore worker had no property interest in Department's share of third party recovery subject to IRS lien).[17]

Tobin relies on *Presbytery of Seattle v. King County*, 114 Wn.2d 320, 787 P.2d 907, *cert. denied*, 498 U.S. 911 (1990), to make his due process argument. Under *Presbytery,* regulation of real property is constitutional if it (a) "is aimed at achieving a legitimate public purpose," (b) "uses means that are reasonably necessary to achieve that purpose," and (c) is not "unduly oppressive." *Presbytery*, 114 Wn.2d 330.[18]

---

[17] *See also Fria v. Dep't of Labor & Indus.*, 125 Wn. App. 531, 534-535, 105 P.3d 33 (2004), *review denied*, 154 Wn.2d 1018 (2005) (rejecting takings challenge to Third Party Recovery Statute); *Gersema v. Allstate Ins. Co.*, 127 Wn. App. 687, 696-699, 112 P.3d 552 (2005) ("[p]lacing a lien on these [third party] settlement funds until such time as Gersema's future disability or medical needs are known does not constitute a 'taking' of or constraint on Gersema's property") (footnote omitted).

[18] The third prong *Presbytery* asks "whether [the challenged regulation] is unduly oppressive *on the land owner*," highlighting how *Presbytery* is written to assess the property rights of real property owners subject to burdensome and possibly irrational regulatory requirements. *See Presbytery*, 114 Wn.2d at 330 (emphasis added). Of course, *Presbytery* has no direct application to this case because there is no need to address burdens on a real property owner.

Tobin agrees the Third Party Recovery Statute addresses a legitimate public purpose. Answer to Petition at 14. The Statute serves at least four legitimate purposes: (1) reimbursing the Industrial Insurance funds that have paid benefits when a third party was at fault; (2) ensuring that third parties bear the cost of their negligence; (3) allowing injured workers to recover additional damages using tort law theories; and (4) preventing double recoveries. *See* Petition for Review at 5.

Tobin argues that distributing damages allocated to pain and suffering "is not reasonably necessary to achieve the purposes of RCW 51.24.060." Answer to Petition at 15. Distributing the tort recovery, however, directly relates to reimbursing the funds after the funds have paid benefits. Reimbursing the funds also ensures that the negligent third party shoulders responsibility rather forcing employers and workers to pay for the injury via the funds. *See* Petition for Review at 11-17. The Legislature can rationally determine that legitimate public purposes are advanced by reimbursing the funds from "all damages except loss of consortium" recovered from the third party. RCW 51.24.030(5). Not surprisingly, Tobin can cite no case in which a state's third party recovery scheme has been found irrational or unconstitutional in this regard.

Tobin also offers a bald conclusion that it is "unduly oppressive" to reimburse the funds from tort damages allocated to pain and suffering

because there is no precise analog for pain and suffering damages in the workers' compensation arena. Answer to Petition at 16. The constitutional limit of due process, however, asks simply if legislation is rational. The Legislature can rationally see that if the Industrial Insurance Funds provided benefits as a primary insurer while a third party paid damages based on tort, both the benefits and the tort damages arose from one injury. The Legislature can rationally decide that "all damages" in tort are to be available to offset the benefits paid by the funds, regardless of the labels used to describe them – particularly when it does so through a formula that guarantees injured workers who successfully pursue third parties compensation that exceeds either their workers' compensation benefits or tort recoveries.

RCW 51.24.030(5) and RCW 51.24.060 rationally relate to advancing legitimate public purposes and therefore do not violate substantive due process. *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88, 75 S. Ct. 461, 99 L. Ed. 563 (1955) (legislation that does not affect a fundamental right is constitutional if there is public purpose to be addressed and it might be thought that the particular legislative measure is a rational way to address it); *see also Smith v. Gould,* 918 F.2d 1361, 1364 (8th Cir. 1990) ("[t]he Court never found a workers' compensation statute that transgressed constitutional limits, nor

did it identify a hypothetical statute that would do so."); *Rafn v. Dep't of Labor & Indus.*, 104 Wn. App. 947, 952-953, 17 P.3d 711, *review denied*, 144 Wn.2d 1006 (2001) (rejecting substantive due process challenge to statute assessing workers' compensation premiums).

D. Attorney Fees

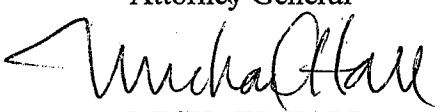
As the Department explained in its Reply Brief below at 13, Tobin is not entitled to attorney fees at any level of court review unless he prevails and the decision affects the accident fund or medical aid fund. RCW 51.52.130.

IV. CONCLUSION

For the foregoing reasons, the Court should reverse the Court of Appeals and affirm the Department's distribution order.

RESPECTFULLY SUBMITTED this 20th day of February, 2009.

ROBERT M. MCKENNA
Attorney General



MICHAEL HALL
Assistant Attorney General
WSBA # 19871
Attorney for Petitioner

JAY D. GECK
Deputy Solicitor General
WSBA # 17916
Attorney for Petitioner

APPENDIX A

RCW 51.24.030

Action against third person — Election by injured person or beneficiary — Underinsured motorist insurance coverage.

. .

(5) For the purposes of this chapter, "recovery" includes all damages except loss of consortium.

RCW 51.24.060
Distribution of amount recovered — Lien.

(1) If the injured worker or beneficiary elects to seek damages from the third person, any recovery made shall be distributed as follows:

(a) The costs and reasonable attorneys' fees shall be paid proportionately by the injured worker or beneficiary and the department and/or self-insurer: PROVIDED, That the department and/or self-insurer may require court approval of costs and attorneys' fees or may petition a court for determination of the reasonableness of costs and attorneys' fees;

(b) The injured worker or beneficiary shall be paid twenty-five percent of the balance of the award: PROVIDED, That in the event of a compromise and settlement by the parties, the injured worker or beneficiary may agree to a sum less than twenty-five percent;

(c) The department and/or self-insurer shall be paid the balance of the recovery made, but only to the extent necessary to reimburse the department and/or self-insurer for benefits paid;

(i) The department and/or self-insurer shall bear its proportionate share of the costs and reasonable attorneys' fees incurred by the worker or beneficiary to the extent of the benefits paid under this title: PROVIDED, That the department's and/or self-insurer's proportionate share shall not exceed one hundred percent of the costs and reasonable attorneys' fees;

(ii) The department's and/or self-insurer's proportionate share of the costs and reasonable attorneys' fees shall be determined by dividing the gross recovery amount into the benefits paid amount and multiplying this percentage times the costs and reasonable attorneys' fees incurred by the worker or beneficiary;

(iii) The department's and/or self-insurer's reimbursement share shall be determined by subtracting their proportionate share of the costs and reasonable attorneys' fees from the benefits paid amount;

(d) Any remaining balance shall be paid to the injured worker or beneficiary; and

(e) Thereafter no payment shall be made to or on behalf of a worker or beneficiary by the department and/or self-insurer for such injury until the amount of any further compensation and benefits shall equal any such remaining balance minus the department's and/or self-insurer's proportionate share of the costs and reasonable attorneys' fees in regards to the remaining balance. This proportionate share shall be determined by dividing the gross recovery amount into the remaining balance amount and multiplying this percentage times the costs and reasonable attorneys' fees incurred by the worker or beneficiary. Thereafter, such benefits shall be paid by the department and/or self-insurer to or on behalf of the worker or beneficiary as though no recovery had been made from a third person.

APPENDIX B

20375

FISCAL NOTE

Section 1: *This amendment allows an offset of the amount of any recoveries made to the claimant, to include settlement proceeds, from another jurisdiction to amounts paid or awarded the claimant by Washington.*

Facts and Assumptions

Amendment to RCW 51.12.120

Fact 1: Compensation paid or awarded a claimant by another jurisdiction are presently offset against amounts paid or awarded the claimant by Washington.

Fact 2: Other recoveries, to include settlement proceeds, made to the claimant under another jurisdiction's workers' compensation laws are sometimes not considered to be "compensation".

Fact 3: Other recoveries, to include settlement proceeds, made to the claimant under another jurisdiction's workers' compensations laws which are not considered to be "compensation" cannot be offset against amounts paid or awarded the claimant by Washington.

Fact 4: Injured workers are not treated equally with regards to moneys received under another jurisdiction's workers' compensations laws when amounts are paid or awarded by Washington.

Fact 5: The amendment allows an offset of the amount of any recoveries made to the claimant, to include settlement proceeds, from another jurisdiction to amounts paid or awarded the claimant by Washington.

Assumption 1: Injured workers who receive moneys under another jurisdiction's workers' compensation laws should be treated equally.

Impact on Agency Operations

This amendment will require a change in department policy with respect to moneys received by claimants under another jurisdiction's workers' compensation laws.

Fiscal Impact

See Fiscal Note.

Section 2: *The term loss of consortium does not fall within the definition of "any recovery" under the third party chapter.*

Facts and Assumptions

Amendment to RCW 51.24.030

Fact 1: Under the current statute "recovery" is not sufficiently defined.

Fact 2: The recent Supreme Court decision in Flanigan v. Department of Labor & Indus., 123 Wn. 2d 418 (1994), excepted damages for loss of consortium from the department's right of reimbursement, and created a potential for attempts at excluding other forms of damages from the department's right of reimbursement.

Fact 3: The amendment defines "recovery" to include all damages except those for loss of consortium.

Fact 4: In fiscal year 1994 the department recovered $11,644,479,25 from third parties for the Trust Funds. These are moneys actually received by the department after deducting for attorney fees and litigation costs. In addition, $21,846,118.39 in potential cost avoidance was established.

Fact 5: Department actuaries consider the amount recovered from third parties when determining the required level of reserves and premium necessary to ensure the solvency of the State Fund.

Assumption 1: Without passage of this amendment, piecemeal attempts to exclude various forms of damages from the Trust Funds' right of reimbursement will be made resulting in increased disputes, costly litigation, and cumbersome administration of the statute.

Assumption 2: Without passage of this amendment, the underlying purpose of the third party chapter which is replenishment of the Trust Funds will be significantly hampered.

Assumption 3: Without passage of this amendment, recoveries from third persons will be unpredictable and unreliable in determining actuarial levels of reserve and premium necessary to ensure solvency of the State Fund, leading to potential instability and higher costs of industrial insurance.

Impact on Agency Operations

None.

Fiscal Impact

Indeterminate.

Sections 3 and 4: *These amendments repeal RCW 51.24.050 (6) and RCW 51.24.060 (4), which require that the department make a retroactive adjustment to an employer's experience rating when a third party recovery has been made on a claim which previously had been used in calculating an employer's experience factor.*

Facts and Assumptions

Repeal of RCW 51.24.050 (6) and RCW 51.24.060 (4)

Fact: WAC 296-17-870 provides for retroactive adjustments, as required by law. Retroactive adjustments will continue to be made after the law is repealed until such time as this rule may be changed.

Assumption: The department will propose and adopt a new rule specifying a method for prospective consideration of third party recoveries, after the current statute is repealed.

In addition, RCW 51.24.060 is being amended to allow for service of an Order and Notice to Withhold and Deliver by certified mail.

Facts and Assumptions

Amendment to RCW 51.24.060

Fact 1: The current statute only provides for service of a Notice and Order to Withhold and Deliver by the sheriff of the county, the sheriff's deputy, or an authorized representative of the director.

Fact 2: The department issues approximately 100 Notice to Withhold and Delivers annually in third party cases.

Fact 3: Notices to Withhold and Deliver are served upon legal offices, banks, and employers.

Fact 4: Service of a Notice to Withhold and Deliver by certified mail does not constitute legal service under the existing statute.

Fact 5: Currently, Notices to Withhold and Deliver are sent certified mail, return receipt requested.

Fact 6: The cost of each legal service by a county sheriff is from $25 to $50.

Assumption 1: Personal service of a Notice to Withhold and Deliver disturbs the workplace.

Assumption 2: Legal offices, banks, and employers believe that service of a Notice to Withhold and Deliver by certified mail is less disruptive to the workplace than by personal service.

Assumption 3: Costs to the department for personal service are much greater than service by certified mail.

Assumption 4: Passage of this bill will codify the existing practice of service by certified mail.

Impact on Agency Operations

None.

Fiscal Impact

None.

Section 5: *RCW 51.24.090 replaces the term "payable" with the phase estimated to be paid on the future.*

Facts and Assumptions

Amendment to RCW 51.24.090

Fact 1: The intent of the legislature has been to protect the Trust Funds from third person settlements that are deficient in covering the full benefits under Title 51.

Fact 2: The term "payable" has been used differently under separate sections of the statute.

Fact 3: The amendment replaces the term "payable" with the phrase "estimated to be paid in the future", and further clarifies the intent of the legislature and eliminates potential disputes over interpretation.

Fact 4: The amendment ensures full protection of the Trust Fund.

Assumption 1: Without passage of this bill, attempts will be made challenging the authority of the department to protect the Trust Funds in full, resulting in increased disputes, costly litigation, and cumbersome administration of the statute.

Impact on Agency Operations

Indeterminate.

Fiscal Impact

Indeterminate.

Section 6: *RCW 51.52.060 is amended to clearly state that the specified twenty day period for filing an appeal to the Board of Industrial Insurance Appeals for a health services provider or other aggrieved party, applies only to department orders or decisions making demand for repayment of sums paid to a provider of medical, dental, vocational or other health services.*

Facts and Assumptions

Amendment to RCW 51.52.060

Fact 1: The 20-day appeal period specified in RCW 51.52.060 applies only to department orders making demand for repayment of sums paid to a provider of medical, dental, vocational or other health services.

Fact 2: The appeal period for all other health services provider orders or decisions is 60 days.

Assumption 1: The amendment applies to health services provider repayment demand orders issued on or after the date of bill enactment.

Impact on Agency Operations

No significant impact on agency operations.

Fiscal Impact

None.

Senate Labor, Commerce and Trade Committee Hearing Transcript
January 24, 1995 (Excerpts)

MR. WATSON: Mr. Chairman, Mike Watson, Deputy Director for the Department of Labor & Industries. . . . .

. . .

. . . Our intent is to codify that loss of consortium is the only part of a third-party recovery for an injury that would not be subject to repayment of the benefits that L & I or the self-insured employer has paid out.

There was some language in the Supreme Court decision that began to get into an analysis of special versus general damages. And that's a discussion that has never taken place in terms of the law or the application of the law in the past, and we would like to make that clear. This is a significant area of recovery for replenishment of the trust funds, but also provides for additional recovery for injured workers or their survivors as well. . . .

. . .

MR. FINCH: . . . I'm Clif Finch with the Association of Washington Business . . . . With me today is Charlie Bush from the law firm of Preston Gates in Seattle. He chairs the worker compensation legal committee for both the Association of Washington Business and the Washington Self-insurers Association. . . .

. . .

MR. BUSH: . . . Since 1911, when the Worker's Compensation Act first came into being, there was, in essence, the third-party concept but it was a much more harsh situation. An injured worker or the surviving beneficiary could either take under the Worker's Comp Act or go against the person responsible as long as it wasn't the employer or a co-employee.

Later on the harsh choice was softened and . . . the worker or the surviving beneficiary or a dependent, could also take under the Worker's Compensation Act the benefits of compensation provided and pursue the third party. But in the event there was a recovery from the third party, . . . the monies had to come back to . . . the state fund, the idea being that the personal injury cause of action was preserved for the benefit of the worker's compensation funds so that . . . the worker's comp claimant still got all of the benefits of compensation to which they were entitled under the act, but also . . . the funds were reimbursed.

Then things got changed a bit and a small amount was carved out for the worker . . . so that they could have a little bit more. It was a 25 percent exemption from the reimbursement and set off provisions otherwise available to the worker's compensation fund. All along there's been this dynamic between the trial lawyer type worker groups and the worker's compensation funds as to how much the statute actually meant as far as the ability to receive monies back to the worker's comp funds and offset against future benefits payable under the worker's compensation funds.

Then came the Supreme Court decision to which Mr. Watson was just referring to and why this particular amendment is being proposed, which said, "Okay. We've got some ideas about the classifications that we can talk about that cover the various types of worker's compensation and benefits payable under a worker's compensation claim and we're going to distinguish those from various elements of damages available to a plaintiff in a personal injury action arising out of the worker's comp claim."

And they carne up with this distinction that, "Consortium allegedly is not compensated for under the Worker's Compensation Act and, therefore; we're going to exempt it from the otherwise 1911 mandatory reimbursement and setoff."

. . . [T]he Department's already told you, what they're doing is they're responding to a Supreme Court decision as if the Supreme Court is a super-legislature telling you what the Legislature intended all along. And we have corrected that several times in prior amendments to other parts of the Worker's Compensation Act.

We submit to you that there's no reason why you should cave in . . . to the Supreme Court and that you should acknowledge that any monies gained by virtue of the pursuit of the third-party cause of action should inure to the benefit of the worker's compensation fund, whether or not those monies come in the form of consortium or any other type of damage that's recoverable in personal injury law. . . .

. . .

And so what we're basically saying by caving in to what the Supreme Court is saying is that in all death claims, we can isolate from the third-party chapter of the Worker's Compensation Act any money gained by the surviving spouse in the form of consortium, which is all basically that's available to the surviving spouse anyway. And therefore, the surviving spouse gets not only the consortium damages from the third party, but also the lifetime pension under the Worker's Compensation Act. And that is contrary to the intent of the Legislature since 1911.

. . .

MR. FINCH: I would just finally point out that with the way the bill is currently worded, you're creating an incentive for attorneys on both sides frankly to play games

with the settlement. This is the exact kind of problem that we had a couple of years ago with regard to both defense attorneys and plaintiff attorneys getting down, rearranging the benefits, so that frankly, the state fund didn't get reimbursed for the worker compensation claims.

To the credit of Mike Watson and the Department of Labor & Industries, they brought both sides together. We sat down. We worked out a compromise on that, a very controversial bill that we supported to try and get away from this manipulating of the benefits.

With the language that you have in front of you today though, once again we see the potential for that problem and would urge you to change that language so that all damages reflect back into the current formula for reimbursing the state fund.

. . .

MR. [HOCHBERG]: . . . My name is Bill [Hochberg]. I'm speaking on behalf today of the Washington State Trial Lawyers Association. . . .

. . .

. . . I think the Department's proposal eliminating the Flannigan situation, in other words a consortium claim, we can argue about whether or not that's good policy. But this seems reasonable under the circumstances.

. . .

House Commerce and Labor Committee Hearing Transcript
March 22, 1995 (Excerpts)

CHAIRPERSON: . . . First we'll start with Senate Bill 5399. Since this is a relatively complicated issue, take your time and make sure that we all understand it with your briefing.

UNIDENTIFIED SPEAKER: Senate Bill 5399 is a request from the Department of Labor & Industries and it has three different areas of the worker's compensation law that are being affected by this bill. I'll go through them one at a time and explain the current - the law and for background and then what the bill changes in each area. . . .

. . .

The second thing in the third-party action that this bill addresses has to do with a recent Supreme Court decision. The Supreme Court decided that some recoveries that workers or beneficiaries make in a third-party recovery is not subject to the lien. This particular case dealt with a loss of consortium, which is the recovery that a spouse gets for the loss of the love and affection of their spouse. . . .

And the Supreme Court said that is not the kind of recovery that the worker's compensation system can have a lien against, that it is a separate action, that it is a loss that the worker's compensation system doesn't recover for or doesn't pay for. This bill would clarify the Supreme Court's decision in this sense. It would say that the right of recovery, the lien that the Department or self-insurer has, extends to all damages that there are in third-party recovery except for the loss of consortium. That's agreeing with the Supreme Court, putting the loss of consortium outside of the limits of recovery but making sure that all other damages are subject to the right of lien by the Department or self-insurer. . . .

. . .

MR. WATSON: . . . My name is Mike Watson, Deputy Director of the Department of Labor & Industries. I'm here to testify in support of this bill. This was a piece of Department-requested legislation. . . .

CHAIRPERSON: I think that it would be helpful if you would explain the Court case that brought this to a head. . . . The one on the loss of consortium.

MR. WATSON: . . . [T]he case that we're talking about is Flannigan . . . [T]he Supreme Court distinguished between economic benefits and noneconomic benefits or recoveries. And it's the difference between general and special damages in a lawsuit.

They essentially only dealt with the issue of loss of consortium, saying that was a noneconomic damage and the Department didn't pay anything in terms of worker's compensation benefits for that; therefore, there should be no right to assert a lien.

The troubling piece of it and the reason for our proposed amendment is they went on to raise the whole issue of economic versus noneconomic damages, and that implied that there was no right to assert a lien against noneconomic damages. Now, if every case went to a jury, this wouldn't be so troubling to us. But in the real world, 90 plus percent of the cases are settled. Our concern is that this created a loophole big enough to drive a truck through that people could simply agree that everything they're paying in terms of a settlement is for noneconomic damages and therefore none of the money could have a lien asserted against it by the Department or the self-insured.

The loss of consortium cases are few and far between. And if we find that people are manipulating that, we'd be right back to talk to you about correcting that situation.

. . .

UNIDENTIFIED SPEAKER: So that we all understand, the Department anticipates that most cases now, because of this lawsuit, will be argued as noneconomic damages and no liens will be able to be put against those settlements?

MR. WATSON: In context in terms of the money - and I don't have figures on the self-insurers - but we recover something in the neighborhood of about between 10 and 12 million dollars a year in cash under the third-party program and up to between 20 and 30 million dollars in cost avoidance because of the excess recoveries per year.

UNIDENTIFIED SPEAKER: If the Legislature does not address this issue without a bill, then the Court case will be the precedent setting case and the Department will have to go from there?

MR. WATSON: Yes. And I would say that it wasn't on point on that issue, but it opened the door wide open. And I think it could be cited as a preceden[t] for taking that position and I think it places those funds at risk. . . .

. . .

MR. EBERLE: . . . My name is Lee Eberle. I'm a principal in Eberle Vivian. We are third-party claims administrators for self-insured employers. I'm speaking on behalf of Washington self-insurers association. I also have up here with me Clif Finch from the Association of Washington Business.

What we're trying to say I guess is yes but. We are very much in favor of the Department's requested legislation if we could possibly have it modified. What we would like would be to also have the loss of consortium aspect put back into the loop, in other words to legislatively put back in what the court took out. Absent that, we believe

that the legislation as proposed by the Department is workable and that it is, as we say, better than the alternatives.

We caution the same way that the Department did. The problem with exempting loss of consortium from recovery under the lien is that as more and more cases go into settlement, we believe that the trial lawyers working on behalf of the injured workers, the claimants, are going to allocate a greater and greater percentage of the recovery to loss of consortium for the spouse and less and less money to the injured worker for recovery of their medical payments, time loss payments, general pain and suffering, whatever they are, that more of it is going to be allocated to the spouse and less of it to the injured worker.

That is our big concern, that down the road it's going to create problems with allocation and it's going to create problems with deficiency settlements and whether or not they ought to be approved.

MR. FINCH: I'm Clif Finch with the Association of Washington Business. And I simply want to second Lee Eberle's remarks but emphasize from AWB's perspective, it's very important that we do get this amendment. . . .

. . .

. . . [W]e don't want to create a situation where there's an incentive for the two attorneys to get together and call a particular monetary settlement something just so that lien . . . by the Department of Labor & Industries isn't paid off.

And the language you have in front of you today creates the same incentive. . . .

But the point is to the degree that you exclude lack of consortium from the lien provision with regard to the Department of Labor & Industries recovering the money it's

paid out, you create an incentive for both the defense attorney and the plaintiff's attorney to sit there and structure their settlement so that the vast majority -so a significant amount of the money goes to, quote, "lack of consortium." It's still money that's . . . paid out in the end. But the fact is the Department of Labor & Industries can't recover against that particular designation.

Yes, there's some legitimate reasons why lack of consortium should not be included in a settlement. But the bottom line it gets back to the same position that we were talking about two years ago, and that is when we get into this particular area of the law with regard to worker compensation settlements, no matter what we do, it gets distorted.

And so what we're trying to do is to remove the distortions in the system and remove the incentive for both attorneys to cut a deal. Because frankly, to the degree in a settlement you make money, lack of consortium the plaintiff -the defense attorney can kick in a little less money than they otherwise would and the plaintiff attorney gets a little more money because the lien's not going to be executed against that money. So they both come out ahead with regard to their clients.

And that's all we're saying is that regardless of what the type of damage is, the Department of Labor & Industries should be able to recover and protect . . . the premium payers in the worker compensation system. . . .

. . .

REPRESENTATIVE CONWAY: . . . Are these -are these jury settlements or are they basically settlements made between the two parties?

MR. FINCH: They are settlements made between two parties.

REPRESENTATIVE CONWAY: So the parties are determining the cases, the medical costs, the time loss, the pain and suffering and the consortium. So that's basically negotiated between the attorney of the injured worker and the state fund or the self-insured fund; is that correct?

MR. WATSON: Most of the time the agreement is made between the injured worker's attorney . . . handling their personal injury claim . . . and the attorney for the insurance company of the . . . the third-party. And they simply get together and come up with figures that they want.

MR. FINCH: And that's where the problem is. These settlements are being cut by the third-party attorney and the plaintiff attorney, the injured worker attorney. Where the Department of Labor & Industries and the rest, they're simply sitting there on the side. Yes, they may be parties to the action. But it's pretty hard to overcome a settlement once those two parties agree. And those two parties, as I indicated, have a direct monetary incentive to shift the money into a lack of consortium settlement.

REPRESENTATIVE CONWAY: Is there any way of appealing? . . .

CHAIRPERSON: Let me just butt in here. It would be the Department that would appeal; correct? Because if the other two parties had agreed on a settlement, the one left out in the cold is the Department.

UNIDENTIFIED SPEAKER: There is no mechanism for appeal. The only thing that can happen is that if there is . . . a deficiency settlement. . . . [I]f an award was made for $100,000 and . . . 80 thousand of it was put into loss of consortium, it would leave 20 thousand left with then attorney fees being calculated in and a 25 percent recovery immediately going to the claimant. There would, let's just for argument say, be

$10,000 left that the Department could assert a lien against. But they've already paid out 80 thousand in damages. They can say that they will not allow that settlement to go forward. And in this particular case, it would very clearly be justifiable. It would be supportable for the Department to refuse that. If it got closer, if it got to the point -and I don't know where it is, somewhere in the middle -where maybe the Department was getting back $40,000 and only 40 percent was being put into loss of consortium, it may be more difficult for the Department to support themselves, even though it's still a disproportionately higher amount going into loss of consortium. And that's where the problem is. . . .

REPRESENTATIVE COLE: Okay. If I understand you right, you're arguing that the two attorneys get together and . . . you fear that they will in the future agree to put a lot more of the dollars into the loss of consortium. Am I right?

MR. FINCH: Correct.

REPRESENTATIVE COLE: The question I have is: I can see why the attorney representing the injured worker would want to do that. But I don't understand why the attorney representing the other side would want to do that.

MR. FINCH: The reason it's in the direct monetary interests of the other attorney is to the degree that they offer in a general settlement say $50,000 and just in overall damages and the Department's going to take 40 of that, . . . the other side's only really getting 10. To the degree that they call it lack of consortium, instead of offering 50, they can offer 40 and the other side still comes out 30 thousand ahead.

So it's in the interest of both attorneys. . . .

. . .

REPRESENTATIVE COLE: You're saying that they both have an interest. Do you mean that they would make more money?

MR. FINCH: . . . [T]he one party on the defense side for the third party can save his client the money and at the same time still put more money directly into the pockets of both the attorney and the injured worker on the other side. So both sides come out ahead if they manipulate a settlement . . . .

REPRESENTATIVE COLE: Thank you.

. . .

MR. LIEB: Good morning. My name is Wayne Lieb. I'm here on behalf of the Washington State Trial Lawyers . . . .

. . .

. . . [W]hat you've described as the collusion issue I think is one that needs to be explored very carefully. . . . [Y]ou know, the logic behind reimbursing the Department is that a person should not be benefited twice for their loss. So for example, if, due to a car accident, you have lost wages and worker's comp has paid you time loss, then when you settle and you get lost wages from the driver who hit you, you should not be paid twice for those same lost wages. That is not fair. The party who paid you first should be reimbursed. And we absolutely agree with that principle. The problem is neither should the party who has paid first be reimbursed for -expenses they did not pay.

So for example, if the provision of worker's compensation does not pay for a benefit, they should not be reimbursed when you get paid for that benefit by somebody else . . . because it's a windfall to them . . . .

That is what consortium is. Consortium, of course, is not the loss to the person hurt in the car. . . . The spouse is never paid for that. And that is why the Department is not entitled to be reimbursed, because they never paid in the first instance.

. . .

. . . [T]he Department and the employers have a complete right to stop a settlement if it's a deficiency settlement. So we're not talking about them not being reimbursed. They already have that right to stop it. And if there's some kind of hanky panky going on where they're not being reimbursed, they simply don't agree to it, end of discussion. The only problem that can occur is when you have an excess. . . .

And I think it's easy to project the horror stories. I didn't hear them refer to even one example where this kind of thing has gone on. And I think you need to take that with a grain of salt in those circumstances . . . .

. . .

. . . I think we have offered a very significant concession with this bill. I go back to my point that the Department should not be reimbursed for benefits they do not pay. The Department does not pay for pain and suffering. The Department does not pay for disfigurement. If you get a slash across your face . . . you get zero from the Department. You get it sewn up. But in terms of any kind of compensation whatsoever, you get zero because that's a disfigurement. It's not a disability. And for whatever reason, whether you're a model or whether you're a worker, you get nothing for that. You go to a jury and the jury's reasonably going to say, "Yes, you should be reimbursed for that disfigurement." And that falls in with -within the general damages as opposed to the specific damages. We are conceding that the Department should benefit in that payment

even though they don't pay a nickel for it. So if you say if the jury says, "Yes, you get $100,000 for that slash across your face," in this bill, we are conceding the Department has a lien on it even though they never paid it in the first instance. So I think there's a very significant concession there.

. . .

REPRESENTATIVE CODY: So when they do the life care planning, consortium isn't calculated into that?

MR. LIEB: No. Again, that -that's just the individual that's been hurt. Right.

. . .

The other point is to simply say we are conceding very substantial general damages the Department and the self-insured do not pay for. And we are - I just want that to be known, that that's a very significant concession on our part.

APPENDIX C

WAC 296-20-340
Categories for evaluation of permanent impairments of mental health.

(1) Nervousness, irritability, worry or lack of motivation following an injury and commensurate with it and/or other situational responses to injury that do not alter significantly the life adjustment of the patient may be present.

(2) Any and all permanent worsenings of preexisting personality traits or character disorders where aggravation of preexisting personality trait or character disorder is the major diagnosis; mild loss of insight, mildly deficient judgment, or rare difficulty in controlling behavior, anxiety with feelings of tension that occasionally limit activity; lack of energy or mild apathy with malaise; brief phobic reactions under usually avoidable conditions; mildly unusual and overly rigid responses that cause mild disturbance in personal or social adjustment; rare and usually self-limiting psycho-physiological reactions; episodic hysterical or conversion reactions with occasional self-limiting losses of physical functions; a history of misinterpreted conversations or events, which is not a preoccupation; is aware of being absentminded, forgetful, thinking slowly occasionally or recognizes some unusual thoughts; mild behavior deviations not particularly disturbing to others; shows mild over-activity or depression; personal appearance is mildly unkempt. Despite such features, productive activity is possible most of the time. If organicity is present, some difficulty may exist with orientation; language skills, comprehension, memory; judgment; capacity to make decisions; insight; or unusual social behavior; but the patient is able to carry out usual work day activities unassisted.

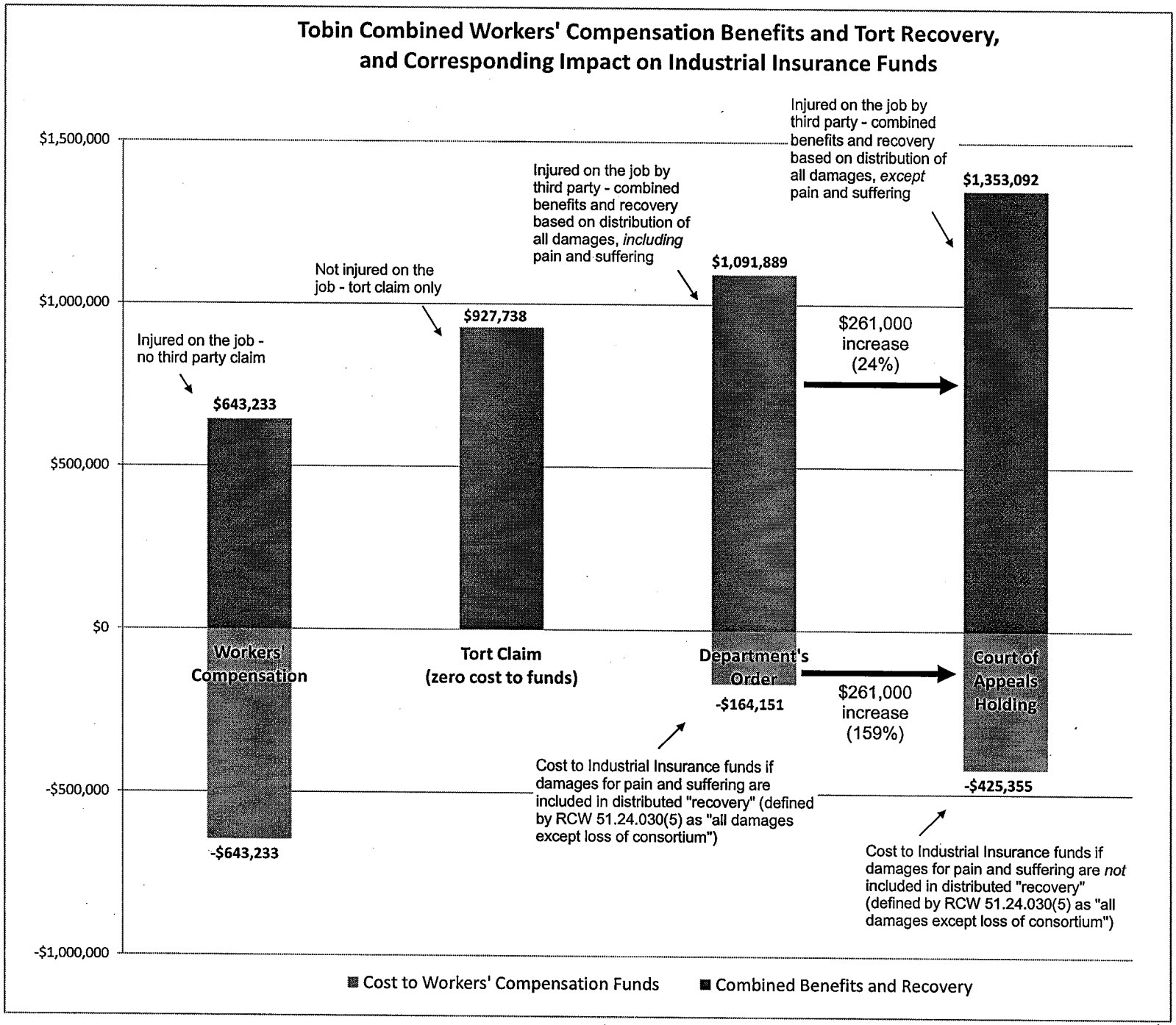
(3) Episodic loss of self-control with risk of causing damage to the community or self; moments of morbid apprehension; periodic depression that disturbs sleep and eating habits or causes loss of interest in usual daily activities but self-care is not a problem; fear-motivated behavior causing mild interference with daily life, frequent emotogenic organ dysfunctions requiring treatment; obsessive-compulsive reactions which limit usual activity; periodic losses of physical function from hysterical or conversion reactions; disturbed perception in that patient does not always distinguish daydreams from reality; recognizes his fantasies about power and money are unusual and tends to keep them secret; thought disturbances cause patient to fear the presence of serious mental trouble; deviant social behavior can be controlled on request; exhibits periodic lack of appropriate emotional control; mild disturbance from organic brain disease such that a few work day activities require supervision.

(4) Very poor judgment, marked apprehension with startle reactions, foreboding leading to indecision, fear of being alone and/or insomnia; some psychomotor retardation or suicidal preoccupation; fear-motivated behavior causing moderate interference with daily life; frequently recurrent and disruptive organ dysfunction with pathology of organ or tissues; obsessive-compulsive reactions causing inability to work with others or adapt; episodic losses of physical function from hysterical or conversion reactions lasting longer than several weeks; misperceptions including sense of persecution or grandiosity which may cause domineering, irritable or suspicious behavior; thought disturbance causing memory loss that interferes with work or recreation; periods of confusion or vivid daydreams that cause withdrawal or reverie; deviations in social behavior which cause concern to others;

lack of emotional control that is a nuisance to family and associates; moderate disturbance from organic brain disease such as to require a moderate amount of supervision and direction of work day activities.

(5) Marked apprehension so as to interfere with memory and concentration and/or to disturb markedly personal relationships; depression causing marked loss of interest in daily activities, loss of weight, unkempt appearance, marked psycho-motor retardation, suicidal preoccupation or attempts, or marked agitation as well as depression; marked phobic reactions with bizarre and disruptive behavior; psychophysiological reactions resulting in lasting organ or tissue damage; obsessive-compulsive reactions that preclude patient's usual activity; frequent or persistent loss of function from conversion or hysterical reactions with regressive tissue or organ change; defects in perception including frank illusions or hallucinations occupying much of the patient's time; behavior deviations so marked as to interfere seriously with the physical or mental well-being or activities of others; lack of emotional control including marked irritability or overactivity.

APPENDIX D


Tobin Combined Workers' Compensation Benefits and Tort Recovery, and Corresponding Impact on Industrial Insurance Funds
$1,500,000
$1,000,000
$500,000
$0
-$500,000
-$1,000,000
Injured on the job - no third party claim
$643,233
-$643,233
Workers' Compensation
Not injured on the job - tort claim only
$927,738
Tort Claim (zero cost to funds)
Injured on the job by third party - combined benefits and recovery based on distribution of all damages, including pain and suffering
$1,091,889
-$164,151
Department's Order
Cost to Industrial Insurance funds if damages for pain and suffering are included in distributed "recovery" (defined by RCW 51.24.030(5) as "all damages except loss of consortium")
$261,000 increase (24%)
$261,000 increase (159%)
Injured on the job by third party - combined benefits and recovery based on distribution of all damages, except pain and suffering
$1,353,092
-$425,355
Court of Appeals Holding
Cost to Industrial Insurance funds if damages for pain and suffering are not included in distributed "recovery" (defined by RCW 51.24.030(5) as "all damages except loss of consortium")
Cost to Workers' Compensation Funds
Combined Benefits and Recovery