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

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STATE OF WASH  
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JIM A. TOBIN,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant.

**BRIEF OF APPELLANT**

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## I. INTRODUCTION

Jim Tobin was injured at work in June of 2003. By late September 2005, the Department of Labor and Industries had provided him more than \$80,000 in workers' compensation benefits, with future benefits estimated at over \$560,000.

Workers' compensation benefits are ordinarily the exclusive remedy for those who have suffered on-the-job injuries. Chapter 51.24 RCW (the Third Party Recovery Statute) provides a limited exception to this rule, allowing an injured worker to sue in tort "a third person, not in a worker's same employ, [who] is or may become liable to pay damages on account of a worker's injury . . . ." RCW 51.24.030(1). "[A]ny recovery" made in a third party suit "shall be distributed" pursuant to a formula set out in the Third Party Recovery Statute. RCW 51.24.060(1).

RCW 51.24.060's mandatory distribution formula includes up-front payment of attorneys' fees and costs, a 25% share to the worker free and clear of any claim by the Department, and reimbursement to the Department "to the extent necessary to reimburse [it] for benefits paid." The formula then provides for an offset of future workers' compensation benefits against the "remaining balance" left after the foregoing allotments. *See* RCW 51.24.060(1)(a)-(d).

In *Flanigan v. Department of Labor and Industries*, 123 Wn.2d 418, 869 P.2d 14 (1994), the Supreme Court held that, notwithstanding RCW 51.24.060's formula governing the distribution of "any recovery" made in a third party lawsuit, "the Department's right to reimbursement does not extend to a spouse's third party recovery for loss of consortium." 123 Wn.2d at 426. The *Flanigan* majority went on in dicta to suggest that its analysis might extend to exclude a worker's own damages for pain and suffering. *Id.* at 423.

The Legislature immediately responded to *Flanigan*. RCW 51.24.030(5), enacted in 1995, codified the Court's loss of consortium holding and rejected its dicta by defining "recovery" to include "all damages except loss of consortium." The history of this statute confirms the Legislature's intent that *only* damages for loss of consortium were to be excluded from distribution under the Third Party Recovery Statute.

Tobin pursued a third party claim and recovered \$1,400,000, including nearly \$800,000 for pain and suffering. The Department issued an order distributing Tobin's recovery in accordance with RCW 51.24.060(1) and RCW 51.24.030(5). Tobin challenged this order, claiming that the Department should have excluded his pain and suffering damages when it distributed his recovery. The Board of Industrial

Insurance Appeals correctly recognized that nothing in the Third Party Recovery Statute supports such a result, and that RCW 51.24.030(5) dictates the opposite.

The trial court, however, held otherwise. Relying on *Flanigan* – a decision that the Legislature had explicitly limited to loss of consortium damages – and ignoring the plain language of the Third Party Recovery Statute, the trial court ruled in effect that “all damages except loss of consortium” in fact means “all damages except loss of consortium, **and pain and suffering.**”

The trial court’s decision is wrong and this Court should correct it.

## II. ASSIGNMENTS OF ERROR

### A. **The Trial Court Erred In Entering Conclusion Of Law No. 2, Which States:**

Under RCW 51.24.060(1)(c), the Department is only entitled to be paid back from the recovery to the extent necessary to reimburse it for benefits paid. Since the Department does not pay pain and suffering benefits, it cannot be reimbursed for such benefits. Therefore, the pain and suffering portion of the third party recovery is not subject to distribution under RCW 51.24.060.

### B. **The Trial Court Erred In Entering Conclusion Of Law No. 3, Which States:**

The July 24, 2006 order of the Board of Industrial Insurance Appeals is incorrect and is reversed.

**C. The Trial Court Erred In Entering Conclusion Of Law No. 4, Which States:**

The September 25 [*sic*, September 29], 2005 Department order is reversed and this matter is remanded to the Department to recalculate the third party offset excluding the pain and suffering portion of the third party recovery from the calculation.

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**D. The Trial Court Erred In Reversing The July 24, 2006 Board Decision**

**E. The Trial Court Erred In Reversing The September 29, 2005 Department Order**

**F. The Trial Court Erred In Ignoring The Plain Language Of RCW 51.24.030(5) And RCW 51.24.060(1) And Excluding Tobin's Pain And Suffering Damages From Distribution Under The Third Party Recovery Statute**

**III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**A. Did the trial court err when it ignored the plain language of RCW 51.24.030(5) (defining "recovery" as "all damages except loss of consortium") and RCW 51.24.060(1) (establishing a mandatory distribution formula for "any recovery" made under the Third Party Recovery Statute) in order to conclude that Tobin's pain and suffering damages were not subject to distribution?<sup>1</sup>**

**B. If RCW 51.24.030(5) is ambiguous, does the statute's legislative history demonstrate that the Legislature intended that all damages except loss of consortium must be included in any distribution made under RCW 51.24.060(1)?**

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<sup>1</sup> Copies of RCW 51.24.030 and RCW 51.24.060 are attached hereto as Appendix A.

#### IV. STATEMENT OF THE CASE

##### A. Facts

The Board considered Tobin's appeal on stipulated facts. *See* BR 69-83.<sup>2</sup> Unless otherwise noted, factual statements herein are to the appropriate page and paragraph number of the stipulation.

##### 1. Tobin's Injury And Workers' Compensation Benefits

In June of 2003 Tobin was injured in the course of his employment when a crane boom swung unexpectedly and crushed him against a post. BR 69, ¶ 1; BR 73, 77. Following his injury, Tobin applied for workers' compensation benefits. The Department accepted Tobin's application and paid him time loss compensation and medical benefits. BR 69-70, ¶¶ 2-3, 5.

The Department eventually determined that Tobin was totally and permanently disabled and began paying him pension benefits effective March 16, 2005. Tobin is entitled to pension benefits for the rest of his natural life, rather than for the rest of his working life or until he reaches retirement age. RCW 51.32.060(1); BR 70, ¶ 5.

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<sup>2</sup> The Clerk's Papers include relevant trial court pleadings and the Certified Appeal Board Record. Citations to the Board's record are indicated by "BR" followed by the number machine-stamped on the lower right-hand corner of each page.

## 2. Tobin's Third Party Recovery

Because Tobin's injury resulted from the negligence of a third party, he elected to pursue a third party claim in addition to receiving workers' compensation benefits. *See* BR 70, ¶ 4. In September 2005

Tobin settled his third party claim for \$1,400,000.00, allocated as follows:

Medical Expenses:	\$ 29,326.84
Future Medical Expenses:	\$ 14,647.00
Total wage loss (past & future):	\$ 562,943.00
Pain and Suffering:	\$ 793,083.16

*Id.*, ¶ 6. While the Department was not a party to Tobin's third party lawsuit, a Department representative signed the settlement agreement.

*Id.*, ¶ 7.

## 3. The Distribution Of Tobin's Third Party Recovery

On September 29, 2005, the Department issued an order distributing Tobin's \$1.4 million third party recovery as follows:

Attorney's share:	\$ 472,262.44
Claimant's share:	\$ 874,391.25
Department's share:	\$ 53,346.31

BR 71, ¶ 8.<sup>3</sup>

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<sup>3</sup> The Department does not "distribute" the actual proceeds of an injured worker's tort recovery. Rather, once the Department learns that a recovery has been made, it calculates the distribution according to RCW 51.24.060(1)'s formula and issues an order setting forth the parties' respective shares. The "person to whom any recovery is paid" – generally the plaintiff's attorney – must then disburse the funds according to the distribution order. *See* RCW 51.24.060(5), (6).

At the time the Department issued the distribution order, it had paid Tobin workers' compensation benefits totaling \$80,501.40. These benefits included \$25,208.93 in medical treatment, \$42,893.89 in time loss compensation, and \$12,398.58 in pension benefits. *Id.*, ¶ 9. It is this "benefits paid" figure that served as the basis for calculating the Department's share of Tobin's recovery. *See id.*, ¶ 8; *see also* BR 83 ("Third Party Recovery Worksheet").<sup>4</sup>

Of Tobin's \$874,391.25 share, the Department calculated \$425,735.63 to be "excess recovery"<sup>5</sup> against which future claim benefits that would otherwise be paid by the Department will be offset. BR 71, ¶ 8. As noted above, Tobin will remain entitled to his workers' compensation pension benefits for the rest of his life; as of April 10, 2006, the Department estimated the present value of Tobin's future pension benefits to be \$562,732. *Id.*, ¶ 10.

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<sup>4</sup> The Department's share of the recovery was less than the workers' compensation benefits it had paid because the Department was responsible for its proportionate share of costs and attorneys' fees on its reimbursement – a share totaling more than \$27,000. Similarly, the Department will eventually pay more than \$215,000 as its share of fees and costs on future workers' compensation benefits that are offset against Tobin's recovery. *See* RCW 51.24.060(1)(c), (e); BR 83.

<sup>5</sup> "Excess recovery" is the amount of a worker's tort recovery against which future worker's compensation benefits are offset. *See* RCW 51.24.060(1)(a)-(e); BR 82 (distribution order describing "excess recovery"); *Gersema v. Allstate Ins. Co.*, 127 Wn. App. 687, 690-691, 112 P.3d 552 (2005) (discussing statutory distribution formula, including "excess recovery").

## **B. Procedural History**

### **1. The Board's Decision**

Tobin appealed the Department's September 29, 2005, order to the Board. Relying on RCW 51.24.060(1)(c) and *Flanigan v. Department of Labor and Industries*, 123 Wn.2d 418, 869 P.2d 14 (1994), Tobin argued that the Department should have excluded his \$800,000 "pain and suffering" damages from the "recovery" figure used to distribute the proceeds of his third party settlement. *See, e.g.*, BR 87-91, 94.<sup>6</sup>

The Board's Industrial Appeals Judge (IAJ) considered Tobin's appeal on stipulated facts and briefs submitted by the parties. On June 6, 2006, the IAJ issued a proposed decision and order (PD&O) that upheld the Department's order based on RCW 51.24.030(5), which defines "recovery" for purposes of the Third Party Recovery Statute as "all damages except loss of consortium." In rejecting Tobin's argument that the Department should have excluded pain and suffering from the recovery subject to distribution, the IAJ observed that:

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<sup>6</sup> Tobin has also argued that including his pain and suffering damages in the Third Party Recovery Statute's distribution formula amounted to an unconstitutional taking. *See* BR 91-94, CP 13-16. Neither the Board nor the trial court reached this issue. As the Department explained in the proceedings below, however, Tobin's constitutional argument is wrong for a number of reasons, not the least of which is that the Court of Appeals recently rejected the same argument in *Fria v. Department of Labor and Industries*, 125 Wn. App. 531, 105 P.3d 33 (2004). *See* BR 125-130; CP 28-32. Should Tobin re-raise his constitutional claim in his Brief of Respondent, the Department will address it in its Reply Brief.

The Department's argument for their right to include pain and suffering in the [distribution] is compelling and correct. . . . [T]he statute is clear that that portion of Mr. Tobin's third-party award identified as pain and suffering needs to be included in the calculation of their recovery.

BR 25.<sup>7</sup> Accepting the plain language of the Third Party Recovery

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Statute, the IAJ made the following pertinent finding of fact:

Mr. Tobin's third-party recovery of \$793,083.16 for pain and suffering for his injuries sustained in the June 11, 2003 industrial injury is an element of his recovery for which the Department has the right of recovery.

BR 26. The IAJ also entered a conclusion of law stating that "RCW 51.24.030(5) authorizes the Department of Labor and Industries to assert a right of recovery for third-party awards for pain and suffering."

BR 26.

Tobin filed a petition for review to the full Board, again arguing that the Department ought to have excluded the portion of his recovery representing pain and suffering from the distribution calculation. *See* BR 3-17. The Board denied the petition on July 24, 2006, making the PD&O the Board's final decision. BR 2.

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<sup>7</sup> The IAJ observed that "a higher court may wish to revisit this issue, as intimated in *Gersema [v. Allstate Ins. Co.]*, 127 Wn. App. 687, 112 P.3d 552 (2005)." BR 25. *Gersema* is discussed below.

## 2. The Trial Court's Ruling

Tobin appealed the Board's decision to the Pierce County Superior Court. CP 1-3. Unlike the Board, the trial court disregarded RCW 51.24.030(5), orally ruling that *Flanigan's* loss of consortium holding should be extended to cover damages for pain and suffering:

I think that the analysis by the Supreme Court in the Flanigan case with respect to loss of consortium applies equally to pain and suffering. RCW 51.24.060 provides specifically that the Department would get recovery only to the point necessary to reimburse the Department for benefits paid. They don't pay for pain and suffering. There's no way I can see a distinction between the Flanigan decision for loss of consortium and, in this case, pain and suffering . . . .

RP 13-14. The trial court subsequently entered findings of fact and conclusions of law in Tobin's favor. For purposes of this appeal, only one conclusion is at issue:

Under RCW 51.24.060(1)(c), the Department is only entitled to be paid back from the recovery to the extent necessary to reimburse it for benefits paid. Since the Department does not pay pain and suffering benefits, it cannot be reimbursed for such benefits. Therefore, the pain and suffering portion of the third party recovery is not subject to distribution under RCW 51.24.060.

CP 42 (Conclusion of Law 2).<sup>8</sup>

The Department appealed.

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<sup>8</sup> The Department also assigns error to Conclusions of Law 3 (reversing Board's decision) and 4 (reversing Department's distribution order). See CP 42 (Conclusions of Law 3 and 4).

## V. ARGUMENT

### A. Summary Of Argument

As a result of an on-the-job injury, Jim Tobin received workers' compensation benefits. Because his injury was caused by a third party, he was also permitted to pursue a separate tort claim. In that action Tobin recovered \$1.4 million, of which \$800,000 represented damages for pain and suffering. Pursuant to RCW 51.24.060, an injured worker's tort "recovery" is subject to a distribution formula which includes "reimburse[ment]" to the Department for "benefits paid."

In *Flanigan v. Department of Labor and Industries*, the Supreme Court held that the Department's reimbursement right did not extend to tort damages for loss of consortium. In dicta, the Court also suggested that its reasoning might extend to damages for pain and suffering. The Legislature immediately responded, codifying *Flanigan's* holding with respect to loss of consortium and rejecting its dicta regarding pain and suffering. Specifically, in RCW 51.24.030(5), the Legislature declared that "'recovery' includes all damages except loss of consortium."

Tobin appealed the Department's distribution of his tort recovery, arguing that his pain and suffering damages should have been excluded under *Flanigan*. The Legislature, however, limited *Flanigan* to damages for loss of consortium. The trial court erred when it relied on *Flanigan's*

dicta to reach a result that the Legislature prohibited. Its decision should be reversed.

**B. Standard Of Review**

This case was tried before the Board on stipulated facts and presents a single question: whether damages for pain and suffering are subject to distribution under the Third Party Recovery Statute. This is a legal question and review is de novo. See *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 209-210, 5 P.3d 691 (2000), cert. denied, 532 U.S. 920 (2001) (“[b]ecause this case is reviewed on stipulated facts, the issues are solely questions of law and are reviewed de novo”); *Tallerday v. DeLong*, 68 Wn. App. 351, 355-356 n.1, 842 P.2d 1023 (1993) (“[b]ecause an issue of law is involved and the facts are not contested, the de novo standard of review applies . . .”).

**C. Workers’ Compensation Benefits And Third Party Actions**

**1. Statutory Framework**

Washington workers injured in the course of their employment are entitled to benefits under Title 51 RCW, the Industrial Insurance Act. These workers’ compensation benefits are, with very limited exceptions, the exclusive remedy available to injured workers. See RCW 51.04.010. As the *Tallerday* Court explained,

The act provides the exclusive remedy for workers . . . unintentionally injured during the course of their employment. . . . A worker who receives workers' compensation benefits under the act has no separate remedy for his or her injuries except where the act specifically authorizes a cause of action. . . . The preemption of civil actions by the act is sweeping and comprehensive, . . . and the act has been characterized as being of the broadest and most encompassing nature. . . . The goal of the act is to provide sure and certain relief to injured workers and their families, not to award full tort damages. . . .

*Tallerday v. DeLong*, 68 Wn. App. at 356 (citations omitted); *see also*, e.g., *Cowlitz Stud Co. v. Clevenger*, 157 Wn.2d 569, 141 P.3d 1 (2006) (“[t]he [Industrial Insurance Act] is the product of a compromise between employers and workers. Under the [Act], employers accepted limited liability for claims that might not have been compensable under the common law. . . . In exchange, workers forfeited common law remedies”) (citations omitted); *West v. Zeibell*, 87 Wn.2d 198, 201, 550 P.2d 522 (1976) (Industrial Insurance Act’s bar to private actions “is of the broadest, most encompassing nature”).

The Third Party Recovery Statute, Chapter 51.24 RCW, sets out the few exceptions to Title 51’s exclusive remedy provisions. *See Bankhead v. Aztec Constr.*, 48 Wn. App. 102, 106, 737 P.2d 1291 (1987) (“[t]he Act has preempted all civil causes of action arising from workplace injuries with the exception of those third party actions authorized under RCW 51.24”). Pertinent to this appeal is RCW 51.24.030(1), which

permits an injured worker to pursue a tort claim “[i]f a third person, not in the worker’s same employ, is or may become liable to pay damages on account of a worker’s injury for which benefits and compensation are provided under this title . . . .”

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The Legislature established a detailed formula setting forth the manner in which “any recovery” made by an injured worker under the Third Party Recovery Statute “shall be distributed.” *See* RCW 51.24.060(1). That formula involves a five step process:

- (a): “The costs and reasonable attorneys’ fees shall be paid proportionately by the injured worker . . . and the department . . . .”
- (b): “The injured worker . . . shall be paid twenty-five percent of the balance of the award . . . .”
- (c): “The department . . . shall be paid the balance of the recovery made, but only to the extent necessary to reimburse the department . . . for benefits paid . . . .”
- (d): “Any remaining balance shall be paid to the injured worker . . . .”
- (e): “Thereafter no payment shall be made to or on behalf of an injured worker . . . by the department . . . for such injury until the amount of any further compensation and benefits shall equal any such remaining balance minus the department’s . . . proportionate share of the costs and reasonable attorneys’ fees in regards to the remaining balance. . . .”

RCW 51.24.060(1).

Thus, “any recovery” that an injured worker makes under the Third Party Recovery Statute “shall be distributed” as follows: attorneys’ fees

and costs are paid first; the worker receives 25% of the recovery (after fees and costs) free and clear of any Department claim; the Department is then paid from the “recovery” to the extent necessary to “reimburse” it “for benefits paid” (less its proportionate share of fees and costs); and the worker receives the “remaining balance” against which future workers’ compensation benefits are offset (with, again, the Department responsible for its proportionate share of fees and costs for the offset benefits).

## 2. *Flanigan* And Loss Of Consortium

In 1994, the Supreme Court held in a 5-4 decision that “the Department’s right of reimbursement [under the Third Party Recovery Statute] does not extend to a spouse’s third party recovery for loss of consortium.” *Flanigan v. Dep’t of Labor & Indus.*, 123 Wn.2d 418, 426, 869 P.2d 14 (1994).

The *Flanigan* majority based its holding on former<sup>9</sup> RCW 51.24.060(1)(c), which provides that “[t]he [D]epartment . . . shall be paid the balance of the recovery made, but only to the extent necessary to reimburse the [D]epartment . . . for benefits paid.” According to the

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<sup>9</sup> The 1993 Legislature amended RCW 51.24.060(1)(c), changing the phrase “for compensation and benefits paid” to “for benefits paid.” Laws of 1993, ch. 496, § 2. The amended statute, however, did not apply to *Flanigan* itself. See Laws of 1993, ch. 496, § 4 (“This act applies to all causes of action that the parties have not settled or in which judgment has not been entered prior to July 1, 1993.”). For purposes of Tobin’s distribution, “compensation and benefits paid” has the same meaning as “benefits paid.” The 1993 amendment is thus immaterial to this appeal and this brief will use the current language of RCW 51.24.060(1)(c).

majority, the Department could not be “reimbursed” from loss of consortium damages because the Industrial Insurance Act does not provide workers’ compensation benefits for loss of consortium. *See Flanigan*, 123 Wn.2d at 424-426. The *Flanigan* majority reached this result despite the plain language of the Third Party Recovery Statute describing the method under which “any recovery” made in a third party action “shall be distributed.”<sup>10</sup>

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<sup>10</sup> *Flanigan* is ultimately irrelevant to the present case involving damages for pain and suffering because, as set out below, the Legislature has limited its holding to loss of consortium. Close examination of the majority opinion, however, strongly suggests that the case was wrongly decided.

In holding that loss of consortium damages were not subject to distribution under the Third Party Recovery Statute, the *Flanigan* majority relied exclusively on RCW 51.24.060(1)(c). This statute provides that the Department “shall be paid the balance of the recovery made, but only to the extent necessary to reimburse the [D]epartment . . . for . . . benefits paid.” The majority reasoned that there could be no “reimbursement” from loss of consortium tort damages because such damages did not represent “benefits paid” by the Department. *Flanigan*, 123 Wn.2d at 425-426.

RCW 51.24.060(1)(c), however, does not compel or even support this result. As it appears in RCW 51.24.060(1)(c), the phrase “benefits paid” establishes the amount of money for which reimbursement is due as the total of all benefits that the Department has paid. It simply ensures that the Department does not receive more money in reimbursement than it has paid out in benefits.

“Benefits paid” has nothing to do with the nature of specific workers’ compensation benefits, nor does it limit in any way the nature or amount of a worker’s tort recovery from which reimbursement is due. That side of the distribution is set out in RCW 51.24.060(1), which requires “any recovery” to be distributed pursuant to the statutory formula. *Cf. Flanigan* at 437 (“reimbursement is based on the *amount* rather than the *nature* of the recovery”) (Madsen, J., dissenting) (emphasis in original); *see also Davis v. Dep’t of Labor & Indus.*, 71 Wn. App. 360, 363, 858 P.2d 1117 (1993), *review denied*, 123 Wn.2d 1016 (1994) (“[t]he Department’s share of the recovery is limited ‘to the extent necessary to reimburse the department . . . for . . . benefits paid’”) (citing former RCW 51.24.060(1)(c)).

Furthermore, while RCW 51.24.060(1)(c) uses the words “benefits paid” with respect to the Department’s *reimbursement* from a third party recovery,

In dicta, the *Flanigan* majority went on to suggest that damages for pain and suffering might also be exempt from distribution under the Third Party Recovery Statute. *See id.* at 423 (workers' compensation benefits "cannot take into account noneconomic damages, such as an employee's own pain and suffering, or a spouse's loss of consortium").<sup>11</sup> Before it

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RCW 51.24.060(1)(e), establishing the excess recovery, does not. The latter statute requires the Department not to pay workers' compensation benefits until the excess recovery has been exhausted. Thus, if – as *Flanigan* states – it is the "benefits paid" language of RCW 51.24.060(1)(c) that prohibits "reimburse[ment]" from a "recovery" for loss of consortium, such damages would automatically become part of the excess recovery against which future workers' compensation benefits would be offset.

Put differently, even if the *Flanigan* majority had correctly interpreted RCW 51.24.060(1)(c) to exclude loss of consortium damages from the Department's right of reimbursement for benefits already paid, future workers' compensation benefits would still be offset against those same damages. The *Flanigan* majority could not have intended that the Department recover through the offset of future benefits that which the Court had held not subject to reimbursement. This gap in its analysis further suggests that the majority did not fully consider the language of the Third Party Recovery Statute when it decided the case.

<sup>11</sup> This language highlights the conceptual difficulties inherent in *Flanigan's* analysis. Prior to *Flanigan*, no decision in the history of the Third Party Recovery Statute had attempted to "match up" tort damages and workers' compensation benefits based on their nature – and for good reason: the statutory benefits available under the Industrial Insurance Act were never intended to duplicate common law tort damages, and any attempt to "match" their respective "elements" is unavailing. What tort damages, for example, equate to the award for permanent partial disability that Title 51 RCW provides? *See* RCW 51.32.080. What tort damages "match" the wage replacement benefits that the Act provides *after retirement age*? *See* RCW 51.32.060.

Industrial Insurance benefits cannot be understood as an item-for-item substitute for tort damages; they are a *replacement* for the entire cause of action. *See Talleday v. DeLong*, 68 Wn. App. 351, 356, 842 P.2d 1023 (1993) ("[t]he goal of the [Industrial Insurance] act is to provide sure and certain relief to injured workers and their families, *not to award full tort damages*") (emphasis added); *cf. Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 651, 771 P.2d 711 (1989) (Industrial Insurance Act's elimination of jury trial for injured workers held to be constitutional in 1913 based on state's police power and "[b]ecause . . . a comprehensive scheme of compensation was inserted in its place," *citing State v. Mountain Timber Co.*, 75 Wash. 581, 135 P. 645 (1913), *aff'd*, 243 U.S. 219 (1917)).

became necessary for a court to consider this question, however, the Legislature acted.

**3. RCW 51.24.030(5): The Legislature's Response To *Flanigan***

Immediately after *Flanigan*, the Legislature passed

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RCW 51.24.030(5), which provides:

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

Laws of 1995, ch. 199, § 2.

The plain language of RCW 51.24.030(5) demonstrates its dual purpose. First, the statute **codifies** the specific holding of *Flanigan* by excluding "loss of consortium" damages from the definition of "recovery"

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The difference between tort damages and workers' compensation benefits is demonstrated by the fact that the party typically at fault when a worker is injured – the employer – is exempt from *all* tort liability in exchange for paying fixed premiums into an accident insurance fund. *See generally Clark v. Pacifcorp*, 118 Wn.2d 167, 174, 822 P.2d 162 (1991) ("A state fund was established as the source for recovery. All employers are required to contribute to this fund (except for self-insurers), and in return they are granted immunity from tort actions by an employee."). Obviously the "damages" an employer pays in the form of Industrial Insurance premiums do not "match up" with the elements of a tort claim – nor, for that matter, with the statutory benefits payable to an injured worker.

For this and other reasons, the majority's holding in *Flanigan* is fundamentally at odds with the complex policies underlying the Third Party Recovery Statute, and inconsistent with nearly a century of workers' compensation law in the State of Washington. *See generally Flanigan* at 430-445 (Madsen, J., dissenting); 428-430 (Anderson, C.J., dissenting) ("I concur in the result of the dissent. I write separately to underscore my serious concern about the violence the majority opinion visits upon state industrial insurance policy").

as that word appears in the Third Party Recovery Statute.<sup>12</sup> Second, the statute **limits** *Flanigan* by confirming that all other damages constitute the “recovery” that is subject to distribution.

RCW 51.24.030(5) thus requires the Department to *exclude* loss of consortium damages from its distribution of third party recoveries, and to *include* all other damages – such as damages for pain and suffering – in the distribution. *Cf. Hi-Way Fuel Co. v. Estate of Allyn*, 128 Wn. App. 351, 359, 115 P.3d 1031 (2005) (“RCW 51.24.030 and .060 are not ambiguous . . . . Where damages are recovered [in a third party action], the Department has a right of reimbursement for benefits it has paid . . . . RCW 51.24.060(1)(c). RCW 51.24.060 governs the distribution of the third-party recovery to both the Department and the worker . . . , and under RCW 51.24.030(5), ‘recovery includes all damages *except loss of consortium*’” (emphasis in *Allyn*; footnote omitted)).

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<sup>12</sup> *Flanigan* did not explicitly state that damages for loss of consortium were not a “recovery” for purposes of the Third Party Recovery Statute. However, reading the *Flanigan* majority opinion literally would lead to the incongruous result of the Department offsetting future workers’ compensation benefits against the same damages that the opinion stated were exempt from up-front reimbursement. *See* note 10, *supra*. The only way to give meaning to *Flanigan* is to interpret it as the Legislature did, i.e., as holding that damages for loss of consortium are not part of a worker’s third party “recovery” and are therefore outside the entire distribution formula of RCW 51.24.060.

**D. RCW 51.24.030(5) And RCW 51.24.060(1) Are Not Ambiguous, And The Trial Court Erred When It Ignored The Statutes' Plain Language**

In holding that Tobin's pain and suffering damages were not subject to distribution under the Third Party Recovery Statute, the trial court relied entirely on *Flanigan* and that case's analysis of RCW 51.24.060(1)(c):

I think that the analysis by the Supreme Court in the *Flanigan* case with respect to loss of consortium applies equally to pain and suffering. RCW 51.24.060 provides specifically that the Department would get recovery only to the point necessary to reimburse the Department for benefits paid. They don't pay for pain and suffering. There's no way I can see a distinction between the *Flanigan* decision for loss of consortium and, in this case, pain and suffering . . . .

RP 13-14.

The trial court was wrong. There is, in fact, a compelling reason to treat pain and suffering damages today differently from how *Flanigan* treated loss of consortium damages in 1994: the 1995 enactment of RCW 51.24.030(5). That statute (a) codified *Flanigan*'s holding that loss of consortium damages are not subject to distribution under the Third Party Recovery Statute, and (b) limited the holding to that specific type of damages, thereby rejecting *Flanigan*'s dicta suggesting that damages for pain and suffering might also be exempt from distribution.

Courts look to the plain language of a statute to determine the

Legislature's intent:

Our primary duty in interpreting any statute is to discern and implement the intent of the legislature. *Nat'l Elec. Contractors Ass'n v. Riveland*, 138 Wn.2d 9, 978 P.2d 481 (1999). Our starting point must always be 'the statute's plain language and ordinary meaning.' *Id.* When the plain language is unambiguous – that is, when the statutory language admits of only one meaning – the legislative intent is apparent, and we will not construe it otherwise. *State v. Wilson*, 125 Wn.2d 212, 883 P.2d 320 (1994).

*State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003); *see also, e.g., State v. Chapman*, 140 Wn.2d 436, 998 P.2d 282 (2000) ("If the language of a statute is clear on its face, courts must give effect to its plain language and should assume the Legislature means exactly what it says.") (footnote omitted); *Alpine Lakes Protection Soc. v. Dep't of Ecology*, 135 Wn. App. 376, 390, 144 P.3d 385 (2006) ("If the statute is unambiguous, its meaning derives from the plain language of the statute alone.").

RCW 51.24.060(1) governs the distribution of "any recovery." RCW 51.24.030(5) defines "recovery" as "all damages except loss of consortium." Neither statute is ambiguous, and together they dictate the outcome of this case: the Department must include damages for pain and suffering in its distribution of third party recoveries. The trial court erred when it ignored these laws. *Cf. Allyn, supra*.

**E. The Legislative History Of RCW 51.24.030(5) Conclusively Establishes The Legislature's Intent To Include All Damages Except Loss Of Consortium In Third Party Distributions**

Because RCW 51.24.030(5) and RCW 51.24.060(1) are not ambiguous, there is no need to go beyond their plain language in interpreting them. *See, e.g., Cosmopolitan Eng'g Group, Inc. v. Ondeo Degremont, Inc.*, 159 Wn.2d 292, 298-299, 149 P.3d 666 (2006). The legislative history of RCW 51.24.030(5), however, provides overwhelming evidence that the Legislature intended the new law to limit *Flanigan's* reach, thereby ensuring that damages such as pain and suffering were included in distributions made under the Third Party Recovery Statute.

The language of RCW 51.24.030(5) was part of the Department's 1995 requested legislation package. The agency's requested legislation summary explained that the proposed law would:

Clarify that third-party recovery does not include an award for loss of consortium (amenities of marriage, including help and affection) for the spouse, but does include other damages paid by the third party.

1995 L&I Request Packages Fact Sheet, Summary Paper: Labor and Industries Request Legislation.<sup>13</sup>

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<sup>13</sup> Copies of the legislative history documents discussed herein are included in Appendix B. Hearing transcripts are separate appendices. *See* notes 14, 15, *infra*.

The proposed 1995 amendment to RCW 51.24.030 appeared in Senate Bill 5399. *See* S.B. 5399, 54<sup>th</sup> Leg. (Wash. 1995). The Fiscal Note for SB 5399 contained the following “Facts and Assumptions” regarding the proposed definition of “recovery”:

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 loss of consortium.

Fact 4: In fiscal year 1994 the department recovered \$11,644,479.25 from third parties for the Trust Funds. . . . 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.

Fiscal Note for SB 5399 (1995) (emphasis added). Thus, from the moment it was introduced, the explicit purpose SB 5399's definition of "recovery" was to limit *Flanigan* to loss of consortium damages.

Transcripts of the Senate Labor, Commerce and Trade Committee hearings on SB 5399 reiterate that enactment of RCW 51.24.030(5) would accomplish two things: insulate loss of consortium damages from distribution under the Third Party Recovery Statute, and ensure that all *other damages were* distributed. As the Department's then-Deputy Director explained:

*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.

Verbatim Report of Proceedings from Tape Recording, Senate Labor, Commerce and Trade Committee, January 24, 1995 (1/24/95 VROP) at 31-32 (Testimony of Deputy Director Mike Watson) (emphasis added).<sup>14</sup>

The business community recognized that SB 5399 was intended to codify *Flanigan* but opposed the bill on the grounds that it did not go far enough. According to the Association of Washington Business and the Washington Self-Insurers' Association, the policies underlying the Third Party Recovery Statute would be better served by *reversing Flanigan* rather than by *codifying* it:

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 came 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

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<sup>14</sup> Pertinent Portions of the Verbatim Report of Proceedings of the Senate Labor, Commerce and Trade Committee's January 24, 1995 hearing are attached as Appendix C.

from the otherwise 1911 mandatory reimbursement and setoff."

. . . [W]hat [the Department is] 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. . . .

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. . .

1/24/95 VROP at 37-38 (Testimony of Charles Bush on behalf of Association of Washington Business and Washington Self-Insurers' Association). The Washington State Trial Lawyers Association likewise recognized that the loss of consortium portion of SB 5399 was a direct response to *Flanigan*. See 1/25/95 VROP at 41-42 (Testimony of Bill "Hartford" [*sic*, Hochberg] on behalf of Washington State Trial Lawyers Association).

On February 22, 1995 the Senate Labor, Commerce and Trade Committee issued its report on SB 5399 with a "Do Pass" recommendation. Senate Labor, Commerce and Trade Comm., S.B. Rep. on S.B. 5399, 54<sup>th</sup> Leg. (Wash. 1995). The report summarized the testimony in favor of the bill as "compl[ying] with recent court decisions,"

and the testimony against the bill as “[l]oss of consortium should be offset against workers’ compensation payments.”

The Senate passed SB 5399 on March 13, 1995. 1 Senate Journal, 54<sup>th</sup> Leg., at 601-602 (Wash. 1995). The next stop for the bill was the House Commerce & Labor Committee. The analysis prepared for that committee contained the following language:

#### BACKGROUND

...

The Washington Supreme Court has held that the department’s right to reimbursement from a third party recovery does not extend to the part of the recovery that is for loss of consortium. The court found that benefits paid under the industrial insurance law do not compensate injured workers for noneconomic damages, such as loss of consortium, and therefore the worker is not obtaining double recovery by retaining both the workers’ compensation benefits and the noneconomic damages recovered in the third party action.

...

#### SUMMARY OF BILL

The definition of ‘recovery’ in an action against a third party, for purposes of determining the state fund’s or self-insurer’s lien against the recovery, includes all damages except loss of consortium.

House Commerce and Labor Comm., H.B. Analysis for S.B. 5399, 54<sup>th</sup> Leg. (Wash. 1995). As with the Senate, the House committee hearing makes perfectly clear that RCW 51.24.030(5) was intended to ensure that

all tort damages except loss of consortium were distributed under the Third Party Recovery Statute.

First, the staff member that introduced the bill for consideration explained that the loss of consortium section would codify and limit

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*Flanigan:*

The Supreme Court decided that some recoveries that workers or beneficiaries make in a third-party recovery is [*sic*] not subject to the lien. This particular case dealt with a loss of consortium . . . .

And the Supreme Court said that is not the kind of recovery that the worker's compensation system can have a lien against . . . . 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.*

Verbatim Report of Proceedings from Tape Recording, House Commerce and Labor Committee, March 22, 1995 (3/22/95 VROP) at 4-5 (emphasis added).<sup>15</sup>

Before the House Committee the Department again described SB 5399's loss of consortium language as a direct response to – and limitation on – *Flanigan:*

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<sup>15</sup> Pertinent portions of the Verbatim Report of Proceedings of the House Commerce and Labor Committee's March 22, 1995 hearing are attached as Appendix D.

. . . . The [*Flanigan*] 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. . . .

3/22/95 VROP at 21-22 (Testimony of Deputy Director Mike Watson).

The Association of Washington Business and the Washington Self-Insurers Association again sought to have SB 5399 amended so that loss of consortium damages would be "put back in the loop, in other words to legislatively put back in what the court took out." *Id.* at 27 (Testimony of Lee Eberle on behalf of Washington Self-Insurers Association); *see also id.* at 30 ("all we're saying is that regardless of what the type of damage is, the Department of Labor & Industries should be able to recover . . .") (Testimony of Clif Finch on behalf of Association of Washington Business).

Perhaps the most illuminating testimony regarding the intent of SB 5399 and its impact on *Flanigan* came from the Washington State

Trial Lawyers Association (WSTLA). Testifying in support of the bill, WSTLA's speaker described the organization's strong belief that *Flanigan's* holding and its dicta were both correct, and the "significant concession" WSTLA had made in supporting a bill that would limit the case's reach:

*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 - and there are cases of this - 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. . . .*

*You go to a jury and the jury's reasonably going to say, "Yes, you should be reimbursed for that disfigurement." And that falls . . . 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. . . . [I]f 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.*

3/22/95 VROP at 44-45 (Testimony of Wayne Lieb on behalf of Washington State Trial Lawyers Association) (emphasis added).

The House Commerce and Labor Bill Report contained the same language regarding distribution of recoveries under the Third Party

Recovery Statute as had the House Bill Analysis. See House Commerce and Trade Comm., H.B. Rep. on S.B. 5399, 54<sup>th</sup> Leg. (Wash. 1995).<sup>16</sup>

The House passed amended SB 5399 96-0 on April 6, 1995. On April 17 the Senate passed the amended bill 40-2. The Governor signed SB 5399 into law on May 1, 1995. See 1995 Legislative History and Digest of Bills, pp. 193-194.

It is difficult to imagine how the Legislature might have been more clear in expressing its intent in enacting RCW 51.24.030(5). The trial court here, however, in holding that damages for pain and suffering must be treated as the *Flanigan* majority had treated loss of consortium, accomplished exactly what the Legislature had set out to prohibit.

**F. *Gersema* Does Not Compel The Trial Court's Ruling**

Tobin argued below that this Court's decision in *Gersema v. Allstate Ins. Co.*, 127 Wn. App. 687, 112 P.3d 552 (2005), supports his argument that the portion of his recovery representing pain and suffering should be excluded from distribution under the Third Party Recovery Statute.<sup>17</sup> The plaintiff in *Gersema* had made a third party recovery and

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<sup>16</sup> The House Committee amended SB 5399 in a way not relevant to the present appeal. See House Commerce and Trade Comm., H.B. Rep. on S.B. 5399, 54<sup>th</sup> Leg. (Wash. 1995) (“[t]he amendment adds provisions that change the method for calculating the award for burial expenses and the immediate payment to the injured worker’s family when the worker dies as a result of the industrial injury”).

<sup>17</sup> *Gersema* is the only published opinion that mentions both *Flanigan* and RCW 51.24.030(5). As noted above, *Allyn* discussed RCW 51.24.030(5), which it

argued that any portion of his recovery that represented pain and suffering should be excluded from the statutory distribution formula. *See id.* at 694-695. *Gersema* predicated this argument entirely on *Flanigan*, arguing that “*Flanigan* applies to general damages for pain and suffering, for which, like loss of consortium,” he had not received workers’ compensation benefits. *Gersema* at 695.

This Court rejected *Gersema*’s argument because his settlement agreement did not specifically allocate any portion of his recovery to pain and suffering. *Id.* at 695-696. This holding was based on *Mills v. Department of Labor and Industries*, 72 Wn. App. 575, 865 P.2d 41, review denied, 124 Wn.2d 1008 (1994), a loss of consortium case in which Division I held an injured worker’s entire third party recovery subject to distribution because no portion of the recovery was specifically allocated to loss of consortium. *See Gersema*, 127 Wn. App. at 695. The exclusion of loss of consortium damages from distribution (assuming documented allocation of such damages) would, of course, have been consistent with *Flanigan*.

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determined was “not ambiguous” in its requirement that the “recovery” subject to distribution under the Third Party Recovery Statute “include[] all damages *except loss of consortium*.” *Allyn* at 359, quoting RCW 51.24.030(5) (emphasis in *Allyn*). *Allyn*, however, does not cite *Flanigan*.

In dicta, the *Gersema* Court intimated that it “might” have reached a different result had Gersema’s settlement agreement explicitly allocated a portion of the recovery to pain and suffering:

If Gersema’s settlement . . . had clearly allocated some or all of his damages to his pain and suffering, we might agree with his contention that these general damages are not “excess” and, therefore, should receive the same treatment as loss of consortium damages in *Flanigan*.

*Gersema* at 695. The Court acknowledged in a footnote that “[a]fter the *Flanigan* decision the legislature amended the Act to exclude loss of consortium benefits from the definition of ‘recovery.’ RCW 51.24.030(5).” *Gersema* at 695.

The *Gersema* Court thus recognized that RCW 51.24.030(5) codified *Flanigan*’s loss of consortium holding. In its dicta, however, the Court appears to have overlooked the fact that the new statute also *limited* *Flanigan*. It seems likely that the Court did not have access to the legislative material discussed above.<sup>18</sup> That legislative history is conclusive evidence that the Legislature intended *only* loss of consortium damages to be exempt from the Third Party Recovery Statute’s mandatory distribution formula.

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<sup>18</sup> This Court decided *Allyn* – which states that only loss of consortium damages are exempt from distribution under the Third Party Recovery Statute as a result of RCW 51.24.030(5) – on July 7, 2005, six weeks after *Gersema*.

**G. RCW 51.24.030(5) Should Be Read To Accomplish The Legislature's Purpose In Enacting The Statute**

In the proceedings below, Tobin also attempted to avoid RCW 51.24.030(5) by acknowledging (correctly) that his pain and suffering damages fell within that law's definition of "recovery," but arguing (wrongly) that the law – enacted in response to *Flanigan* – somehow "did not change the result that should be reached, based on *Flanigan*." RP 5.

If Tobin's understanding of RCW 51.24.030(5) were correct, then the Legislature accomplished precisely nothing when it enacted that statute. Instead, it simply restated what *Flanigan* had already held, and left wholly unaddressed the question of how any other damages recovered in a third party action should be distributed. "The Legislature," however, "does not engage in unnecessary or meaningless acts, and we presume some significant purpose or objective in every legislative enactment." *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 769, 10 P.3d 1034 (2000) (quoting *John H. Sellen Constr. Co. v. Dep't of Revenue*, 87 Wn.2d 878, 883, 558 P.2d 1342 (1976)).

The presumption that the Legislature intends to accomplish something when it acts holds particularly true where, as here, the history of a statute demonstrates that it was enacted to prevent precisely the type

of litigation now underway, and precisely the result that the trial court reached. See Fiscal Note, 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.”). As set out above, the Legislature had two goals when it passed RCW 51.24.030(5): to *codify Flanigan*, and to *limit* its reach. The trial court erred when it ignored the law that controlled the case before it.<sup>19</sup>

Tobin, like any injured worker who files a third party claim, will receive more in combined tort damages and workers’ compensation benefits than he would under either system alone. Absent his third party recovery, Tobin could have expected to collect slightly over \$642,000 in

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<sup>19</sup> Tobin’s argument that *Flanigan* controls despite the Legislature’s response also proves too much. As explained above, *see* notes 10, 12, *supra*, interpreting *Flanigan* literally would mean that loss of consortium damages must become part of a worker’s excess recovery, against which future workers’ compensation benefits would be offset. It was this incongruity that led the Legislature to choose to amend RCW 51.24.030 to exclude loss of consortium tort damages from the definition of “recovery,” rather than amend RCW 51.24.060 to differentiate between categories of workers’ compensation benefits in the definition of “reimbursement.”

If, as he argues, Tobin’s pain and suffering damages are “recovery” but still covered by *Flanigan*, than his remedy would not be to have them entirely excluded from RCW 51.24.060(1)’s distribution formula. Rather, these damages would merely be shifted from reimbursement to future offset. *Flanigan* could not have intended this result; the Legislature did not intend this result; and Tobin presumably does not either.

workers' compensation benefits.<sup>20</sup> Conversely, Tobin's tort claim alone would have netted him nearly \$928,000.<sup>21</sup> Under the Third Party Recovery Statute, which enabled Tobin to obtain tort damages in addition to his workers' compensation benefits, Tobin will receive nearly \$1.1 million.<sup>22</sup> Including Tobin's pain and suffering damages in the distribution of his third party recovery is not unfair; rather, it is simply applying RCW 51.24.030(5) in the way that the Legislature wrote and intended it.

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<sup>20</sup> This is the sum of the benefits paid figure the Department used in distributing Tobin's tort recovery (\$80,501.40) and the present value of his future workers' compensation benefits (\$562,732). *See* BR 71, ¶¶ 8, 10.

<sup>21</sup> This figure represents Tobin's gross recovery of \$1.4 million less fees and costs totaling \$472,262.44. *See* BR 71, ¶ 8; BR 83.

<sup>22</sup> The calculations underlying this figure are somewhat complex. Tobin had received \$80,501.40 in workers' compensation benefits at the time he made his third party recovery. *See* BR 71, ¶ 9. Tobin's share of his tort recovery was \$874,391.25 (\$1.4 million less \$472,262.44 to his attorneys and \$53,346.31 to the Department). BR 71, ¶ 8.

Tobin's share of \$874,391.25 included \$231,934.39 that he received free and clear of any Department claim as well as a "remaining balance" of \$642,456.86. *See* RCW 51.24.060(1)(b), (d); BR 83. Of the remaining balance, \$425,735.63 constituted an excess recovery and was subject to offset against future workers' compensation benefits. BR 71, ¶ 8; BR 83; *see* RCW 51.24.060(1)(e). As of April 10, 2006, the Department estimated the present value of Tobin's future pension benefits to be \$562,732. BR 71, ¶ 10. Thus, it is likely that Tobin will exhaust his excess recovery and receive \$136,996.37 in additional workers' compensation benefits.

In total, Tobin will receive \$80,501.40 (pre-recovery workers' compensation benefits), plus \$231,934.39 (25% share), plus \$642,456.86 (remaining balance), plus \$136,996.37 (workers' compensation benefits paid after excess recovery is exhausted), or \$1,091,889.02.

The Third Party Recovery Statute is the result of a delicate balancing of various and often-competing interests. As Chief Justice Anderson explained in his concurrence to the *Flanigan* dissent:

It may be that the nature of recoveries for loss of consortium damages are of such unique nature that they should be accorded special treatment. If that is so, however, any response to such uniqueness should be hammered out in the legislative arena where public hearings could be afforded an input received from labor, management and all others concerned.

*Flanigan*, 123 Wn.2d at 429-430. The Legislature took up Chief Justice Anderson's invitation when it "hammered out" the manner in which damages for pain and suffering were to be distributed under the Third Party Recovery Statute. Labor (through the Washington State Trial Lawyers Association), management (through the Association of Washington Business and the Washington Self-Insurers Association) and the Department participated in the legislative process. The trial court's decision to undo what the Legislature intended to do should be reversed.

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VI. CONCLUSION

For the foregoing reasons, the trial court's decision should be reversed.

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RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of September,

2007.

ROBERT M. MCKENNA  
Attorney General



MICHAEL HALL  
Assistant Attorney General  
WSBA No. 19871

**PROOF OF SERVICE**

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 5<sup>th</sup> day of September, 2007, at Tumwater, Washington.

  
Darcie McMullin  
Legal Assistant

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# APPENDIX A

**RCW 51.24.030**

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

(1) If a third person, not in a worker's same employ, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title, the injured worker or beneficiary may elect to seek damages from the third person.

(2) In every action brought under this section, the plaintiff shall give notice to the department or self-insurer when the action is filed. The department or self-insurer may file a notice of statutory interest in recovery. When such notice has been filed by the department or self-insurer, the parties shall thereafter serve copies of all notices, motions, pleadings, and other process on the department or self-insurer. The department or self-insurer may then intervene as a party in the action to protect its statutory interest in recovery.

(3) For the purposes of this chapter, "injury" shall include any physical or mental condition, disease, ailment or loss, including death, for which compensation and benefits are paid or payable under this title.

(4) Damages recoverable by a worker or beneficiary pursuant to the underinsured motorist coverage of an insurance policy shall be subject to this chapter only if the owner of the policy is the employer of the injured worker.

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

[1995 c 199 § 2; 1987 c 212 § 1701; 1986 c 58 § 1; 1984 c 218 § 3; 1977 ex.s. c 85 § 1.]

**Notes:**

**Severability -- 1995 c 199:** See note following RCW 51.12.120.

**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.

(2) The recovery made shall be subject to a lien by the department and/or self-insurer for its share under this section.

(3) The department or self-insurer has sole discretion to compromise the amount of its lien. In deciding whether or to what extent to compromise its lien, the department or self-insurer shall consider at least the following:

(a) The likelihood of collection of the award or settlement as may be affected by insurance coverage, solvency, or other factors relating to the third person;

(b) Factual and legal issues of liability as between the injured worker or beneficiary and the third person. Such issues include but are not limited to possible contributory negligence and novel theories of liability; and

(c) Problems of proof faced in obtaining the award or settlement.

(4) In an action under this section, the self-insurer may act on behalf and for the benefit of the department to the extent of any compensation and benefits paid or payable from state funds.

(5) It shall be the duty of the person to whom any recovery is paid before distribution under this section to advise the department or self-insurer of the fact and amount of such recovery, the costs and reasonable attorneys' fees associated with the recovery, and to distribute the recovery in compliance with this section.

(6) The distribution of any recovery made by award or settlement of the third party action shall be confirmed by department order, served by registered or certified mail, and shall be subject to chapter 51.52 RCW. In the event the order of distribution becomes final under chapter 51.52 RCW, the director or the director's designee may file with the clerk of any county within the state a warrant in the amount of the sum representing the unpaid lien plus interest accruing from the date the order became final. The clerk of the county in which the warrant is filed shall immediately designate a

superior court cause number for such warrant and the clerk shall cause to be entered in the judgment docket under the superior court cause number assigned to the warrant, the name of such worker or beneficiary mentioned in the warrant, the amount of the unpaid lien plus interest accrued and the date when the warrant was filed. The amount of such warrant as docketed shall become a lien upon the title to and interest in all real and personal property of the injured worker or beneficiary against whom the warrant is issued, the same as a judgment in a civil case docketed in the office of such clerk. The sheriff shall then proceed in the same manner and with like effect as prescribed by law with respect to execution or other process issued against rights or property upon judgment in the superior court. Such warrant so docketed shall be sufficient to support the issuance of writs of garnishment in favor of the department in the manner provided by law in the case of judgment, wholly or partially unsatisfied. The clerk of the court shall be entitled to a filing fee under RCW 36.18.012(10), which shall be added to the amount of the warrant. A copy of such warrant shall be mailed to the injured worker or beneficiary within three days of filing with the clerk.

(7) The director, or the director's designee, may issue to any person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state, a notice and order to withhold and deliver property of any kind if he or she has reason to believe that there is in the possession of such person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state, property which is due, owing, or belonging to any worker or beneficiary upon whom a warrant has been served by the department for payments due to the state fund. The notice and order to withhold and deliver shall be served by the sheriff of the county or by the sheriff's deputy; by certified mail, return receipt requested; or by any authorized representatives of the director. Any person, firm, corporation, municipal corporation, political subdivision of the state, public corporation, or agency of the state upon whom service has been made shall answer the notice within twenty days exclusive of the day of service, under oath and in writing, and shall make true answers to the matters inquired of in the notice and order to withhold and deliver. In the event there is in the possession of the party named and served with such notice and order, any property which may be subject to the claim of the department, such property shall be delivered forthwith to the director or the director's authorized representative upon demand. If the party served and named in the notice and order fails to answer the notice and order within the time prescribed in this section, the court may, after the time to answer such order has expired, render judgment by default against the party named in the notice for the full amount claimed by the director in the notice together with costs. In the event that a notice to withhold and deliver is served upon an employer and the property found to be subject thereto is wages, the employer may assert in the answer to all exemptions provided for by chapter 6.27 RCW to which the wage earner may be entitled.

[2001 c 146 § 9; 1995 c 199 § 4; 1993 c 496 § 2; 1987 c 442 § 1118; 1986 c 305 § 403; 1984 c 218 § 5; 1983 c 211 § 2; 1977 ex.s. c 85 § 4.]

#### Notes:

**Severability -- 1995 c 199:** See note following RCW 51.12.120.

**Effective date -- Application--1993 c 496:** See notes following RCW 4.22.070.

**Preamble -- Report to legislature -- Applicability -- Severability -- 1986 c 305:** See notes following RCW 4.16.160.

**Applicability -- Severability -- 1983 c 211:** See notes following RCW 51.24.050.

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# **APPENDIX B**



State of Washington  
Department of  
Labor and Industries

# 1995 L&I request packages Fact Sheet



January 1995 — #1

Legislative request packages propose to:

## Summary Paper: Labor and Industries request legislation

- Strengthen the crime victims compensation collections authority.
- Extend the due dates for the Workers' Comp Consolidation Study and the Managed Care Pilot Project.
- Bring the department up to federal standards for asbestos inspections and for certified asbestos supervisors' training.
- License crane operators working on construction sites.
- Eliminate filing requirement for personal services contracts to employ expert witnesses for legal proceedings.
- Reduce the requirement for yearly elevator inspections to every two years.
- Make housekeeping changes to maintain equity in the workers' comp system, to reduce its misuse and to keep the State Fund financially sound.

### Crime victims compensation — bill package Z-0049.6

Amend statutes to strengthen the department's collections authority, using the industrial insurance collections model.

### Consolidation Study, Managed Care Pilot Project — bill package Z-0374.1/95

The Workers' Compensation Consolidation Study and Managed Care Pilot Project were authorized by the Health Services Act of 1993. The Consolidation Study will research how workers' compensation medical benefits might be consolidated in a reformed health care system. The pilots — launched this month — will discover if managed care can improve medical outcomes for injured workers, while also saving money.

For the Consolidation Study, L&I proposes to:

- Extend the due date of the final report of the Consolidation Study of workers' compensation medical benefits to Jan. 1, 1997.
- Submit a second interim report to the governor and the Legislature on Oct. 1, 1996.

For the Managed Care Pilot Project, L&I proposes to:

- Extend the pilots one year, to end Jan. 1, 1997.
- Submit a second interim report due to the governor and the Legislature Jan. 1, 1996.
- Submit a final report in April 1997, a six-month extension.

### Asbestos certification — request bill Z-0098.2

Bring the department up to federal standards for asbestos inspections and for certified asbestos supervisors' training.

### **Crane legislation — request bill pending**

License crane operators who are operating on construction sites, in response to several serious crane accidents in this state in the last six months.

Licenses would require:

- Education and experience.
- Written exam.
- Practical skills requirement.
- Physical skills requirement.

### **Personal services contracts — Z0382.1/95**

Eliminate the filing requirement from the Office of Financial Management and the Legislative Budget Committee for personal services contracts to employ expert witnesses for legal proceedings.

### **Elevator inspections — Z0381.1/95**

Reduce the requirement for yearly elevator inspections to every two years.

### **Trust fund protections, procedural clarification — Z0375.2**

Prevent double recoveries when workers' compensation jurisdictions overlap by permitting an offset of an award made by another jurisdiction.

Clarify that third-party recovery does not include an award for loss of consortium (amenities of marriage, including help and affection) for the spouse, but does include other damages paid by the third party.

Permit service by certified mail; protect trust funds from deficient settlements; and provide more flexibility in granting credit to an employer's account.

Clarify the statute giving providers 60 days instead of 20 to contest overpayment assessments against them.

### **Workers' comp equity, fraud — Z0376.2**

Prevent benefits to a survivor who kills his or her spouse at work. Also, prohibit benefits to a beneficiary while incarcerated.

Increase the burial award for fatal injuries from \$2,000 to two times the state's average monthly wage (\$2,125 in 1994).

Increase immediate payment from \$1,600 to equal the state's average monthly wage (\$2,125 in 1994).

Allow the worker to select a surviving spouse, child or dependent under each total permanent disability pension option.

Change the rate at which permanent partial disability (PPD) payments are made, increasing down payments and installments to equal the average monthly wage or compensation rate.

Allow discretionary authority for retraining expenses to elapse over a one-year period rather than two years, for the Long-Term Disability Prevention Pilots.

### **Overdue premiums and fraud — Z0377.2**

Increase from 60 to 180 days the time to issue an assessment to a successor corporation.

Clarifies language in payroll fraud law and simplifies notification procedures.

Permit certified mail delivery of Notice of Assessment and Order to Withhold and Deliver.

Require annual report to Legislature on workers' compensation fraud.

*For more information about these issues, contact Karen Terwilleger at (360) 956-4233.*

# FISCAL NOTE

BILL NO. 20375-2195      0375.3	RESPONDING AGENCY Department of Labor and Industries	REQUEST NO. 95-35
TITLE Refining Industrial Insurance Acts	APPROVED BY <i>[Signature]</i>	CODE 2350
HEARING DATE & TIME	PREPARED BY Ron Gray	DATE
	REVIEWED BY OFM	SCAN 269-4997
		DATE

Fiscal impact of the above legislation on Washington State government is estimated to be:

- NONE
- AS SHOWN BELOW
- INDETERMINATE
- COSTS CAN BE ABSORBED

### REVENUE TO:

First Biennium 1995 - 1997

FUND	SOURCE	CODE	1ST YEAR	2ND YEAR	TOTAL	2ND BIENNIUM	3RD BIENNIUM
OTHER*							
*Identify			TOTALS				

### EXPENDITURES FROM:

FUND	CODE	1ST YEAR	2ND YEAR	TOTAL	2ND BIENNIUM	3RD BIENNIUM
Accident Account - State	608-1	7,500		7,500		
Medical Aid Account - State	609-1	7,500		7,500		
OTHER*						
*Identify		TOTALS		15,000		

### EXPENDITURES BY OBJECT OR PURPOSE:

FTE STAFF YEARS					
SALARIES AND WAGES					
EMPLOYEE BENEFITS					
PERSONAL SERVICE CONTRACTS					
GOODS AND SERVICES		15,000		15,000	
TRAVEL					
EQUIPMENT					
GRANTS AND SUBSIDIES					
DEBT SERVICE					
INTERAGENCY REIMBURSEMENT					
TOTALS		15,000		15,000	

Check boxes applicable to the above legislation and provide explanation on FN-2:

- CASH FLOW IMPACT
- CAPITAL BUDGET IMPACT
- REQUIRES NEW RULE MAKING

Above legislation has fiscal impact on local government:

# FISCAL NOTE

REQUEST NO. 95-35

RESPONDING AGENCY                      CODE  
 Department of Labor and Industries      2350

BILL NO.:                      20375.2195

TITLE:    PREPARED BY: Ron Gray

Refining Industrial Insurance Acts

ESTIMATED EXPENDITURES:

NUMBER OF POS.	RANGE	POSITION'S TITLE	1ST BIENNIUM	2ND BIENNIUM	3RD BIENNIUM	6YEARS
-------------------	-------	------------------	--------------	--------------	--------------	--------

FTE Staff Yeats.....  
 Total Salary and Wages.....

EMPLOYEE BENEFITS:

OASI Retirement, Insurance  
 Total Employee Benefits.....

GOODS AND SERVICES:

Postage, Telephone, Supplies, Lease/Facilities, Printing/Copying,  
 Employee Training, Personnel Services Cost, Basic DP Cost

Attorney General			
Data Processing		15,000	
Miscellaneous Goods and Services			15,000
Total Goods and Services.....		15,000	15,000

EQUIPMENT:

Standard Office Startup Equipment.....  
 Special Equipment.....  
 Total Equipment.....

PERSONAL SERVICE CONTRACTS:

Total Personal Service Contracts

TRAVEL:

Total Travel.....

Appropriated Funds.....		15,000	
Non-Appropriated Funds.....			

OFM FORM FN-1 (Rev 8/94)	TOTAL FISCAL IMPACT.....	15,000	15,000
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# FISCAL NOTE

RECEIVED  
O.F.M.

REQUEST NO. 95-35

BILL NO. <del>0375-2195</del> (0375.3) SB 5399	RESPONDING AGENCY Department of Labor and Industries	CODE 2350
TITLE Refining Industrial Insurance Acts	APPROVED BY <i>[Signature]</i>	DATE [ ]
HEARING DATE & TIME 1-24-95 1:30	PREPARED BY Ron Gray	SCAN 269:4997
	REVIEWED BY OFM <i>[Signature]</i>	DATE 1/25/95

Fiscal impact of the above legislation on Washington State government is estimated to be:

- NONE
- AS SHOWN BELOW
- INDETERMINATE
- COSTS CAN BE ABSORBED

**REVENUE TO:**

First Biennium 1995 - 1997

FUND	SOURCE	CODE	1ST YEAR	2ND YEAR	TOTAL	2ND BIENNIUM	3RD BIENNIUM
OTHER*							
*Identify TOTALS							

**EXPENDITURES FROM:**

FUND	CODE					
Accident Account - State	608-1					
Medical Aid Account - State	609-1					
OTHER*						
*Identify TOTALS						

**EXPENDITURES BY OBJECT OR PURPOSE:**

FTE STAFF YEARS				
SALARIES AND WAGES				
EMPLOYEE BENEFITS				
PERSONAL SERVICE CONTRACTS				
GOODS AND SERVICES				
TRAVEL				
EQUIPMENT				
GRANTS AND SUBSIDIES				
DEBT SERVICE				
INTERAGENCY REIMBURSEMENT				
TOTALS				

Check boxes applicable to the above legislation and provide explanation on FN-2:

- CASH FLOW IMPACT
- CAPITAL BUDGET IMPACT
- REQUIRES NEW RULE MAKING

Above legislation has fiscal impact on local government: [ ]

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.*

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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

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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 phrase 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.

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**Impact on Agency Operations**

No significant impact on agency operations.

**Fiscal Impact**

None.

# FISCAL NOTE

SB 5399 RECEIVED  
O.F.M.

REQUEST NO. 7

BILL NO. 20375 (SB 5399)	RESPONDING AGENCY OFFICE OF THE ATTORNEY GENERAL	CODE 100
TITLE An act relating to refining industrial insurance actions.	APPROVED BY Neil Brandsma <i>1/6</i>	DATE 01/26/95
HEARING DATE & TIME	PREPARED BY David E. Walsh	TELEPHONE 753-6983
	REVIEWED BY OFM <i>Keith Long</i>	DATE 1-27-95

Fiscal impact of the above legislation on Washington State government is estimated to be:

- NONE
- AS SHOWN BELOW
- INDETERMINATE
- COSTS CAN BE ABSORBED

**REVENUE TO:** First Biennium 1995 -1997

FUND	SOURCE	CODE	1ST YEAR	2ND YEAR	TOTAL	2ND BIENNIUM	3RD BIENNIUM
GF-STATE					0		
GF-FED					0		
OTHER*					0		
					0		
					0		
					0		
<i>Identify</i> TOTALS			0	0	0	0	0

**EXPENDITURES FROM:**

FUND	CODE	1ST YEAR	2ND YEAR	TOTAL	2ND BIENNIUM	3RD BIENNIUM
GENERAL FUND-STATE	001-1			0		
GENERAL FUND-FEDERAL	001-2			0		
OTHER*				0		
				0		
				0		
				0		
<i>Identify</i> TOTALS		0	0	0	0	0

**EXPENDITURES BY OBJECT OR PURPOSE:**

FTE STAFF YEARS				0		
SALARIES AND WAGES				0		
EMPLOYEE BENEFITS				0		
PERSONAL SERVICE CONTRACTS				0		
GOODS AND SERVICES				0		
TRAVEL				0		
EQUIPMENT				0		
GRANTS AND SUBSIDIES				0		
DEBT SERVICE				0		
INTERAGENCY REIMBURSEMENT				0		
TOTALS				0	0	0

Check boxes applicable to the above legislation and provide explanation on FN-2:

- CASH FLOW IMPACT
- CAPITAL BUDGET IMPACT
- REQUIRES NEW RULE MAKING

Above legislation has fiscal impact on local government:

# SENATE BILL REPORT

## SB 5399

As Reported By Senate Committee On:  
Labor, Commerce & Trade, February 22, 1995

**Title:** An act relating to refining industrial insurance actions.

**Brief Description:** Refining industrial insurance actions.

**Sponsors:** Senators Pelz and Franklin; by request of Department of Labor & Industries.

**Brief History:**

**Committee Activity:** Labor, Commerce & Trade: 1/24/95, 2/22/95 [DP, DNP].

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### SENATE COMMITTEE ON LABOR, COMMERCE & TRADE

**Majority Report:** Do pass.

Signed by Senators Pelz, Chair; Heavey, Vice Chair; Franklin, Fraser and Wojahn.

**Minority Report:** Do not pass.

Signed by Senators Deccio, Hale and Palmer.

**Staff:** Jack Brummel (786-7428)

**Background:** Compensation paid or awarded by another jurisdiction is presently offset against amounts paid or awarded the claimant by Washington State. Other recoveries made to the claimant under another jurisdiction's workers' compensation laws are sometimes not considered to be compensation and cannot be offset against amounts paid or awarded the claimant by Washington.

Injured workers may seek recovery against third parties other than their employer for work-related injuries. If such recoveries are made, the Department of Labor and Industries may seek reimbursement of amounts recovered by injured workers. The state Supreme Court ruled last year that the department's right to reimbursement does not extend to amounts awarded for loss of consortium.

Current law requires that the Department of Labor and Industries make a retroactive adjustment to an employer's experience rating when a third party recovery was made on a claim which changed the rating.

The department believes that there are several technical changes to the workers' compensation statutes which would improve administration.

**Summary of Bill:** Any settlement proceeds from another jurisdiction are used to offset workers' compensation award payments to claimants in Washington. The department will no longer make retroactive adjustments to an employer's experience rating when a third party recovery has been made on claims previously used to calculate experience rating. Health

services providers are allowed 60 days to appeal department orders which do not make demands for repayment of sums paid. Orders and Notices to Withhold and Deliver can be served by certified mail, in addition to personal service. The term "recovery" does not include damages for loss of consortium.

Minor technical changes are made to clarify legislative intent with regard to third party settlements.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

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**Testimony For:** The bill provides several needed technical corrections to industrial insurance statutes and complies with recent court decisions.

**Testimony Against:** Loss of consortium should be offset against workers' compensation payments. Greater clarity in establishing benefits for the future is needed.

**Testified:** Mark Brown, Mike Watson, Department of Labor and Industries (pro); Charles Bush, WA Self-Insurers Assn. (con); Clif Finch, AWB (con).

The joint memorial was read the second time.

MOTION

On motion of Senator Heavey, the rules were suspended, Senate Joint Memorial No. 8004 was advanced to third reading, the second reading considered the third and the joint memorial was placed on final passage.

MOTION

On motion of Senator Kohl, Senator Loveland was excused.

The President declared the question before the Senate to be the roll call on the final passage of Senate Joint Memorial No. 8004.

ROLL CALL

The Secretary called the roll on the final passage of Senate Joint Memorial No. 8004 and the joint memorial passed the Senate by the following vote: Yeas, 43; Nays, 4; Absent, 0; Excused, 2.

Voting yea: Senators Anderson, A., Bauer, Cantu, Deccio, Drew, Finkbeiner, Franklin, Gaspard, Hale, Hargrove, Haugen, Heavey, Hochstatter, Johnson, Long, McAuliffe, McCaslin, McDonald, Moyer, Newhouse, Oke, Owen, Palmer, Pelz, Prentice, Prince, Quigley, Rasmussen, Rinehart, Roach, Schow, Sellar, Sheldon, Smith, Snyder, Spanel, Strannigan, Sutherland, Swecker, West, Winsley, Wojahn and Wood - 43.

Voting nay: Senators Fairley, Fraser, Kohl and Morton - 4.

Excused: Senators Anderson, C. and Loveland - 2.

SENATE JOINT MEMORIAL NO. 8004, having received the constitutional majority, was declared passed.

SECOND READING

SENATE BILL NO. 5359, by Senators Sheldon, Cantu, Rasmussen, Winsley and A. Anderson

Creating a self-employment income support program.

MOTIONS

On motion of Senator Pelz, Substitute Senate Bill No. 5359 was substituted for Senate Bill No. 5359 and the substitute bill was placed on second reading and read the second time.

On motion of Senator Pelz, the rules were suspended, Substitute Senate Bill No. 5359 was advanced to third reading, the second reading considered the third and the bill was placed on final passage.

MOTION

On motion of Senator Ann Anderson, Senator Strannigan was excused.

The President declared the question before the Senate to be the roll call on the final passage of Substitute Senate Bill No. 5359.

ROLL CALL

The Secretary called the roll on the final passage of Substitute Senate Bill No. 5359 and the bill passed the Senate by the following vote: Yeas, 46; Nays, 0; Absent, 0; Excused, 3.

Voting yea: Senators Anderson, A., Bauer, Cantu, Deccio, Drew, Fairley, Finkbeiner, Franklin, Fraser, Gaspard, Hale, Hargrove, Haugen, Heavey, Hochstatter, Johnson, Kohl, Long, McAuliffe, McCaslin, McDonald, Morton, Moyer, Newhouse, Oke, Owen, Palmer, Pelz, Prentice, Prince, Quigley, Rasmussen, Rinehart, Roach, Schow, Sellar, Sheldon, Smith, Snyder, Spanel, Sutherland, Swecker, West, Winsley, Wojahn and Wood - 46.

Excused: Senators Anderson, C., Loveland and Strannigan - 3.

SUBSTITUTE SENATE BILL NO. 5359, having received the constitutional majority, was declared passed. There being no objection, the title of the bill will stand as the title of the act.

SECOND READING

SENATE BILL NO. 5399, by Senators Pelz and Franklin (by request of Department of Labor and Industries)

Refining industrial insurance actions.

The bill was read the second time.

MOTION

On motion of Senator Pelz, the rules were suspended, Senate Bill No. 5399 was advanced to third reading, the second reading considered the third and the bill was placed on final passage.

POINT OF INQUIRY

Senator Deccio: "Senator Pelz, would you explain why the consortium element is exempt from lawsuits in this bill?"

Senator Pelz: "I will, sir. This could be brutally dull."

Senator Deccio: "Maybe."

Senator Pelz: "Currently, when a worker is injured and they receive a payment from L & I--a successful claim--the claim often times includes a payment for loss of consortium. Now, this claim accrues to the spouse of the injured worker. When an injured worker is successful--receives a successful claim--but is pursuing a third party damages and if they succeed in those third party damages, the L & I claim can be deducted. In other words, L & I gets their money back. The court ruled, however, the L & I did not have a right to loss

of consortium, because that was a benefit that did not accrue to the injured worker, but rather to the spouse of the injured worker. What is bill is doing is making clear that those payments which are recouped to L & I will not include the loss of consortium in the event that the worker wins a third party lawsuit, so I am not sure this is a very common occurrence."

Further debate ensued.

The President declared the question before the Senate to be the roll call on the final passage of Senate Bill No. 5399.

#### ROLL CALL

The Secretary called the roll on the final passage of Senate Bill No. 5399 and the bill passed the Senate by the following vote: Yeas, 25; Nays, 23; Absent, 0; Excused, 1.

Voting yea: Senators Anderson, C., Bauer, Drew, Fairley, Franklin, Fraser, Gaspard, Hargrove, Haugen, Heavey, Kohl, Loveland, McAuliffe, Owen, Pelz, Prentice, Quigley, Rasmussen, Rinehart, Sheldon, Smith, Snyder, Spanel, Sutherland and Wojahn - 25.

Voting nay: Senators Anderson, A., Cantu, Deccio, Finkbeiner, Hale, Hochstatter, Johnson, Long, McCaslin, McDonald, Morton, Moyer, Newhouse, Oke, Palmer, Prince, Roach, Schow, Sellar, Swecker, West, Winsley and Wood - 23.

Excused: Senator Strannigan - 1.

SENATE BILL NO. 5399, having received the constitutional majority, was declared passed. There being no objection, the title of the bill will stand as the title of the act.

#### SECOND READING

SENATE BILL NO. 5164, by Senator Smith

Allowing a conformed copy of certain orders to be served.

#### MOTIONS

On motion of Senator Smith, Substitute Senate Bill No. 5164 was substituted for Senate Bill No. 5164 and the substitute bill was placed on second reading and read the second time.

On motion of Senator Smith, the rules were suspended, Substitute Senate Bill No. 5164 was advanced to third reading, the second reading considered the third and the bill was placed on final passage.

The President declared the question before the Senate to be the roll call on the final passage of Substitute Senate Bill No. 5164.

#### ROLL CALL

The Secretary called the roll on the final passage of Substitute Senate Bill No. 5164 and the bill passed the Senate by the following vote: Yeas, 48; Nays, 0; Absent, 0; Excused, 1.

Voting yea: Senators Anderson, A., Anderson, C., Bauer, Cantu, Deccio, Drew, Fairley, Finkbeiner, Franklin, Fraser, Gaspard, Hale, Hargrove, Haugen, Heavey, Hochstatter, Johnson, Kohl, Long, Loveland, McAuliffe, McCaslin, McDonald, Morton, Moyer, Newhouse, Oke, Owen, Palmer, Pelz, Prentice, Prince, Quigley, Rasmussen, Rinehart, Roach, Schow, Sellar, Sheldon, Smith, Snyder, Spanel, Sutherland, Swecker, West, Winsley, Wojahn and Wood - 48.

Excused: Senator Strannigan - 1.

SUBSTITUTE SENATE BILL NO. 5164, having received the constitutional majority, was declared passed. There being no objection, the title of the bill will stand as the title of the act.

#### SECOND READING

SENATE BILL NO. 5159, by Senators Owen, Oke, Haugen and Hochstatter

Creating the warm water game fish enhancement program.

#### MOTIONS

On motion of Senator Owen, Second Substitute Senate Bill No. 5159 was substituted for Senate Bill No. 5159 and the second substitute bill was placed on second reading and read the second time.

On motion of Senator Owen, the rules were suspended, Second Substitute Senate Bill No. 5159 was advanced to third reading, the second reading considered the third and the bill was placed on final passage.

Debate ensued.

The President declared the question before the Senate to be the roll call on the final passage of Second Substitute Senate Bill No. 5159.

#### ROLL CALL

The Secretary called the roll on the final passage of Second Substitute Senate Bill No. 5159 and the bill passed the Senate by the following vote: Yeas, 47; Nays, 1; Absent, 0; Excused, 1.

Voting yea: Senators Anderson, A., Anderson, C., Bauer, Cantu, Deccio, Drew, Fairley, Finkbeiner, Franklin, Fraser, Gaspard, Hale, Hargrove, Haugen, Heavey, Hochstatter, Johnson, Kohl, Long, Loveland, McAuliffe, McCaslin, McDonald, Morton, Moyer, Newhouse, Oke, Owen, Palmer, Pelz, Prentice, Prince, Quigley, Rasmussen, Rinehart, Roach, Schow, Sellar, Sheldon, Smith, Snyder, Spanel, Swecker, West, Winsley, Wojahn and Wood - 47.

Voting nay: Senator Sutherland - 1.

Excused: Senator Strannigan - 1.

SECOND SUBSTITUTE SENATE BILL NO. 5159, having received the constitutional majority, was declared passed. There being no objection, the title of the bill will stand as the title of the act.

# SENATE BILL REPORT

## SB 5399

As Reported By Senate Committee On:  
Labor, Commerce & Trade, February 22, 1995

**Title:** An act relating to refining industrial insurance actions.

**Brief Description:** Refining industrial insurance actions.

**Sponsors:** Senators Pelz and Franklin; by request of Department of Labor & Industries.

**Brief History:**

**Committee Activity:** Labor, Commerce & Trade: 1/24/95, 2/22/95 [DP, DNP].

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### SENATE COMMITTEE ON LABOR, COMMERCE & TRADE

**Majority Report:** Do pass.

Signed by Senators Pelz, Chair; Heavey, Vice Chair; Franklin, Fraser and Wojahn.

**Minority Report:** Do not pass.

Signed by Senators Deccio, Hale and Palmer.

**Staff:** Jack Brummel (786-7428)

**Background:** Compensation paid or awarded by another jurisdiction is presently offset against amounts paid or awarded the claimant by Washington State. Other recoveries made to the claimant under another jurisdiction's workers' compensation laws are sometimes not considered to be compensation and cannot be offset against amounts paid or awarded the claimant by Washington.

Injured workers may seek recovery against third parties other than their employer for work-related injuries. If such recoveries are made, the Department of Labor and Industries may seek reimbursement of amounts recovered by injured workers. The state Supreme Court ruled last year that the department's right to reimbursement does not extend to amounts awarded for loss of consortium.

Current law requires that the Department of Labor and Industries make a retroactive adjustment to an employer's experience rating when a third party recovery was made on a claim which changed the rating.

The department believes that there are several technical changes to the workers' compensation statutes which would improve administration.

**Summary of Bill:** Any settlement proceeds from another jurisdiction are used to offset workers' compensation award payments to claimants in Washington. The department will no longer make retroactive adjustments to an employer's experience rating when a third party recovery has been made on claims previously used to calculate experience rating. Health

services providers are allowed 60 days to appeal department orders which do not make demands for repayment of sums paid. Orders and Notices to Withhold and Deliver can be served by certified mail, in addition to personal service. The term "recovery" does not include damages for loss of consortium.

Minor technical changes are made to clarify legislative intent with regard to third party settlements.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Testimony For:** The bill provides several needed technical corrections to industrial insurance statutes and complies with recent court decisions.

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**Testimony Against:** Loss of consortium should be offset against workers' compensation payments. Greater clarity in establishing benefits for the future is needed.

**Testified:** Mark Brown, Mike Watson, Department of Labor and Industries (pro); Charles Bush, WA Self-Insurers Assn. (con); Clif Finch, AWB (con).

# HOUSE BILL ANALYSIS

## SB 5399

**Brief Description:** Refining industrial insurance actions.

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**Sponsors:** Senators Pelz and Franklin.

Hearing: March 22, 1995

### BACKGROUND

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#### Industrial insurance actions related to out-of-jurisdiction claims

A worker who is injured outside of the territorial limits of Washington and whose employment is principally located in Washington or is under a contract made in Washington is entitled to benefits under Washington industrial insurance law if the injury is one for which benefits would have been paid had the injury occurred in Washington. However, any payment or award received by the worker under the other jurisdiction's workers' compensation law is offset against the benefits received under Washington law.

#### Third party actions

An injured worker, or the Department of Labor and Industries or self-insured employer on behalf of the injured worker, may file a civil action against third parties (not the employer or co-worker) who may be liable for the worker's injuries. The worker is entitled to full benefits under the industrial insurance law and the department or self-insurer has a lien against the third party recovery for benefits that are paid. When benefits are reimbursed from the third party recovery, the department is required to make a retroactive adjustment to the state fund employer's experience rating account.

The Washington Supreme Court has held that the department's right to reimbursement from a third party recovery does not extend to the part of the recovery that is for loss of consortium. The court found that benefits paid under the industrial insurance law do not compensate injured workers for noneconomic damages, such as loss of consortium, and therefore the worker is not obtaining double recovery by retaining both the workers' compensation benefits and the noneconomic damages recovered in the third party action.

If a third party cause of action is settled, the department or the self-insurer must approve any settlement that results in the worker receiving less than he or she is entitled to under the industrial insurance law. "Entitlement" includes benefits paid and payable.

A notice to withhold and deliver property in a collection action related to a lien against a third party recovery must be personally served by the county sheriff's department or by the director's authorized representative.

### **Industrial insurance appeals by health services providers**

A provider who chooses to file an appeal of a Department of Labor and Industries order that demands repayment from the provider must file the appeal within 20 days of the order being communicated to the provider.

## **SUMMARY OF BILL**

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### **Industrial insurance actions related to out-of-jurisdiction claims**

Settlement proceeds and other recoveries that a worker receives under another jurisdiction's workers' compensation law are included as part of the other jurisdiction's compensation that may be offset against compensation received under Washington's law.

### **Third party actions**

The definition of "recovery" in an action against a third party, for purposes of determining the state fund's or self-insurer's lien against the recovery, includes all damages except loss of consortium.

In a compromise or settlement of a third party action, when written approval of the department of self-insurer is required because the settlement results in less than the worker's entitlement, "entitlement" includes benefits that are estimated by the department to be paid in the future.

The provision is deleted that required the Department of Labor and Industries to make a retroactive adjustment to an employer's experience rating account based on reimbursement from a third party recovery.

Notices to withhold and deliver property in a collection action related to a lien against a third party recovery may, in addition to personal service, be served by certified mail with return receipt requested.

### **Industrial insurance appeals by health services providers**

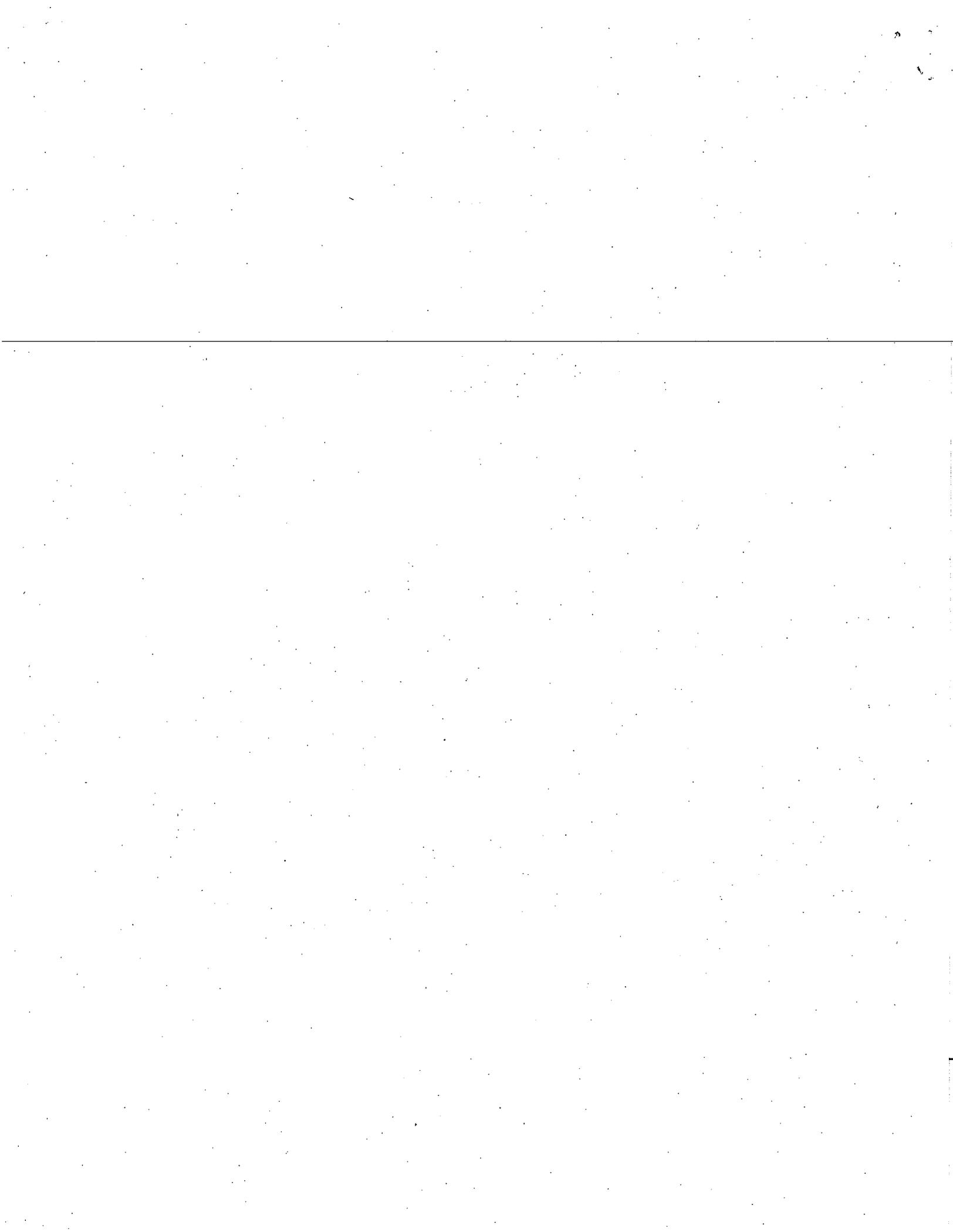
The time period for health services providers to appeal orders of the Department of Labor and Industries is revised. Health services providers are given a 60-day period to file appeals to department orders unless the order is solely a demand for the repayment of amounts paid to the provider.

The bill does not contain provisions addressing the rule-making powers of an agency.

**FISCAL NOTE:** Available.

**EFFECTIVE DATE:** Ninety days after adjournment of session in which bill is passed.

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# HOUSE BILL REPORT

## SB 5399

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As Reported By House Committee On:  
Commerce & Labor

**Title:** An act relating to refining industrial insurance actions.

**Brief Description:** Refining industrial insurance actions.

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**Sponsors:** Senators Pelz and Franklin; by request of Department of Labor & Industries.

**Brief History:**

**Committee Activity:**

Commerce & Labor: 3/22/95, 3/29/95 [DPA].

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### HOUSE COMMITTEE ON COMMERCE & LABOR

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**Majority Report:** Do pass as amended. Signed by 10 members: Representatives Lisk, Chairman; Hargrove, Vice Chairman; Thompson, Vice Chairman; Romero, Ranking Minority Member; Conway, Assistant Ranking Minority Member; Cairnes; Cody; Cole; Fuhrman and Goldsmith.

**Staff:** Chris Cordes (786-7117).

**Background:**

**Industrial insurance actions related to out-of-jurisdiction claims**

A worker who is injured outside of the territorial limits of Washington and whose employment is principally located in Washington or is under a contract made in Washington is entitled to benefits under Washington industrial insurance law if the injury is one for which benefits would have been paid had the injury occurred in Washington. However, any payment or award received by the worker under the other jurisdiction's workers' compensation law is offset against the benefits received under Washington law.

**Benefits in case of the injured worker's death**

If an injured worker dies as a result of the industrial injury, burial expenses of \$2,000 are paid and the worker's family receives an immediate payment of \$1,600.

### Third party actions

An injured worker, or the Department of Labor and Industries or self-insured employer on behalf of the injured worker, may file a civil action against third parties (not the employer or co-worker) who may be liable for the worker's injuries. The worker is entitled to full benefits under the industrial insurance law and the department or self-insurer has a lien against the third party recovery for benefits that are paid. When benefits are reimbursed from the third party recovery, the department is required to make a retroactive adjustment to the state fund employer's experience rating account.

The Washington Supreme Court has held that the department's right to reimbursement from a third party recovery does not extend to the part of the recovery that is for loss of consortium. The court found that benefits paid under the industrial insurance law do not compensate injured workers for noneconomic damages, such as loss of consortium, and therefore the worker is not obtaining double recovery by retaining both the workers' compensation benefits and the noneconomic damages recovered in the third party action.

If a third party cause of action is settled, the department or the self-insurer must approve any settlement that results in the worker receiving less than he or she is entitled to under the industrial insurance law. "Entitlement" includes benefits paid and payable.

A notice to withhold and deliver property in a collection action related to a lien against a third party recovery must be personally served by the county sheriff's department or by the director's authorized representative.

### Industrial insurance appeals by health services providers

A provider who chooses to file an appeal of a Department of Labor and Industries order that demands repayment from the provider must file the appeal within 20 days of the order being communicated to the provider.

### **Summary of Amended Bill:**

### Industrial insurance actions related to out-of-jurisdiction claims

Settlement proceeds and other recoveries that a worker receives under another jurisdiction's workers' compensation law are included as part of the other jurisdiction's compensation that may be offset against compensation received under Washington's law.

### Benefits in case of the injured worker's death

The amount of the benefits paid for burial expenses when an injured worker dies as a result of the industrial injury is changed from \$2,000 to 200 percent of the state's average monthly wage (approximately \$4,250). The immediate payment for the injured worker's family is changed from \$1,600 to 100 percent of the state average monthly wage (approximately \$2,125).

### Third party actions

The definition of "recovery" in an action against a third party, for purposes of determining the state fund's or self-insurer's lien against the recovery, includes all damages except loss of consortium.

In a compromise or settlement of a third party action, when written approval of the department of self-insurer is required because the settlement results in less than the worker's entitlement, "entitlement" includes benefits that are estimated by the department to be paid in the future.

The provision is deleted that required the Department of Labor and Industries to make a retroactive adjustment to an employer's experience rating account based on reimbursement from a third party recovery.

Notices to withhold and deliver property in a collection action related to a lien against a third party recovery may, in addition to personal service, be served by certified mail with return receipt requested.

### Industrial insurance appeals by health services providers

The time period for health services providers to appeal orders of the Department of Labor and Industries is revised. Health services providers are given a 60-day period to file appeals to department orders unless the order is solely a demand for the repayment of amounts paid to the provider.

**Amended Bill Compared to Original Bill:** The amendment adds provisions that change the method for calculating the award for burial expenses and the immediate payment to the injured worker's family when the worker dies as a result of the industrial injury.

**Appropriation:** None.

**Fiscal Note:** Available.

**Effective Date:** Ninety days after adjournment of session in which bill is passed.

**Testimony For:** (1) This bill will assist the Department of Labor and Industries and self-insured employers when a settlement results in a deficiency recovery. The department or self-insurer could void the settlement if the recovery fails to account for the future costs that are expected in the claim. This bill also clarifies appeal rights by health care providers, whose period of time in which to file an appeal has been limited by the Board of Industrial Insurance Appeals. Amendments should be added to this bill that would allow a better method to calculate burial benefits if an industrial injury results in the death of an injured worker. (2) The bill should address all noneconomic damages that an injured worker might recover in a third party action, and not provide an exemption for loss of consortium damages. Permitting this exemption from the definition of "recovery" creates an incentive for the parties on both sides of the issue to manipulate settlements and shift the recovery away from economic damages. If this happens, it will complicate settlements to the detriment of the premium payers. (3) The logic behind the lien statute is to protect against double recoveries. Because workers' compensation does not cover every kind of loss suffered by the worker, it is fair that some parts of a third party recovery should not be subject to the department's lien. The department or self-insurer already has the right to void a settlement when it is deficient. However, these procedures are particularly important when the injured party is not represented by counsel. The bill should allow parties who are represented to make whatever settlement fits their circumstances. Allowing the settlement to be voided simply forces an expensive trial without any risk to the department or self-insurer.

**Testimony Against:** None.

**Testified:** (In favor) Mike Watson, Department of Labor and Industries. (In favor, with amendments) Lee Eberle, Washington Self-Insurers Association; Clif Finch, Association of Washington Business; and Wayne Lieb, Washington State Trial Lawyers Association.

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# APPENDIX C

VERBATIM REPORT OF PROCEEDINGS

FROM TAPE RECORDING

DATED 1/24/95

Transcribed By:

Connie Church, CCR #2555, RPR, CRR  
Certified Court Reporter

of

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1 that I clearly wouldn't be proposing this alternative to  
2 you if I personally felt that, in any significant way, it  
3 compromised public safety. That was the threshold that I  
4 had to reach. And it's my judgment that it would not. I  
5 ~~looked at the citation and inspection history and other~~  
6 data. And I just am - I am comfortable with saying that  
7 the additional risk is insignificant. Others clearly  
8 have the right to disagree with that. If they do, I'd  
9 like to see the data that supports their conclusion. It  
10 would help me.

11 CHAIRMAN: Thank you very much.

12 MR. BROWN: Thank you.

13 CHAIRMAN: We will move on to Senate Bill 5399.

14 UNIDENTIFIED SPEAKER: Mr. Chairman, members of  
15 the committee, under Tab 12, you'll find Senate Bill 5399  
16 and the bill report.

17 By way of background, currently if an individual is  
18 injured out of state, our state worker's compensation  
19 system will compensate that individual. The law provides  
20 that other recoveries made to the claimant under another  
21 jurisdictions' worker's compensation laws may be offset  
22 against the recoveries made in this state.

23 Section one of the bill attempts to adjust for  
24 differences in language. Currently the payment or award  
25 of compensation is covered. Additional language is

1 included to say compensation or other recoveries,  
2 including settlement proceeds. So the Department may now  
3 offset those other recoveries.

4 In this state, injured workers may seek recovery  
5 ~~against third-party - third parties which may be at fault~~  
6 for an injury. Currently the Department may seek  
7 reimbursement of amounts recovered by injured workers.  
8 Last year the Supreme Court ruled that such recoveries do  
9 not include amounts awarded for loss of consortium.  
10 Consortium is considered to be the love and affection of  
11 a dear one.

12 Section two of the bill attempts to deal with that  
13 by putting in statute for purposes of the statute  
14 recovery includes all damages except loss of consortium.  
15 I think the intention of the Department - Department can  
16 speak to this - but I think the intention of the  
17 Department is to specify that loss of consortium is the  
18 only exception. And I think they'll be able to talk a  
19 little bit more about that.

20 In addition, when third-party recoveries are made,  
21 an adjustment to an employee's experience rating is made  
22 retroactively. And the Department believes that this is  
23 a cumbersome process and you'll see that in section three  
24 of the bill, the Department will no longer make  
25 retroactive adjustments to an experience rating.

1           In addition to the sections that I pointed out to  
2 you, there are a number of other technical changes that  
3 the Department thought would be useful and would improve  
4 the administration. So for instance, in section four  
5 having to do with delivery by certified mail, new  
6 language is added. In addition, section five, relating  
7 to third-party settlements; and section six, allowing  
8 health providers 60 days to appeal Department orders  
9 which do not make demands for repayment of sums paid.  
10 And those are all fairly minor amendments. Yes?

11           UNIDENTIFIED SPEAKER: (Indiscernible) is that a  
12 misprint? It says "an employee."

13           UNIDENTIFIED SPEAKER: That's probably a  
14 misprint, yeah. Would be an employer's experience  
15 rating.

16           CHAIRMAN: Thank you. Questions for Jack or  
17 Mr. Brown? Okay. Mr. Watson, did you want to come  
18 forth?

19           MR. WATSON: Mr. Chairman, Mike Watson, Deputy  
20 Director for the Department of Labor & Industries. I  
21 will be brief and primarily respond to questions, if  
22 necessary. I do want to mention with regard to double  
23 recovery, you closed a loophole a couple of years ago  
24 with regard to certain federal settlements.

25           What we've run into - it's a limited number of

1 cases, but it actually involves where somebody is in a  
2 twilight zone of coverage and files with more than one  
3 insurer for the same injury. And then in other states  
4 and with some federal programs, they have the ability to  
5 do something called a compromise and release, where the  
6 insurer can pay them money basically to go away and not  
7 admit liability. And we have run into problems in terms  
8 of considering that money actually for that injury. And  
9 so we would like the ability to offset that because it  
10 represents a form of double recovery.

11 UNIDENTIFIED SPEAKER: That happened in this  
12 state?

13 MR. WATSON: It's happened to us several times,  
14 with regard to Oregon Longshore and Harbor Workers Act  
15 and others.

16 UNIDENTIFIED SPEAKER: Oh.

17 MR. WATSON: There are several amendments that  
18 relate to third-party recovery section of the statute.  
19 And that is correct. Our intent is to codify that loss  
20 of consortium is the only part of a third-party recovery  
21 for an injury that would not be subject to repayment of  
22 the benefits that L & I or the self-insured employer has  
23 paid out.

24 There was some language in the Supreme Court  
25 decision that began to get into an analysis of special

1 versus general damages. And that's a discussion that has  
2 never taken place in terms of the law or the application  
3 of the law in the past, and we would like to make that  
4 clear. This is a significant area of recovery for  
5 replenishment of the trust funds, but also provides for  
6 additional recovery for injured workers or their  
7 survivors as well.

8 The - I would make one correction with regard to the  
9 elimination of the restriction on giving - well, the  
10 requirement to make a retroactive adjustment to an  
11 employer's account. We agreed some time ago that if we  
12 could get stability in the third-party recovery area,  
13 which is a significant area - it's over 11 million  
14 dollars in cash and over 20 million dollars in cost  
15 avoidance each year - that we . . . This is a process  
16 that can take three to five years, as you know, for a  
17 case to be ultimately settled with a private party. That  
18 involves going backwards then to recalculate the  
19 employer's experience rating when they're with a state  
20 fund. What we have agreed is that we'd like to come up  
21 with a system for giving prospective credit to the  
22 employer so that it can be done much earlier in the  
23 process. And this would move that prohibition and allow  
24 us to do something by rule that can be agreed upon by  
25 various parties.

1           The last one that I want to comment on was with  
2 regard to deficiency settlements. If somebody gets in an  
3 auto accident while they're working and the other driver  
4 is at fault and they make a settlement with that party,  
5 the Department must give approval if the settlement is  
6 going to result in something less than what L & I is  
7 paying in benefits. We want to make it clear that it  
8 doesn't matter at what point in the process someone makes  
9 the settlement, whether only \$10 in bills have been paid  
10 or whether \$100,000 in bills have been paid. The  
11 ultimate cost of the case is what's used to determine  
12 whether or not the settlement is less than adequate to  
13 replenish the trust funds.

14           This doesn't come up very often. Deficiency  
15 settlements come up often. Our denial of them doesn't  
16 come up very often because there are many factors that go  
17 into making a settlement. It does come up most often  
18 with private insurance adjusters and individuals who are  
19 unrepresented. And a week after the accident, they make  
20 an offer of a settlement which the person accepts. And  
21 there may not have been any costs paid on the claim at  
22 that point. The Department has the authority, under  
23 current law, to vacate a settlement if it is a  
24 deficiency. We want to clarify what that deficiency  
25 means.

1           And the very last provision there simply clarifies  
2 that providers do, in fact, have 60 days to appeal all  
3 orders other than overpayment assessments against them.  
4 There was a recent Board of Industrial Insurance case  
5 that was decided that limited that to 20 days.

6           CHAIRMAN: Questions for Mr. Watson? Okay.  
7 Thank you. We have Charlie Bush and Bill Hawthorne, if  
8 they could come forward and bring your . . . Let's see.  
9 I think we need a couple chairs up here, folks. I think  
10 we are five. Well, wait a second.

11           UNIDENTIFIED SPEAKER: Actually Bill is --

12           CHAIRMAN: Okay. Good. Clif will sit behind  
13 him.

14           UNIDENTIFIED SPEAKER: You could have this. I'm  
15 not going to say anything.

16           UNIDENTIFIED SPEAKER: All right. Melonie.

17           MR. FINCH: I saw that on the sign-up sheet,  
18 they did this loop up to include our panel so . . .  
19 But . . . I'm Clif Finch with the Association of  
20 Washington Business here to speak today on all three of  
21 the industrial insurance bills. And with the permission  
22 of the Chair . . . With me today is Charlie Bush from  
23 the law firm of Preston Gates in Seattle. He chairs the  
24 worker compensation legal committee for both the  
25 Association of Washington Business and the Washington

1 Self-insurers Association. And with the permission of  
2 the Chair, in order to expedite his time in front of the  
3 committee, I'd ask the Chair's permission that he be able  
4 to address all three of the bills on industrial  
5 insurance. His comments are very brief with regard to  
6 the major issues.

7 CHAIRMAN: Okay. I'm going to make the same  
8 provision I made to Mr. Brown, which is I don't think  
9 we'll be able to ask you questions then because we're not  
10 getting . . . But if your time constraint is such, sir,  
11 and you'd like to speak to all three . . .

12 MR. BUSH: Actually I can wait, Senator Pelz,  
13 until we get to the other.

14 CHAIRMAN: I think you'd get a - you might get a  
15 little bit more thoughtful questioning if you do it that  
16 way. If you'd like to speak to the 5399.

17 MR. BUSH: Yes, sir. Senator Pelz, just briefly  
18 on the consortium loss issue, I know this probably  
19 doesn't make sense to most of you. Since 1911, when the  
20 Worker's Compensation Act first came into being, there  
21 was, in essence, the third-party concept but it was a  
22 much more harsh situation. An injured worker or the  
23 surviving beneficiary could either take under the  
24 Worker's Comp Act or go against the person responsible as  
25 long as it wasn't the employer or a co-employee.

1           Later on the harsh choice was softened and the  
2 worker's compensation claimant, be it the worker or the  
3 surviving beneficiary or a dependent, could also take  
4 under the Worker's Compensation Act the benefits of  
5 compensation provided and pursue the third party. But in  
6 the event there was a recovery from the third party,  
7 whether by settlement or by actually going through the  
8 court proceeding, the monies had to come back to the  
9 state - at that time, there was no self-insurance concept  
10 - the state fund, the idea being that the personal injury  
11 cause of action was preserved for the benefit of the  
12 worker's compensation funds so that the worker still got  
13 - or the worker's comp claimant still got all of the  
14 benefits of compensation to which they were entitled  
15 under the act, but also, in the event that there was a  
16 third party responsible for it, the funds were  
17 reimbursed.

18           Then things got changed a bit and a small amount was  
19 carved out for the worker and a third-party situation so  
20 that they could have a little bit more. It was a 25  
21 percent exemption from the reimbursement and set off  
22 provisions otherwise available to the worker's  
23 compensation fund. All along there's been this dynamic  
24 between the trial lawyer type worker groups and the  
25 worker's compensation funds as to how much the statute

1 actually meant as far as the ability to receive monies  
2 back to the worker's comp funds and offset against future  
3 benefits payable under the worker's compensation funds.

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

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

19 We - and our position here is that - and the  
20 Department's already told you, what they're doing is  
21 they're responding to a Supreme Court decision as if the  
22 Supreme Court is a super-legislature telling you what the  
23 Legislature intended all along. And we have corrected  
24 that several times in prior amendments to other parts of  
25 the Worker's Compensation Act.



1 only the consortium damages from the third party, but  
2 also the lifetime pension under the Worker's Compensation  
3 Act. And that is contrary to the intent of the  
4 Legislature since 1911.

5 CHAIRMAN: Can I ask you to give us a  
6 hypothetical on a third-party lawsuit successfully for a  
7 million dollars against a death benefit of \$100,000? And  
8 how do those dollars track then under this proposal and  
9 under your objection?

10 MR. BUSH: In the event I was killed as a  
11 malfunction of a piece of equipment while I was in the  
12 course of my employment, my wife Linda would be able to  
13 pursue a personal injury cause of action against the  
14 third party who made the bad equipment and recover a  
15 million dollars. And similarly, she could file a  
16 worker's compensation claim because I was killed in the  
17 course of my employment, as a result of which she'd be  
18 entitled to a lifetime pension. And the Department of  
19 Labor & Industries would set up a pension reserve. And  
20 we call that the present value of that pension. And that  
21 can go up to 300, 350 thousand dollars.

22 CHAIRMAN: Okay. So she gets a million plus 350  
23 thousand under this. And you would rather see what? The  
24 350 is subtracted from the million?

25 MR. BUSH: Yeah.

1 CHAIRMAN: Okay.

2 MR. BUSH: Minus proportionate share of the fees  
3 and costs, which is what the statutory formula is now

4 UNIDENTIFIED SPEAKER: What?

5 MR. BUSH: Minus a proportionate share of the  
6 fees and costs. We have to acknowledge that my wife  
7 incurred legal expenses, litigation expenses, to get the  
8 million dollars. And so the worker's comp fund has to  
9 bear a proportionate share of that.

10 MR. FINCH: I would just finally point out that  
11 with the way the bill is currently worded, you're  
12 creating an incentive for attorneys on both sides frankly  
13 to play games with the settlement. This is the exact  
14 kind of problem that we had a couple of years ago with  
15 regard to both defense attorneys and plaintiff attorneys  
16 getting down, rearranging the benefits, so that frankly,  
17 the state fund didn't get reimbursed for the worker  
18 compensation claims.

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

24 With the language that you have in front of you  
25 today though, once again we see the potential for that

1 problem and would urge you to change that language so  
2 that all damages reflect back into the current formula  
3 for reimbursing the state fund.

4 CHAIRMAN: I'm going to ask Mr. Hartford to  
5 speak, and then I think we can ask questions to either.

6 MR. HARTFORD: Thank you, Senator. My name is  
7 Bill Hartford. I'm speaking on behalf today of the  
8 Washington State Trial Lawyers Association. I've been  
9 working 10 years in worker's comp both for claimants and  
10 workers and also as a prior Assistant Attorney General.

11 In terms of Senate Bill 5399, I would take great  
12 issue with Mr. Bush's explanation of the effect of the  
13 recent court case, the Flannigan case, and whether that  
14 is good policy or not and the Department's reaction to  
15 it. I think the bottom line really goes to whether or  
16 not individuals would rather have their spouses with them  
17 and enjoying their time with them or whether or not, you  
18 know, it's better off to have a pension from the  
19 Department and a potential third-party recovery. I think  
20 the answer to that is most everyone would rather have  
21 their spouse with them.

22 The fact of the matter is that Labor & Industries is  
23 not necessarily a full and fair result and a method of  
24 getting all compensation on behalf of a widow or widower  
25 if, in fact, someone dies on the job. The Flannigan case

1 Compensation Act. Actually you never come --

2 CHAIRMAN: I understand that. I'm saying a  
3 hundred would come from the private. The 250 . . .  
4 Would still be the same 350. But would the state get the  
5 hundred thousand - would the fund get the hundred  
6 thousand dollar offset?

7 UNIDENTIFIED SPEAKER: Yes. Less 25 percent of  
8 that hundred thousand, yes.

9 CHAIRMAN: And less attorney's fees and costs.

10 UNIDENTIFIED SPEAKER: Right.

11 CHAIRMAN: I guess my question is: If - if you  
12 thought you were going to . . . This is grotesque, but  
13 I'm not going to say attorneys don't sink to this level.  
14 If you thought it was going to be a \$500,000 settlement  
15 in a third-party lawsuit but with your deductions you get  
16 your \$350,000, then offset against the fund, there's no  
17 reason for anyone to go ahead with the claim in that  
18 case, is there, because there's no net benefit to the  
19 family?

20 UNIDENTIFIED SPEAKER: No. That's incorrect  
21 because after attorney's fees and costs, there's an  
22 initial 25 percent that goes to the worker. So there's  
23 always an incentive to pursue a third-party claim.  
24 That's when Mr. Bush, when giving the history of the  
25 third-party statute - we specifically allow the 25

1 percent off the top to allow an incentive for a worker to  
2 pursue a claim.

3 CHAIRMAN: Thank you very much. 5395.

4 UNIDENTIFIED SPEAKER: Mr. Chairman, members of  
5 the committee, behind Tab 15 is Senate Bill 5395. This

6 deals with a number of industrial insurance benefits  
7 provisions. Currently recipients of industrial insurance  
8 benefits are not barred from receiving benefits even if  
9 they deliberately intended to produce injury or death.

10 Similarly, a beneficiary that is incarcerated --

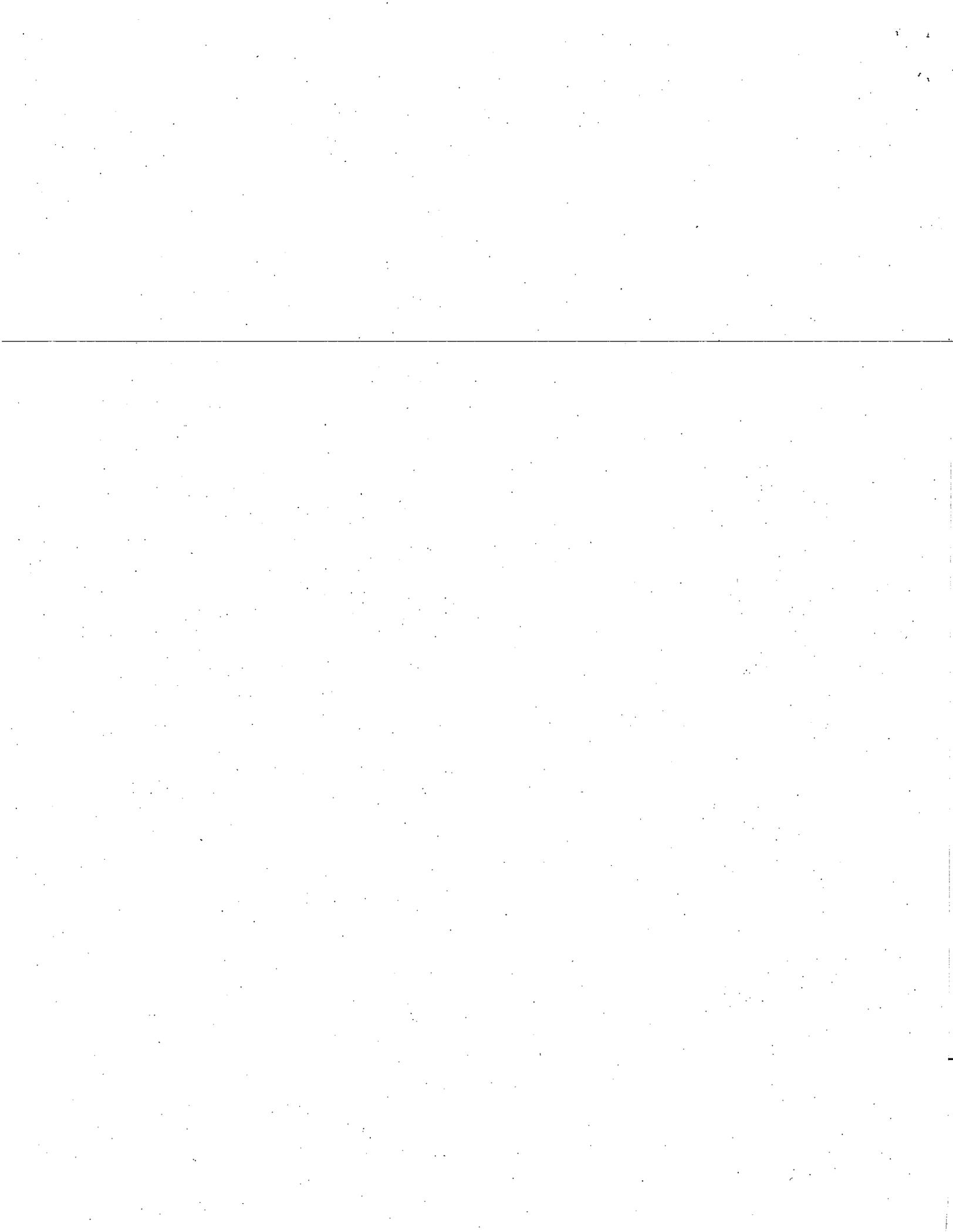
11 UNIDENTIFIED SPEAKER: Mr. Chairman, I can't  
12 hear.

13 UNIDENTIFIED SPEAKER: Sorry. I'll start over.  
14 Beneficiaries under the current worker's compensation law  
15 may receive benefits from worker's compensation even if  
16 they were - if they intentionally harmed the injured  
17 worker through which they receive benefits. Similarly,  
18 they may be in prison and receive worker's compensation  
19 benefits.

20 Other benefit provisions in current law include a  
21 \$2,000 allowance for burial experiences. This has been  
22 the same for about 12 years.

23 Currently individuals that are eligible for training  
24 may receive up to \$3,000 in each of two 52-week periods.

25 And finally, in terms of monthly partial disability



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# APPENDIX D

VERBATIM REPORT OF PROCEEDINGS

FROM TAPE RECORDING

DATED 3/22/95

Transcribed By:

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1 (Beginning of tape.)

2 CHAIRPERSON: Let's get this show on the road.  
3 First we'll start with Senate Bill 5399. Since this is a  
4 relatively complicated issue, take your time and make  
5 sure that we all understand it with your briefing.

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

13 The first one has to do with out-of-jurisdiction  
14 claims. Washington law provides that if a worker is hurt  
15 outside of the territorial limits of Washington, they may  
16 still be entitled to benefits under the Washington law if  
17 their employment is principally located in Washington or  
18 they're under a contract for employment that was made in  
19 Washington. However, if they are paid benefits under  
20 another state's worker's compensation system, then those  
21 benefits from the other state are offset against the  
22 benefits they get in Washington. In other words, there's  
23 no double payment. You get one or the other, and it's  
24 offset against them.

25 The question that was raised and that this bill

1 addresses is whether the compensation that could be  
2 offset would include settlements and other kinds of  
3 recoveries. And this bill clarifies by adding that  
4 settlements are also subject to the offset, making it  
5 clear that it's not just compensation under the system,  
6 but it may be settlements and other recoveries related.

7 CHAIRPERSON: Keep the conversations outside,  
8 please. I can't hear. Sorry. Go ahead.

9 UNIDENTIFIED SPEAKER: The next area has to do  
10 with third-party action. In the worker's compensation  
11 laws, the employer - employee is not permitted to sue his  
12 or her employer. That includes a co-worker who may have  
13 been involved in the injury. But workers can bring suits  
14 against third parties, nonemployment related parties, who  
15 may have been also responsible or may be liable for the  
16 injuries.

17 There are a number of provisions in this bill that  
18 deal with those kinds of actions, those third-party  
19 actions. The first one deals with what happens if there  
20 is a recovery from a third-party action. The Department  
21 has - department or the self-insured if it's a  
22 self-insured employer has the right to be reimbursed from  
23 the third-party action from any benefits that they've  
24 paid under the worker's compensation system. What  
25 generally happens is that the worker gets their worker's

1 compensation benefits just under a normal routine manner.  
2 But when they bring the third-party recovery and get a  
3 third-party action and get a recovery, then the  
4 Department or the self-insured has a right to be  
5 reimbursed for the benefits that they pay under the  
6 system.

7 This - the current law says that the Department will  
8 make a retroactive adjustment to the employer's  
9 experience rating account after they get the recovery.  
10 This bill would delete the requirement that the  
11 adjustment be made after there is a reimbursement. And  
12 the Department can explain more fully why they want that  
13 change. But it's my understanding that they feel that  
14 the statute requires them to make the reimbursement  
15 afterwards. This limits their ability to make a  
16 prospective reimbursement. And they can talk to you  
17 about that change.

18 The second thing in the third-party action that this  
19 bill addresses has to do with a recent Supreme Court  
20 decision. The Supreme Court decided that some recoveries  
21 that workers or beneficiaries make in a third-party  
22 recovery is not subject to the lien. This particular  
23 case dealt with a loss of consortium, which is the  
24 recovery that a spouse gets for the loss of the love and  
25 affection of their spouse. And just so you know, there's

1 also a parental consortium for the loss of a parent and  
2 child, between a parent and child, the loss of love and  
3 affection. This one had to do with the spouse's loss of  
4 consortium.

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

19 The third issue for the third-party action area is  
20 that has to do with approving settlements. The  
21 Department or self-insured does have to approve a  
22 settlement that a worker may enter into if the settlement  
23 is less than what the worker may have been entitled to  
24 under the worker's compensation law. This provision in  
25 the law now defines entitlement as the benefits that are

1 paid and payable. This bill would change that by saying  
2 that it would also - entitlement would also include the  
3 benefits that are estimated to be paid into the future so  
4 that the Department can include what they estimate in  
5 their reserve for the particular claim.

6 REPRESENTATIVE COLE: Could you do that again,  
7 that part, that entitlement part, say that over again.

8 UNIDENTIFIED SPEAKER: Right now the law defines  
9 entitlement as what is paid or payable - and payable.  
10 This would include an estimated - those benefits  
11 estimated to be paid into the future. Again, the  
12 Department can explain, give you some examples of what  
13 that change is. But it allows them to estimate the  
14 amount that is reserved for the claim and include that in  
15 the - what is estimated to be entitlement for the worker.

16 REPRESENTATIVE COLE: I have a question about  
17 that. That then is perhaps something that may be under  
18 appeal, but the Department doesn't know whether the  
19 appeal will be won or not?

20 UNIDENTIFIED SPEAKER: It has to do with a  
21 settlement. It's in a situation where there's been a  
22 settlement of the third-party claim. And the Department  
23 has a right to decide whether to approve the settlement  
24 or not. And the settlement can be - this right occurs if  
25 the settlement is for less than the worker is entitled

1 to. So it's a question of what is entitlement and trying  
2 to decide whether or not the settlement is less than the  
3 worker's entitlement.

4 A couple more minor issues in this bill. There are  
5 some changes in the way that the Department can serve  
6 notice of withhold and deliver when there is a collection  
7 action. And the third party rather than having the  
8 requirement that the notice be personally served, they  
9 can also serve it by certified mail.

10 And the final issue in this bill has to do with  
11 appeals by health services providers. Right now health  
12 services providers only have 20 days to file an appeal.  
13 Other claims can be filed - other appeals can be filed in  
14 a 60-day period. This would change - clarify that appeal  
15 period by saying that health services providers have 60  
16 days unless the demand that the Department has made has  
17 only to do with repayment of a bill. And so then they  
18 would still have 20 days. But if the appeal has anything  
19 to do with issues other than a demand for repayment, then  
20 they would have 60 days.

21 REPRESENTATIVE COLE: So now I don't understand  
22 that either.

23 UNIDENTIFIED SPEAKER: Start from the beginning.  
24 Almost everyone has a 60-day period to file an appeal  
25 except for health services providers. The law says they

1 have 20 days. This would say only in the case of an  
2 appeal having to do with repayment. For example, let's  
3 say the Department has decided that a billing was in  
4 error and demands repayment of the billing. That would  
5 still have a 20-day appeal. But if there were other  
6 issues involved, if it involved anything besides just  
7 that repayment, then they would have 60 days, like  
8 everyone else.

9 REPRESENTATIVE COLE: And this is the only part  
10 of the law that has 20 days.

11 UNIDENTIFIED SPEAKER: As far as I know.

12 UNIDENTIFIED SPEAKER: (Indiscernible).

13 UNIDENTIFIED SPEAKER: Oh, good. Yeah.

14 REPRESENTATIVE COLE: So if they don't get the  
15 appeal filed within 20 days --

16 UNIDENTIFIED SPEAKER: Once the demand for  
17 repayment --

18 REPRESENTATIVE COLE: -- from the Department,  
19 then the doc has to pay it if he doesn't get --

20 UNIDENTIFIED SPEAKER: But the appeal would  
21 become final if the 20-day period passed.

22 CHAIRPERSON: Okay. I think maybe we might want  
23 further questions on that one for the Department.

24 UNIDENTIFIED SPEAKER: I have one question.

25 CHAIRPERSON: Go ahead.

1 UNIDENTIFIED SPEAKER: Can you explain to me  
2 what a lien against recovery is, self-insured's lean  
3 against recovery.

4 UNIDENTIFIED SPEAKER: The Department and the  
5 self-insured both have a right to be reimbursed for the  
6 benefits they pay when there's a third-party settlement.  
7 So that if a third party caused the worker's injuries,  
8 the Department nevertheless or the self-insured goes  
9 ahead and pays the claim anyway, pays benefits on the  
10 claim anyway. But then they have a right to  
11 reimbursement from the third-party recovery. So their  
12 right is supported by a lien against that recovery. They  
13 have what's been termed and what is called in the statute  
14 a lien against the recovery, which means they can enforce  
15 their right to collect.

16 CHAIRPERSON: I think (Indiscernible) has  
17 questions.

18 UNIDENTIFIED SPEAKER: Do they collect from the  
19 third party or do they collect from the injured person  
20 when they get their dollars?

21 UNIDENTIFIED SPEAKER: Well, it's against the  
22 third-party recovery, but that recovery is the injured  
23 worker's recovery.

24 UNIDENTIFIED SPEAKER: Yeah. I understand that.

25 UNIDENTIFIED SPEAKER: So it's - comes out of

1 the settlement or out of the recovery.

2 UNIDENTIFIED SPEAKER: Yeah.

3 CHAIRPERSON: Okay. Any further questions? I  
4 would ask the committee members each to try to  
5 understand, if you don't fully - get the consortium issue  
6 under your belt, because that's probably the most  
7 controversial aspect of this bill. And we may be  
8 addressing it. Okay? Okay.

9 Let's hear from Mike Watson. Too early for jokes  
10 about getting consortium under your belt.

11 MR. WATSON: Thank you, Madame Chairman. My  
12 name is Mike Watson, Deputy Director of the Department of  
13 Labor & Industries. I'm here to testify in support of  
14 this bill. This was a piece of Department-requested  
15 legislation. Kris has done an excellent job of giving my  
16 testimony, so I'll just mention a couple of things where  
17 I heard questions or concerns come up.

18 One thing I might mention that Kris didn't is what  
19 happens with the recovery in a third-party case. And  
20 when somebody does make a recovery against the person who  
21 caused the injury, the way the statute reads is that the  
22 first person paid is the attorney for the attorney's  
23 fees, then the costs. Then the worker is guaranteed 25  
24 percent of whatever the balance is off the top. And then  
25 the Department or the self-insured asserts a lien against

1 the balance of that recovery in order to try to recoup  
2 the benefits that have been paid out. Whatever remains  
3 at the end of that time is excess and goes back to the  
4 worker or the survivor, whichever the case may be.

5 UNIDENTIFIED SPEAKER: Mike, just let me  
6 interrupt you. Is there any limit on attorney's fees?

7 MR. WATSON: In a third-party case, they can be  
8 set by the Court. But there's no statutory limit on  
9 attorney's fees in third-party cases. There are in  
10 worker's compensation cases.

11 UNIDENTIFIED SPEAKER: Okay. So there wouldn't  
12 be --

13 MR. WATSON: Typically - and it depends on the  
14 nature of the suit - it can range anywhere from 25 to 50  
15 percent, depending on the degree of difficulty or the  
16 type of case.

17 UNIDENTIFIED SPEAKER: But not in a third-party  
18 recovery.

19 MR. WATSON: I'm sorry?

20 UNIDENTIFIED SPEAKER: Not in a third-party  
21 recovery. Would there be? If a suit were brought and  
22 they won and it was a third-party, it wouldn't be a  
23 worker's comp, would it?

24 MR. WATSON: No.

25 CHAIRPERSON: So they wouldn't have a limit on

1 the attorney's fees.

2 MR. WATSON: No. That's a contract between the  
3 worker and the attorney. The recovery is then held in  
4 trust by the - generally an attorney. And then that  
5 attorney has a fiduciary responsibility for paying out  
6 the various folks who are entitled to receive the  
7 proceeds from the settlement. The --

8 UNIDENTIFIED SPEAKER: Can you . . . Excuse me.  
9 Can you go through that again? In terms of the injured  
10 person, when they have won - I assume they've won the  
11 case and they're awarded so many dollars.

12 MR. WATSON: 90 percent of the cases are  
13 settlements. But yes, that's --

14 UNIDENTIFIED SPEAKER: And then the first person  
15 paid is the attorney. And then the second person paid is  
16 the injured person?

17 MR. WATSON: Well, you can categorize the  
18 attorney and the costs together. There are costs  
19 associated with, you know, the court fees.

20 UNIDENTIFIED SPEAKER: Costs. Yeah.

21 MR. WATSON: And then the worker receives 25  
22 percent of the balance and then the lien is asserted, and  
23 then the worker receives the balance if there is one.

24 UNIDENTIFIED SPEAKER: And the lien is asserted  
25 by the Department of Labor & Industries.

1 MR. WATSON: Or the self-insured.

2 UNIDENTIFIED SPEAKER: Or the self-insured.

3 Okay. For recovery of payments already made to that  
4 injured worker.

5 MR. WATSON: Correct. And if the recovery - I  
6 don't want to make this even worse, although it comes up  
7 in another section of the bill. Assume that somebody  
8 recovers a million dollars in a case and the lien is for  
9 only \$100,000. And so there is a significant excess  
10 there. The Department or the self-insured basically stop  
11 paying benefits at that point until the person would have  
12 used up the amount of the excess award. If they do use  
13 up that excess, then benefits are reinstated after that  
14 point.

15 The issue that came up on paid or payable that  
16 determines whether or not the recovery is deficient, what  
17 - deficient recovery is one that isn't sufficient to  
18 reimburse the Department or the self-insured for the  
19 amount of benefits paid. And the statute presents the  
20 Department or the self-insured with an interest then in  
21 that recovery. They want to make sure that it's adequate  
22 for the circumstances.

23 The term of art in the statute right now is paid or  
24 payable. And that one has - that term has been subject  
25 to dispute, the payable side of that term. What the

1 current definition of that term is is that the benefits  
2 have either been paid or are payable in the sense that a  
3 bill has come in but not yet been negotiated for payment.

4 What we're trying to clarify is that the real intent  
5 there was payable in the future so that if somebody is  
6 paralyzed in a car accident, a quick settlement on the  
7 first day before they benefits are paid is a deficient  
8 recovery because there are likely to be many expenses in  
9 the future.

10 Our point is that it shouldn't matter when the  
11 settlement is made. It should matter what the amount of  
12 damages are and what the amount of the recovery is. And  
13 the Department or the self-insured does and we regularly  
14 do approve deficiency settlements because not every case  
15 is perfect. The worker may have a great deal of fault or  
16 there may be other issues involved.

17 But there are situations that come up - and I would  
18 add primarily where people are unrepresented - where they  
19 make settlements that are not in their best interests,  
20 that are far below what the value of the case is. And  
21 our interest as an agency is in protecting the trust  
22 funds. The self-insurer is in much the same position.  
23 And if that is the case, under current law, we have the  
24 ability to void the settlement and then go back into  
25 negotiations or lawsuit if necessary.

1           The last piece I wanted to try to clarify had to do  
2 with providers' appeal rights. And this case about -  
3 virtually everybody in a worker's compensation decision,  
4 these decisions are made in orders. The orders have in  
5 bold type to the worker, the employer and the physician  
6 what their rights are for contesting the decision. And  
7 for decades, that period of time has been a period of 60  
8 days.

9           There were amendments to the act - and I can't  
10 recall when; I would guess within the past 10 years -  
11 that dealt with audit assessments against providers where  
12 we do a provider review. And if we find that they have  
13 overbilled or overcharged, we issue a notice of  
14 assessment against that provider. And under that  
15 particular statute, the provider has 20 days to appeal  
16 the decision.

17           An issue came up at the Board of Industrial  
18 Insurance Appeals, and they held in that case that the 20  
19 days' notice superseded the 60-day notice. All we're  
20 trying to do is sort of set things back to the way they  
21 were before that case, saying that in any other worker's  
22 comp decision, the provider has 60 days to contest it;  
23 but in the case of the notice of assessment, they still  
24 have 20 days, as it currently reads in the statute.

25           The only other thing I wanted to add is that we

1 wanted to encourage the committee to . . . . This is  
2 fairly broad bill now. We'd like to make it a little  
3 broader. There was a bill that died in rules in the  
4 Senate just last week that corrected a longstanding  
5 inequity, and that deals with the burial allowance for  
6 people that are killed on the job. There's something  
7 over a hundred people a year who are killed on the job.  
8 This burial allowance has been changed only once in the  
9 last 25 years. It is not enough for a normal burial.  
10 And in about 30 percent of the cases where people are  
11 single and have no beneficiaries, it's the only benefit  
12 payable. And frankly we're not even paying for burial  
13 support.

14 It also includes a change in the immediate payment,  
15 which is a payment that goes to a surviving spouse or  
16 children immediately after the death in order to hold  
17 them over until the pension benefit kicks in. This would  
18 change it from being a fixed amount for burial of \$2,000  
19 to twice the average monthly wage, which would be just  
20 over \$4,000 if it were in effect today. And in terms of  
21 the immediate payment, it's currently \$1,600. This would  
22 change it to be just over \$2,000 if it were in effect  
23 today.

24 CHAIRPERSON: Did the governor veto that bill?

25 MR. WATSON: Oh, no.

1 CHAIRPERSON: Well, didn't we pass that once  
2 before? What happened to it?

3 MR. WATSON: It has never made it all the way  
4 through the process. About three years ago, I think it  
5 just (Indiscernible) business.

6 UNIDENTIFIED SPEAKER: Can you tell me what the  
7 fiscal note on that bill was?

8 MR. WATSON: Yes. The burial award, based on  
9 the - assuming a hundred and some deaths per year, is  
10 \$215,000 approximately. The immediate payment is about  
11 \$51,000 a year.

12 UNIDENTIFIED SPEAKER: About 300 thousand total.

13 MR. WATSON: Yes.

14 UNIDENTIFIED SPEAKER: Out of the fund, out of  
15 the trust funds.

16 MR. WATSON: And I might add, giving  
17 self-insurers their due, that they're not limited by  
18 these payments. And I think you'll find that most  
19 self-insurers pay the full burial award without regard to  
20 what the statute says.

21 CHAIRPERSON: Kris, I thought that that bill got  
22 to the governor's desk on death benefits.

23 UNIDENTIFIED SPEAKER: I'll have to check. But  
24 I believe it did die in dispute at the end of the  
25 session.

1 CHAIRPERSON: In the Senate?

2 UNIDENTIFIED SPEAKER: I'll have to check. I'm  
3 not sure.

4 CHAIRPERSON: I remember that because I . . .  
5 Yeah. I remember that.

6 UNIDENTIFIED SPEAKER: Yeah. I think I  
7 (Indiscernible).

8 MR. WATSON: If I could, because I wrote that  
9 piece of it and testified for it several (Indiscernible),  
10 it passed from the House Commerce and Labor Committee.  
11 It was sent to appropriations. And unfortunately, the  
12 timing was poor because that was the same year they were  
13 eliminating pauper's funeral benefit. Both of those  
14 bills died at the same time. It didn't make it out of  
15 appropriations.

16 CHAIRPERSON: And do you think the title of this  
17 new - (Indiscernible) title of this bill?

18 MR. WATSON: It's arguable. But we would urge  
19 you to add a severance clause just in case it didn't.

20 CHAIRPERSON: I think Representative Cole has a  
21 question.

22 REPRESENTATIVE COLE: I want you to go back.  
23 I'm sorry. Not being an attorney, I don't understand all  
24 of this. In the deficiencies, are you saying that  
25 because the injured person may be paralyzed or something

1 and the settlement would not cover the cost of the care  
2 of this person and so on in the future, that . . . Now,  
3 I assume this was a court decision. Right?

4 MR. WATSON: No. These - we're only talking  
5 about settlements here, not judgments.

6 REPRESENTATIVE COLE: Oh. Well, that's what  
7 confused me. But - and the Department or the  
8 self-insureds can void this settlement; is that right?

9 MR. WATSON: If it's deficient.

10 REPRESENTATIVE COLE: You just have to show that  
11 the award was not enough?

12 MR. WATSON: Correct.

13 REPRESENTATIVE COLE: Hmmm, that's very unusual.

14 CHAIRPERSON: Representative Conway.

15 UNIDENTIFIED SPEAKER: I'd like to add,  
16 Representative Cole, it's because the Department or  
17 self-insured basically has an interest in this. We're  
18 basically a party to this action as well as the worker  
19 and the person who committed it because we have a  
20 financial interest in the settlement in protecting the  
21 trust funds.

22 REPRESENTATIVE COLE: Yeah. I understand that.

23 REPRESENTATIVE CONWAY: Mike, I guess I need to  
24 understand more clearly exactly the problem you're trying  
25 to correct here. And you know, even though we've had a

1 lot of testimony here about what we're doing, what I  
2 guess I haven't heard from you is what Labor & Industries  
3 has lost because of the lack of having these rule changes  
4 or these legal changes and what kind of problems you've  
5 had with regard to recovery of third-party settlements.

6 MR. WATSON: In each of the elements? In  
7 each --

8 REPRESENTATIVE CONWAY: I'm just - I don't want  
9 you to go too specific here. But I mean if you can just  
10 give us some overall feeling.

11 MR. WATSON: Just a quick summary in terms of  
12 the double recovery issue?

13 CHAIRPERSON: I think that it would be helpful  
14 if you would explain the Court case that brought this to  
15 a head.

16 MR. WATSON: Which - the --

17 CHAIRPERSON: The one on the loss of consortium.

18 MR. WATSON: Okay. Be happy to. In the case of  
19 the double recovery, that is infrequent. I would guess  
20 no more than six to 10 cases a year. The committee a  
21 couple of years ago closed the last (Indiscernible)  
22 which was between the federal compensation system and the  
23 state one where the court or the law allowed people to  
24 receive benefits from both without being offset.

25 What we're talking about here are states or even in

1 the federal system where they have the ability to do  
2 something called a compromise and release and they can  
3 agree to pay you \$10,000 if you basically go away and  
4 only pursue the claim against the state of Washington.  
5 What we're saying is if they do that, that \$10,000 ought  
6 to be subject to assertion of a lien because it is  
7 recovery for the same injury or accident.

8 In the case that we're talking about is Flannigan  
9 and Downey versus the Department of Labor & Industries.  
10 It was an asbestos disease case where the spouses  
11 recovered money for loss of consortium. The Department  
12 asserted liens against those as the recoveries were made  
13 from the asbestos manufacturers and distributors. It was  
14 taken to the Supreme Court. The Supreme Court  
15 distinguished between . . . . And I have to say up front  
16 I'm not an attorney either. But the Supreme Court  
17 distinguished between economic benefits and noneconomic  
18 benefits or recoveries. And it's the difference between  
19 general and special damages in a lawsuit.

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

25 The troubling piece of it and the reason for our

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

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

17 UNIDENTIFIED SPEAKER: So wouldn't this piece of  
18 legislation the Department is requesting - this is the  
19 way I understand it - basically the Department is saying,  
20 "Okay. You won, setting aside consortium. But from this  
21 point forward, we will define what economic and  
22 noneconomic damages are and go from there." That's what  
23 this legislation --

24 MR. WATSON: We're saying it isn't necessary to  
25 define whether they're economic or noneconomic. If you

1 make the recovery, anything other than loss of consortium  
2 is subject to the lien of the Department or the  
3 self-insured.

4 UNIDENTIFIED SPEAKER: Is this language too  
5 broad to make that distinction?

6 MR. WATSON: Not according to the Attorney  
7 General's office. The language in the bill?

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

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

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

24 MR. WATSON: Yes. And I would say that it  
25 wasn't on point on that issue, but it opened the door

1 wide open. And I think it could be cited as a precedence  
2 for taking that position and I think it places those  
3 funds at risk. And that has historically not been the  
4 approach either by the courts or the Department.

5 CHAIRPERSON: Representative Cole.

6 REPRESENTATIVE COLE: I'd like to change the  
7 direction of your questioning. I want to go back to that  
8 deficient (Indiscernible). Bothers me when I don't  
9 understand what we're doing here. Who makes that  
10 settlement? That's where I'm confused. You said it's  
11 not the courts.

12 MR. WATSON: Let's assume that you were driving  
13 to - from one meeting, legislative meeting, to another  
14 and were involved in an automobile accident.

15 REPRESENTATIVE COLE: Let's not assume that.

16 MR. WATSON: Let's assume Steve was. And while  
17 he was driving, he was involved in an automobile accident  
18 and somebody ran a red light and hit him. He would be  
19 covered under worker's compensation because legislators  
20 are employees.

21 REPRESENTATIVE COLE: I didn't know that.

22 MR. WATSON: He would have the right to sue the  
23 person who caused the accident, provided that they didn't  
24 work for the Legislature. The recovery that he made  
25 would be subject to a lien for any benefits that we paid

1 to him in the meanwhile for not being able to work, for  
2 his medical expenses.

3 What we're saying is that if the person got out of  
4 the car at the time they hit him and offered him a  
5 hundred bucks if he would leave them alone, no benefits  
6 have been paid by the Department. That's not a  
7 deficiency settlement at that point, unless you consider  
8 what it's going to cost to heal his injury and pay his  
9 benefits.

10 REPRESENTATIVE COLE: I understand. It's not  
11 gone before any kind of a hearing or anything like that,  
12 board.

13 MR. WATSON: No. And if a judge - I mean a jury  
14 or a judge can say, "No, there's nothing payable," or,  
15 "No, your damages are only this." What we're talking  
16 about are settlements where the parties --

17 REPRESENTATIVE COLE: Okay. Now I understand.  
18 Okay. Thank you.

19 CHAIRPERSON: Any questions?

20 UNIDENTIFIED SPEAKER: See, that wasn't so bad.

21 CHAIRPERSON: Okay. I find it interesting the  
22 people who have signed up and what their comments are  
23 while they're signed up. Melonie Stewart and David  
24 Ducharme for the self-insurers say that they're in favor  
25 of this bill but with amendments. And Wayne Lieb and Lee

1 Eberle from the Washington State Trial Lawyers say that  
2 they are in favor of this bill but with amendments.

3 Now, I am just . . . Oh, self-insurers? Okay.  
4 Never mind. Well, everybody likes this bill, but  
5 everybody wants amendments. And I'm very curious as to  
6 what amendments you guys want out there. So the  
7 self-insurers. . . Oh, yeah. I guess Lee is going to  
8 testify. So Lee, let's hear what the self-insurers want.  
9 And then Wayne, we're going to hear what the trial  
10 lawyers want. I think this is going to be very  
11 interesting because we have three entities. We've got  
12 the Department, who's asking for this legislation. We've  
13 got the self-insurers, who wants an amendment on it. And  
14 we've got the trial lawyers, who want an amendment on it.  
15 And I suspect they're going to be three very different  
16 positions on it.

17 MR. EBERLE: Thank you, Representative  
18 (Indiscernible) and members of the committee. My name is  
19 Lee Eberle. I'm a principal in Eberle Vivian. We are  
20 third-party claims administrators for self-insured  
21 employers. I'm speaking on behalf of Washington  
22 self-insurers association. I also have up here with me  
23 Clif Finch from the Association of Washington Business.

24 What we're trying to say I guess is yes but. We are  
25 very much in favor of the Department's requested

1 legislation if we could possibly have it modified. What  
2 we would like would be to also have the loss of  
3 consortium aspect put back into the loop, in other words  
4 to legislatively put back in what the court took out.  
5 Absent that, we believe that the legislation as proposed  
6 by the Department is workable and that it is, as we say,  
7 better than the alternatives.

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

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

24 MR. FINCH: I'm Clif Finch with the Association  
25 of Washington Business. And I simply want to second

1 Lee Eberle's remarks but emphasize from AWB's  
2 perspective, it's very important that we do get this  
3 amendment. Sitting in front of you today, it's sort of  
4 ironic because in 1993, I sat before this committee and  
5 also testified in the Senate in support of another bill  
6 that was supported by the trial attorneys. And in fact,  
7 it got at the same issue and that is the fact that the  
8 attorneys on both sides, we're not talking simply about  
9 the trial attorneys here - we're talking about both the  
10 defense attorneys and the trial attorneys, the plaintiff  
11 attorneys - were manipulating settlements so that the  
12 Department of Labor & Industries wasn't getting its fair  
13 share.

14 And at that particular time, the trial attorneys  
15 came forward with a bill and even though it meant  
16 reversing a longstanding employer community position  
17 against joint and several liability, AWB supported that  
18 bill. In fact, I was just got reminded of that in the  
19 back by one of our members who, to this day, is still  
20 irritated at our position that year.

21 But the key policy position that we were taking is  
22 the same as today and that is we don't want to create a  
23 situation where there's an incentive for the two  
24 attorneys to get together and call a particular monetary  
25 settlement something just so that lien - that lien by the

1 Department of Labor & Industries isn't paid off.

2 And the language you have in front of you today  
3 creates the same incentive. Unfortunately the trial  
4 attorneys are not with us today because now this  
5 particular provision works entirely to their advantage.

6 And consequently, they have no interest in getting rid of  
7 this particular incentive.

8 But the point is to the degree that you exclude lack  
9 of consortium from the lien provision with regard to the  
10 Department of Labor & Industries recovering the money  
11 it's paid out, you create an incentive for both the  
12 defense attorney and the plaintiff's attorney to sit  
13 there and structure their settlement so that the vast  
14 majority - so a significant amount of the money goes to,  
15 quote, "lack of consortium." It's still money that's -  
16 it's still money that's paid out in the end. But the  
17 fact is the Department of Labor & Industries can't  
18 recover against that particular designation.

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

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

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

15           CHAIRPERSON: Kris, there are a couple of  
16 questions here from members - from the panel. You said  
17 in your briefing that statute in Department cases or  
18 settlements or awards - statute limits attorney's fees?

19           UNIDENTIFIED SPEAKER: The worker's compensation  
20 statute does have some limitations on attorney's fees.

21           CHAIRPERSON: But I would assume that in a broad  
22 sense, that there are no limitation on attorney's fees in  
23 third-party recoveries.

24           UNIDENTIFIED SPEAKER: Only in the sense that  
25 you can go to the Court for a reasonableness and they can

1 set fees. But there aren't any particular limitations  
2 like there are in the worker's comp system.

3 CHAIRPERSON: Okay. Representative Hargrove and  
4 then Representative Conway had some questions.

5 REPRESENTATIVE HARGROVE: Thank you, Madame  
6 Chairman. This may have been answered. Are there any  
7 limits ever set on the loss of consortium?

8 MR. FINCH: There are currently no limits at all  
9 that are set on it. And percentagewise or dollar wise.  
10 And so they can agree to anything they want.

11 REPRESENTATIVE HARGROVE: Is there any way to do  
12 that?

13 MR. FINCH: Well, in the past, they were -  
14 generally the Department even calculated in figures  
15 saying that 20 percent was appropriate. That has since  
16 gone out the window based on the recent cases. And there  
17 is simply no - unless you amended it statutorily, you  
18 could put in a percentage that says 20 percent of a  
19 recovery could be - up to or something like that. There  
20 currently are no limits.

21 REPRESENTATIVE HARGROVE: Thank you.

22 REPRESENTATIVE CONWAY: I guess I'm trying to  
23 see the process here, not being a lawyer and not being  
24 through any of these trials or these settlements. Are  
25 these - are these jury settlements or are they basically

1 settlements made between the two parties?

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

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

10 MR. WATSON: Most of the time the agreement is  
11 made between the injured worker's attorney and -  
12 sometimes it can get confusing because they may even have  
13 two separate attorneys, one handling their worker's comp  
14 claim and one handling their personal injury claim for  
15 the same injury - but that attorney and the attorney for  
16 the insurance company of the person - the third-party.  
17 And they simply get together and come up with figures  
18 that they want.

19 MR. FINCH: And that's where the problem is.  
20 These settlements are being cut by the third-party  
21 attorney and the plaintiff attorney, the injured worker  
22 attorney. Where the Department of Labor & Industries and  
23 the rest, they're simply sitting there on the side. Yes,  
24 they may be parties to the action. But it's pretty hard  
25 to overcome a settlement once those two parties agree.

1 And those two parties, as I indicated, have a direct  
2 monetary incentive to shift the money into a lack of  
3 consortium settlement.

4 REPRESENTATIVE CONWAY: Is there any way of  
5 appealing? Like for example, let's say we just have  
6 \$100,000 settlement and they put \$80,000 of it into  
7 consortium. Is there any way of appealing that kind of a  
8 resolution of the claim? Or is it - is that the end of  
9 the game, when they make that decision?

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

15 UNIDENTIFIED SPEAKER: There is no mechanism for  
16 appeal. The only thing that can happen is that if there  
17 is a deficiency judgment - or not judgment, but a  
18 deficiency settlement. And again this is why the two  
19 parts go hand in hand. The necessity for the Department  
20 to be able to include all estimated future cost is that  
21 if an award was made for \$100,000 and, as you were  
22 saying, 80 thousand of it was put into loss of  
23 consortium, it would leave 20 thousand left with then  
24 attorney fees being calculated in and a 25 percent  
25 recovery immediately going to the claimant.

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

15           CHAIRPERSON: Okay. Representative Horn and  
16 Representative Cole. And we're going to shut this panel  
17 down and hear from the much maligned lawyers in the room.

18           REPRESENTATIVE HORN: Thank you very much,  
19 Madame Chair. I'm just interested a little bit in the  
20 history. Now that this bill passed the Senate, are we  
21 just now getting interested in it and have come up with  
22 new amendments? Or were these amendments presented and  
23 argued in the Senate?

24           UNIDENTIFIED SPEAKER: I think you'll find that  
25 there was a very, very close vote in the Senate as I

1 recall with regard to this particular bill. But to  
2 answer your question specifically, no. We brought up  
3 this specific change in the Senate, the very specific  
4 change. To be honest, just simply from a resources  
5 perspective, are we able to lobby it aggressively over  
6 there? The answer is no. We were tied down on other  
7 issues. But this specific point was brought up in front  
8 of the Senate committee.

9 CHAIRPERSON: Okay. Representative Cole.

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

15 MR. FINCH: Correct.

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

21 MR. FINCH: The reason it's in the direct  
22 monetary interests of the other attorney is to the degree  
23 that they offer in a general settlement say \$50,000 and  
24 just in overall damages and the Department's going to  
25 take 40 of that, the other side is only getting - the

1 other side's only really getting 10. To the degree that  
2 they call it lack of consortium, instead of offering 50,  
3 they can offer 40 and the other side still comes out 30  
4 thousand ahead.

5 So it's in the interest of both attorneys. And this  
6 is not just a fear on our part. It's the reason why we  
7 did support the trial attorneys bill in 1993 was because  
8 this is exactly what happens when those attorneys get  
9 together. They both have a financial interest in  
10 depriving the Department of Labor & Industries of a  
11 particular portion of the settlement.

12 REPRESENTATIVE COLE: You mean when they . . .

13 CHAIRPERSON: Your turn.

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

17 MR. FINCH: They can ensure that more money -  
18 the one party can - the one party on the defense side for  
19 the third party can save his client the money and at the  
20 same time still put more money directly into the pockets  
21 of both the attorney and the injured worker on the other  
22 side. So both sides come out ahead if they manipulate a  
23 settlement, which is what was happening in 1993, on  
24 another component of the settlement that we took care of  
25 in '93. And what we're asking is that we also remove

1 this particular incentive because of the unique  
2 characteristics of worker compensation.

3 REPRESENTATIVE COLE: Thank you.

4 CHAIRPERSON: Okay. Thank you. Let's hear from  
5 Wayne Lieb. Defend yourself.

6 MR. LIEB: Good morning. My name is Wayne Lieb.  
7 I'm here on behalf of the Washington State Trial Lawyers,  
8 as was commented on. I'm here with mixed purposes, but I  
9 think what I will do is start off to try and address some  
10 of the issues that have arisen and I know are of  
11 immediate concern to the committee.

12 First can I make some comments about attorney's  
13 fees? Because that has come up. Worker's compensation  
14 imposes an artificial cap on one side's attorney's fees  
15 but not on the other. For third-party cases, the . . .  
16 And actually on the worker's comp side, we are regulated  
17 twice. We are regulated once by the bar, which has its  
18 own ethical rules which are enforced by court and can  
19 result in disbarment for a violation of those. And we  
20 are also regulated by statute.

21 For third-party cases, we are not regulated by  
22 statute, but we are regulated by those same ethical  
23 rules, which are quite extensive and which have been  
24 litigated. And there's quite a bit of court law both in  
25 terms of what a reasonable fee is as well as on

1 disciplinary issues to be taken, including disbarment for  
2 a violation of those ethical rules.

3 CHAIRPERSON: So you're referring to the  
4 collusion allegations.

5 MR. LIEB: I'm sorry?

6 CHAIRPERSON: You are referring with those  
7 comments to the collusion allegation?

8 MR. LIEB: No. I'll come to those in a minute.  
9 I'm simply . . . You were asking . . . Madame Chairman,  
10 you were asking are attorney's fees regulated. And the  
11 answer is yes. They must be reasonable. And of course,  
12 the thing to remember is that what is reasonable depends  
13 on the facts of the case; the difficulty of the  
14 challenge; is the defendant, you know, out of state, out  
15 of country; what are the liabilities; what are the  
16 damages issues. And that's why there is traditionally a  
17 range of, as Mr. Watson said, approximately 25 percent to  
18 50 percent, of course the most standard rule being  
19 one-third of the fee. But it varies depending on the  
20 cases. And they are frankly negotiated and I negotiate  
21 them in my own situation depending on circumstances.

22 The - what you've described as the collusion issue I  
23 think is one that needs to be explored very carefully.  
24 First you have to - you know, the logic behind  
25 reimbursing the Department is that a person should not be

1 benefited twice for their loss. So for example, if, due  
2 to a car accident, you have lost wages and worker's comp  
3 has paid you time loss, then when you settle and you get  
4 lost wages from the driver who hit you, you should not be  
5 paid twice for those same lost wages. That is not fair.  
6 The party who paid you first should be reimbursed. And  
7 we absolutely agree with that principle. The problem is  
8 neither should the party who has paid first be reimbursed  
9 for expenses they did not pay.

10 So for example, if the provision of worker's  
11 compensation does not pay for a benefit, they should not  
12 be reimbursed when you get paid for that benefit by  
13 somebody else where they did not pay for it in the first  
14 instance because it's a windfall to them in that  
15 situation where they have never paid a benefit out.

16 That is what consortium is. Consortium, of course,  
17 is not the loss to the person hurt in the car.  
18 Mr. Conway, in the example, it is the loss to his wife  
19 and perhaps to his children, depending on the  
20 circumstances there. It is the loss of the love and  
21 affection and relationship that is - that can be  
22 disrupted during that. The spouse is never paid for  
23 that. And that is why the Department is not entitled to  
24 be reimbursed, because they never paid in the first  
25 instance.

1           One additional area. And in fact, I think one thing  
2     (Indiscernible) understood here is that these are  
3     (Indiscernible) as two separate claims. You can have, in  
4     fact, two attorneys and it's not at all uncommon to have  
5     two attorneys on the case, one representing the husband  
6     and one representing the wife. And they can, in fact,  
7     have, to some degree, conflicting interests. And that's  
8     one of the reasons why you can sometimes have two  
9     attorneys on the case. Certainly it is common to have  
10    them both represented simultaneously, but that's by no  
11    means the only rule. And each stands or falls on their  
12    own merits regardless of the other.

13           And in fact, there's this notion that well, should  
14    be 20 percent or some rule like that. In fact, you can  
15    have situations where the consortium is larger than the  
16    underlying claim. For example, Mr. Watson was  
17    referencing in a worker's compensation situation, a  
18    situation where you have a death of a worker with no  
19    beneficiaries. You know. You can - if you've got a  
20    17-year-old boy on a construction job, you can kill him  
21    and all you do is bury him. Nobody gets a penny beyond  
22    that.

23           And it's a real hardship. It's not a . . . I mean  
24    the argument is that there's no beneficiaries and so  
25    there's no worker's compensation loss. Yet if that death

1 involves a mother on the scene who is - you know, happens  
2 to observe it, be it a car accident or a client I  
3 represented once was crushed alive by a crane, the  
4 consortium component can be quite large. In that  
5 scenario, you can have the consortium award be larger -  
6 by a jury be larger than the underlying claim. That  
7 would be very unusual, but the point being that each of  
8 these are fact driven and there is no rule of thumb.

9 You - when I negotiate a case, I don't say, "Well,  
10 here's this; now give me the extra 20 percent for the  
11 consortium," because that gets you a big laugh on the  
12 other end of the phone. It just doesn't work that way.

13 The other point here is that - to remember is that  
14 the Department and the employers have a complete right to  
15 stop a settlement if it's a deficiency settlement. So  
16 we're not talking about them not being reimbursed. They  
17 already have that right to stop it. And if there's some  
18 kind of hanky panky going on where they're not being  
19 reimbursed, they simply don't agree to it, end of  
20 discussion.

21 The only problem that can occur is when you have an  
22 excess. And again, when you have those kinds of  
23 excesses, then you're talking about particularly very  
24 catastrophic injuries. And then it comes to what is a  
25 reasonableness factor. And again, I think it's just fact

1 driven.

2 And I think it's easy to project the horror stories.  
3 I didn't hear them refer to even one example where this  
4 kind of thing has gone on. And I think you need to take  
5 that with a grain of salt in those circumstances, which  
6 brings me to my - actually my one suggestion to the  
7 amendment. And I believe that the Department is in  
8 agreement at least in principle on this point, and that  
9 is with regard to section five. Section five is the part  
10 that talks about these deficiency settlements and the  
11 example of the early settlement, hundred bucks at the  
12 scene of the accident if you go away. And basically the  
13 Department is wanting to say we should have a right to be  
14 sure that that kind of unfairness does not occur. And  
15 actually I - we agree with them.

16 I have seen clients come in to me who were misled by  
17 insurance companies, who did a quick settlement not  
18 realizing the significance of it and for whom they got  
19 really 10 cents on the dollar on what they should have,  
20 and they were essentially taken advantage of. I don't  
21 have a disagreement with that. I don't think that that  
22 happens when there's legal representation for the obvious  
23 reason that we understand what is reasonable and what is  
24 not and are not going to let that quick and dirty  
25 settlement go through.

1           And I think the principle here is that when the  
2 individual is unrepresented, I think there ought to be  
3 that ability to come in and scrutinize. Where there is  
4 representation, then there is the existing safeguard of a  
5 deficiency settlement where you have to have permission.  
6 If we have been successful in negotiating an excess  
7 settlement, I think that the discretion ought to be given  
8 there to allow under the circumstances to weigh the risk  
9 factors. Because the thing to remember is that the  
10 ability to withhold a settlement is riskless as to the  
11 employer. All the risk is placed on the worker.

12           So again, to go back to the automobile accident, if  
13 - if we are not allowed to settle that case, then I say  
14 to Mr. Conway, "Well, that's fine. We can't settle the  
15 case. We are now forced to try it even though you and I  
16 agree that we ought to settle it. We are now forced to  
17 try it. Would you please write me a check for \$10,000 to  
18 cover the anticipated out-of-pocket costs? Because I'm  
19 going to have to call your doctor, your surgeon and your  
20 anesthesiologist and we're going to have to depose the  
21 opposing doctors. And that's just 10 thousand up front  
22 discovery costs. But when we get to trial, I'll tell you  
23 how much more."

24           And the employer puts none of that money up. And if  
25 we lose, the employer walks away with no commitment to

1 that \$10,000. They walk away with no risk whatsoever.  
2 And that is - that's one of the tensions that exist is  
3 that they get to say yes or no with no risk to  
4 themselves, whereas between I and my client, we are  
5 trying to calculate the risk/reward ratio of what's a  
6 reasonable settlement; what's your likelihood of  
7 prevailing; what's the down side; and can you come up  
8 with \$10,000 to get through the courthouse door. And  
9 that's the real tension that exists there.

10 Those are my comments.

11 CHAIRPERSON: So you support the language by the  
12 Department then, as stated by the Department?

13 MR. LIEB: No. With the amendment that it would  
14 apply to unrepresented cases, where the worker is not  
15 represented. And I believe the Department has agreed in  
16 concept to that principle. And we are in the process of  
17 working on language.

18 You know, I do want to make one other comment. I  
19 think we have offered a very significant concession with  
20 this bill. I go back to my point that the Department  
21 should not be reimbursed for benefits they do not pay.  
22 The Department does not pay for pain and suffering. The  
23 Department does not pay for disfigurement. If you get a  
24 slash across your face - and there are cases of this -  
25 you get zero from the Department. You get it sewn up.

1 But in terms of any kind of compensation whatsoever, you  
2 get zero because that's a disfigurement. It's not a  
3 disability. And for whatever reason, whether you're a  
4 model or whether you're a worker, you get nothing for  
5 that.

6 You go to a jury and the jury's reasonably going to  
7 say, "Yes, you should be reimbursed for that  
8 disfigurement." And that falls in with - within the  
9 general damages as opposed to the specific damages. We  
10 are conceding that the Department should benefit in that  
11 payment even though they don't pay a nickel for it. So  
12 if you say - if the jury says, "Yes, you get \$100,000 for  
13 that slash across your face," in this bill, we are  
14 conceding the Department has a lien on it even though  
15 they never paid it in the first instance. So I think  
16 there's a very significant concession there.

17 CHAIRPERSON: Okay. Representative Conway has a  
18 question.

19 REPRESENTATIVE CONWAY: Well, I guess I'm trying  
20 to see what the conflict is here also because actually I  
21 assume that the Department wants to recover the actual  
22 costs. Is the debate over future costs? Is that what  
23 the issue is here?

24 MR. LIEB: The debate is what is actual costs.  
25 They are again seeking to recover for costs that they

1 have actually spent but for which there may not be a  
2 recovery in court. But there's also the debate over how  
3 you define what are actual costs. They are trying to say  
4 - they're trying to say, "We want to look into the  
5 crystal ball and tell you what it's going to cost in the  
6 future," and then call that an actual cost. And you  
7 know, within reason, that can be done. On the other  
8 hand, I think there's also a lot of room for advantageous  
9 definition of what that is, also.

10 REPRESENTATIVE CONWAY: That's what I was  
11 assuming, that there would be disagreements between the  
12 parties on that.

13 MR. LIEB: Yeah. Actually that can create a  
14 problem. Alls they have to do is say, "By our  
15 calculation, that's a deficiency settlement," and stop  
16 the settlement.

17 CHAIRPERSON: Okay. Representative Cody  
18 (phonetic) and then Representative Romero. Then I think  
19 we're going to shut this one down.

20 REPRESENTATIVE CODY: I'm familiar with like  
21 life care planning that they do. Isn't that how a lot of  
22 the settlements are calculated, at least for the care  
23 that is projected?

24 MR. LIEB: Certainly that is very common. And  
25 again there are individual circumstances. It varies with

1 the ability of the individual to handle their own  
2 finances. And sometimes your client simply says, "I  
3 don't want it." It is discretionary to the client unless  
4 there is some kind of - unless they're a minor or unless  
5 they're mentally incompetent. But if my client tells me,  
6 "I want the cash and I do not want a trust fund," I am  
7 bound by that, with those two exceptions.

8 I cannot impose it upon my client. I can say, "Look  
9 it, I completely recommend against it." I'll write them  
10 a letter to tell them again.

11 But if they tell me, "I don't want a trust fund; I  
12 want cash," then that's my ethical duty.

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

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

17 CHAIRPERSON: Representative Romero.

18 REPRESENTATIVE ROMERO: Thank you, Madame  
19 Chairman. Wayne, when you were talking about your  
20 amendment for unrepresented cases, I guess I got lost  
21 because I'm trying to figure where your compromise is in  
22 the bill for say the disfigurement issue. Is that in  
23 section five, or are we back on recovery?

24 MR. LIEB: No. We're talking apples and  
25 oranges. That's back on recovery. The section five

1 language just says that yes, the Department should be  
2 entitled to screen for unrepresented people, and the  
3 employers, too, to make sure there's not some unfair,  
4 on-the-street settlement.

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

10 CHAIRPERSON: Thank you very much. Let's move  
11 on to the next bill. Senate Bill 5402. Kris, would you  
12 please explain that.

13 UNIDENTIFIED SPEAKER: This is a second - a  
14 requested bill from the Department of Labor & Industries.  
15 And it deals with a number of issues having to do with  
16 penalties and fraud provisions. Again, I'll go through  
17 the issues one by one and explain how the bill changes  
18 each one. The first issue that I've described in the  
19 bill has to do with the fraud provisions. I've laid out  
20 in the background - and I'm not going to go through these  
21 - but there are fraud provisions related to both employer  
22 fraud, worker fraud and provider fraud. And I've given  
23 you some sense of what those are in the background.

24 One provision that is addressed in the bill has to  
25 do with the employer fraud provision relating to