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No. 92581-0

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

FRANCISCO ENTILA and ERLINDA ENTILA, husband and wife, and
the marital community composed thereof,

Plaintiffs/Respondents,

vs.

GERALD COOK and JANE DOE COOK, husband and wife, and the
marital community composed thereof,

Defendants/Petitioners.

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WASHINGTON STATE
SUPREME COURT
by h

BRIEF OF AMICUS CURIAE
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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 ORIGINAL

TABLE OF CONTENTS

	Pages
I. IDENTITY AND INTEREST OF AMICUS CURIAE	1
II. INTRODUCTION AND STATEMENT OF THE CASE	1
III. ISSUES PRESENTED	4
IV. SUMMARY OF ARGUMENT	4
V. ARGUMENT	5
A. The Defendant In A Third Party Action Brought Pursuant To RCW 51.24.030 Should Be Deemed To Be In The "Same Employ" And Immune From Liability Only If His Or Her Employer Would Be Vicariously Liable For The Tortious Conduct At Common Law – That Is, Upon Proof The Worker Was Acting Within The Scope Of Employment Under The Circumstances, In Furtherance Of The Employer's Business.	5
B. Under RCW 51.24.100, The Viability Of A Plaintiff-Worker's Third Party Claim Under RCW 51.24.030 Must Be Resolved Without Regard To Whether He Or She Is Receiving Industrial Insurance Benefits For The Same Injury Giving Rise To The Third Party Action.	10
VI. CONCLUSION	12
Appendix	

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<u>Brazier v. Betts</u> , 8 Wn.2d 549, 113 P.2d 34 (1941)	9
<u>Elder v. Cisco Constr. Co.</u> , 52 Wn.2d 241, 324 P.2d 1082 (1958)	9
<u>Entila v. Cook</u> , 190 Wn. App. 477, 360 P.3d 870 (2015), <i>review granted</i> , 185 Wn.2d 1017 (2016)	passim
<u>Evans v. Thompson</u> , 124 Wn.2d 435, 879 P.2d 938 (1994)	7, 8, 9
<u>Fisher v. Seattle</u> , 62 Wn.2d 800, 384 P.2d 852 (1963)	9
<u>Gray v. Dept. of Labor & Ind.</u> , 43 Wn.2d 578, 262 P.2d 533 (1953)	6
<u>Heim v. Longview Fibre Co.</u> , 41 Wn. App. 745, 707 P.2d 689 (1985)	3, 10
<u>Johnson v. Weyerhaeuser Co.</u> , 134 Wn.2d 795, 953 P.2d 800 (1998)	11
<u>Michaels v. CH2M Hill, Inc.</u> , 171 Wn.2d 587, 257 P.3d 532 (2011)	7, 9
<u>Olson v. Stern</u> , 65 Wn.2d 871, 400 P.2d 305 (1965)	3, 4, 8, 9
<u>Purington v. Dept. of Labor & Ind.</u> , 25 Wn.2d 364, 170 P.2d 656 (1946)	6
<u>State v. Devin</u> , 158 Wn.2d 157, 142 P.3d 599 (2006)	10

<u>State v. LG Elecs., Inc.</u> , 2016 WL 3910985 (Wash. Sup. Ct., July 14, 2016)	11
<u>Strachan v. Kitsap County</u> , 27 Wn. App. 271, 616 P.2d 1251, <i>review denied</i> , 94 Wn.2d 1025 (1980)	8
<u>Taylor v. Cady</u> , 18 Wn. App. 204, 566 P.2d 987 (1977)	3
<u>Statutes and Rules</u>	
RCW 51.04.010	4
RCW 51.08.013	passim
RCW 51.24.010	8, 9
RCW 51.24.030	passim
RCW 51.24.030(1)	2
RCW 51.24.030(2)	7
RCW 51.24.050	7
RCW 51.24.060	7
RCW 51.24.100	passim
RCW 51.32.010	6
Title 51 RCW	1, 7

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the rights of plaintiffs under the civil justice system, including an interest in the proper interpretation and application of provisions of the Industrial Insurance Act, Title 51 RCW (IIA), permitting workers to pursue certain third party tort actions, in addition to receiving industrial insurance benefits under the Act.

II. INTRODUCTION AND STATEMENT OF THE CASE

This appeal provides the Court with an opportunity to clarify when a defendant in a third party tort action, brought pursuant to RCW 51.24.030, is immune from liability under the statute because he or she is deemed to be in the "same employ" as the plaintiff-worker.¹ This third party action was brought by Francisco Entila and Erlinda Entila, husband and wife, and the marital community composed thereof (Entila), against Gerald Cook and Jane Doe Cook, husband and wife, and the marital community composed thereof (Cook). The underlying facts are drawn from the Court of Appeals opinion and the briefing of the parties. See Entila v. Cook, 190 Wn. App. 477, 360 P.3d 870 (2015), *review*

¹ This brief uses the term "worker" instead of "claimant" because the relevant statutes use this term. See e.g. RCW 51.08.013; RCW 51.24.030.

granted, 185 Wn.2d 1017 (2016); Entila Supp. Br. at 1, 4-5; Cook Pet. for Rev. at 1, 2-4; Entila Ans. to Pet. for Rev. at 1, 5-6; Entila Br. at 1, 3-5; Cook Br. at 1-4; Entila Reply Br. at 1.

For purposes of this brief, the following facts are relevant: Both Francisco Entila and Gerald Cook worked for Boeing. Mr. Cook had completed his work shift at Boeing and he drove out of its parking lot on to a Boeing access road. Mr. Cook's car struck and injured Mr. Entila as he was walking across the access road. Mr. Entila applied for and obtained industrial insurance benefits as a result of this injury, and Entila commenced this third party tort action against Cook, pursuant to RCW 51.24.030(1).

Cook sought dismissal of the action under RCW 51.24.030(1), on grounds that Gerald Cook was in the "same employ" as Francisco Entila. The superior court granted summary judgment in Cook's favor, relying on the definition of "[a]cting in the course of employment" in RCW 51.08.013 that is used to determine a worker's eligibility for benefits to define "same employ" for purposes of coworker immunity. Entila, 190 Wn. App. at 479. In deciding the motion, the superior court considered Entila's receipt of industrial insurance benefits, presumably because it believed his eligibility for benefits also had a bearing on Cook's immunity. The court rejected Entila's argument that RCW 51.24.100 and the collateral source rule prohibited such consideration.

The Court of Appeals reversed, concluding that Cook was not entitled to immunity under RCW 51.24.030(1), and that the superior court had also erred in considering the fact that Francisco Entila was receiving industrial insurance benefits. See Entila at 479. With regard to the immunity issue, the Court of Appeals identifies some confusion regarding the proper interpretation of Olson v. Stern, 65 Wn.2d 871, 400 P.2d 305 (1965), which interprets a former statute authorizing a worker to bring a third party action (former RCW 51.24.010), and which used the identical "same employ" phrase as RCW 51.24.030(1). See Entila at 481-87. Ultimately, the Court of Appeals concludes that the definition of "[a]cting in the course of employment" in RCW 51.08.013 is not determinative of the immunity issue, and focuses upon that portion of Olson that requires the third party defendant actually be doing work for the employer at the time of the accident. See Entila at 482-86.² The court holds:

Because a tortfeasor claiming coemployee immunity must show that he was doing work for the employer to establish this immunity and Cook has not done so, we reverse and remand for further proceedings consistent with this opinion.

Id. at 487-88.

This Court granted Cook's petition for review on both the immunity defense and receipt of benefits issues.

² In reaching this conclusion, the court appears to agree with the analysis in Taylor v. Cady, 18 Wn. App. 204, 566 P.2d 987 (1977) (viewing Olson as turning on whether the coworker was performing work for the employer at the time of the accident), instead of Heim v. Longview Fibre Co., 41 Wn. App. 745, 707 P.2d 689 (1985) (concluding that Olson holds that whether a coworker is "[a]cting in the course of employment" under RCW 51.08.013 is dispositive). See Entila at 484-86.

III. ISSUES PRESENTED

1. Under the IIA, what is the test for determining when a coworker is in the "same employ" and hence immune from a third party action brought by a plaintiff-worker under RCW 51.24.030?
2. In resolving this immunity question on a summary judgment motion, does RCW 51.24.100 allow a court to take into account the plaintiff-worker's receipt of industrial insurance benefits?

IV. SUMMARY OF ARGUMENT

Re: "Same Employ" Immunity Under RCW 51.24.030

For purposes of determining whether a defendant in a third party action brought pursuant to RCW 51.24.030 is in the "same employ" as the plaintiff-worker, and thereby immune from suit, the test should be whether the coworker's conduct would subject his or her employer to vicarious liability at common law. This inquiry focuses on whether the worker was actually within the scope of employment under the circumstances, in furtherance of the employer's business. This test is distinct from, and narrower than, the "[a]cting in the course of employment" standard for determining a worker's eligibility for industrial insurance benefits under RCW 51.08.013. To the extent the rationale in Olson v. Stern, 65 Wn.2d 870, 400 P.2d 305 (1965), recognizes the definition of "[a]cting in the course of employment" in RCW 51.08.013 as relevant to determining "same employ" immunity under RCW 51.24.030(1), it should be overruled as "incorrect and harmful," along with subsequent precedent to this effect.

Re: RCW 51.24.100 and Relevance of IIA Benefits

RCW 51.24.100 categorically prohibits a party in a third party action under RCW 51.24.030 from pleading or seeking to admit into evidence that the plaintiff-worker is entitled to industrial insurance benefits. Given the breadth of this prohibition, it necessarily applies to legal rulings made by a court in the course of determining the viability of the third party action.

V. ARGUMENT

A. The Defendant In A Third Party Action Brought Pursuant To RCW 51.24.030 Should Be Deemed To Be In The "Same Employ" And Immune From Liability Only If His Or Her Employer Would Be Vicariously Liable For The Tortious Conduct At Common Law – That Is, Upon Proof The Worker Was Acting Within The Scope Of Employment Under The Circumstances, In Furtherance Of The Employer's Business.

Entila and Cook disagree whether RCW 51.08.013 – defining “[a]cting in the course of employment” – is relevant in determining whether Cook is entitled to immunity under RCW 51.24.030(1). Compare Cook Supp. Br. at 5-14, with Entila Supp. Br. at 8-13. Entila is correct that RCW 51.08.013 should have no bearing on this inquiry. Cook is not seeking IIA benefits, he is seeking immunity from a favored third party action authorized under this Act. As explained below, in the absence of a definition for the phrase "same employ" in RCW 51.24.030(1), this question should be resolved by applying the common law test for when an

employer is vicariously liable for the tortious conduct of his or her employee.

RCW 51.32.010 provides that a worker "injured in the course of his or her employment" is entitled to industrial insurance benefits and "except as in this title otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever." See also RCW 51.04.010; RCW 51.24.030. RCW 51.08.013 defines "[a]cting in the course of employment" solely for purposes of determining a worker's eligibility for IIA benefits.³ This definition is more expansive than that provided by this Court before the phrase was defined by the Legislature. See e.g. Purinton v. Dept. of Labor & Ind., 25 Wn.2d 364, 366-68, 170 P.2d 656 (1946) (without referencing source of "in the course of his employment" formulation, requiring "actual performance of the duties required by the contract of employment"); Gray v. Dept. of Labor & Ind., 43 Wn.2d 578, 583, 262 P.2d 533 (1953) (interpreting former RCW 51.32.010 phrase "in the course of his employment" as requiring the worker to "reasonably have been in the performance of her duties, or engaged in doing something incidental thereto").⁴

³ The full texts of the current versions of RCW 51.04.010, RCW 51.08.013, RCW 51.24.030, and RCW 51.32.010 are reproduced in the Appendix to this brief.

⁴ The expansion of the concept of "in the course of employment" with enactment of RCW 51.08.013 in 1961, and in subsequent iterations, has mostly centered around modification of the common law "going and coming rule." See current version of RCW 51.08.013, and Code Reviser's Historical and Statutory Notes to RCW 51.08.013.

There is no indication in RCW 51.08.013 that the definition of "[a]cting in the course of employment" has any bearing on the issue of immunity under RCW 51.24.030, the third party statute. Tellingly, the second sentence of RCW 51.08.013 confirms the focus of this provision is on the *injured* worker. See Appendix. Nor does any other statute in Title 51 RCW use "in the course of employment" with reference to any immunity provided under the Act. Further, as the Court of Appeals notes, there is nothing in the history of this statute's enactment suggesting it was intended to expand upon the immunity provided in RCW 51.24.030. See Entila at 483.

RCW 51.24.030 provides that workers may bring a third party tort action against others for their resulting industrial injuries, with the limitation that such defendants are "not in a worker's same employ." The meaning of this undefined phrase is at the heart of this case. In Evans v. Thompson, 124 Wn.2d 435, 437, 879 P.2d 938 (1994), this Court recognized that these third party actions are favored in the law because they provide an opportunity for the state fund (or self-insured employer) to recoup benefits paid workers under the Act.⁵ More recently, in Michaels v. CH2M Hill, Inc., 171 Wn.2d 587, 598-99, 257 P.3d 532 (2011), this Court

⁵ See RCW 51.24.050 (providing the Department of Labor & Industries or self-insurer assignment of the third party cause of action when the worker elects not to proceed against the third party); RCW 51.24.060 (establishing formula for distribution of recovery made in third party action, including recoupment of benefits paid); see also RCW 51.24.030(2) (providing Department or self-insurer the right to notice and opportunity to intervene in third party action to protect their statutory interest in recovery).

reaffirmed the valuable right of a worker to pursue a third party action and that doubts regarding the viability of such an action should be resolved against a third party wrongdoer who has not contributed to the industrial insurance fund.

In Evans, the Court indicated that in the third party action it is not enough that the plaintiff-worker and defendant share the same employer; it must also be shown that the defendant "was acting in the scope and course of his or her employment." 124 Wn.2d at 444. The problem is that this formulation suggests that the definition of "[a]cting in the course of employment" in RCW 51.08.013 is relevant to this immunity issue. This view is furthered by reference to a prior version of RCW 51.08.013 in Olson v. Stern, *supra*, during the course of resolving a "same employ" immunity issue in a RCW 51.24.010 third party action. See 65 Wn.2d at 876-77. Olson is cited with approval in Evans. See 124 Wn.2d at 444.

Entila is correct that in order to establish "same employ" and be entitled to immunity, the defendant should have to bear the common law burden of proving that he or she was actually engaged in work for the benefit of the employer at the time of the tortious conduct. See Entila Supp. Br. at 5-11; Entila Ans. to Pet. for Rev. at 17-18. As noted in Strachan v. Kitsap County, 27 Wn. App. 271, 275, 616 P.2d 1251, *review denied*, 94 Wn.2d 1025 (1980), in a somewhat related context, the question of immunity is conceptually different than the determination of

eligibility for IIA benefits. See also Fisher v. Seattle, 62 Wn.2d 800, 805, 384 P.2d 852 (1963) (recognizing conceptual difference between determining employee eligibility for industrial insurance benefits and assessing employee's actions for purposes of determining vicarious liability of employer). The proper lens to be employed for determining immunity under RCW 51.24.030 should be the common law standard for determining when an employer is vicariously liable for an employee's conduct. This standard asks whether the employee was actually within the scope of employment under the circumstances, in furtherance of the employer's business. See Elder v. Cisco Constr. Co., 52 Wn.2d 241, 244-46, 324 P.2d 1082 (1958); Brazier v. Betts, 8 Wn.2d 549, 555-56, 113 P.2d 34 (1941). This standard implements RCW 51.24.030 in a manner favorable to the worker, and the Department or self-insured employer. See Michaels, 171 Wn.2d at 598-99.

There are traces of this kind of analysis in Olson v. Stern, in that the Court found it significant that the defendant coworker had "finished his day's work" and "had completed his tasks for the day[.]" 65 Wn.2d at 876. However, the analysis in Olson also unmistakably takes into account the impact of RCW 51.08.013. See id. at 876-77. Because RCW 51.08.013 only relates to eligibility for benefits, the Court erred in considering this statute in assessing "same employ" immunity under RCW 51.24.010. This portion of the Olson rationale should be overruled as "incorrect and

harmful," as should subsequent cases relying on this analysis, such as Heim, supra. See State v. Devin, 158 Wn.2d 157, 142 P.3d 599 (2006) (applying incorrect and harmful test for overruling precedent). It is incorrect because there is no basis in the text of the statute or legislative history to suggest it has any bearing on the immunity issue. It is harmful because the expansive definition of "[a]cting in the course of employment" in RCW 51.08.013 will restrict third party recovery, undermining full compensation for the injured worker and reimbursement of the industrial insurance fund, despite the fact the coworker was not actually working at the time. The common law standard for determining vicarious liability assures that the immunity will only be available when the defendant is "acting in the scope and course of his or her employment." Evans at 444.

B. Under RCW 51.24.100, The Viability Of A Plaintiff-Worker's Third Party Claim Under RCW 51.24.030 Must Be Resolved Without Regard To Whether He Or She Is Receiving Industrial Insurance Benefits For The Same Injury Giving Rise To The Third Party Action.

The Court of Appeals below correctly held that the superior court erred in considering Entila's receipt of industrial insurance benefits in the course of deciding the immunity issue on summary judgment. See Entila, 190 Wn. App. at 479, 486-87. RCW 51.24.100 provides:

The fact that the injured worker or beneficiary is entitled to compensation under this title **shall not be pleaded or admissible in evidence in any third party action under**

this chapter. Any challenge of the right to bring such action shall be made by supplemental pleadings only and shall be decided by the court as a matter of law.

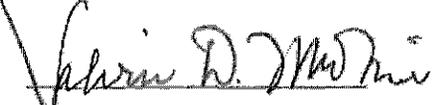
(Emphasis added). The language of this statute is plain and unambiguous. See State v. LG Elecs., Inc., 2016 WL 3910985, at *8 (Wash. Sup. Ct., July 14, 2016) (stating “[w]here possible, we must give effect to the plain meaning of a statute as an expression of legislative intent”). The prohibition is broadly stated, necessarily encompassing superior court rulings on an issue of law. Cook relies on the second sentence of the statute, noting that: “[t]he statutory language succinctly states the trial court shall decide the issue as a matter of law. How else than a summary judgment proceeding is the trial court to decide the issue?” Cook Supp. Br. at 15-16. However, the second sentence does not address the relevance of the worker's receipt of IIA benefits, but rather how a challenge to the right to maintain the action must be made.⁶

⁶ As the Court of Appeals notes, the prohibition in RCW 51.24.100 is consistent with the common law collateral source rule. See Entila, 190 Wn. App. at 487 (citing Johnson v. Weyerhaeuser Co., 134 Wn.2d 795, 798, 953 P.2d 800 (1998), applying rule in IIA context).

VI. CONCLUSION

The Court should adopt the arguments advanced in this brief and resolve this appeal accordingly.

DATED this 29th day of July, 2016.

	
<i>For</i> BRYAN P. HARNETIAUX, <i>with authority</i>	<i>For</i> GEORGE M. AHREND, <i>With authority</i>
	
VALERIE D. McOMIE	On behalf of WSAJ Foundation

Appendix

West's Revised Code of Washington Annotated
Title 51. Industrial Insurance (Refs & Annos)
Chapter 51.04. General Provisions (Refs & Annos)

West's RCWA 51.04.010

51.04.010. Declaration of police power--Jurisdiction of courts abolished

Currentness

The common law system governing the remedy of workers against employers for injuries received in employment is inconsistent with modern industrial conditions. In practice it proves to be economically unwise and unfair. Its administration has produced the result that little of the cost of the employer has reached the worker and that little only at large expense to the public. The remedy of the worker has been uncertain, slow and inadequate. Injuries in such works, formerly occasional, have become frequent and inevitable. The welfare of the state depends upon its industries, and even more upon the welfare of its wage worker. The state of Washington, therefore, exercising herein its police and sovereign power, declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

Credits

[1977 ex.s. c 350 § 1; 1972 ex.s. c 43 § 1; 1961 c 23 § 51.04.010. Prior: 1911 c 74 § 1; RRS § 7673.]

Notes of Decisions (265)

West's RCWA 51.04.010, WA ST 51.04.010

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West's Revised Code of Washington Annotated
Title 51. Industrial Insurance (Refs & Annos)
Chapter 51.08. Definitions

West's RCWA 51.08.013

51.08.013. "Acting in the course of employment"

Currentness

(1) "Acting in the course of employment" means the worker acting at his or her employer's direction or in the furtherance of his or her employer's business which shall include time spent going to and from work on the jobsite, as defined in RCW 51.32.015 and 51.36.040, insofar as such time is immediate to the actual time that the worker is engaged in the work process in areas controlled by his or her employer, except parking area. It is not necessary that at the time an injury is sustained by a worker he or she is doing the work on which his or her compensation is based or that the event is within the time limits on which industrial insurance or medical aid premiums or assessments are paid.

(2) "Acting in the course of employment" does not include:

(a) Time spent going to or coming from the employer's place of business in an alternative commute mode, notwithstanding that the employer (i) paid directly or indirectly, in whole or in part, the cost of a fare, pass, or other expense associated with the alternative commute mode; (ii) promoted and encouraged employee use of one or more alternative commute modes; or (iii) otherwise participated in the provision of the alternative commute mode.

(b) An employee's participation in social activities, recreational or athletic activities, events, or competitions, and parties or picnics, whether or not the employer pays some or all of the costs thereof, unless: (i) The participation is during the employee's working hours, not including paid leave; (ii) the employee was paid monetary compensation by the employer to participate; or (iii) the employee was ordered or directed by the employer to participate or reasonably believed the employee was ordered or directed to participate.

(3) "Alternative commute mode" means (a) a carpool or vanpool arrangement whereby a group of at least two but not more than fifteen persons including passengers and driver, is transported between their places of abode or termini near those places, and their places of employment or educational or other institutions, where the driver is also on the way to or from his or her place of employment or educational or other institution; (b) a bus, ferry, or other public transportation service; or (c) a nonmotorized means of commuting such as bicycling or walking.

Credits

[1997 c 250 § 10; 1995 c 179 § 1; 1993 c 138 § 1; 1979 c 111 § 15; 1977 ex.s. c 350 § 8; 1961 c 107 § 3.]

Notes of Decisions (72)

West's RCWA 51.08.013, WA ST 51.08.013

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Proposed Legislation

West's Revised Code of Washington Annotated
Title 51, Industrial Insurance (Refs & Annos)
Chapter 51.24, Actions at Law for Injury or Death

West's RCWA 51.24.030

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

Currentness

(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.

Credits

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

Notes of Decisions (79)

West's RCWA 51.24.030, WA ST 51.24.030

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West's Revised Code of Washington Annotated
Title 51. Industrial Insurance (Refs & Annos)
Chapter 51.32. Compensation--Right to and Amount (Refs & Annos)

West's RCWA 51.32.010

51.32.010. Who entitled to compensation

Currentness

Each worker injured in the course of his or her employment, or his or her family or dependents in case of death of the worker, shall receive compensation in accordance with this chapter, and, except as in this title otherwise provided, such payment shall be in lieu of any and all rights of action whatsoever against any person whomsoever; PROVIDED, That if an injured worker, or the surviving spouse of an injured worker shall not have the legal custody of a child for, or on account of whom payments are required to be made under this title, such payment or payments shall be made to the person or persons having the legal custody of such child but only for the periods of time after the department has been notified of the fact of such legal custody, and it shall be the duty of any such person or persons receiving payments because of legal custody of any child immediately to notify the department of any change in such legal custody.

Credits

[1977 ex.s. c 350 § 37; 1975 1st ex.s. c 224 § 7; 1971 ex.s. c 289 § 40; 1961 c 23 § 51.32.010. Prior: 1957 c 70 § 26; prior: 1949 c 219 § 1, part; 1947 c 246 § 1, part; 1929 c 132 § 2, part; 1927 c 310 § 4, part; 1923 c 136 § 2, part; 1919 c 131 § 4, part; 1917 c 28 § 1, part; 1913 c 148 § 1, part; 1911 c 74 § 5, part; Rem. Supp. 1949 § 7679, part.]

Notes of Decisions (156)

West's RCWA 51.32.010, WA ST 51.32.010

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Cc: Bruce Lambrecht <brucejlambrecht@icloud.com>; amyjgoertz@icloud.com; Marilee Erickson <merickson@rmlaw.com>; sestest@kbmlawyers.com; George Ahrend <gahrend@ahrendlaw.com>; Bryan Harnetiaux <bryanpharnetiauxwsba@gmail.com>
Subject: Entila v. Cook (S.C. # 92581-0)

Dear Ms. Carlson:

On behalf of the WSAJ Foundation, a letter request to file an Amicus Curiae Brief and accompanying Amicus Curiae Brief (with Appendix) are attached to this email. Counsel for the parties are being served simultaneously by copy of this email, per prior arrangement.

Respectfully submitted,

Valerie McOmie
On behalf of WSAJ Foundation
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Camas, WA 98607
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