

68825-1

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Court of Appeals No. 68825-1-I  
BEFORE THE WASHINGTON STATE COURT OF APPEALS  
DIVISION ONE

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LEE RICHARDSON,  
Appellant

vs.

DEPARTMENT OF LABOR & INDUSTRIES,  
Respondent

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2012  
MAY 11 11:42  
STATE  
COURT OF APPEALS  
DIVISION ONE

On Appeal from the King County Superior Court  
KCSC Case No. 10-2-44819-5SEA

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APPELLANT'S OPENING BRIEF

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**I. ASSIGNMENT OF ERROR**

Lee Richardson appeals the lower court's granting of Respondent State Of Washington, Department Of Labor And Industries' ("L&I") Motion for Summary Judgment. In the underlying action, Plaintiff was not seeking to re-litigate prior administrative appeals or hearings, but rather sought adjudication of specific issues related to her ongoing treatment and L&I's refusal to pay for those treatments. Plaintiff submits that the lower court erred in granting summary judgment since genuine issues of disputed material facts exist as to plaintiff's claims.

**II. STATEMENT OF THE CASE**

In 1995, plaintiff Lee Richardson ("Lee") was injured in a fall while on the job. The injury occurred on August 17, 1995, due to faulty construction on a staircase while she was working. The hotel & the foot surgeon who performed two faulty surgeries became third party defendants in a lawsuit that was scheduled for trial on November 13, 2001.

A Superior Court ordered mediation took place on October 10, 2001. During mediation, the Podiatric Surgeon settled shortly into negotiations (45 minutes) for the current limit of his malpractice insurance coverage \$1 million. Lee's counsel at that time was not inclined to pursue additional business assets and so Lee was instructed to settle for that amount only with the doctor. The second defendant, Red Lion Hotels

refused to settle at the mediation in October. At the time, L&I's legal negotiating expert, Richard Vlosich then offered Lee 100% of any monies recovered by her from the second defendant (Red Lion) if Lee would agree on October 10, 2001 to the compromise agreement regarding the settlement with the doctor. Lee was instructed to agree to that concession.<sup>1</sup>

Three years before the mediation, Lee elected on official Washington State Third Party Election form, with legal counsel guidance, option A of RCW 51.24.090. This Compromise election option allowed Lee to pursue negotiations directly with her choice of legal counsel and the defendants via compromise law RCW 51.24.090-A. L&I's Third Party Election Claim form offers only two options for settling a Third Party work injury Claim, A is RCW 51.24.090 and option B is RCW 51.24.050 which is the WA State formula rule. The discrepancy between the two was enormous and equated to approximately 80% difference from A to B. Since Washington State employers and employees are legally required to pre-pay for any and all work injury benefits for their employees, the Third Party Election choice of how to obtain recovery is solely up to the Claimant. Lee's legal counsel at the time (Harry Platis) returned her L&I Third Party Election form to Olympia in either late 1997

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<sup>1</sup> Clerk's Paper (CP) 153 [Declaration of Lee Richardson ¶2]

or early 1998.<sup>2</sup>

L & I issued a Department Order that Lee was advised would reflect the Superior Court mediation and legal & binding compromise contract. It did not do that. There was added language that financially caused Lee to be continuously aggrieved—the dollar amounts were not the same as the compromise agreement Lee signed at Superior Court mediation on October 10, 2001, and stated she had settled her third party claim under different conditions. The added language stated that L & I “reserve[d] the right to continue to take funds from any future settlements in this matter.” This was not her option to settle her industrial insurance claim. Lee opted for a compromise and to obtain her own counsel. She did this to ensure that she would receive more than 25% of the entire recovery.<sup>3</sup> L & I Official Department Orders dated 10/30/01 and 5/6/02 were made through dockets # 02 16287, 02 15983, 02 22986, 02 24081, 03 15279. These docket numbers also were to dispute the financial damage caused by misreporting of the settlement terms of Lee’s claim #P164786. RCW 51.24.050 which resulted in Lee suffering more than \$928,000 in financial damage to date.<sup>4</sup>

As a result of this, Lee requested reconsideration, and appealed

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2 CP 153-154; CP 159-; [Declaration of Lee Richardson ¶3; Exhibit 1]

3 CP 154, 161 [Declaration of Lee Richardson ¶4; Exhibit 2]

4 CP 154 [Declaration of Lee Richardson ¶5]

Claim #P164786. In February 2007, Richard Vlosich provided a declaration affirming the conditions of settlement as “RCW 51.24.090” and that no other formula was ever used. This is contradicted by the signed Compromise Agreement from the October 2001 mediation, which indicates, both that a “formula” was used in determining the 37% legal fees for the attorneys, and that RCW 51.24.060(3) was applied rather than RCW 51.24.090 for which Lee opted when she signed the Third Party Election form. Mr. Vlosich confirmed that the agreement provided for a reduction of entire lien/monies owed to L & I by claimant, from 50 % down to 40%; L&I would continue to keep and pay all medical costs and fees related to injury through the receipt (if any) from a settlement from the second defendant (Red Lion); that L & I would not take any additional money from a recovery from any settlement with Red Lion, no matter what the amount; and that private insurance and Medicare would pay the only offset of \$130,000.00+ to ensure Lee had a net settlement of \$695,000.00 under RCW 51.24.090.<sup>5</sup>

On November 13, 2003, a deposition was scheduled for Mr. James Nylander, L&I 3rd Party Manager. The Court reporter was asked to remain outside the room while Mr. Nylander and Ms. Diane Cornell of WA Office of Attorney General suggested that Lee and her counsel agree

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<sup>5</sup> CP 155, 165 [Declaration of Lee Richardson ¶8; Exhibit 3]

to change the nature of the meeting instead to focus on the lack of compliance with compromise contract terms RCW 51.24.090, and the misapplication of approved medical bills toward L&I's excess offset total. During this meeting, Lee and Mr. Nylander only discussed overdue medical bills of more than \$140,000.00 from 1999 thru 2003. Mr. Nylander offered to look in the stack of medical bills and collection notices received by Lee, and hand wrote a note agreeing to do only that and agreeing to reduce L&I's current outstanding lien by a further 40%, and requested that she sign the note. The Note addressed getting medical bills entered and resolved, and complying with the original "compromise settlement terms" made in 2001. Nothing was formally recorded in the dockets or record of the Board of Industrial Insurance Appeals, as only a list of past due collection and medical bills were addressed. To date, those bills are still not correctly paid and causing Lee financial grief.<sup>6</sup>

Unbeknownst to Lee, Mr. Nylander later added the docket numbers associated with all of her outstanding appeals before the BIIA to the hand written note after she signed the same. On March 3, 2005, under oath Mr. Nylander acknowledged doing that after everyone left the premises.<sup>7</sup> The effect of adding those numbers resulted in, once again, increasing amount of medical debt Lee had, and allowing L&I to curtail

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6 CP 156, 169 [Declaration of Lee Richardson ¶9; Exhibit 4]

7 CP 156, 171 [Declaration of Lee Richardson, ¶10; Exhibit 5, pages 55-65]

her benefits and wages for more than four years. It also allowed L&I to avoid paying its share of all legal costs and fees associated with the claim to date. The effect of this note, with the docket numbers added, was to inaccurately convey to the BIIA and the Superior Court that an agreement on all of these appeals had been reached in the meeting on November 13, 2003. This was not accurate, as there was no discussion whatsoever of any of the other issues on appeal and under the separate jurisdiction of the Washington State Board of Industrial Insurance Appeals. The appointment was originally scheduled for Mr. Nylander's deposition in one of those appeals.

Since the initial injury Lee has had to endure 34 surgical procedures (ankle, leg, intestines, etc.) and her health continues to deteriorate with pulmonary emboli, chronic pain that is spreading up her spine with tremors and speech difficulties, along with other physical impairments. Over the last four years the Complex Regional Pain Syndrome (CRPS II) & the non-union of the left ankle have caused Dystonia (palsy tremors) to spread from her spine to her larynx and throat. Neurological damage from the untreated short bowel syndrome, plus causal malabsorption with Pernicious Anemia is ongoing, uncontrollable, and literally demyelinating her spine and nervous system. Her speech and mobility are impaired and it's difficult for others to understand Lee. The discrepancy between the application of the two RCW formulas and the

fact that Mr. Nylander adopted the wrong RCW to Lee's distribution has caused L&I to continue to deny her ongoing benefits, and has reduced her recovery in a substantial manner.<sup>8</sup>

### III. ARGUMENT

#### 1. *Standard of Review*

An appeal of a summary judgment is reviewed de novo. *Castro v. Stanwood School Dist. No. 401*, 151 Wash.2d 221, 224, 86 P.3d 1166 (2004). A summary judgment motion can only be sustained if there is no genuine issue of material fact, looking at all evidence and inferences in the light most favorable to the nonmoving party. *Pelton v. Tri-State Mem'l Hosp., Inc.*, 66 Wash.App. 350, 354, 831 P.2d 1147 (1992).

#### 2. *Genuine Issues Of Material Fact Existed As To Plaintiff's Claims, As They Were Not Barred By Res Judicata*

In the lower court, plaintiff argued that her claims were not directed to prior issues that were adjudicated in the earlier industrial appeals and actions, but rather were limited towards the failure of L&I to properly allocate her offset amounts in accordance with Mr. Nylander's November 2003 "note" and the subsequent actions of L&I to cut Lee's benefits off and refuse additional payment of her medical treatment and wages stemming from these agreements.

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<sup>8</sup> Declaration of Lee Richardson ¶11 and ¶12

As L&I asserted in its Motion for Summary Judgment, the elements of *res judicata* requires there be identity between a prior judgment and a subsequent action as to (i) subject matter, (ii) cause of action, (iii) persons and parties; and (iv) the quality of the persons for or against whom the claim is made. *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearing Bd.*, 165 Wn.2d. 768, 791 (2008).

Plaintiff acknowledged that there have been prior appeals and adjudications by both the BIIA and the Superior Court. Plaintiff did not seek to re-adjudicate those decisions, nor did the plaintiff seek to have the lower court reach alternative decisions to those already adjudicated issues. Rather, plaintiff's dispute in the court below was over the ongoing misapplication of her prior medical bills to the excess off-set total. Ased upon Mr. Nylander's concession in 2005 that he added docket numbers that affected all of plaintiff's claims, and further the recent cessation of benefits paid to her based upon those offsets. Plaintiff contends that had the appropriate offsets and formulas been put into place, then plaintiff would have met her offset requirement earlier under L&I's accounting measures and would have therefore been entitled to earlier reinstatement of benefits and payments. Moreover, if the proper offset formula had been correctly applied pursuant to Mr. Vlosich's original agreement, and Mr. Nylander's later hand written note, then plaintiff would not now be denied ongoing payment of benefits and medical treatment.

Plaintiff's amended complaint also sought equitable relief in that plaintiff had requested both the issuance of a writ of mandamus that L&I apply the proper formulas and continue her *current* benefits, and declaratory relief to enjoin L&I from refusing those benefits. This relief was aimed at the current conduct of L&I. As L&I argued in its motion below, under RCW 7.16.160, a court may issue a writ of mandamus to an "inferior tribunal, corporation, board or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station."

Plaintiff respectfully submits that her action sought to enjoin current actions of L&I. Plaintiff was not seeking relief from the lower court to go back and re-adjudicate prior rulings of other administrative organs of the State or Superior Courts. Rather, as indicated the record below, plaintiff's medical condition is deteriorating. Over the last two years plaintiff's condition has worsened and the severity of her symptoms is ongoing and uncontrollable. Her speech and mobility is impaired and it's difficult for others to understand plaintiff.

The discrepancy between the application of the two RCW formulas and the fact that Mr. Nylander adopted the wrong RCW to Lee's distribution has caused L&I to continue to deny her ongoing benefits, and has reduced her recovery in a substantial manner. Lee is put in a no win situation—because medical providers will not take private insurance or

other payment if they know it is an industrial injury; on the other hand, because of L&I's accounting methods, she is unable to receive ongoing treatment and payment by L&I for necessary medical treatment.

L&I's arguments below were the very reason Lee sought Superior Court intervention. Lee has made several appeals and requests to L&I to act promptly and correctly—and they refuse.<sup>9</sup> The only available remedy Lee has is to make application under RCW 7.16.160 for relief that L&I provide the correct accounting and treatment to her as required.

Based thereon, Lee respectfully submits that her current action for mandamus and declaratory relief is not barred by the doctrine of res judicata.

#### **IV. CONCLUSION**

Plaintiff respectfully submits that she was not attempting to revisit past, litigated issues but rather the claims were addressed to her ongoing predicament—she is in need of current treatment and benefits paid by L&I. Plaintiff submits that the lower court erred by finding that no issues of fact existed regarding the misapplication of the appropriate off-set formulas which has resulted in a reduction of benefits paid by L&I, and more importantly, the cutting-off of current medical treatment and benefits to Lee at the moment. Genuine material of facts existed which would have allowed the lower court to exercise its power to order L&I to take

appropriate action in line with its prior agreements and to provide Lee the benefits she is entitled by law. For that reason the granting of the Motion for Summary Judgment below should be reversed and this matter remanded to the King County Superior Court.

Dated: November 1, 2012

LAW OFFICES OF BRIAN H. KRIKORIAN

A handwritten signature in black ink, appearing to read "Brian H. Krikorian". The signature is fluid and cursive, with the first name being the most prominent.

By \_\_\_\_\_  
Brian H. Krikorian, WSBA # 27861  
Attorneys for Appellant

I, Brian H. Krikorian, declare:

On November 1, 2012 I caused to be serve the Appellant's

Statement of Arrangements

on :

Scott T. Middleton  
Attorney General of Washington  
Labor & Industries Division  
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Seattle, WA 98104-3188

- by ABC Legal Messenger
- United States First Class Mail
- E-service as allowed by the King County Superior Court Local

Rules

- Email service
- Facsimile Service

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated: November 1, 2012



By /s Brian H. Krikorian