NO. 100374-9

SUPREME COURT OF THE STATE OF WASHINGTON

WILLIAM A. BOLEY,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

ANSWER TO PETITION FOR REVIEW DEPARTMENT OF LABOR & INDUSTRIES

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I. INTRODUCTION

An ordinary case controlled by a long-standing line of decisions that aligns with the Legislature's intent provides no reason for review. This case involves the situation in which a worker is injured by a person other than the worker's employer while in the course of employment. Such a worker receives workers' compensation benefits and can also bring a tort claim against the responsible person—a "third party" case. The Department of Labor & Industries is entitled to a share of any settlement or judgment in a third party case as partial reimbursement for workers' compensation benefits paid. A mandatory statutory formula governs the distribution of the worker's recovery, excluding damages for pain and suffering (*Tobin v. Department of Labor & Industries*, 169 Wn.2d 396, 406–07, 239 P.3d 544 (2010)), as well as loss of consortium (RCW 51.24.030(5)). *See* RCW 51.24.060. The Department is not entitled to reimbursement from such damages if they are established at the time of the settlement.

Almost three decades of case law dictate that where third party cases settle, it is the worker's responsibility to allocate damages to pain and suffering or loss of consortium at the time of settlement.[1] When a worker allocates no portion of a third party settlement to damages for pain and suffering or loss of consortium, the Department distributes the entire recovery, meaning a statutory formula is used to divide both general and special damages between the worker and the Deparment.

William Boley filed both a third party lawsuit and an industrial insurance claim for the same injury caused by a negligent driver, and he allocated no portion of the third party recovery to general damages or loss of consortium. In an unpublished opinion, the Court of Appeals held that under this circumstance the entire settlement was subject to distribution

[1] *Jones v. City of Olympia*, 171 Wn. App. 614, 287 P.3d 687 (2012); *Davis v. Dep't of Lab. & Indus.*, 166 Wn. App. 494, 268 P.3d 1033 (2012); *Gersema v. Allstate Ins. Co.*, 127 Wn. App. 687, 112 P.3d 552 (2005); *Mills v. Dep't of Lab. & Indus.*, 72 Wn. App. 575, 865 P.2d 41, *review denied*, 124 Wn.2d 1008 (1994).

under the statutory formula. Boley argues that this conflicts with *Tobin*, which excludes general damages from distribution, but that case involved an allocated settlement, illustrating the basic principle that it is possible to allocate settlements. He also argues that there is an issue of substantial public interest, arguing the line of cases that the Court of Appeals followed is wrong and unfair. But these cases properly follow the many decisions of this Court that place the responsibility of proving their entitlement to benefits on the worker.

Boley asks the Court to reject long-standing precedent requiring injured workers to allocate damages recovered in third party actions. And the centerpiece of this argument is that the Department has too much power in the settlement process. This is incorrect. Boley could have had—but did not have—an independent factfinder (the court in an interpleader action) establish what portion of his settlement constituted general damages, which would have insulated that portion from distribution regardless of the Department's interest.

Furthermore, under *any* distribution of his recovery, Boley, like any injured worker with a third party claim, will receive more in combined workers' compensation benefits and tort damages than under either avenue alone.

The Legislature's distribution formula is not unfair. This Court should deny review.

II. ISSUE

Decades of Court of Appeals opinions state that to be exempt from distribution under RCW 51.24.060, general damages must be explicitly allocated in a settlement agreement. Was the Department required to allocate 100 percent of the settlement to pain and suffering when Boley allocated none of it to such damages in his settlement agreement?

III. STATEMENT OF THE CASE

A. Third Party Claims Under the Industrial Insurance Act

In general, workers injured in the course of their employment cannot file tort lawsuits, as the Industrial Insurance Act typically provides the exclusive remedy for workers injured

on the job. *See* RCW 51.04.010. But the Act establishes a narrow exception to this rule when a third party injures a worker. The third party statute, RCW 51.24, allows injured workers to pursue civil actions against responsible third parties for damages. RCW 51.24.030.

In the context of workers' compensation, the term "third party" is not limited to persons directly liable, such as tortfeasors. *O'Rourke v. Dep't of Lab. & Indus.*, 57 Wn. App. 374, 380, 788 P.2d 17 (1990). Third party also includes insurers who are liable under underinsured motorist policies where the policy is owned by the employer. *Michel v. Dep't of Lab. & Indus.*, 80 Wn. App. 32, 34, 906 P.2d 960 (1995). Thus, an employer's underinsured motorist policy falls within the scope of the third party statute. RCW 51.24.030(4).

The injured worker is entitled to full compensation and benefits under the Industrial Insurance Act, regardless of the worker's election to pursue recovery against the third party. RCW 51.24.040. But any recovery obtained from the third

party is subject to distribution under RCW 51.24.060, which includes a reimbursement share to the Department for workers' compensation benefits paid (less a proportionate share of attorney fees and costs).

"[A]ny recovery" made in a third party action is subject to distribution according to the mandatory formula set out in the statute. Under this formula, "recovery" is defined to include "all damages" the worker receives in a third party lawsuit except loss of consortium. RCW 51.24.030(5). As a result, damages for loss of consortium are not subject to distribution under the third party statute. *See also Flanigan v. Dep't of Lab. & Indus.*, 123 Wn.2d 418, 420, 426, 869 P.2d 14 (1994). Pursuant to this Court's precedent, also excluded from distribution under RCW 51.24.060(1) are pain and suffering damages. *Tobin*, 169 Wn.2d at 406–07. Neither of these two types of damages may be included in the portion of the recovery subject to distribution. *Id.*

The third party statute serves several sometimes-competing purposes. One purpose is to make it possible for the worker to receive compensation "from the party . . . responsible for [the worker's] injuries and consequent damages." *Maxey v. Dep't of Lab. & Indus.*, 114 Wn.2d 542, 549, 789 P.2d 75 (1990). Another purpose is to shift the cost of the workers' compensation benefits paid under the claim from the Industrial Insurance funds onto the liable tortfeasors. *Id.* Third party lawsuits reimburse the workers' compensation funds so they "are not charged for damages caused by a third party." *Id.* A third purpose of the third party statute is to prevent the worker from receiving a double recovery, i.e., the worker "cannot be paid compensation and benefits from the Department and yet retain the portion of damages which would include those same elements." *Maxey*, 114 Wn.2d at 549.

B. Boley Was Injured by a Negligent Third Party in the Course of His Employment and Received a Third Party Recovery and Benefits from the Department

Boley suffered a serious on-the-job injury when the company vehicle in which he was a passenger was rear-ended. CP 22, 29, 71, 320, 339. Because of the injury, Boley received workers' compensation benefits and sought to recover damages from the negligent driver and from his own employer's underinsured motorist (UIM) coverage provider. CP 22, 25, 29, 71, 309, 331. Two others who were riding in the car at the time of the accident were also injured. CP 25, 29, 71, 320, 331.

The negligent driver's insurer provided its $50,000 policy limit and the UIM carrier tendered its $1,000,000 policy limit in an interpleader action. CP 25, 331. Boley and the two other injured persons were joined as co-defendants in the interpleader action. CP 25, 60, 331. Boley and his co-defendants agreed to dismiss the UIM carrier from the interpleader action and to distribute funds among themselves,

either by agreement or by a decision from the court. CP 25, 60–61, 89.

While the interpleader action was underway, the Department asserted its statutory interest in the potential recovery, and gave Boley's attorney notice of this. *See* CP 309–13, 316–18, 325–28. The Department periodically sent Boley correspondence that informed him of the amount the Department had spent on Boley's workers' compensation claim. *Id*. Boley's attorney acknowledged that the recovery would be subject to a Department lien. CP 82, 86–87.

While mediating the interpleader action during 2017, Boley attempted to negotiate an agreement with the Department about the amount of its lien. CP 319-–27. Boley knew that the Department would not approve of a settlement that allocated the entire amount of the recovery to pain and suffering. CP 310–13, 316–18, 326–27; *See* RCW 51.24.090(1) ("Any compromise or settlement of the third party cause of action by the injured worker or beneficiary which results in less than the entitlement

[to reimbursement of benefits] under this title is void unless made with the written approval of the department or self-insurer."). Boley and the Department exchanged settlement proposals allocating various portions of the recovery to pain and suffering. CP 326–27. The Department advised Boley's attorney that it would not accept a settlement that had a 100 percent allocation to pain and suffering. CP 304, 327.

Boley was always aware that some portion of his third party recovery would be subject to the Department's statutory reimbursement right. *E.g.*, CP 82-83. Indeed, he relied on that fact in negotiating a larger settlement in the interpleader action. *See* CP 86-87 (letter from Boley's attorney seeking greater share of interpled funds due to "net result" to Boley after distribution).

In the mediation itself, Boley initially claimed past medical expenses of more than $380,000, medical damages "for the rest of his life," and unspecified lost wages and general damages. CP 322-324 (5/9/17 mediation statement). In August

of 2017, Boley asserted lost wages of $955,000. CP 82. Later, in connection with a claim against his own UIM carrier, Boley alleged medical damages of more than $424,000, lost wages of approximately $2.4 million, and general damages of $2.5 million. CP 195-200.

In October 2017, without having reached an agreement with the Department about distribution of the recovery, Boley settled the interpleader claim with the other passengers. CP 331–34. The negotiated settlement agreement provided that Boley recovered $637,500.00 and contained no allocation to damages such as pain and suffering. CP 331–34. It did, however, require Boley to satisfy any liens on the recovery, including "liens of workers' compensation insurance." CP 331. One of the other other two defendants also had a workers' compensation claim, and made a separate arrangement with the Department about allocation. CP 83–84, 330, 461.

After settling his third party case, Boley continued to negotiate with the Department regarding the distribution of the

recovery. CP 335-338. In a May 18, 2018 letter he asked the Department to waive its interest entirely, reiterating his alleged damages of $424,000 in medical bills, $2.4 million in lost wages, and $2.5 million in pain and suffering. CP 339-343.

C. The Department Issued an Order That Distributed Boley's Third Party Settlement and the Board Affirmed the Order

The Department issued a distribution order on June 6, 2018. CP 346. At that time the Department had paid benefits on Boley's claim of more than $246,000. CP 348. The Department distributed $637,000.00 ($500 less than the actual settlement amount)[2] of the recovery as follows: (1) $318,500.00 allocated to pain and suffering (50 percent of the recovery);

(2) $106,586.11 to Mr. Boley's attorney for fees and costs;

[2] The distribution of $500 less than the actual recovery was presumably based on Boley's May 18, 2018 letter, which erroneously described the recovery as $637,000 rather than $637,500. Regardless, assuming the Department used the lower dollar amount in error, this worked to Boley's benefit, as it allowed him to retain a slightly larger portion of the award.

(3) $86,913.89 to Mr. Boley; and (4) $125,000.00 to the Department for benefits paid. CP 346.[3]

Boley appealed to the Board. CP 430-31. Citing *Davis* and *Jones*, the Industrial Appeals Judge granted the Department's motion for summary judgment because Boley settled his claim for a lump sum and the settlement agreement contained no allocation to damages for pain and suffering. CP 22–31 (citing *Jones*, 171 Wn. App. 614; *Davis*, 166 Wn. App. 494). The Board adopted the Industrial Appeal Judge's decision after Boley petitioned for review. CP 12.

[3] The Department was not required to designate any portion of the settlement to pain and suffering damages because Boley failed to allocate in his settlement. So the allocation of 50 percent of the recovery to pain and suffering (which Boley received) was itself a significant unilateral compromise on the part of the Department. Notably, however, that allocation was consistent with the proportionate total damages that Boley described in his May 18, 2018 letter. The Department further reduced its share from more than $150,000 to $125,000. *See* CP 306, 345, 348.

D. The Superior Court Reversed the Board's Decision and Remanded It to the Board for Additional Evidence

Boley appealed the Board's decision to superior court. CP 1. At superior court, Boley asserted that his case was distinguishable from *Davis* and *Jones*. CP 477–78. This was so, he argued, because the interpleader action did not provide him with an opportunity to present evidence of pain and suffering, nor a chance to allocate any portion of his recovery to such damages. CP 477–78. The Department responded that established case law provides that the entirety of an undifferentiated settlement is subject to distribution under RCW 51.24.060. CP 484–87. And the Department also noted that nothing about the fact that the case was an interpleader action prevented Boley and his coworkers from agreeing to designate a portion of Boley's recovery as pain and suffering damages, just as they had allocated the total recovery among themselves. *See* CP 487.

The superior court reversed the Board's decision. CP 496-99. The court ruled that "Boley was denied an opportunity to have his pain and suffering designated" in the interpleader action, because he was denied "an opportunity to have an adversarial procedure where evidence can be presented and pain and suffering can be determined." RP 23–24. Because it believed he had been unable to allocate any portion of his recovery to damages for pain and suffering, the superior court continued, "the application of the statutory distribution scheme is unfair to Mr. Boley. When he has specials that are exceeding or approaching five hundred thousand, and the total award is only [$637,500], and he had to have surgery, given the injuries, that's a no-brainer to me, it's just completely unfair." RP 24.[4]

The court entered a judgment that remanded the case to the Board "for [an] evidentiary hearing regarding pain and suffering. Following that hearing, the Board shall make a

[4] As discussed above, Boley's alleged special damages were actually nearly $3 million. *See supra* p. 11.

determination of what portion of Mr. Boley's recovery should be allocated to damages for pain and suffering." CP 498; *see* RP 24–25. The Department appealed. CP 500–04.

E. The Court of Appeals Followed Well-Settled Case Law to Reverse the Superior Court

The Court of Appeals reversed the superior court's decision, holding that because Boley failed to designate any portion of his settlement to pain and suffering damages, the Department correctly applied the distribution statute. *Boley v. Dep't of Lab. & Indus.*, No. 54884-4-II; Slip op. 7–8 (Wash. Ct. App. Aug. 17, 2021) (unpublished decision). In reaching this result, the Court of Appeals followed the four Court of Appeals cases that require allocation. *Boley*, slip op. at 9–11 (citing *Jones*, 171 Wn. App. at 624–29; *Davis*, 166 Wn. App. at 495–98; *Gersema*, 127 Wn. App. at 693; *Mills*, 72 Wn. App. at 577–78).

IV. REASONS TO DENY REVIEW

There is no reason under either RAP 13.4(b)(1) or (4) to take review. Boley's claimed conflict is refuted by the text of

the *Tobin* decision. And there is no issue of substantial public interest when the Legislature's decision to provide for distribution of funds, with discretion to the Department to compromise its lien, is furthered by the allocation rule. Finally, the fact that a deficient settlement is void is not unfair to injured workers.

A. The Court of Appeals Acted Consistently with *Tobin, Jones*, *Davis*, *Mills*, and *Gersema*

The Court of Appeals acted consistently with *Tobin* by recognizing that *Tobin* did not address the allocation issue in this case. *Boley*, slip op. 9 (citing *Tobin*, 169 Wn.2d at 404). Boley argues that the Court of Appeals' decision conflicts with *Tobin* "by allowing the Department to collect reimbursement from portions of Boley's recovery that, in fact, represent general damages." Pet. 18; *see also* Pet. 19, 21–22, 26. This is of course unknown, since the settlement does not describe any of the recovery as general damages. Furthermore, as Boley admits, *Tobin* did not reach the allocation issue presented here

because that case involved an allocated settlement. Pet. 25. So there is no conflict.

Boley also says that there is not a public policy issue in solvency of the workers' compensation fund because *Tobin* did not find that controlling in its holding about pain and suffering damages. Pet. 29. But *Tobin* does not eliminate reimbursement of the funds for workers' compensation benefits paid as an interest, nor did it overrule or otherwise modify the multiple decisions that emphasize the interest in reimbursing the funds.

Post-*Tobin*, the Court of Appeals has held in an un-allocated settlement the statutory distribution was required because it was unknown what the proportion of damages are between general and special damages. *Jones*, 171 Wn. App. at 624–29; *Davis*, 166 Wn. App. at 495–99. This result is compelled by RCW 51.24.060, which provides that "any recovery made *shall* be distributed [according to the formula]." (emphasis added). Thus, damages not designated as loss of consortium or pain and suffering *shall* be distributed. The

Legislature has had many opportunities to change RCW 51.24.060 in view of the *Jones* line of cases, and it has not, acquiescing to the result. *See City of Fed. Way v. Koenig*, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009).

While Boley neglects to cite to RCW 51.24.060, he does acknowledge the line of cases requiring allocation. But he appears to argue that they are incorrect. Pet. 21–22. They are not. To support his argument, Boley asserts that "[if] the record does not show how much is pain and suffering, the Department should first find the answer to that question before it can collect." Pet. 23. But under the basic structure of the Industrial Insurance Act, the responsibility is on the worker to show entitlement to benefits. *Lightle v. Dep't of Lab. & Indus*., 68 Wn.2d 507, 510, 413 P.2d 814 (1966); *Cyr v. Dep't of Lab. & Indus.*, 47 Wn.2d 92, 97, 286 P.2d 1038 (1955); *Clausen v. Dep't of Lab. & Indus.*, 15 Wn.2d 62, 68, 129 P.2d 777 (1942); *Kirk v. Dep't of Lab. & Indus.*, 192 Wash. 671, 674, 74 P.2d 227 (1937); RCW 51.52.050(2)(a). The *Mills* Court, in

discussing why the Department should not be required to establish allocations for the parties, emphasized that there was "no reason to require the Department to do something over which the parties had control." *Mills*, 72 Wn. App. at 577–78.

The Court of Appeals correctly held that it was within Boley's control to negotiate a settlement agreement that specified an amount for pain and suffering damages. *Boley*, slip op. 10 n.3; *see Tobin*, 169 Wn.2d at 398 (allocated settlement to include pain and suffering damages). Boley argues that he did not have control to consider an allocation of pain and suffering because Travelers did not participate in a division of funds or allocation. Pet. 23, 26–27. But he did have control over how he settled with the co-defendants who were passengers in the car with them, and did allocate the recovery with them. He admits that the three claimants and three attorneys negotiated the divisions of the funds, with the input of the Department. Pet. 9. He also admits he could have taken the case to trial to obtain an allocation. Pet. 25, 27. There is nothing that would have

prevented Boley and his co-defendants from allocating portions of their respective recoveries to include damages for pain and suffering.

Boley told the Department that he had $2.8 million in special damages and $2.5 million in damages for pain and suffering. CP 339-343. Thus, while it is technically unknown what the recovered damages were for and in what proportion, Boley's assertion that the damages recovered were necessarily 100 percent for his pain and suffering is unsupported by the record. *See* Pet. 10, 20. He certainly cannot unilaterally establish this one-sided allocation in a post facto manner. The Court of Appeals correctly acted under *Tobin*, *Jones*, *Davis*, and other cases to find his belated assertion insufficient to claim general damages.

B. There Is No Issue of Substantial Public Interest

Placing the burden on the worker to allocate their settlement furthers the goals of RCW 51.24. Third party lawsuits reimburse the workers' compensation funds so they

"are not charged for damages caused by a third party." *Maxey*, 114 Wn.2d at 549. Thus, by shifting the costs of the benefits onto liable third party tortfeasors, workers and employers who pay into the workers' compensation fund or self-insured employers who pay claim costs are not forced to underwrite the damages caused by the third party who, by definition, never purchased industrial insurance coverage for the worker he or she injured.

Boley raises three arguments to argue that there is an issue of substantial public interest. First, while he admits he could have taken the case to trial to obtain an allocation, he complains of litigation costs. Pet. 25, 27. Litigation costs are the normal consequence of the American rule for fees. *See Interlake Sporting Ass'n, Inc. v. Washington State Boundary Review Bd. for King Cnty.*, 158 Wn.2d 545, 560, 146 P.3d 904 (2006).

Second, Boley argues "he had no power to compel the other injured parties, or the Department, to sign a settlement

that allocated" his general damages because the Department is not required to approve a settlement that is deficient. Pet. 24. But he does note that the other parties had an interest in allocation because they would not want their settlement to be voided. Pet. 24. In any event, if there is not an agreement between the parties to resolve the interest of the claimants the matter could have been brought before a judge. In that case an independent factfinder would have established whatever allocation was appropriate, and the resolution could not have been deficient because it would not have been a "settlement."

Furthermore, while Boley is correct that he could not "compel" the Department to agree to his own allocation, he ignores that the Department proposed multiple allocations that *did* approve a settlement. *See* CP 327, 366. In fact, the order that the Department ultimately issued allocated half of Boley's recovery to pain and suffering, representing a substantial compromise and the approval of a deficient settlement under RCW 51.24.060(3). CP 344-46, 367. Boley presents no

authority for his argument that he should have been able to compel the Department to completely abrogate its statutory rights and abandon the funds' interest in his recovery.

The Legislature's determination that deficient settlements are void without Department approval is also not inherently unfair in the way that Boley claims. He argues that the Department has undue power but ignores the complex policies that underlie the entire third party statute. Third party actions are the exception and not the rule for injured workers. They are authorized for multiple reasons, including the state's interest in reimbursing the industrial insurance funds. By definition, deficient settlements represent inadequate reimbursement to the funds. Requiring that the Department review and approve such settlements is not unreasonable or unfair. And the Legislature ensured that the Department would approve deficient

settlements where appropriate by allowing the Department to compromise its interest in the recovery. [5]

Underlying Boley's arguments is a sense that he doesn't think the Department will act in good faith about compromising its lien. But the Department is the trustee of the State fund, *Hadley v. Department of Labor & Industries*, 116 Wn.2d 897, 900, 810 P.2d 500 (1991), and it must be presumed it will carry out its duties fairly, following the statutory direction in RCW 51.24.060(3)(a)-(c). This statute requires consideration of the availability of insurance money, factual and legal questions of liability, and problems of proof with respect to obtaining

[5] RCW 51.24.060(3) provides that "The department or self-insurer has sole discretion to compromise the amount of its lien." The Department gave Boley 50 percent of the settlement amount as pain and suffering damages. The Department decided to do this in an effort to resolve the matter without further litigation on Boley's part. Boley now seeks to have his entire recovery allocated to pain and suffering. Such an outcome would make the settlement even more deficient and, therefore, void without the Department's written approval. *See* RCW 51.24.090.

settlements and judgments.[6] The Department is well cabined in its consideration of compromise of its fiduciary interest.

At a more fundamental level, and contrary to Boley's argument (and the concurrence in the Court of Appeals decision), the structure of the third party statute is not unfair to injured workers. Workers with third party claims *always* recover more than they would have recovered with either workers' compensation benefits or tort lawsuits alone. This is because the injured worker receives the first 25 percent of their tort recovery (after attorney fees and costs) free and clear of any Department claim (RCW 51.24.060(1)(b)), and because the Department always pays its proportionate share of attorney fees on any reimbursement (RCW 51.24.060(1)(c)(i)).[7] The funds

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[6] It is undisputed that the Department considered the statutory factors when it substantially compromised its interest in Boley's recovery. CP 298-99.

[7] Boley's own case demonstrates this fact: he and his attorney received $512,500 of the $637,500 third party recovery. At that time, he had also received workers' compensation benefits of $246,798.19. CP 348. Thus, in total Boley received $759,298.19—more than his workers'

are never fully reimbursed, and there is simply no distribution of any recovery under which the injured worker is worse off than if they did not have both a workers' compensation claim and a personal injury case. Eliminating the Department's right to void deficient settlements would simply allow workers to recover even more. Under these circumstances, the Legislature's distribution structure is eminently reasonable.

Third, Boley argues he should be made whole. Pet. 28. But he cites no authority to support importing this subrogation principle from the tort context into the workers' compensation system. In fact, the Court of Appeals has explicitly rejected application of the made-whole doctrine to the Industrial Insurance Act's third party statute. *Dep't of Lab. & Indus*. *v. Dillon*, 28 Wn. App. 853, 855–56, 626 P.2d 1004 (1981) ("A statutory right to reimbursement (i. e., the Department's lien on recovery) is not to be diminished absent an express statutory

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compensation benefits alone and more than his tort recovery alone.

provision. . . . The Department is entitled to a lien upon the amount of recovery, whether or not the victim has recovered in full for his injuries.").

V. CONCLUSION

The Court should deny review.

This document contains 4581 words, excluding the parts of the document exempted from the word count by RAP 18.17.

RESPECTFULLY SUBMITTED this 12th day of January 2022.

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SUPREME COURT
STATE OF WASHINGTON

WILLIAM A. BOLEY, Petitioner, v. WASHINGTON STATE DEPARTMENT OF LABOR AND INDUSTRIES, Respondent.	CERTIFICATE OF SERVICE

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, she caused to be served the Department of Labor & Industries' Answer to Petition for Review and this Certificate of Service in the below described manner:

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DATED this 12th day of January 2022.

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January 12, 2022 - 10:56 AM

Transmittal Information

Filed with Court:	Supreme Court
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Appellate Court Case Title:	William Boley v. Washington State Department of Labor and Industries
Superior Court Case Number:	19-2-00546-3

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