NO. 95577-8

SUPREME COURT OF THE STATE OF WASHINGTON

TIMOTHY NELSON,

Petitioner,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Respondent.

DEPARTMENT OF LABOR & INDUSTRIES ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Legislature did not intend the statute addressing third-party claims, RCW 51.24, to be a mechanism for funding an injured worker's unsuccessful litigation. The Court of Appeals correctly determined that RCW 51.24.060 does not require the Department of Labor & Industries to pay the costs and attorney fees of unsuccessful claims. Instead, the Department pays a proportionate share of costs and fees that are "associated with [a] recovery." RCW 51.24.060(5). Recovery means money obtained from a defendant through a lawsuit. The Court of Appeals' routine exercise of statutory construction presents no issue of substantial public interest.

This Court should deny review.

II. ISSUE

Review is not warranted, but if it were granted, this case presents the following issue:

> RCW 51.24.060 requires the Department to pay a proportionate share of costs and attorney fees associated with a recovery. Nelson admits he provided a ledger of all costs and attorney fees associated with his recovery from the third party motorist who caused his injuries. Was the Department required to pay the costs and attorney fees of Nelson's other, ongoing lawsuits against a different set of potentially liable third parties?

III. STATEMENT OF THE CASE

A. After Nelson Made a Recovery From the Third-Party Motorist Who Caused His Injuries, He Reported the Costs Associated with the Recovery to the Department

Timothy Nelson was injured in a motor vehicle accident while working for All State Dry Wall Systems. CP 59. He filed a workers' compensation claim, and the Department paid benefits. CP 59-60. The Department spent $116,958.64 in benefits, including payments for medical aid, time loss compensation, and permanent partial disability. CP 94.

In general, an injured worker may not pursue tort claims against the worker's employer or fellow employees. RCW 51.04.010. But when a "third person, not in a worker's same employ" is responsible for the worker's injury, the worker may elect to seek damages from such a person in a third-party lawsuit. RCW 51.24.030(1). The worker can pursue damages on his or her own or can assign the third-party claims to the Department to pursue. RCW 51.24.050(1).

While Nelson was receiving benefits, he sued Amanda Wade, the third-party motorist responsible for his workplace injuries. CP 77. He elected to pursue this claim with his own attorney. *See* CP 77. Nelson settled with Wade and her insurance company for $525,000. CP 77-78, 81. Of this amount, the parties allocated $408,000 as "pain and suffering" and

$117,000 as "medical aid, time loss compensation and permanent partial disability." CP 81.

The decision to bring a third-party lawsuit does not preclude an injured worker from receiving workers' compensation benefits. RCW 51.24.040. But if the worker successfully recovers damages from a third person, the Department is reimbursed from the recovery for the benefits it has paid. *See* RCW 51.24.060. RCW 51.24.060(5) requires the worker to advise the Department of the recovery and "the costs and reasonable attorneys' fees associated with the recovery."

At the Department's request, Nelson sent the Department a copy of his fee agreement and a ledger of costs relating to his recovery from Wade. CP 77. The fee agreement stated that Nelson had agreed to pay his lawyers "One Third (1/3) of the total recovery in this case." CP 87. The ledger of costs showed that the costs relating to the lawsuit against Wade totaled $6,523.23. CP 90-92.

B. The Department Used the Figures Provided by Nelson to Distribute His Recovery From Wade Under RCW 51.24.060

The third-party distribution statute, RCW 51.24.060, requires that the Department distribute any recovery from a third person between the injured worker, the worker's attorneys, and the Department. "Recovery" is defined to include "all damages except loss of consortium." RCW

51.24.030(5). Pain and suffering damages are also not subject to distribution.[1]

RCW 51.24.060(1) sets forth the formula for distributing any third-party recovery:

1. The costs and reasonable attorney fees shall be paid proportionately by the injured worker and the Department. RCW 51.24.060(1)(a).

2. The injured worker shall be paid twenty-five percent of the balance of the award. RCW 51.24.060(1)(b).

3. The Department "shall be paid the balance of the recovery made, but only to the extent necessary to reimburse the department . . . for benefits paid." RCW 51.24.060(1)(c).

4. Any remaining balance shall be paid to the injured worker. RCW 51.24.060(1)(d).

The Department applied RCW 51.24.060(1) to distribute Nelson's recovery from Wade. Because the $408,000 allocated for pain and suffering did not constitute a "recovery" under the third-party statute, only the $117,000 allocated as special damages was a "recovery" subject to distribution. CP 78, 96. The Department distributed this amount as follows: $40,453.75 for attorney fees and costs (of which the Department paid $39,745.81); $19,136.56 to Nelson as his 25 percent of the balance of the recovery; and the remainder of $57,409.69 to reimburse the

[1] *Tobin v. Dep't of Labor & Indus.*, 169 Wn.2d 396, 404, 239 P.3d 544 (2010).

Department for benefits paid. CP 96. Because the recovery was insufficient for the Department to receive its total reimbursement share, there was no remaining balance. CP 96. The Department issued a distribution order reflecting these calculations. CP 98.

In calculating the distribution of Nelson's recovery from Wade, the Department included all costs submitted by Nelson. CP 77-78, 90-92, 96, 100. It excluded no costs reported on the cost ledger. CP 96.

C. The Board and the Superior Court Rejected Nelson's Argument That the Department Must Wait To Distribute the Recovery Until After Nelson's Lawsuits Against Other Third-Party Defendants Had Been Resolved

Nelson requested that the Department reconsider the distribution order. CP 100. Although he agreed that the Department's calculation accurately reflected his costs related to the recovery from Wade, he asserted that the Department's distribution order was "premature." CP 100. Nelson explained that he was continuing to pursue other lawsuits against additional third-party defendants and that his expenses in these actions would not be known with finality until completion. CP 100. He argued that these costs should also be included when distributing his recovery from Wade and that, accordingly, the Department should wait to issue the distribution order until after such costs were known. CP 100.

Nelson did not indicate that he had incurred any additional costs in his lawsuit against Wade. CP 100.

The Department affirmed the distribution order, and Nelson appealed to the Board of Industrial Insurance Appeals. CP 57. Both Nelson and the Department moved for summary judgment. CP 39-40. Nelson reiterated his argument that the Department should not issue the distribution order until his claims against other third-party defendants had been resolved. CP 108. The Department argued that, because it uses only the costs associated with a recovery when calculating the recovery's distribution, the Department did not have to delay issuing the distribution order until after Nelson's other lawsuits were complete. CP 121-25. It noted that if Nelson made additional recoveries in these lawsuits, it would issue separate distribution orders in which it shared in the costs associated with those recoveries. CP 125.

The Board granted summary judgment to the Department. CP 10, 38-47. It explained that Nelson's position that the Department must delay issuing the distribution order until all his claims had resolved was "simply not supported by the plain meaning of the statute, or by any other legal authority." CP 45-46. Nelson appealed to superior court. CP 1-2. The superior court affirmed the Board, adopting the Board's findings of fact and conclusions of law. CP 185-87.

D. The Court of Appeals Held That the Department Correctly Distributed Nelson's Recovery from Wade

Nelson appealed. In his briefing, he abandoned his argument that the Department should delay issuing the distribution order. Instead, he suggested that the Department had improperly excluded costs relating to a road design claim against Pierce County when calculating the distribution of the recovery from Wade. Appellant's Br. at 4-5. But Nelson had never mentioned the Pierce County claim until argument in the summary judgment hearing at the Board. CP 142. He reported no costs associated with this claim to the Department. CP 90-92. The first reference to the Pierce County claim was the unsworn statement of Nelson's counsel. CP 142.

The Court of Appeals affirmed the Department's distribution order. *Nelson v. Dep't of Labor & Indus.*, 198 Wn. App. 101, 104, 392 P.3d 1138 (2017). It held that under RCW 51.24.060, in distributing a recovery, "only the attorney fees and costs associated with the resolved claims that caused the recovery and triggered the distribution are considered in the distribution." *Id.* at 114. The court noted that the Department had deducted no costs from the bill that Nelson submitted, explaining that, "the Department included all costs Nelson submitted to it

when it applied the distribution formula." *Id.* at 115. Nelson petitions for review.

IV. ARGUMENT

RCW 51.24.060 requires the Department to pay a proportionate share of only those costs and attorney fees associated with a third-party recovery. "[T]he Department is required to bear a proportionate share of the fees and costs incurred in obtaining . . . a recovery." *Rhoad v. McLean Trucking Co.*, 102 Wn.2d 422, 424, 686 P.2d 483 (1984). The statute is unambiguous, and the Court of Appeals' routine application of plain meaning analysis raises no issue of substantial public interest—the only basis for review proposed by Nelson. *See* Pet. 1-2; RAP 13.4(b)(4).

Nelson claims he should be reimbursed for unsuccessful claims, but his strained reading of the statute would create perverse incentives for injured workers to pursue ligation of questionable legal merit. Knowing that the state fund would defray his or her costs, a worker would have little reason to refrain from litigation with minimal chances of success. As the plain language of the third party statute demonstrates, the Legislature did not intend for the Department to fund litigation regardless of outcome and over which it has no control.

Nelson's arguments lack merit and raise no issue of substantial public interest. This Court should deny review.

A. The Court of Appeals' Correct Application of Plain Meaning Analysis Raises No Issue of Substantial Public Interest

Under the third-party distribution statute, RCW 51.24.060, the Department shares only in those costs and attorney fees that are associated with a third-party recovery. Nelson has never disputed that his reported costs accurately reflect his expenses relating to his recovery from Wade. CP 15, 100, 107. Instead, he argues that the distribution order understated his costs because it did not include costs he was incurring in other lawsuits against additional third-party defendants. CP 100; Pet. 7-8.

The distribution statute precludes Nelson's argument. RCW 51.24.060 requires that a portion of "any recovery made" be used to pay the costs and attorney fees of the recovery:

> (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[.]

RCW 51.24.060 (emphasis added). A recovery is "all damages except loss of consortium" or pain and suffering. RCW 51.24.030(5); *Tobin*, 169 Wn.2d at 404. The defendant causes the damages. So the recovery is money obtained from the defendant.

The Department distributes the recovery to account for expenses incurred in obtaining the recovery. RCW 51.24.060(1)'s introductory sentence requires that "any recovery made shall be distributed as follows[.]" It then contains five subparts (a), (b), (c), (d), and (e), that specify how the distribution works. The statute ties each subpart to the introductory language in section (1), connecting the "recovery" to "the costs and reasonable attorney fees" noted in subsection (1)(a). By linking the costs and fees to the particular "recovery" identified in subsection (1), the statute provides that only those costs and attorney fees associated with the recovery are included when calculating the recovery's distribution.

Nevertheless, Nelson asserts that the statute places no limit on the Department's responsibility for a worker's costs, pointing out that RCW 51.24.060(1)(a) requires that "[t]he costs and attorney fees shall be paid proportionately" and that RCW 51.24.060(1)(c) refers to "costs incurred by the injured worker." Pet. 7-9. But Nelson reads this statutory language out of context. He fails to note that the costs and attorney fees noted in these subsections are linked to the particular recovery being distributed. Contrary to his suggestion, it is not all costs and attorney fees incurred by the worker that are paid proportionately but, rather, only those costs and fees associated with the recovery to be distributed.

RCW 51.24.060(5) confirms this analysis. It requires that "the person to whom any recovery is paid . . . advise the department or self-insurer of the fact and amount of such recovery [and] the costs and reasonable attorneys' fees *associated with the recovery.*" RCW 51.24.060(5) (emphasis added). This requirement would be meaningless if costs and fees from other, unrelated lawsuits that did not result in the recovery were also to be included when calculating a distribution. As this statutory provision shows, unless the injured worker's litigation costs are "associated with the recovery," the Department cannot properly include such costs when calculating the recovery's distribution.

Nelson now asserts for the first time that the language "associated with the recovery" is somehow ambiguous, contending that this phrase could mean all "costs in multi-defendant litigation" and not simply costs relating to a settling defendant. Pet. 10-11. He did not raise this argument below, and the Court should not consider it. RAP 2.5(a). Nor is Nelson's proposed interpretation a reasonable reading of the statutory language. Indeed, his strained interpretation is foreclosed by RCW 51.24.060(1), which links "the costs and reasonable attorney fees" to the particular recovery being distributed. A recovery is defined as "all damages except loss of consortium" or pain and suffering. RCW 51.24.030(5); *Tobin*, 169 Wn.2d at 404. Damages are money acquired from resolving a specific

claim against a specific party. Thus, as the Court of Appeals properly determined, associated costs are those costs "spent on resolved claims that triggered the recovery." *Nelson*, 198 Wn. App. at 112. Nelson conceded as much by reporting to the Department only those costs he expended in making the recovery from Wade.[2]

Nelson does not dispute that he accurately reported all of his expenses in obtaining that recovery. CP 15, 100, 107. Because his costs in litigation against other third-party defendants did not relate to this recovery, the Department did not have to delay issuing the distribution order until these costs were known with finality. Such costs would not be properly included when calculating the distribution of the recovery from Wade. Under RCW 51.24.060, the Department shares only in the costs and reasonable attorney fees associated with a recovery.

By electing to seek damages on his own, with his own attorney, Nelson assumed responsibility for the financing of his case. This was Nelson's choice. Where a worker wishes to avoid the financial risk of bringing such litigation, the worker may assign the third party claims to

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[2] Contrary to Nelson's suggestion, the Department often pays costs that are related in part to dismissed claims in multi-defendant lawsuits. This is because many of the worker's costs in multi-defendant lawsuits—e.g. investigation expenses, filing fees, deposition transcript costs, and expert fees—relate both to the dismissed claims and to a claim that resulted in a successful recovery. Ultimately, the question is whether a given litigation cost is associated with a claim that resulted in a recovery. Here, there is no indication that the Department excluded any such cost in calculating the distribution of Nelson's recovery from Wade.

the Department. RCW 51.24.050(1). But in such circumstances, it is the Department that controls the litigation, determining whether to prosecute or compromise the claims in its discretion. *Id.* Although the worker avoids potential legal costs, the worker must accede to the Department's choices in what claims to pursue. *See Burnett v. Dep't of Corr.*, 187 Wn. App. 159, 172-77, 349 P.3d 42 (2015). Unlike the situation here, in cases where the Department fronts the costs of litigation, the Legislature has granted it authority to direct such litigation, including the ability to make fiscally responsible decisions about costs.

The Department's responsibility to share in litigation costs is based on principles of subrogation and fairness.[3] *See Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 149-50, 736 P.2d 265 (1987). Because a third party recovery is used to reimburse the Department, it is only fair that the Department join in costs that resulted in repayment. *See Peterson v. Safeco Ins. Co. of Ill.*, 95 Wn. App. 254, 264, 976 P.2d 632 (1999) (discussing principles of equitable subrogation). By contrast, unsuccessful litigation does not result in any reimbursement to the Department. As the third party distribution statute makes clear, where litigation does not

[3] While subrogation principles are useful for understanding the Department's responsibility for costs and fees, the nature of this responsibility is ultimately a question of statute. The Department's right to reimbursement from a third party recovery is a statutory right that is enforceable as a statutory lien rather than an equitable subrogation interest. *Rhoad*, 102 Wn.2d at 427.

reimburse the Department's accident and medical funds for the benefits it has paid, the Department is not required to join in the costs of such litigation.

B. The Department Excluded No Costs Submitted by Nelson, and This Court Should Reject His Attempt to Supplement the Record

In his petition for review, Nelson makes no mention of his previous arguments that the Department should delay issuing its distribution order. He likely recognizes that they are unsupported by the statute, which requires that any recovery be distributed. RCW 51.24.060(1). Instead, Nelson suggests that the Department improperly excluded costs relating to a road design claim against Pierce County. Pet. 3, 8-10. Relying on *Hi-Way Fuel Co. v. Estate of Allyn*, 128 Wn. App. 351, 115 P.3d 1031 (2005), he argues that the Department lacked discretion to "unilaterally deduct" his costs in pursuing this claim. Pet. 8. Nelson misstates both the record and the law.

Hi-Way Fuel does not apply here. There, the injured worker submitted a cost bill to the Department that listed her expenses associated with a third-party recovery as $76,818.90. *Hi-Way Fuel*, 128 Wn. App. at 355. Before calculating the distribution order, the Department deducted several hundred dollars from the cost bill that related to internal copying and postage. *Id.* The worker appealed, and the court reversed, holding that

the Department could not unilaterally reduce the worker's litigation costs in this way. *Hi-Way Fuel*, 128 Wn. App. at 362-63. It explained that the Department must petition a court to determine the reasonableness of a worker's reported costs and that the Department lacked discretion under RCW 51.24.060 to deduct a portion of the worker's costs for internal copying and postage. *Id.* at 363

Here, unlike in *Hi-Way Fuel*, the Department deducted no costs reported by Nelson. The Department included all of Nelson's reported costs when calculating the distribution of his recovery from Wade. CP 77-78, 90-92, 96, 100. While Nelson now suggests that the Department refused to consider costs relating to his Pierce County claim, there is no indication he submitted any such costs to the Department. He did not mention this claim in his request for reconsideration or in his correspondence with the Department. CP 76-79, 100. His summary judgment motion at the Board did not reference it; nor did Nelson file any declarations to support that motion. CP 40, 107-11.

The first reference to the Pierce County claim was at oral argument at the Board, where Nelson's counsel stated that the superior court had dismissed the claim (CP 142), and asked whether it was the Department's position that costs relating to a dismissed claim should not be included when calculating a distribution order. CP 145-46. Even then, Nelson did

not suggest that the Department rejected any submitted costs. *See* CP 146. Nothing in the record indicates that the Department excluded any costs relating to the Pierce County claim when distributing Nelson's recovery from Wade. Because the only reference to this claim was the unsworn statement of Nelson's counsel, there is no record about the Pierce County claim or any costs linked to it. *See Green v. A.P.C. (Am. Pharm. Co.)*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998) ("Argument of counsel does not constitute evidence").[4]

Nelson now attaches new documents to his petition for review, seeking to support his shifting arguments. *See* Pet., App. C. But again, these documents provide no indication that the Department rejected any submitted costs. Without extraordinary circumstances, appellate courts consider only evidence adduced in the proceedings below. *See* RAP 9.11(a); *see* RCW 51.52.115 (court considers evidence only in the Board record). Nelson does not try to prove that he meets the 6-part test in RAP 9.11(a). This Court should decline to consider the newly submitted evidence and ignore arguments based on evidence not in the record.

[4] The Court should not consider Nelson's arguments about the Pierce County claim. Not only are they unsupported by any record, he did not raise them at the Department level, and the order did not address them. *See Hanquet v. Dep't of Labor & Indus.*, 75 Wn. App. 657, 662, 879 P.2d 326 (1994).

Finally, there is no indication that the costs in the Pierce County claim were associated with Nelson's recovery from Wade. In *Hi-Way Fuel*, the court's decision presupposed that all costs and attorney fees reported by the worker were associated with the recovery. *See Hi-Way Fuel*, 128 Wn. App. at 362. The court held that the Department could not unilaterally deduct costs it considered unreasonable. *Id.* By contrast, here, the Department has never contested the reasonableness of Nelson's costs. Instead, it affirmed its distribution order because Nelson agreed that he had reported all costs associated with his recovery from Wade. *See* CP 100. And because only costs associated with a recovery are properly included when calculating a distribution, the Department properly included only those reported costs.

The Department deducted no costs reported by Nelson. As the Court of Appeals correctly determined, *Hi-Way Fuel* does not apply. This Court should deny review.

C. Nelson's Other Arguments Are Also Without Merit and Raise No Issue of Substantial Public Interest

The Court of Appeals did not improperly defer to the Department in reaching its decision. Nelson asserts that the court gave undue deference to the Department's interpretation of RCW 51.24.060, arguing that this statute does not "fall within the department's special expertise." Pet. 13.

But courts give deference to the Department's interpretation of the Industrial Insurance Act, including the third-party distribution statute. *Jones v. City of Olympia*, 171 Wn. App. 614, 621, 287 P.3d 687 (2012). As the agency that administers the Act, the Department's interpretation is accorded great weight. *Id.*; *see also Dep't of Labor & Indus. v. Slaugh*, 177 Wn. App. 439, 452, 312 P.3d 676 (2013). Nelson's assertion to the contrary is simply wrong.

More to the point, the Court of Appeals did not give deference to the Department here. Instead, it found the statute unambiguous. A court does not rely on agency interpretations where the meaning of a statute is clear. *Slaugh*, 177 Wn. App. at 452. The Court of Appeals looked to the plain language of the statute, examining "the meaning of the provisions in question as well as the context of the statute and related statutes." *Nelson*, 198 Wn. App. at 110 (citing *Birgen v. Dep't of Labor & Indus.*, 186 Wn. App. 851, 857, 347 P.3d 503 (2015)). Contrary to Nelson's assertion, because the third-party distribution statute is unambiguous, the court gave no weight to any party's interpretation.

For this same reason, the court correctly determined that the Industrial Insurance Act's rule of liberal construction does not apply. Nelson asserts that the Court must interpret RCW 51.24.060 to his benefit. Pet. 11-12. But the rule of liberal construction is not triggered unless a

court must resolve ambiguities in the Act. *Harris v. Dep't of Labor & Indus.*, 120 Wn.2d 461, 474, 843 P.2d 1056 (1993). Here, the plain language of RCW 51.24.060 provides that only costs and fees associated with a recovery are subject to distribution of that recovery. Because the statute's meaning is clear, the rule of liberal construction does not apply.

Finally, Nelson objects to the court's determination that his 25 percent share of the recovery could be reduced if the Department included additional costs in the distribution. Pet. 15-17. But the court was merely responding to Nelson's assertion—made without explanation—that including only associated costs and fees would result "in Nelson receiving less than the twenty-five percent net recovery RCW 51.24.060 guarantees him." Appellant's Br. 14. As the court pointed out, this statement is simply not true. Because the Department deducts costs and fees before it calculates a worker's 25 percent share, including additional costs in the distribution formula would reduce the worker's share. *Nelson*, 198 Wn. App. at 114-15. While there may be other financial implications of including additional, unrelated costs, the court correctly rejected Nelson's contention that failing to include such costs would reduce his share of the recovery.

Nelson's arguments lack merit and raise no issue of substantial public interest. This Court should deny review.

V. CONCLUSION

The Court of Appeals correctly determined that the plain language of RCW 51.24.060 requires the Department to pay a proportionate share of only those costs and attorney fees associated with a recovery. The court's straightforward analysis raises no issue of substantial public interest. This Court should deny review.

RESPECTFULLY SUBMITTED this 30th day of April, 2018.

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NO. 95577-8

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

TIMOTHY NELSON, Petitioner, v. DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF WASHINGTON, 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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Susan L. Carlson
Supreme Court Clerk
Supreme Court
Washington State Appellate Court's Portal

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Via E-service via the Appellate Court's Portal to:

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RESPECTFULLY SUBMITTED this 30th day of April, 2018.

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