

FILED  
COURT OF APPEALS  
DIVISION II

09 FEB -3 PM 2:44

STATE OF WASHINGTON

BY S DEPUTY NO. 38527-9-II

---

**COURT OF APPEALS FOR DIVISION II  
STATE OF WASHINGTON**

---

SHARON DAVIS and BATYAH CHLIEK and JAMES BOOTH,  
individually and on behalf of all others similarly situated,

Respondents,

v.

THE WASHINGTON STATE DEPARTMENT OF LABOR AND  
INDUSTRIES, an agency of the State of Washington; and JUDY  
SCHURKE, in her capacity as the Director of the Washington State  
Department of Labor & Industries,

Appellants.

---

**BRIEF OF APPELLANTS**

---

ROBERT M. MCKENNA  
Attorney General

STEVE PUZ, WSBA No. 17407  
MICHAEL HALL, WSBA No. 19871  
Assistant Attorneys General  
7141 Cleanwater Dr. SW  
P.O. Box 40126  
Olympia, WA 98504-0126  
(360) 586-6300

**TABLE OF CONTENTS**

I. ASSIGNMENTS OF ERROR..... 1

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR ..... 1

III. STATEMENT OF THE CASE ..... 2

    A. Industrial Insurance Claims Of Davis And Chliek ..... 2

        1. Sharon Davis ..... 2

        2. Batyah Chliek ..... 3

    B. Superior Court Procedural History ..... 4

IV. STANDARD OF REVIEW..... 5

V. ARGUMENT..... 7

    A. Overview Of Industrial Insurance Act..... 7

    B. This Lawsuit Should Be Dismissed For Lack Of Subject  
    Matter Jurisdiction And For Failure To Exhaust  
    Administrative Remedies Under The Act..... 11

        1. The Courts Lack Original Subject Matter  
        Jurisdiction Over The Industrial Insurance Issues  
        Raised In This Lawsuit..... 12

        2. Davis And Chliek Failed To Exhaust Their  
        Administrative Remedies Under The Act Requiring  
        Dismissal Of Their Lawsuit..... 15

    C. Davis And Chliek Cannot Avoid The Act’s Jurisdictional  
    Requirements Or Their Obligation To Exhaust  
    Administrative Remedies By Characterizing Their  
    Lawsuit As A “Class Action” ..... 17

VI. CONCLUSION ..... 22

## TABLE OF AUTHORITIES

### Cases

<i>Ackerley Communications, Inc. v. City of Seattle</i> 92 Wn.2d 905, 602 P.2d 1177 (1979).....	17
<i>Atherton Condo Ass'n v. Blume Development</i> 115 Wn.2d 506, 799 P.2d 250 (1990).....	6
<i>Aviation West Corp. v. Dep't of Labor &amp; Indus.</i> 138 Wn.2d 413, 980 P.2d 701 (1999).....	20
<i>Ball-Foster Glass v. Giovanelli</i> 163 Wn.2d 133, 177 P.3d 692 (2008).....	7, 21
<i>Brand v. Dep't of Labor &amp; Indus.</i> 139 Wn.2d 659, 989 P.2d 1111 (1999).....	21
<i>Cena v. State</i> 121 Wn. App. 352, 88 P.3d 432, <i>review denied</i> , 153 Wn.2d 1009 (2005).....	13
<i>Chaney v. Fetterly</i> 100 Wn. App. 140, 995 P.2d 1284, <i>review denied</i> , 142 Wn.2d 1001 (2000).....	16
<i>Citizens for Clean Air v. City of Spokane</i> 114 Wn.2d 20, 785 P.2d 447 (1990).....	16
<i>Davis v. Dep't of Transportation</i> 138 Wn. App. 811, 159 P.3d 427, (2007) <i>review denied</i> , 163 Wn.2d 1019, 180 P.3d 1291 (2008) .....	18
<i>Deeter v. Safeway Stores, Inc.</i> 50 Wn. App. 67, 747 P.2d 1103 (1987), <i>review denied</i> , 110 Wn.2d 1016 (1988).....	14

<i>Dils v. Dep't of Labor &amp; Indus.</i> 51 Wn. App. 216, 752 P.2d 1357 (1988).....	passim
<i>Dougherty v. Dep't of Labor &amp; Indus.</i> 150 Wn.2d 310, 76 P.3d 1183 (2003).....	12
<i>Equity Group, Inc. v. Hidden</i> 88 Wn. App. 148, 943 P.2d 1167 (1997).....	6, 13, 15
<i>Fay v. Northwest Airlines, Inc.</i> 115 Wn.2d 194, 796 P.2d 412 (1990).....	13, 17
<i>Hanquet v. Dep't of Labor &amp; Indus.</i> 75 Wn. App. 657, 879 P.2d 326 (1994).....	11
<i>Harrington v. Spokane County</i> 128 Wn. App. 202, 114 P.3d 1233 (2005).....	7, 16, 17
<i>Howland v. Grout</i> 123 Wn. App. 6, 94 P.3d 332 (2004).....	5
<i>LaMon v. Butler</i> 112 Wn.2d 193, 770 P.2d 1027 (1989).....	7
<i>Lewis v. Simpson Timber Co.</i> 145 Wn. App. 302, 189 P.3d 178 (2008).....	11
<i>Marley v. Dep't of Labor &amp; Indus.</i> 125 Wn.2d 533, 886 P.2d 189 (1994).....	4
<i>Maxey v. Dep't of Labor &amp; Indus.</i> 114 Wn.2d 542, 789 P.2d 75 (1990).....	9
<i>Mendoza v. Neudorfer Engineers, Inc.</i> 145 Wn. App. 146, 185 P.3d 1204 (2008).....	5, 12, 15
<i>Retail Store Emp. Union v. Washington Surveying &amp; Rating Bureau</i> 87 Wn.2d 887, 558 P.2d 215 (1976).....	16

<i>Rhoad v. McLean Trucking &amp; Dep't of Labor &amp; Indus.</i> 102 Wn.2d 422, 686 P.2d 483 (1984).....	20
<i>Skagit Surveyors and Engineers, LLC v. Friend of Skagit County</i> 135 Wn.2d 542, 958 P.2d 962 (1998).....	12
<i>Smith v. Bates Technical College</i> 139 Wn.2d 793, 991 P.2d 1135 (2000).....	15
<i>South Hollywood Hills Citizens v. King County</i> 101 Wn.2d 68, 677 P.2d 114 (1984).....	16
<i>Spokane County Fire Protection Dist. v. Spokane County Boundary Review Bd.</i> , 97 Wn.2d 922, 652 P.2d 1356 (1982).....	16
<i>State v. Halsten</i> 108 Wn. App. 759, 33 P.3d 751 (2001).....	20
<i>Tilly v. Dep't of Labor &amp; Indus.</i> 52 Wn.2d 148, 324 P.2d 432 (1958).....	7
<i>Wells v. Olsten Corp.</i> 104 Wn. App. 135, 15 P.3d 652 (2001).....	passim
<i>Weyerhaeuser Co. v. Aetna Cas. &amp; Sur. Co.</i> 123 Wn.2d 891, 874 P.2d 142 (1994).....	6
<i>White v. State</i> 131 Wn.2d 1, 929 P.2d 396 (1997).....	6
<i>Wolf v. Scott Wetzel Serv., Inc.</i> 113 Wn.2d 665, 782 P.2d 203 (1989).....	14
<i>Young v. Clark</i> 149 Wn.2d 130, 65 P.3d 1192 (2003).....	12
<i>Young v. Key Pharmaceuticals, Inc.</i> 112 Wn.2d 216, 770 P.2d 182 (1989).....	6

**Statutes**

42 U.S.C. § 1983.....	4
RCW 7.16 .....	4
RCW 51.04.010 .....	passim
RCW 51.24.030(1).....	2, 8
RCW 51.24.030(5).....	9
RCW 51.24.050 .....	9
RCW 51.24.050(4).....	9
RCW 51.24.060(1).....	3, 10,12
RCW 51.24.060(6).....	8, 13, 14, 15
RCW 51.32.010 .....	9, 13, 14, 15
RCW 51.52.050 .....	4
RCW 51.52.060(1).....	passim
RCW 51.52.060(2).....	10
RCW 51.52.100 .....	10
RCW 51.52.104 .....	10
RCW 51.52.110 .....	passim
RCW 51.52.115 .....	10, 11
RCW 51.52.140 .....	11
WAC 263-12-125.....	10
WAC 296-20-19030.....	2

**Other Authorities**

*In re Ken Bezley*  
BIIA Dec., 95 5865 & 95 6356, 1997 WL 207941 (1997)..... 7

*In re Ricky Morgan*  
BIIA Dec., 94 1042, 1995 WL 312117 (1995)..... 7

**Rules**

CR 12(h)(3)..... 13

CR 56 ..... 6

## **I. ASSIGNMENTS OF ERROR**

The trial court lacks subject matter jurisdiction to decide the industrial insurance benefit decisions challenged by Respondents Sharon Davis and Batyah Chliek in this lawsuit. Furthermore, Davis and Chliek did not exhaust their administrative remedies under Washington's Industrial Insurance Act, Title 51 RCW (Act) before filing their lawsuit. The trial court erred by not dismissing this lawsuit on one or both of these grounds. Appellants Department of Labor and Industries and its Director, Judy Schurke (hereinafter collectively referred to as L&I), appeal and assign error to sections (2)(i)-(iv) and 3 of the Order Regarding Defendants' Motion For Summary Judgment, as well as the trial court's October 20, 2008 denial of L&I's motion for reconsideration. App. V and Y.<sup>1</sup>

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Does the superior court have original subject matter jurisdiction to hear and decide legal challenges to third party distribution orders issued by L&I under the Act?
2. Must a worker exhaust his or her administrative remedies

---

<sup>1</sup> "App." refers to the appendices submitted with L&I's Motion for Discretionary Review, which, the parties agreed, is the record that should be used for this appeal. Each individual pleading and transcript contained in these appendices is assigned a letter, beginning with "A" and ending with "Y." In addition, these appendices are consecutively numbered in the lower right hand corner of each page. Every reference to the record will identify the specific letter of the appendix cited and, where appropriate, the page number. For the Court's ease of reference, a copy of the index for these appendices is attached to this brief as App. 1.

under the Act before challenging an industrial insurance benefit decision in superior court?

### **III. STATEMENT OF THE CASE**

#### **A. Industrial Insurance Claims Of Davis And Chliek**

##### **1. Sharon Davis**

Sharon Davis sustained an industrial injury on August 22, 2002, as a result of the negligence of a third party.<sup>2</sup> App. E:59. Davis applied for and received industrial insurance benefits from L&I, and ultimately received a permanent partial disability (PPD) award on July 29, 2005. App. M:264. A portion of that PPD award compensated Davis for the pain and suffering she experienced as a result of her industrial injury. WAC 296-20-19030 (a portion of the PPD award compensates the worker for her “subjective complaints”).

As permitted by the Act, Davis also pursued a tort action against the third party that caused her industrial injury. App. E:57; *see also* RCW 51.24.030(1). On June 2, 2008, Davis settled her tort action by entering into a written agreement that: (1) discharged all claims she had against the liable third party; and, in return (2) required the third party to pay her a lump sum payment of \$75,000. App. E:58. On June 9, 2008, L&I issued

---

<sup>2</sup> “Third party” is a term of art in the Act that refers to a person or entity other than the worker’s employer who caused for that worker’s industrial injury. RCW 51.24.030(1).

an order distributing this undifferentiated lump sum third party settlement pursuant to the formula set forth in RCW 51.24.060(1). App. E:59-60.

On August 1, 2008, three weeks *after* she filed the present lawsuit, Davis appealed that L&I order to the Board of Industrial Insurance Appeals (Board) where the administrative appeal is pending. App. B; G.

**2. Batyah Chliek**

On November 30, 2006, Respondent Batyah Chliek was injured in the course of her employment as the result of the negligence of a third party. She applied for and received industrial insurance benefits from L&I. App. E:65.

Chliek also brought a tort action against the third party who caused her industrial injury. On June 19, 2008, Chliek settled her tort action by entering into a written agreement that: (1) discharged all claims she had against the liable third party; and (2) required the third party to pay her a lump sum payment of \$46,250.00. App. E:64. On June 26, 2008, L&I issued an order distributing Chliek's undifferentiated lump sum third party settlement pursuant to RCW 51.24.060(1). App. E:65-6.

Like Davis, Chliek appealed her third party distribution order to the Board three weeks *after* filing the present lawsuit. That administrative appeal is still pending before the Board. App. B; G:115.

**B. Superior Court Procedural History**

On July 11, 2008, Davis, Chliek and James Booth<sup>3</sup> filed the present lawsuit in Thurston County Superior Court attacking the third party distribution orders issued on their respective industrial insurance claims. App. B. On July 31, 2008, L&I moved for summary judgment, which was heard on October 3, 2008. App. C.

By order dated October 24, 2008, the superior court granted partial summary judgment to L&I. Specifically, that order: (a) dismissed Booth from this lawsuit because he failed to timely appeal his third party distribution order to the Board; (b) dismissed the 42 U.S.C. § 1983 cause of action; and (c) denied their demand for issuance of a writ of certiorari and/or mandamus under chapter 7.16 RCW. App. Y:364. However, the trial court “declined” to rule whether it had subject matter jurisdiction over the industrial insurance issues raised in this lawsuit, and, further, “declined . . . at this time” to dismiss those same industrial insurance issues despite the admitted failure by Davis and Chliek to exhaust their administrative remedies under the Act. App. Y:364.

On October 14, 2008, after the superior court’s oral ruling but

---

<sup>3</sup> Unlike Davis and Chliek, Booth chose not to appeal his third party distribution order to the Board, and that order became final. RCW 51.52.050; *Marley v. Dep’t of Labor & Indus.*, 125 Wn.2d 533, 537-38, 886 P.2d 189 (1994) (“The failure to appeal an order, even one containing a clear error of law, turns the [L&I] order into a final adjudication, precluding any reargument of the same claim.”). Citing the finality of his unappealed third party distribution order, the superior court dismissed Booth from this lawsuit. App. Y:364. Booth did not seek discretionary review of that determination, and he is not a party to this appeal.

before entry of a written order on the summary judgment motion, L&I filed a motion seeking reconsideration of that portion of the superior court order that “declined” to dismiss Davis’ and Chliek’s industrial insurance issues. App. R. The trial court denied reconsideration by order dated October 20, 2008. App. V.

On November 3, 2008, L&I filed a Notice For Discretionary Review to this Court. In her January 9, 2009 order, Commissioner Ernetta Skerlec ruled that, under the Act, the jurisdiction of the superior court over industrial insurance matters “is limited to review of [L&I] proceedings on appeal from orders of the [Board].”<sup>4</sup> Appendix 2, p. 2, 4. In granting review, Commissioner Skerlec concluded the “superior court’s decision appears to be contrary to existing law. And if that court does not have jurisdiction to adjudicate this matter, further proceedings are useless.” *Id.* at p. 4.

#### IV. STANDARD OF REVIEW

When reviewing a motion for summary judgment, the appellate court conducts the same inquiry as the trial court. *Howland v. Grout*, 123 Wn. App. 6, 9, 94 P.3d 332 (2004).

Whether a court has subject matter jurisdiction is a question of law that is reviewed de novo. *Mendoza v. Neudorfer Engineers, Inc.*, 145 Wn. App. 146, 149, 185 P.3d 1204 (2008); *Equity Group, Inc. v. Hidden*, 88

---

<sup>4</sup> Commissioner Skerlec’s Order is attached to this brief as Appendix 2.

Wn. App. 148, 153, 943 P.2d 1167 (1997).

Summary judgment is appropriate where the evidence, viewed in the light most favorable to the nonmoving party, demonstrates there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56; *Weyerhaeuser Co. v. Aetna Cas. & Sur. Co.*, 123 Wn.2d 891, 897, 874 P.2d 142 (1994). An issue of material fact is one upon which the outcome of the litigation depends. *Atherton Condo Ass'n v. Blume Development Co.*, 115 Wn.2d 506, 799 P.2d 250 (1990).

To defeat summary judgment, the non-moving party must come forward with specific, admissible evidence to rebut the moving party's contentions and support all necessary elements of the non-moving party's claims. *White v. State*, 131 Wn.2d 1, 9, 929 P.2d 396 (1997). If the non-moving party fails to establish the existence of a necessary element to that party's case, summary judgment must be granted. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

In such situation, there can be 'no genuine issue as to any material fact,' since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial.

*Id.* (citation omitted).

Where reasonable minds can reach only one conclusion based on the facts, summary judgment should be granted. *LaMon v. Butler*, 112

Wn.2d 193, 199 and n.5, 770 P.2d 1027 (1989).

Here, the material facts are not in dispute. Davis and Chliek concede they did not appeal their third party distribution orders to the Board before filing this lawsuit. Thus, the superior court's refusal to apply the exhaustion of administrative remedies doctrine and dismiss this lawsuit presents a question of law for this Court to decide. *Harrington v. Spokane County*, 128 Wn. App. 202, 209-10, 114 P.3d 1233 (2005); *see also Wells v. Olsten Corp.*, 104 Wn. App. 135, 144, 15 P.3d 652 (2001); *Dils v. Dep't of Labor & Indus.*, 51 Wn. App. 216, 217-210, 752 P.2d 1357 (1988).

## V. ARGUMENT

### A. Overview Of Industrial Insurance Act

Generally, workers injured in the course of their employment are entitled to receive compensation and medical benefits under the Act, without regard to fault.<sup>5</sup> RCW 51.04.010. In exchange for this “sure and

---

<sup>5</sup> The “no fault” remedy provided to workers under the Act is significant. For example, benefits are routinely paid to workers whose injuries result *solely* from their own misconduct and intentional actions. *See, e.g., Tilly v. Dep't of Labor & Indus.*, 52 Wn.2d 148, 324 P.2d 432 (1958) (widow entitled to benefits after husband died at work while engaged in “horseplay” with coworkers); *In re Ken Bezley*, BIIA Dec., 95 5865 & 95 6356, 1997 WL 207941 (1997) (worker entitled to benefits after he broke his foot by jumping into a dumpster full of water to cool himself off); *In re Ricky Morgan*, BIIA Dec., 94 1042 1995 WL 312117 (1995) (worker awarded benefits for injury sustained in a pick-up football game during a temporary work stoppage). Indeed, it is not necessary that a worker actually be performing the duties for which he or she was hired at the time of the accident for the injury to be compensable under the Act. It is “sufficient if the injury arises out of a risk that is sufficiently incidental to the conditions and circumstances of the particular employment.” *Ball-Foster Glass Container Co. v. Giovanelli*, 163 Wn.2d 133, 141-42, 177 P.3d 692 (2008).

certain relief,” workers are precluded from bringing tort actions concerning their work related injuries.

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.

RCW 51.04.010; *see also* RCW 51.32.010 (the compensation paid under the Act “shall be in lieu of any and all rights of action whatsoever against any person whomsoever”).

A narrow exception to the rule precluding tort actions exists for the comparatively small number of workers who are injured by the negligence of third parties. RCW 51.24.030(1). The Act permits this small subset of injured workers to receive workers’ compensation benefits and pursue a

civil action against the liable third party. *Id.* However, any “recovery” obtained from that third party tort action must be used to reimburse the workers’ compensation fund for the industrial insurance benefits paid out on that worker’s claim.<sup>6</sup> RCW 51.24.050(4); RCW 51.24.060(1). A statutory formula determines the amount that must be repaid to L&I or the self-insured employer.<sup>7</sup> *Id.* Both the formula calculations and the amount of reimbursement due are detailed in an order issued by L&I which, if the worker or employer disagree, is appealable only to the Board. RCW 51.24.060(6).

Through this third party system, the Legislature effectively shifted financial responsibility for the worker’s injury from the fault free employers and workers whose premiums fund the workers’ compensation system to the third party who actually caused the worker’s injury. *Maxey v. Dep’t of Labor & Indus.*, 114 Wn.2d 542, 549, 789 P.2d 75 (1990) (third party lawsuits reimburse the workers’ compensation funds so they “are not charged for damages caused by a third party”).

Chapter 51.52 RCW sets forth the mandatory administrative remedies that workers and employers must exhaust before seeking

---

<sup>6</sup> Under the Act’s third party statute, “recovery” includes all damages except loss of consortium.” RCW 51.24.030(5).

<sup>7</sup> Employers who self-insure under the Act pay for and provide workers’ compensation benefits directly to their injured employees. *See* RCW 51.14.020. Because they pay for their employees’ industrial insurance benefits, self-insured employers receive any reimbursement obtained from a third party tortfeasor. RCW 51.24.050; RCW 51.24.060(1).

superior court review of any industrial insurance order issued by L&I, including the third party distribution orders challenged in this lawsuit. RCW 51.24.060(6). Every employer and worker who is aggrieved by any L&I “order, decision, or award” must file an appeal with the Board “before he or she appeals to the courts.”<sup>8</sup> RCW 51.52.060(1). Workers and employers have the opportunity to present evidence and cross-examine adverse witnesses at these hearings, which are presided over by an Industrial Appeals Judge (IAJ). RCW 51.52.100. The superior court civil rules and rules of evidence apply at Board hearings. *Id.*; WAC 263-12-125. Following the hearing, the IAJ must issue a written decision containing “findings and conclusions as to each contested issue of fact and law.” RCW 51.52.104. If dissatisfied, the worker can appeal the IAJ’s decision to the full three-member Board. RCW 51.52.104.

A final Board order can be appealed to the superior court by the worker or employer. RCW 51.52.110; RCW 51.52.115. There are three requirements that must be satisfied to invoke the superior court’s jurisdiction: (1) the Board must issue a final order; (2) the appeal to superior court must be filed within thirty days of communication of the final Board order; and (3) the petitioner must perfect the appeal by filing it with the clerk of the court and serving a copy on L&I, the Board and self-

---

<sup>8</sup> The employer is a statutory party to every administrative appeal filed by their employee. *See* RCW 51.52.060(2).

insured employer. RCW 51.52.110; *Wells*, 104 Wn. App. at 144. The superior court’s jurisdiction “may never be presumed; the record must affirmatively show that all essential facts exist to invoke the court’s jurisdiction.” *Dils*, 51 Wn. App. at 218; *Wells*, 104 Wn. App. at 144.

In an appeal from the Board, the superior court’s jurisdiction is limited to those issues of law and fact that were raised below. RCW 51.52.115; *Hanquet v. Dep’t of Labor & Indus.*, 75 Wn. App. 657, 665-66, 879 P.2d 326 (1994). Furthermore, the superior court can only consider the record created at the Board. *Id.* (the superior court “shall not receive evidence or testimony other than, or in addition to, that offered before the Board or included in the record filed by the Board in the superior court as provided in RCW 51.52.110.”); *Lewis v. Simpson Timber Co.*, 145 Wn. App. 302, 315-16, 189 P.3d 178 (2008).

Any party who disagrees with the superior court decision can seek review in the appellate courts “as in other civil cases.” RCW 51.52.140.

**B. This Lawsuit Should Be Dismissed For Lack Of Subject Matter Jurisdiction And For Failure To Exhaust Administrative Remedies Under The Act**

The only issues that remain in this lawsuit are the challenges by Davis and Chliek to the third party distribution orders issued in their respective industrial insurance claims. App. Y. As a matter of law, the trial court lacks original subject matter jurisdiction to decide these industrial insurance issues, and, on this basis alone, this lawsuit should be

dismissed. RCW 51.04.010; *Dougherty v. Dep't of Labor & Indus.*, 150 Wn.2d 310, 315, 76 P.3d 1183 (2003); *Young v. Clark*, 149 Wn.2d 130, 132-33, 65 P.3d 1192 (2003); *Mendoza*, 145 Wn. App. at 149; *Wells*, 104 Wn. App. at 144.

Furthermore, neither Davis nor Chliek exhausted their administrative remedies under the Act before filing this lawsuit. For this reason as well, their lawsuit should be dismissed as a matter of law. RCW 51.52.060(1); RCW 51.52.110; *Wells*, 104 Wn. App. at 144; *Dils*, 51 Wn. App. at 217-210.

**1. The Courts Lack Original Subject Matter Jurisdiction Over The Industrial Insurance Issues Raised In This Lawsuit**

It is well established that, without subject matter jurisdiction, the superior court has no recourse except to dismiss the lawsuit.

[A] court only has authorization to hear and determine a cause or proceeding if it has jurisdiction over the parties and the subject matter. Absent proper jurisdiction, a court may do nothing more than enter an order of dismissal.

*Mendoza*, 145 Wn. App. at 149; *Young*, 149 Wn.2d at 132-33 (without subject matter jurisdiction “dismissal is the only permissible action the court may take.”); *Skagit Surveyors and Engineers, LLC v. Friend of Skagit County*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998) (“Lack of jurisdiction over the subject matter renders the superior court powerless to pass on the merits of the controversy brought before it.”); *Equity Group*,

88 Wn. App. at 153 (subject matter jurisdiction is a threshold issue that must be decided because “a judgment is void if entered without subject matter jurisdiction.”); *see also* CR 12(h)(3) (“Where it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court *shall* dismiss the action.”) (emphasis added). The superior court lacks original subject matter jurisdiction to decide the industrial insurance disputes raised by Davis and Chliek, and, accordingly, their lawsuit should be dismissed. *Id.*; RCW 51.04.010; RCW 51.32.010; RCW 51.52.110.

Exercising its police and sovereign power, the Legislature “abolished” the superior court’s jurisdiction over all “civil actions and civil causes of action” involving industrial insurance decisions rendered under the Act, except where there has been an appeal from a final Board order. RCW 51.04.010; RCW 51.32.010; *Fay v. Northwest Airlines, Inc.*, 115 Wn.2d 194, 197, 796 P.2d 412 (1990).<sup>9</sup> Even then, the superior court acts in a limited appellate capacity, and “has jurisdiction only if there has been compliance with all statutory procedural requirements set forth in RCW 51.52.110.” *Wells*, 104 Wn. App. at 144.

---

<sup>9</sup> These exclusive remedy provisions are:  
sweeping, comprehensive, and of the broadest, most encompassing nature. A person receiving benefits under the [Act] has no separate remedies for his or her injuries except where the [Act] specifically authorizes a cause of action.

*Cena v. State*, 121 Wn. App. 352, 356, 88 P.3d 432, *review denied*, 153 Wn.2d 1009 (2005).

Here, Davis and Chliek admit they filed the present lawsuit challenging the third party distribution orders issued by L&I *before* filing an appeal with the Board. App. B (*Complaint* filed July 11, 2008); App. F:70-1 (Davis and Chliek filed their Board appeals on August 1, 2008). Unable to establish compliance with the statutory prerequisites necessary to invoke the superior court's jurisdiction, this lawsuit should be dismissed as a matter of law. RCW 51.04.010; RCW 51.32.010; RCW 51.24.060(6); *Wells*, 104 Wn. App. at 144.

Although Davis and Chliek concede they cannot sue their employers in tort, they claim there is nothing in the Act prohibiting workers from bypassing the Board and challenging an industrial insurance benefit decision in superior court, so long as *L&I* is the named defendant. App. F:78. Davis and Chliek are mistaken. Indeed, this very argument was considered and expressly rejected by the Supreme Court in *Wolf v. Scott Wetzel Serv., Inc.*, 113 Wn.2d 665, 675, 782 P.2d 203 (1989).

The exclusive remedy provisions purport to withdraw from private controversy "*all phases of the premises.*" RCW 51.04.010. It is, therefore, appropriate that we consider an action such as this one, which concerns the administration of a claim, as involving one of the "phases of the premises" so excluded.

(Emphasis in original); *see also Deeter v. Safeway Stores, Inc.*, 50 Wn. App. 67, 82-83, 747 P.2d 1103, *review denied*, 110 Wn.2d 1016 (1988); *Cena*, 121 Wn. App. at 357 ("The exclusive remedy provisions in RCW

51.04.010 withdraw from private controversy ‘all phases of the premises’ and consider the administration of a claim as involving one of those phases.”).

As a matter of law, the superior court does not have original subject matter jurisdiction to hear or decide the industrial insurance disputes raised in this lawsuit. RCW 51.04.010; RCW 51.32.010; *Wells*, 104 Wn. App. at 144. Accordingly, their lawsuit should be dismissed. *Mendoza*, 145 Wn. App. at 149; *Equity Group*, 88 Wn. App. at 153.

**2. Davis And Chliek Failed To Exhaust Their Administrative Remedies Under The Act Requiring Dismissal Of Their Lawsuit**

Davis and Chliek concede, as they must, that they failed to exhaust their administrative remedies under the Act before filing this lawsuit. *See* App. B; App. F:70-1, 81; App. G:109, 115; App. S:340. As such, their lawsuit should be dismissed. RCW 51.52.060(1); RCW 51.52.110; *Smith v. Bates Technical College*, 139 Wn.2d 793, 808, 991 P.2d 1135 (2000); *Dils*, 51 Wn. App. at 220.

The doctrine of exhaustion of administrative remedies requires a party to fully exhaust all available administrative remedies before seeking relief in superior court. *Smith*, 139 Wn.2d at 808.

...an agency action cannot be challenged on review until all rights of administrative appeal have been exhausted.

*Spokane County Fire Protection Dist. No. 9 v. Spokane County Boundary*

*Review Bd.*, 97 Wn.2d 922, 928, 652 P.2d 1356 (1982); *see also Harrington*, 128 Wn. App. at 210 (“The court will not intervene where an exclusive administrative remedy is provided.”); *Chaney v. Fetterly*, 100 Wn. App. 140, 995 P.2d 1284, review denied, 142 Wn.2d 1001 (2000).

The exhaustion doctrine is founded on the principle that the judiciary should give proper deference to the body possessing expertise in areas outside the conventional experience of judges. *South Hollywood Hills Citizens v. King County.*, 101 Wn.2d 68, 73, 677 P.2d 114 (1984) (citing *Retail Store Emp. Union, Local 1001 v. Washington Surveying and Rating Bureau*, 87 Wn.2d 887, 906, 558 P.2d 215 (1976)). The doctrine (1) prevents the premature interruption of the administrative process; (2) allows the agency to develop the factual background on which to base a decision; (3) allows the exercise of agency expertise; (4) provides a more efficient process and allows the agency to correct its own mistake; and (5) insures that individuals are not encouraged to ignore administrative procedures by resorting in the first instance to the courts. *Citizens for Clean Air v. City of Spokane*, 114 Wn.2d 20, 30, 785 P.2d 447 (1990). A party that fails to fully exhaust its administrative remedies lacks standing to maintain an action for damages, declaratory or injunctive relief.<sup>10</sup> *Ackerley Communications, Inc. v. City of Seattle*, 92 Wn.2d 905, 908, 602

---

<sup>10</sup> While a party will not be required to exhaust administrative remedies where resort to them would be futile, this exception to the exhaustion doctrine applies only in rare factual situations not present here. *Dils*, 51 Wn. App. at 219.

P.2d 1177 (1979); *Harrington*, 128 Wn. App. at 210; *see also Dils*, 51 Wn. App. at 219.

The doctrine is not only a fixture of the common law, it is explicitly required by the Act. Every employer and worker aggrieved by an L&I “order, decision, or award” must file an appeal with the Board “before he or she appeals to the courts.” RCW 51.52.060(1); *Wells*, 104 Wn. App. at 144; *Dils*, 51 Wn. App. at 218-20. Contrary to the assertion made by Davis and Chliek, this exclusive remedy specifically applies to the third party distribution orders they attempt to challenge in this lawsuit. RCW 51.24.060(6).

Because Davis and Chliek did not exhaust their administrative remedies under the Act, they cannot seek relief in superior court and their lawsuit should be dismissed as a matter of law. RCW 51.52.060(1); RCW 51.52.110; *Fay*, 115 Wn.2d at 197; *Wells*, 104 Wn. App. at 144; *Dils*, 51 Wn. App. at 220.

**C. Davis And Chliek Cannot Avoid The Act’s Jurisdictional Requirements Or Their Obligation To Exhaust Administrative Remedies By Characterizing Their Lawsuit As A “Class Action”**

L&I anticipates that Davis and Chliek will again claim they can ignore the Act’s statutory jurisdictional bar and the administrative remedy exhaustion doctrine simply by couching their Complaint as a “class action.” *See* App. B. They are mistaken.

Initially, as demonstrated above, this argument is contrary to the plain language of the Act which “abolishes” the original jurisdiction of the superior court over *all* industrial insurance matters except where there is an appeal from a final Board order. RCW 51.04.010; RCW 51.52.060(1); RCW 51.52.110; *Wells*, 104 Wn. App. at 144.

Moreover, pleading their industrial insurance dispute as a class action does not relieve Davis and Chliek of their obligation to exhaust the Act’s administrative remedies. *Dils*, 51 Wn. App. at 218-20; *see also Davis v. Dep’t of Transportation*, 138 Wn. App. 811, 824-25, 159 P.3d 427, 429, *review denied*, 163 Wn.2d 1019, 180 P.3d 1291 (2008) (plaintiffs cannot avoid their administrative remedies by characterizing their superior action as a class action).

In *Dils*, a group of injured workers filed a class action lawsuit alleging that L&I wrongfully denied them industrial insurance benefits, unlawfully delayed final adjudication of their industrial insurance claims, and improperly made decisions and set policy in violation of both the administrative procedures act and the open public meetings act. *Dils*, 51 Wn. App. at 217. Like Davis and Chliek do here, the workers in *Dils* sought declaratory and injunctive relief and money damages. The trial court dismissed the workers’ class action because they failed to exhaust their administrative remedies under the Act, and the workers appealed. *Id.*

Affirming the trial court, the Court of Appeals held that exhaustion

of administrative remedies is a threshold requirement that must be satisfied to invoke the superior court's jurisdiction. *Id.* at 220.

Even administrative remedies [the workers] thought to be unavailing should have been pursued.

*Dils*, 51 Wn. App. at 220.

Like the workers in *Dils*, Davis and Chliek cannot pursue a **class** action lawsuit because they failed to exhaust their administrative remedies. *Id.* Accordingly, the Court should dismiss this lawsuit. *Id.*

Although Davis and Chliek attempt to characterize their proposed amendment to the Act as one benefiting all injured workers, the reality may be quite different. If workers are permitted to bypass the Act's administrative remedies, that right must similarly extend to employers who will be permitted to challenge the type, level and extent of benefits awarded to workers simply by charactering their legal challenge to an industrial insurance decision made by L&I as a "class action." By allowing parties to bypass the Board, the rule proposed by Davis and Chliek would impose on employers and workers the very "uncertain, slow and inadequate" remedies that led to the creation of the Act in 1911. RCW 51.04.010.

In addition to transferring a significant number of the 7,000 administrative appeals heard by the Board each year directly to the superior courts' dockets, the new procedure Davis and Chliek propose

would lead to confusion and inconsistent results as parties scramble to preserve their rights and remedies by simultaneously pursuing Board appeals and superior court lawsuits that challenge the exact same industrial insurance decision. *See* App. I:161 (in 2007 the Board agreed to hear 7,760 appeals filed by workers and employers).<sup>11</sup> Indeed, one need look no further than Davis' and Chliek's present superior court lawsuit and Board appeal, which both challenge the exact same third party distribution orders, as definitive proof of the procedural quagmire that would result from their proposal.

On a more fundamental level, the judicial legislation that Davis and Chliek propose to the Act's exclusive remedies exceeds the authority of this Court. *Aviation West Corp. v. Dep't of Labor & Indus.*, 138 Wn.2d 413, 432, 980 P.2d 701 (1999) (a court cannot, under the guise of statutory construction, distort a statute's plain meaning in order to make it conform with the court's own views of sound social policy); *Rhoad v. McLean Trucking & Dep't of Labor & Indus.*, 102 Wn.2d 422, 426, 686 P.2d 483 (1984) (courts will neither read into a statute matters which are not there nor modify a statute by construction); *State v. Halsten*, 108 Wn. App. 759, 764, 33 P.3d 751 (2001) (the drafting of a statute is a legislative, not a judicial function.).

---

<sup>11</sup> This would represent a significant increase from the 360 industrial insurance cases appealed to superior court in that same fiscal year. App. I:166.

Title 51 RCW is a self-contained, fully integrated Act. *Brand v. Dep't of Labor & Indus.*, 139 Wn.2d 659, 668, 989 P.2d 1111 (1999). It is for the Legislature, not the courts, to carefully balance the interests of employers and workers when deciding what changes should be made to this Act. The legislative process allows *all* Washington employers and workers, who must ultimately bear the cost of every change to the exclusive remedy provisions, to provide information concerning the financial impact (e.g., the increase in the premiums that *both* employers and workers must pay), additional administrative burden placed on workers and employers, and the expected benefits of every proposed change. *See Ball-Foster Glass Container Co. v. Giovanelli*, 163 Wn.2d 133, 177 P.3d 692, 696 (2008) (workers' compensation is a "particularly dynamic field of legislative activity, as the forces of labor and business assert their interests at each legislative session.").

This Court should reject Davis' and Chliek's attempt to avoid the Legislature entirely and elevate their agenda above the interests of the hundreds of thousands of employers and workers covered by the Act.

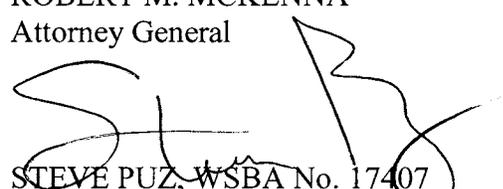
///  
///  
/

## VI. CONCLUSION

For each of the reasons stated, the Court should reverse the superior court order and dismiss this lawsuit.

RESPECTFULLY SUBMITTED this 2nd day of February, 2009.

ROBERT M. MCKENNA  
Attorney General



STEVE PUZ, WSBA No. 17407  
MICHAEL HALL, WSBA No. 19871  
Assistant Attorneys General  
Attorneys for Appellant

**PROOF OF SERVICE**

I, Marsha Staggs, hereby certify that on February 2<sup>nd</sup>, 2009, I caused to be delivered a copy of the following documents:

**Brief of Appellant**

to the attorney for Respondents, as set forth below:

Attorney for  
Respondents/Plaintiffs:

Michael D. Myers  
Myers & Company PLLC  
1809 Seventh Avenue,  
Suite 700  
Seattle, Washington 98101

- United States Mail
- Hand Delivered by Legal Messenger
- UPS Overnight Mail
- Fax

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

DATED this 2<sup>nd</sup> day of February, 2009, at Tumwater, Washington.

*Marsha Staggs*  
MARSHA STAGGS

FILED  
COURT OF APPEALS  
DIVISION II

09 FEB - 3 PM 2:45

STATE OF WASHINGTON  
BY *[Signature]*  
DEPUTY

# APPENDIX 1

**INDEX OF APPENDICES**

<u>Document</u>	<u>Appendix</u>
Summons, 7/11/08 .....	A
Complaint, 7/11/08 .....	B
Notice of Issue, 7/31/08 .....	C
Defendants' Motion for Summary Judgment 7/31/08 .....	D
Declaration of James F. Nylander, Exs. 1-6, 7/31/08 .....	E
Plaintiffs' Response to Defendant Motion for Summary Judgment, 9/8/08 .....	F
Declaration of Michael Myers, Exs. 1-8, 9/8/08 .....	G
Defendants' Reply Brief in Support Of Motion for Summary Judgment, 9/15/08 .....	H
Declaration of Steve Puz, Exs. 1-2, 9/15/08 .....	I
Supplemental Declaration of Michael Myers, Exs. 1-6, 9/18/08 .....	J
Amended Notice of Issue, 9/19/08, .....	K
Defendant Supplemental Reply, 9/29/08 .....	L
Second Declaration of James F. Nylander, Ex. 1, 9/29/08 .....	M
Verbatim Report of Proceedings, 10/3/08 .....	N

Notice of Issue, Presentation of Order	
On Summary Judgment, 10/15/08 .....	O
Proposed Order, 10/15/08 .....	P
Notice of Issue, 10/15/08 .....	Q
Defendants' Motion for Reconsideration, 10/15/08 .....	R
Second Declaration of Steve Puz, 10/15/08 .....	S
Plaintiffs' Motion to Strike (in part) Defendants'	
Motion for Reconsideration, 10/20/08 .....	T
Plaintiffs' Proposed Order, 10/20/08 .....	U
Letter Order Denying Motion for Reconsideration	
10/20/08 .....	V
Defendants' Objection to Plaintiffs'	
Proposed Order, 10/22/08 .....	W
Plaintiffs' Response to Defendants'	
Objection, 10/23/08 .....	X
Order Regarding Defendants' Motion for	
Summary Judgment, 10/24/08 .....	Y

APPENDIX 2

RECEIVED

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

2009 JAN 13 AM 11:45  
ATTORNEY GENERAL'S OFFICE  
TORTS DIVISION OLYMPIA

DIVISION II

FILED  
COURT OF APPEALS

09 JAN -9 AM 11:45

STATE OF WASHINGTON  
*[Signature]*

SHARON DAVIS, BATYAH CHLIEK,  
and JAMES BOOTH, individually and  
on behalf of others similarly situated,

No. 38527-9-II

Respondents,

RULING GRANTING REVIEW

v.

THE WASHINGTON STATE  
DEPARTMENT OF LABOR AND  
INDUSTRIES, an agency of the State of  
Washington; and JUDY SCHURKE, in  
her capacity as the Director of the  
Washington State Department of  
Labor & Industries,

Petitioner.

The Department of Labor and Industries seeks review of that part of a Thurston County Superior Court order of partial summary judgment refusing to dismiss this lawsuit in its entirety. The Department contends that dismissal is required because the superior court lacks subject matter jurisdiction, the plaintiffs having failed to exhaust their administrative remedies.

Plaintiffs/respondents Sharon Davis, Batyah Chliek, and James Booth were all injured in work-related accidents caused by third parties, and all three obtained settlements from those third parties. Pursuant to RCW 51.24.060(1),

the Department allocated portions of those settlements to reimburse the workers compensation fund. Relying on *Tobin v. Department of Labor & Indus.*, 145 Wn. App. 607 (2008), Davis, Chliek, and Booth challenged this allocation, asserting that the Department improperly included the portions of the settlements related to pain and suffering in making the reimbursement calculations. They filed this lawsuit on July 11, 2008. Davis and Chliek appealed the Department's decision to the Board of Industrial Appeals on August 1, 2008, and those appeals are still pending before the Board. Booth did not file an administrative appeal. The Department has filed a petition in the Supreme Court for review of *Tobin*, and that court has not yet determined whether it will grant review.

The superior court dismissed all of Booth's claims, as well as Davis's and Chliek's 42 U.S.C. 1983 claims and requests for extraordinary writs, but declined to dismiss their other claims, explaining that it was not going to decide the issue of jurisdiction until the Department's challenge to *Tobin* had been resolved. The Department asserts that the court obviously erred in continuing to exercise jurisdiction, justifying review under RAP 2.3(b)(1).

Jurisdiction is a threshold issue, not in any way affected by the merits of the claim. See *Skagit Surveyors & Engineers, LLC v. Friends*, 135 Wn.2d 542, 556, 958 P.2d 962 (1998); *Equity Group, Inc. v. Hidden*, 88 Wn. App. 148, 153, 943 P.2d 1167 (1997). Pursuant to RCW 51.04.010, and RCW 51.52.110 and .115, the jurisdiction of the superior court in industrial insurance cases is limited to review of department proceedings on appeal from orders of the Board of Industrial Appeals. *Dils v. Labor and Indus.*, 51 Wn. App. 216, 217, 752 P.2d

1357 (1988) (affirming the dismissal of Dils's lawsuit because, although he had timely appealed to the Board, the Board had not issued a final decision). See also *Wells v. Olsten Corp.*, 104 Wn. App. 135, 144, 15 P.3d 652 (2001).

Respondents argue that this rule does not apply because they are seeking an equitable remedy. The superior court has no equitable power in cases arising out of industrial insurance claims, except in those limited instances in which the claimant was not competent to understand the Department's order or the appeal process, and the Department engaged in some misconduct in communicating the order. See *Kingery v. Dept. of Labor and Indus.*, 132 Wn.2d 162, 174, 937 P.2d 565 (1997). There is no such issue here.

Respondents also assert that the statutory limits on jurisdiction do not apply to class actions.<sup>1</sup> However, the only authority that they cite holds that the named plaintiffs in a class action must have exhausted administrative remedies. See *Chisholm v. U.S. Postal Service*, 665 F.2d 482, 490 (4th Cir. 1981).

Finally, respondents argue that the lawsuit must be permitted because the class will encompass persons in whose cases the Department issued final (unappealed) orders before this court decided *Tobin*, and those persons will have no remedy at the administrative level. That is undoubtedly true. However, even erroneous decisions have finality. If they are not appealed, they are binding on all parties and cannot be reargued by a claimant. See *Kingery*, 132 Wn.2d at 172-73; *Marley v. Department of Labor and Indus.*, 125 Wn.2d 533, 542-43, 886 P.2d 189 (1994).

---

<sup>1</sup> Plaintiffs filed this lawsuit as a class action, but no class has yet been certified.

The superior court's decision appears to be contrary to existing law. And if that court does not have jurisdiction to adjudicate this matter, further proceedings are useless.<sup>2</sup> Review is appropriate. Respondents request that if this court grants review, it stay appellate proceedings until the Supreme Court disposes of *Tobin*. As this court will not address the merits of the underlying case in resolving the issues presented, there is no need for a stay at this level.

Based on the foregoing, it is hereby

ORDERED that review is granted. Proceedings in the superior court are stayed. Proceedings before the Board and in this court are not stayed.

DATED this 9<sup>th</sup> day of January, 2009.

  
Ernetta G. Skerlec  
Court Commissioner

cc: Steve Puz ✓  
Michael Myers  
Ryan Nute  
Hon. Gary R. Tabor

---

<sup>2</sup> It is entirely possible that the Board may issue final orders while this matter is pending before this court. The case will then be appealable to the superior court, but it will not be entitled to the de novo review that is apparently contemplated in the current lawsuit.