

FILED  
COURT OF APPEALS  
DIVISION II

2013 FEB 19 PM 2:40

STATE OF WASHINGTON

BY   
DEPUTY

No. 43688-4-II

---

**IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II**

---

BOARD OF INDUSTRIAL INSURANCE APPEALS,

Appellant,

v.

SOUTH KITSAP SCHOOL DISTRICT,  
DANIEL B. ZIMMERMAN and,  
THE DEPARTMENT OF  
LABOR AND INDUSTRIES  
OF THE STATE OF WASHINGTON,

Respondents.

---

**BRIEF OF RESPONDENT, SOUTH KITSAP SCHOOL DISTRICT**

---

PRATT, DAY & STRATTON, PLLC

Bernadette M. Pratt, # 22073  
Eric J. Jensen, # 43265  
Attorneys for Respondent, South Kitsap  
School District

**Pratt Day & Stratton, PLLC**  
2102 N. Pearl Street, Suite 106  
Tacoma, Washington 98406  
(253) 573-1441

**ORIGINAL**

## TABLE OF CONTENTS

<b>A. <u>INTRODUCTION</u></b> .....	1
<b>B. <u>COUNTERSTATEMENT OF THE CASE</u></b> .....	3
<b>C. <u>COUNTERSTATEMENT OF THE ISSUE</u></b> .....	4
<b>D. <u>SCOPE AND STANDARD OF REVIEW</u></b> .....	5
<b>E. <u>ARGUMENT</u></b> .....	7
1. <u>RCW 51.04.063(3) AND WASH. ADMIN. CODE § 263-12-052 DO NOT GIVE THE BOARD THE POWER TO REVIEW CRSSAS SUBMITTED BY REPRESENTED WORKERS FOR "THE BEST INTEREST OF THE WORKER."</u> .....	7
<i>a. The plain language of RCW 51.04.063(3) does not grant the Board the power to review CRSSAs submitted by represented workers for "the best interest of the worker".....</i>	8
<i>b. Wash. Admin. Code § 263-12-052 does not grant the Board the power to review CRSSAs submitted by represented workers for "the best interest of the worker.".....</i>	11
<i>c. The Board's construction of RCW 51.04.063 would render portions of the statute meaningless surplusage. ....</i>	16
2. <u>THE BOARD DOES NOT HAVE THE INHERENT AUTHORITY TO REVIEW CRSSAS FOR "THE BEST INTEREST OF THE WORKER."</u> .....	19
3. <u>THE BOARD'S ARGUMENT THAT THE GOALS OF RCW 51.04.063(3) WOULD BE BEST ADVANCED IF THE BOARD HAD THE AUTHORITY TO REVIEW CLAIMS FOR "THE BEST INTEREST OF THE WORKER" IS A POLICY ARGUMENT PROPERLY ADDRESSED TO THE LEGISLATURE.</u> .....	22
4. <u>RCW 51.04.069'S REPORTING REQUIREMENTS DO NOT SUGGEST THAT THE BOARD IS REQUIRED TO EXAMINE CRSSAS FOR "THE BEST INTEREST OF THE WORKER."</u> .....	23
5. <u>RCW 51.04.063(3) ASSIGNS THE BOARD A SIGNIFICANTLY MORE THAN MINISTERIAL ROLE IN REVIEWING CRSSAS SUBMITTED BY REPRESENTED WORKERS.</u> .....	25
6. <u>ALLOWING THE BOARD TO EVALUATE THE SETTLEMENT AGREEMENTS OF REPRESENTED WORKERS WOULD UNREASONABLY INFRINGE ON THE PRIVACY RIGHTS OF REPRESENTED WORKERS AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATIONS AND WORK-PRODUCT.</u> .....	28
<b>F. <u>CONCLUSION</u></b> .....	35

## TABLE OF AUTHORITIES

### Cases

<i>Cobra Roofing Serv., Inc. v. Dep't of Labor &amp; Indus.</i> , 122 Wn. App. 402, 97 P.3d 17 (2004) .....	6
<i>Cobra Roofing Services, Inc. v. Dep't of Labor &amp; Indus.</i> , 157 Wn.2d 90, 135 P.3d 913 (2006) .....	6
<i>Cole v. State Util. &amp; Transp. Comm'n</i> , 79 Wn.2d 302, 485 P.2d 71 (1971) .....	21
<i>Duke v. Boyd</i> , 133 Wn.2d 80, 942 P.2d 351 (1997) .....	8
<i>East Wind Express, Inc. v. Airborne Freight Corp.</i> , 95 Wn.App. 98, 974 P.2d 369 (1999) .....	5
<i>Erection Co. v. Dep't of Labor &amp; Indus.</i> , 121 Wn.2d 513, 852 P.2d 288 (1993).....	6, 8, 10, 20, 23
<i>Fahn v. Civil Serv. Comm'n of Cowlitz County</i> , 621 P.2d 1293 (1981) ....	21
<i>Fahn v. Cowlitz County</i> , 93 Wn.2d 368, 610 P.2d 857 (1980).....	21
<i>Federated Am. Ins. v. Marquardt</i> , 108 Wn.2d 651, 741 P.2d 18 (1987).....	6
<i>Guarino v. Interactive Objects, Inc.</i> , 122 Wn. App. 95, 86 P.3d 1175 (2004).....	18
<i>Hawkins v. Diel</i> , 166 Wn. App. 1, 269 P.3d 1049 (2011) .....	18
<i>In re Deloris Burmeiseter</i> , Dckt. No. 12 S0004 (February 23, 2012) .....	27
<i>In re Gary Gene Beard</i> , Dckt. No. 12 S0040 (October 8, 2012).....	27
<i>In re Jacquelyn Chany</i> , Dckt. No. 12 S0054 (December 31, 2012) .....	27
<i>In re Lorraine A. Findlay</i> , Dckt. No. 12 S0038 (September 25, 2012).....	27
<i>In re Lynnetta Castelo</i> , Dckt. No. 12 S0033 (September 18, 2012).....	27
<i>In re Ray W. Stiltner III</i> , Dckt. No. 12 S0014 (June 11, 2012) .....	27
<i>In re Raymond C. Prather</i> , Dckt. No. 12 S0052 (November 27, 2012).....	27
<i>In re Raymond Prather</i> , Dckt. No. 12 S0031 (September 10, 2012) .....	27
<i>In re Robert H. Lund</i> , Dckt. No. 12 S0049 (November 9, 2012) .....	27
<i>In re Sandy G. Nohra</i> , Dckt. No. 12 S0019 (June 4, 2012).....	27
<i>In re Yen Chi Morehead</i> . Dckt No. 12 S0050 (November 27, 2012).....	27
<i>Jeffers v. City of Seattle</i> , 23 Wn.App. 301, 597 P.2d 899 (1979).....	32, 33
<i>Mayer v. Huesner</i> , 126, Wn.App. 114, 107 P.3d 152, <i>review denied</i> , 155 Wn.2d 1019 (2005).....	33

<i>Municipality of Metro Seattle v. Dep't of Labor &amp; Indus.</i> , 88 Wn.2d 925, 568 P.2d 775 (1977) .....	6
<i>North Bend Stage Lines, Inc. v. Schaaf</i> , 199 Wash. 621, 92 P.2d 702 (1939).....	21
<i>Northern Pacific Railway Co. v. Denney</i> , 155 Wash. 544, 285 P. 452 (1930).....	21
<i>Ortega v. Employment Sec. Dep't</i> , 90 Wn. App. 617, 953 P.2d 827 (1998) .....	6
<i>Puget Sound Navigation Co. v. Department of Public Works</i> , 152 Wash. 417, 278 P. 189 (1929) .....	21
<i>Pulcino v. Fed. Express Corp.</i> , 141 Wn. 2d 629, 9 P.3d 787 (2000) .....	18
<i>Reid v. Pierce County</i> , 136 Wn.2d 195, 961 P.2d 333 (1998).....	29
<i>SEIU Healthcare 775NW v. Gregoire</i> , 168 Wn. 2d 593, 229 P.3d 774 (2010).....	25
<i>Sprint Spectrum, L.P./Sprint PCS v. City of Seattle</i> , 131 Wn. App. 339, 127 P.3d 755 (2006) .....	8
<i>St. Francis Extended Health Care v. Dep't of Soc. &amp; Health Serv.</i> , 115 Wn.2d 690, 801 P.2d 212 (1990).....	6
<i>State ex rel. Northeast Transportation Co. v. Schaaf</i> , 198 Wash. 52, 86 P.2d 1112 (1939) .....	21
<i>State ex rel. Pub. Util. Dist. No. 1 of Okanogan County v. Dep't of Pub. Serv.</i> , 21 Wn.2d 201, 150 P.2d 709 (1944).....	20
<i>State v. City of Seattle</i> , 137 Wash. 455, 242 P. 966 (1926).....	25
<i>State v. Madry</i> , 12 Wn. App. 178, 529 P.2d 463 (1974) .....	18
<i>State v. Seattle Gas &amp; Elec. Co.</i> , 28 Wash. 488, 68 P. 946 (1902) .....	22
<i>Stone v. Chelan County Sheriff's Dep't</i> , 110 Wn.2d 806, 756 P.2d 736 (1988).....	17
<i>Stuckey v. Dep't of Labor &amp; Indus.</i> , 129 Wn.2d 289, 916 P.2d 399 (1996) .....	6
<i>Tommy P. v. Board of County Comm'rs</i> , 97 Wn.2d 385, 645 P.2d 697 (1982).....	17
<i>Washington Water Power Co. v. State Human Rights Comm'n</i> , 91 Wn.2d 62, 586 P.2d 1149 (1978) .....	21
<i>Whatcom County v. City of Bellingham</i> , 128 Wn.2d 537, 909 P.2d 1303 (1996).....	17, 18
<i>Wishkah Boom Co. v. Greenwood Timber Co.</i> , 88 Wash. 568, 153 P. 367 (1915).....	20

<i>Xenith Group, Inc. v. Dep't of Labor &amp; Indus.</i> , 167 Wn. App. 389, 269 P.3d 414 (2012).	8
---	---

**Statutes**

RCW 51.04.063	<i>passim</i>
RCW 51.04.069	23, 24, 25

**Regulations**

Wash. Admin. Code § 263-12-052	3, 11, 12, 14, 15, 16, 30, 31
--------------------------------	-------------------------------

**Rules**

CR 26(b)(4)	31
RPC 1.1	35
RPC 1.6	31

**Other Authorities**

18 <u>Ruling Case Law (Mandamus)</u>	25
Const. art. I § 7	29

## **A. INTRODUCTION**

As of January 1, 2012, injured workers who meet a defined set of criteria may now choose “to initiate and agree to a resolution of their claim with a structured settlement.” RCW 51.04.063(1). The statute delineates the procedure for the approval of a proposed agreement based on whether or not an injured worker is represented by an attorney at the time of signing of the Agreement. If the worker is *not* represented, the parties submit the Agreement to the Board of Industrial Insurance Appeals (BIIA or Board) and request a conference with an Industrial Appeals Judge. RCW 51.04.063(2)(h). The Industrial Appeals Judge can approve a structured settlement agreement “only if the judge finds that the agreement is in the best interest of the worker.” RCW 51.04.063(2)(j). In contrast, “If a worker is represented by an attorney at the time of signing a claim resolution structured settlement agreement, the parties shall submit the agreement directly to the board without the conference described in this section.” RCW 51.04.063(4). Once an agreement is submitted to the Board, review is governed by RCW 51.04.063(3). The Board is required to approve it unless it satisfies one of five criteria listed at RCW 51.04.063(3)(a)-(e).

Here, the Board chose to reject an Agreement between Daniel Zimmerman and the South Kitsap School District. This Agreement was

made while both Mr. Zimmerman and the School District were represented by counsel. A 2-1 majority of the Board, over a dissent, stated that it rejected the Agreement because it felt that it did not have enough information to determine if the Agreement was in “the best interests of the worker.” However, nothing in RCW 51.04.063(3), which governs the Board’s review and approval of Claim Resolution Structured Settlement Agreements (CRSSAs), gives the Board the power to review agreements, submitted directly to the Board by represented workers, for “the best interest of the worker.” Mr. Zimmerman and the School District appealed the Board’s decision to Kitsap County Superior Court. After briefing and oral argument, the Superior Court found that the Board did not have the power to review CRSSAs submitted by represented workers for “the best interest of the worker” and remanded Mr. Zimmerman and the School District’s Agreement back to the Board for a proper review, which excludes an examination for “the best interest of the worker.” The Board appealed to this Court. The South Kitsap School District requests that this Court affirm the Superior Court’s decision reversing the Board’s Decision and remanding the Agreement, so that Mr. Zimmerman and the School District may have a proper statutorily authorized review of their Claim Resolution Structured Settlement Agreement.

/

## **B. COUNTERSTATEMENT OF THE CASE**

In February of 2012, Mr. Zimmerman and the School District, while both were represented by attorneys, agreed to and entered into a Claim Resolution Structured Settlement Agreement (CRSSA). CP 56-58.<sup>1</sup> The Agreement was three pages long and included factual and personal information regarding Mr. Zimmerman and his claim, including his benefits, marital status, dependants, and life expectancy. *Id.* The Agreement included all information required to be included in a CRSSA by statute and regulation. *Compare* CP 56-58 *with* RCW 51.04.063(2)(c) *and* Wash. Admin. Code § 263-12-052.

The parties then submitted their Agreement directly to the Board for approval. CP 59-60. The Board, in a 2-1 decision and over a dissent, rejected Mr. Zimmerman and the School District's Agreement. CP 47-55. The Board majority stated that "we believe we must evaluate whether the agreement is in the best interest of the worker. We are unable to make that determination based on the information that has been provided to us." CP 49. The Board majority demanded that the parties turn over their individual assessments of Mr. Zimmerman's claim, made while the claim was being litigated, and demanded information from Mr. Zimmerman regarding his motivations for settling his claim and extensive details

---

<sup>1</sup> Clerk's Papers are cited as "CP." Appellant's Brief is cited as "AB."

regarding his financial status and from the School District regarding its confidential claim valuation. CP 51. Without the information it demanded, the Board majority stated that it would not approve Mr. Zimmerman and the School District's Agreement. CP 52.

The School District appealed the Board's decision not to approve the Agreement to Kitsap County Superior Court. CP 1-2. After extensive briefing and oral argument, which included the Department and, as an amicus, the Washington State Labor Council, the Superior Court granted summary judgment for the employer, reversed the Board's decision, and remanded the Agreement to the Board. CP 104-105. The Superior Court stated that "the Board [is] to review the agreement under RCW 51.04.063(3) with the caveat that subsection (3)(b) does not include a finding of the best interest of the worker but only those requirements that apply to all CRSSAs." CP 104. The Board then appealed to this Court. CP 106-111.

**C. COUNTERSTATEMENT OF THE ISSUE**

Did the Superior Court correctly decide that the Board erred in deciding that a Claim Resolution Structured Settlement Agreement

submitted by a represented worker is subject to review for “the best interest of the worker?”<sup>2</sup>

#### **D. SCOPE AND STANDARD OF REVIEW**

This case is on appeal from the Superior Court’s order of summary judgment. CP 104-111. When reviewing an order of summary judgment, this Court conducts the same inquiry as the trial court. *East Wind Express, Inc. v. Airborne Freight Corp.*, 95 Wn.App. 98, 102, 974 P.2d 369 (1999) (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)). Summary judgment is proper if pleadings, depositions, affidavits, and admissions, viewed in a light most favorable to the nonmoving party, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *East Wind Express*, 95 Wn.App. at 102. Here, the facts are not in dispute and this case presents only an issue of law for this Court’s *de novo* review – namely the BIIA and Superior Court’s construction of RCW 51.04.063 and its related regulations.

---

<sup>2</sup> The Board’s second Issue Pertaining to the Assignment of Error is not presented by this case. At no point was the Board required to approve a represented party’s Claim Resolution Structured Settlement Agreement when the Board felt that the Agreement was not in the best interest of the worker. Indeed, the reason this case was appealed from the Board is the fact that the Board refused to approve Mr. Zimmerman and the School District’s Agreement because it stated it could not determine whether the Agreement was in Mr. Zimmerman’s best interest.

Courts review the BIIA's interpretation of statutes or regulations *de novo*. *Stuckey v. Dep't of Labor & Indus.*, 129 Wn.2d 289, 295, 916 P.2d 399 (1996). Though Courts do "give substantial weight to the agency's interpretation of statutes and regulations within its area of expertise," *id.*, they must also "ensure that the agency applies and interprets its regulations consistently with the enabling statute." *Cobra Roofing Serv., Inc. v. Dep't of Labor & Indus.*, 122 Wn. App. 402, 409, 97 P.3d 17 (2004) *aff'd on other grounds sub nom. Cobra Roofing Services, Inc. v. Dep't of Labor & Indus.*, 157 Wn.2d 90, 135 P.3d 913 (2006) (citing *Ortega v. Employment Sec. Dep't*, 90 Wn. App. 617, 622, 953 P.2d 827 (1998)); *see also, Federated Am. Ins. v. Marquardt*, 108 Wn.2d 651, 655, 741 P.2d 18 (1987) (regulation must be consistent with the statute being implemented). In addition, Courts review agency interpretations under an error of law standard, which allows a Court to substitute its own interpretation of the statute or regulation for the agency's interpretation. *St. Francis Extended Health Care v. Dep't of Soc. & Health Serv.*, 115 Wn.2d 690, 695, 801 P.2d 212 (1990). Finally, "court[s] do[] not exercise deference to an agency's interpretation of a statute if the statute is not ambiguous[.]" *Erection Co. v. Dep't of Labor & Indus.*, 121 Wn.2d 513, 522, 852 P.2d 288 (1993) (citing *Municipality of Metro Seattle v. Dep't of Labor & Indus.*, 88 Wn.2d 925, 929, 568 P.2d 775 (1977)).

## **E. ARGUMENT**

1. RCW 51.04.063(3) AND WASH. ADMIN. CODE § 263-12-052 DO NOT GIVE THE BOARD THE POWER TO REVIEW CRSSAS SUBMITTED BY REPRESENTED WORKERS FOR “THE BEST INTEREST OF THE WORKER.”

This case of first impression is one, primarily, of statutory construction. The chief question presented is whether RCW 51.04.063 and its accompanying regulations give the Board the power to review a CRSSA for “the best interest of the worker.” Notably, the Board’s brief does not directly analyze the statute or even engage the statutory text in any meaningful way. Indeed, the Board’s entire argument regarding the construction of the statutory language at issue is contained in a single footnote which, in fact, contains no analysis. AB at p. 17, fn. 7. The Board’s sole footnote mentioning statutory construction does nothing more than baldly state that “if this Court were to use a ‘plain meaning’ analysis, such an analysis, properly applied, would result in upholding the Board’s interpretation of the statute” and provide the Court with a recitation of the standard for plain language analysis. *Id.* However, despite the Board’s lack of statutory analysis, the construction of RCW 51.04.063 and its accompanying regulations is, and has always, been the issue in this case. A full analysis of RCW 51.04.063 and its implementing regulations shows that the Superior Court correctly awarded the

Respondents here summary judgment and remanded this case to the Board for proper review of Mr. Zimmerman and the School District's Agreement.

- a. *The plain language of RCW 51.04.063(3) does not grant the Board the power to review CRSSAs submitted by represented workers for "the best interest of the worker."*

The most basic canon of statutory construction is that, where a statute is unambiguous, there is no room for statutory interpretation. *Xenith Group, Inc. v. Dep't of Labor & Indus.*, 167 Wn. App. 389, 269 P.3d 414 (2012). Indeed:

[T]he rule of statutory construction that requires [the Court] to derive the meaning of an unambiguous statute from the statute's plain language. "When the words in a statute are 'clear and unequivocal,' [the Court] must assume the legislative body meant exactly what it said and apply the statute as written."

*Id.* at 400 (quoting *Sprint Spectrum, L.P./Sprint PCS v. City of Seattle*, 131 Wn. App. 339, 346, 127 P.3d 755 (2006) (quoting *Duke v. Boyd*, 133 Wn.2d 80, 87, 942 P.2d 351 (1997))). As noted above, where a statute is unambiguous, courts give no deference to agency interpretations. *Erection Co. v. Dep't of Labor & Indus.*, 121 Wn.2d at 522. Here, the Claim Resolution Structured Settlement Agreement statute, RCW 51.04.063, unambiguously creates two different paths for Board approval of a CRSSA, depending upon whether the worker is represented by an attorney.

The first path occurs when a CRSSA is submitted to the Board by an *unrepresented* worker. When this occurs, RCW 51.04.063(2) requires a conference to be held with an Industrial Appeals Judge (IAJ). RCW 51.04.063(2) subsections (i) and (j) specifically address what the IAJ is to consider when deciding whether to approve the agreement. The statute directs the IAJ to “assure that the worker has an adequate understanding of the agreement and its consequences.” RCW 51.04.063(2)(i). Subsection (j) refers only to the Industrial Appeals Judge and directs that the IAJ *may* approve the CRSSA “only if the judge finds the agreement is in the best interest of the worker.” This sub-section provides the IAJ with four factors to consider in determining if the agreement is in the worker’s best interest. RCW 51.04.063(2)(j)(i)-(iv). RCW 51.04.063(2)(k) permits the Industrial Appeals Judge to reject the CRSSA if it is not in the worker’s best interest. This decision to reject an agreement is not appealable. *Id.* However, if the IAJ determines the CRSSA is in the best interest of the worker, then the agreement is submitted to the Board for approval. RCW 51.04.063(2)(l).

In short, if a worker is unrepresented, an IAJ acts as an advocate for the injured worker to insure the injured worker makes an informed decision that is in his or her best interest. This process does not take place when a worker is represented by counsel tasked with advocating for the best interest of his or her client. Indeed, RCW 51.04.063(4) explicitly exempts agreements which are submitted to the Board by workers represented by legal counsel from review by an Industrial Appeals Judge.

*Id.* A CRSSA submitted by a represented worker is not subject to the conference or assessment by the IAJ, but, instead, the statute directs that “the parties shall submit the agreement directly to the board without the conference described in this section.” *Id.*

Once a CRSSA has been submitted to the Board, either following review by an IAJ in the case of an unrepresented worker or, as in this case, directly by a represented worker, RCW 51.04.063(3) governs the Board’s review. That section of the statute states:

Upon receiving the agreement, the board *shall* approve it within thirty working days of receipt unless it finds that:

- (a) The parties have not entered into the agreement knowingly and willingly;
- (b) The agreement does not meet the requirements of a claim resolution structured settlement agreement;
- (c) The agreement is the result of a material misrepresentation of law or fact;
- (d) The agreement is the result of harassment or coercion; or
- (e) The agreement is unreasonable as a matter of law.

*Id.* (emphasis added). Because RCW 51.04.063(3) states that the Board “*shall* approve” the Agreement, the Board is under a *mandatory duty* to approve CRSSAs unless the agreement satisfies one or more of the criteria listed at RCW 51.04.063(3)(a)-(e). *See Erection Co. v. Dep’t of Labor & Indus.*, 21 Wn. 2d at 518 (“The word ‘shall’ in a statute [] imposes a mandatory requirement unless a contrary legislative intent is apparent.”).

In contrast to RCW 51.04.063(2), which governs review of unrepresented workers' Agreements by an Industrial Appeals Judge, nowhere in 51.04.063(3) has the Legislature explicitly directed the Board to assess whether an agreement is in the worker's best interest.

- b. *Wash. Admin. Code § 263-12-052 does not grant the Board the power to review CRSSAs submitted by represented workers for "the best interest of the worker."*

Following the enactment of RCW 51.04.063, the Board promulgated Wash. Admin. Code § 263-12-052. This regulation mandates what must be included in a CRSSA. Other than Wash. Admin. Code §§ 263-12-052(10) and (11)(q)-(r), Wash. Admin. Code § 263-12-052's requirements are also listed at RCW 51.04.063. *Compare* RCW 51.04.063 *with* Wash. Admin. Code § 263-12-052. Here, the Board refused to approve Mr. Zimmerman and the School District's CRSSA because it could "[n]ot determine whether it meets the requirements of a claim resolution structured settlement agreement as required by RCW 51.04.060(3)(b)." CP 47. However, the Board did not base its finding on a failure to meet Wash. Admin. Code § 263-12-052's requirements. Instead the Board stated "we believe we must evaluate whether the agreement is in the best interest of the worker." CP 49. Such a

“requirement” is neither mandated nor suggested by RCW 51.04.060(3) or Wash. Admin. Code § 263-12-052.

In full, Wash. Admin. Code § 263-12-052’s requirements mandate that an

agreement shall contain the following information:

- (1) The names and mailing addresses of the parties to the agreement;
- (2) The date of birth of the worker;
- (3) The date the claim was received by the department or the self-insured employer, and the claim number;
- (4) The date of the order allowing the claim and the date the order became final;
- (5) The payment schedule and amounts to be paid through the claim resolution structured settlement agreement;
- (6) The nature and extent of the injuries and disabilities of the worker and the conditions accepted and segregated in the claim;
- (7) The life expectancy of the worker;
- (8) Other benefits the worker is receiving or is entitled to receive and the effect that a claim resolution structured settlement agreement may have on those benefits;
- (9) The marital or domestic partnership status of the worker;
- (10) The number of dependents, if any, the worker has;
- (11) A statement that:
  - (a) The worker knows that he/she has the right to:
    - (i) continue to receive all the benefits for which they are eligible under this title,
    - (ii) participate in vocational training if eligible, or
    - (iii) resolve their claim with a structured settlement;
  - (b) All parties have signed the agreement. If a state fund employer has not signed the agreement, a statement that:
    - (i) the cost of the settlement will no longer be included in the calculation of the

- employer's experience factor used to determine premiums, or
- (ii) the employer cannot be located, or
  - (iii) the employer is no longer in business, or
  - (iv) the employer failed to respond or declined to participate after timely notice of the claim resolution settlement process provided by the department;
- (c) The parties are seeking approval by the board of the agreement;
  - (d) The agreement binds parties with regard to all aspects of the claim except medical benefits;
  - (e) The periodic payment schedule is equal to at least twenty-five percent but not more than one hundred fifty percent of the average monthly wage in the state pursuant to RCW 51.08.018, except for the initial payment which may be up to six times the average monthly wage in the state pursuant to RCW 51.08.018;
  - (f) The agreement does not set aside or reverse an allowance order;
  - (g) The agreement does not subject any employer who is not a signatory to the agreement to any responsibility or burden under any claim;
  - (h) The agreement does not subject any department funds covered under the title to any responsibility or burden without prior approval from the director or his/her designee;
  - (i) The unrepresented worker or beneficiary of a self-insured employer was informed that he/she may request that the office of the ombudsman for self-insured injured workers provide assistance or be present during the negotiations;
  - (j) The claim will remain open for treatment or that the claim will be closed;
  - (k) The worker will either be required to or not be required to demonstrate aggravation of accepted conditions as contemplated by RCW 51.32.160 if the worker applies to reopen the claim;
  - (l) The parties understand and agree to the terms of the agreement;

- (m) The parties have entered into the agreement knowingly and willingly, without harassment or coercion;
- (n) The parties have represented the facts and the law to each other to the best of their knowledge;
- (o) The parties believe that the agreement is reasonable under the circumstances;
- (p) The parties know that they may revoke consent to the agreement by providing written notice to the other parties and the board within thirty days after the agreement is approved by the board.
- (q) The designation of the party that will apply for approval with the board;
- (r) Restrictions on the assignment, if any, of rights and benefits under the claim resolution structured settlement agreement.

Of particular import amongst Wash. Admin. Code § 263-12-052's many requirements are Wash. Admin. Code §§ 263-12-052(11)(l)-(o). Each of these regulatory requirements mandates that a CRSSA contain information directly relevant to the Board's statutorily defined review criteria under RCW 51.04.063(3). Wash. Admin. Code §§ 263-12-052(11)(l) and (m) require statements that "[t]he parties understand and agree to the terms of the agreement," Wash. Admin. Code § 263-12-052(11)(l), and "[t]he parties have entered into the agreement knowingly and willingly," Wash. Admin. Code § 263-12-052(11)(m), statements directly relevant to the Board's determination under RCW 51.04.063(3)(a) that "[t]he parties have  entered into the agreement knowingly and willingly." Wash. Admin. Code § 263-12-052(11)(m) requires a statement that "[t]he parties

have entered into the agreement... without harassment or coercion,” a statement directly relevant to the Board’s determination under RCW 51.04.063(3)(d) that “[t]he agreement is [not] the result of harassment or coercion.” Wash. Admin. Code § 263-12-052(11)(n) requires a statement that “[t]he parties have represented the facts and the law to each other to the best of their knowledge,” a statement directly relevant to the Board’s determination under RCW 51.04.063(3)(c) that “[t]he agreement is [not] the result of a material misrepresentation of law or fact.” Finally, Wash. Admin. Code § 263-12-052(o) requires a statement that “[t]he parties believe that the agreement is reasonable under the circumstances,” a statement directly relevant to the Board’s determination under RCW 51.04.063(3)(e) that “[t]he agreement is [not] unreasonable as a matter of law.”

Indeed, as the above shows, Wash. Admin. Code § 263-12-052’s requirements, which must be met by a CRSSA under RCW 51.04.063(3)(b), require statements directly relevant to every exemption to mandatory Board approval of the Agreement. A statement or certification that the Agreement is in “the best interest of the worker” is simply not amongst those required by the statute or regulations. In fact, the phrase “best interest of the worker” does not appear a single time in the regulations. *See* Wash. Admin. Code § 263-12-052. Even the word “best”

appears only once: when requiring, as noted above, that the parties state that they “have represented the facts and the law to each other to the best of their knowledge.” Wash. Admin. Code § 263-12-052(11)(n). If the Board felt that it was required to assess whether an Agreement was in “the best interests of the worker” it would have included a certification requirement under Wash. Admin. Code § 263-12-052(11), as it did with the actual statutory standards. It chose not to.

The Board’s decision not to include “the best interest of the worker” in its own regulations mirrors a similar decision by the Legislature. If the Legislature had intended for the Board to apply its own “best interest” analysis to a CRSSA for a worker who is represented by counsel before approval would be granted, it would have explicitly included that in the statute, as it did for an unrepresented worker. *See* RCW 51.04.063(2)(j). Instead, the Legislature *mandated* that the Board approve CRSSAs unless the Agreement ran afoul of the five criteria listed at RCW 51.04.063(3)(a)-(e).

*c. The Board’s construction of RCW 51.04.063 would render portions of the statute meaningless surplusage.*

The Board’s assertion that “[n]o reason exists to believe that the Legislature wanted to make any distinction between represented and

unrepresented workers,”<sup>3</sup> AB at 20, regarding administrative scrutiny of CRSSAs runs counter to any reasonable construction of RCW 51.04.063. Such an interpretation of the statute, which would apply the same standard for assessing an agreement submitted by a represented worker as is applied to an agreement submitted by an unrepresented worker, would eliminate the need for the two different paths to approval created by the Legislature and would “interpret” that distinction out of existence. “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *Whatcom County v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (citing *Stone v. Chelan County Sheriff's Dep't*, 110 Wn.2d 806, 810, 756 P.2d 736 (1988); *Tommy P. v. Board of County Comm'rs*, 97 Wn.2d 385, 391, 645 P.2d 697 (1982)).

The Board’s proffered construction violates this rule especially egregiously with respect to RCW 51.04.063(3)(e). There, the Legislature gave the Board the authority to reject a CRSSA if “[t]he agreement is unreasonable as a matter of law.” If the Board is correct, and it is also

---

<sup>3</sup> Fn. 8 of the Board’s Brief, though appearing after this statement, provides no support for the Board’s position. Instead, it raises an issue that was addressed, not by the Superior Court, but by a dissenting opinion to the Decision of the Board. The Decision of the Board and the dissenting Member’s opinion regarding whether the Board has authority to review an IAJ’s “best interest” determination are not on review here. The Board also alludes to this issue at AB 22-23. As the Board properly notes, this issue is not presented by this case and is not properly before this Court.

directed to examine Agreements for “the best interest of the worker,” RCW 51.04.063(3)(e) would be superfluous language. It is self-evident that an Agreement that is in the worker’s best interest would also be a reasonable one, especially if the Board is correct in its assumption that the purpose of CRSSAs is to ensure that workers get maximum financial benefit from their claims.<sup>4</sup> The Board attempts to re-write the statute, borrowing language applied exclusively to CRSSAs presented by unrepresented workers and injecting it into the section which applies to represented workers. This administrative alteration of the statute would render RCW 51.04.063(3)(e) meaningless or superfluous in violation of *Whatcom County v. City of Bellingham*, 128 Wn.2d at 546.

---

<sup>4</sup> The School District should not be interpreted as suggesting that “reasonable as a matter of law” and “the best interest of the worker” constitute the same standard. Reasonable or unreasonable as a matter of law is its own distinct legal standard. See e.g. *Guarino v. Interactive Objects, Inc.*, 122 Wn. App. 95, 123, 86 P.3d 1175 (2004) (holding that “it was not unreasonable as a matter of law” for stockholders to rely on omissions made by company representatives); *Hawkins v. Diel*, 166 Wn. App. 1, 14, 269 P.3d 1049 (2011) (holding that severe emotional distress in response to landlord’s failure to fix a hole in an apartment wall was “unreasonable as a matter of law”); *Pulcino v. Fed. Express Corp.*, 141 Wn. 2d 629, 644, 9 P.3d 787 (2000) (holding that “certain types of [employment accommodation] requests have been found unreasonable as a matter of law”); *State v. Madry*, 12 Wn. App. 178, 529 P.2d 463 (1974) (holding that use or threat of deadly force to recover \$50 from acquaintance was unreasonable as a matter of law). Though not directly presented here, it is the School District’s position that “reasonable as a matter of law” is a considerably less stringent standard than “the best interest of the worker.” Thus, if the Board was intended to review all Agreements for “the best interest of the worker” it would be unnecessary to also review Agreements for “reasonableness.” The “reasonableness” of a CRSSA would be a given if the Agreement satisfied the “best interest of the worker” standard. As a result, RCW 51.04.063(3)(e)’s reasonableness standard would become superfluous.

As the above shows, the Board's decision to reject Mr. Zimmerman and the School District's CRSSA is unsupported by statutory or regulatory authority. Nothing in RCW 51.04.063, its accompanying regulations, or any other statute or regulation gives the Board the power to reject CRSSAs submitted to the Board directly by represented workers based on the Board's determination of "the best interest of the worker." The Board's attempt to give itself that power through administrative fiat should be rejected.

2. THE BOARD DOES NOT HAVE THE INHERENT AUTHORITY TO REVIEW CRSSAS FOR "THE BEST INTEREST OF THE WORKER."

Indeed, the Board's true position does not seem to be that the statute or regulations explicitly give it the power to review Agreements submitted by represented workers for "the best interest of the worker." Instead, the Board's position is best encapsulated by its statement that it may review CRSSA's for "the best interest of the worker" because "[n]othing in RCW 51.04.063 expressly states that" it may not do so. AB at 17. In essence, the Board argues that, absent an explicit prohibition, due to its presumed inherent authority over workers' compensation claims, the Board may use any standard of review for CRSSAs it deems appropriate. AB at 17-18. That the Board would take this position is understandable, considering that, if this Court were to agree, it would give

the Board near-plenary power over CRSSA reviews. The Board's position, however, has two serious flaws.

First, the Board ignores the fact that RCW 51.04.063(3) contains explicit limitations on the Board's power to reject CRSSAs. As noted above, because RCW 51.04.063(3) states that the Board "shall approve" the Agreement, the Board is under a *mandatory duty* to approve CRSSAs unless the agreement satisfies one or more of the criteria listed at RCW 51.04.063(3)(a)-(e). *Erection Co. v. Dep't of Labor & Indus.*, 121 Wn. 2d at 518. RCW 51.04.063(3)(a)-(e) does not include a requirement that the CRSSA be "in the best interest of the worker," therefore the rejection of an Agreement based upon that requirement would be contrary to an explicit statutory restriction on the Board's authority.

Second, even if 51.04.063(3) did not explicitly restrict the Board's power, the Board does not have the authority to unilaterally add an additional criterion to its own statutory review of CRSSAs. Because the Board is an administrative agency created by statute, it "has *no* inherent powers, but only such as have been expressly granted to it by the legislature or have, by implication, been conferred upon it as necessarily incident to the exercise of those powers expressly granted." *State ex rel. Pub. Util. Dist. No. 1 of Okanogan County v. Dep't of Pub. Serv.*, 21 Wn.2d 201, 208-09, 150 P.2d 709 (1944) (citing *Wishkah Boom Co. v.*

*Greenwood Timber Co.*, 88 Wash. 568, 153 P. 367 (1915); *Puget Sound Navigation Co. v. Department of Public Works*, 152 Wash. 417, 278 P. 189 (1929); *Northern Pacific Railway Co. v. Denney*, 155 Wash. 544, 285 P. 452 (1930); *State ex rel. Northeast Transportation Co. v. Schaaf*, 198 Wash. 52, 86 P.2d 1112 (1939); *North Bend Stage Lines, Inc. v. Schaaf*, 199 Wash. 621, 92 P.2d 702 (1939)). Indeed, “[i]t is well settled that an administrative agency is limited to the powers and authority granted to it by the legislature.” *Fahn v. Cowlitz County*, 93 Wn.2d 368, 374, 610 P.2d 857 (1980) *amended sub nom. Fahn v. Civil Serv. Comm'n of Cowlitz County*, 621 P.2d 1293 (1981) (citing *Washington Water Power Co. v. State Human Rights Comm'n*, 91 Wn.2d 62, 65, 586 P.2d 1149 (1978); *Cole v. State Util. & Transp. Comm'n*, 79 Wn.2d 302, 485 P.2d 71 (1971)).

The Board’s argument that it has the power to review for “the best interest of the worker,” absent legislative direction that it cannot, presumes that it has inherent power over the approval of CRSSAs beyond that granted to it by the Legislature. The Board’s position takes the rule that administrative agencies have only delegated power and turns it on its head, requiring the Legislature to spell out each and every thing that an agency is *not* allowed to do, instead of delineating only those things that an agency may do. This position is simply irreconcilable with this state’s

over-century-long rule that “[e]very office under our system of government, from the governor down, is one of delegated powers.” *State v. Seattle Gas & Elec. Co.*, 28 Wash. 488, 495, 68 P. 946 (1902). The Board’s argument that it may consider “the best interest of the worker” because RCW 51.04.063(3) does not explicitly bar it from doing so, and its implicit drastic expansion of administrative authority, should be rejected.

3. THE BOARD’S ARGUMENT THAT THE GOALS OF RCW 51.04.063(3) WOULD BE BEST ADVANCED IF THE BOARD HAD THE AUTHORITY TO REVIEW CLAIMS FOR “THE BEST INTEREST OF THE WORKER” IS A POLICY ARGUMENT PROPERLY ADDRESSED TO THE LEGISLATURE.

In tandem with its argument that it has the inherent authority to review CRSSAs with a standard not authorized by statute or regulation, the Board argues that RCW 51.04.063(3) should be read to include a mandatory Board review for “the best interest of the worker” because “[t]he Legislature’s stated statutory goals of ‘achieving the best outcomes for injured workers’ and ensuring that there are ‘sufficient protections for injured workers’ are best advanced by having the Board consider whether a Claim Resolution Structured Settlement Agreement is in the best interest of the worker, including those workers who are represented by an attorney[.]” AB at 19.

This argument is one based, not on law, but on policy, and is, therefore, best addressed to the Legislature. Indeed, the Legislature devised a system that it felt met its stated goals and provided sufficient protections for injured workers by having either an IAJ, in the case of unrepresented workers, or an attorney of the worker's choosing, in the case of represented workers, ensure that the terms of CRSSAs are in the worker's best interest. The Board's position extends administrative scrutiny beyond what the Legislature felt was sufficient to protect the interests of injured workers. "The [Board] basically is arguing that RCW [51.04.063(3)] needs to be amended to extend" the Board's ability to review CRSSAs submitted by represented workers. *Erection Co. v. Dep't of Labor & Indus.*, 121 Wn.2d at 522. "However, such an argument should be raised before the Legislature, not the court." *Id.*

4. RCW 51.04.069'S REPORTING REQUIREMENTS DO NOT SUGGEST THAT THE BOARD IS REQUIRED TO EXAMINE CRSSAS FOR "THE BEST INTEREST OF THE WORKER."

The Board next argues that RCW 51.04.069's requirement that there be a series of studies on the effect of CRSSAs in 2015, 2019, and 2023 somehow implies that it has the authority to review for and reject Agreements based upon "the best interest of the worker." AB at 18. In full, RCW 51.04.069 states that

On December 1, 2011, and annually thereafter through December 1, 2014, the department shall report annually to the appropriate committees of the legislature on the implementation of claim resolution structured settlement agreements. In calendar years 2015, 2019, and 2023, the department shall contract for an independent study of claim resolution structured settlement agreements approved by the board under this section. The study must be performed by a researcher with experience in workers' compensation issues. When selecting the independent researcher, the department shall consult with the workers' compensation advisory committee. *The study must evaluate the quality and effectiveness of structured settlement agreements of state fund and self-insured claims, provide information on the impact of these agreements to the state fund and to self-insured employers, and evaluate the outcomes of workers who have resolved their claims through the claim resolution structured settlement agreement process.* The study must be submitted to the appropriate committees of the legislature.

*Id.* (emphasis added). As the statutory text shows, RCW 51.04.069 contains nothing that expands the Board's authority to reject CRSSAs under RCW 51.04.063(3) and, in fact, does not use the phrase "best interest of the worker." Though the Board laments that "[i]t is difficult to see how the effectiveness of such agreements can be determined if the Board is precluded from considering the fundamental legislative objective these Agreements are intended to serve – the best interest of the worker," AB at 18, the Board takes a peculiarly narrow view of what RCW 51.04.069 actually mandates be studied. RCW 51.04.069 does not direct a study examining *ex post* if the Board made the right decision in approving

a CRSSA or if a worker obtained maximum benefits or economic advantage from his or her agreement. Instead the studies are directed to make a comprehensive examination of the CRSSA system on workers' long-term personal and financial outcomes, the impact on the State's pension fund, and the economic effect on self-insured employers. *See* RCW 51.04.069. It is difficult to imagine how the Legislature's direction that such studies take place could lead the Board to the conclusion that it has the authority to reject CRSSA's based on its own evaluation of "the best interests of the worker." Such a heavily strained reading of RCW 51.04.069 should be rejected.

5. RCW 51.04.063(3) ASSIGNS THE BOARD A SIGNIFICANTLY MORE THAN MINISTERIAL ROLE IN REVIEWING CRSSAS SUBMITTED BY REPRESENTED WORKERS.

Next, the Board argues that, because the Legislature decided to assign it the authority to review CRSSAs, the Legislature must have intended that the Board undertake an analysis of "the best interests of the worker" in all cases. AB at 21-23. The Board states that this must be the case, because any other interpretation of RCW 51.04.063 would "reduce[] the Board's role to a largely ministerial one and fail[] to use the Board's expertise in any meaningful way." AB at 21. A role is ministerial "where the law prescribes and defines the duty to be performed with such precision and certainty *as to leave nothing* to the exercise of discretion or

judgment[.]” *SEIU Healthcare 775NW v. Gregoire*, 168 Wn. 2d 593, 599, 229 P.3d 774 (2010) (quoting *State v. City of Seattle*, 137 Wash. 455, 461, 242 P. 966 (1926) (emphasis added) (quoting 18 Ruling Case Law (Mandamus) at 116)). The Board’s argument fails in two ways. First, the Board reads RCW 51.04.063(3) unreasonably narrowly. The Board interprets its only task, other than reviewing for “the best interest of the worker,” as “limit[ed]... to verifying that a Claim Resolution Structured Settlement Agreement conforms to the technical requirements of the statute (such as that the worker has reached the required age and that the required time has passed since the claim was filed with the Department of Labor and Industries or self-insured employer)[.]” AB at 22. This may have been true if the Legislature had only given the Board the authority to reject CRSSAs if “[t]he agreement does not meet the requirements of a claim resolution structured settlement agreement.” RCW 51.04.063(3)(b). However, the Board also gave the Board the power to reject agreements if it finds that:

- (a) The parties have not entered into the agreement knowingly and willingly...
- (c) The agreement is the result of a material misrepresentation of law or fact;
- (d) The agreement is the result of harassment or coercion;
- or
- (e) The agreement is unreasonable as a matter of law.

RCW 51.04.063(3). These are questions of mixed law and fact that involve the Board exercising its authority. These decisions are both well beyond the realm of the ministerial and allow the Board “to use [its] expertise in a[] meaningful way.” AB at 21.<sup>5</sup>

Second, even if RCW 51.04.063 did reduce the Board’s role to a ministerial one, the Board’s disappointment with its legislatively mandated task does not provide the Board with authority to unilaterally expand its own ability to reject CRSSAs. Whether the Board feels that the task given to it by the elected branches of government is beneath it is neither controlling nor persuasive authority that would give it the ability to

---

<sup>5</sup> In addition, the Board’s “ministerial” task has proven to be an important check on the approval of defective Agreements. The Board has rejected numerous CRSSAs that were technically deficient. *See, e.g. In re Deloris Burmeiseter*, Dckt. No. 12 S0004 (February 23, 2012) (periodic payment amounts outside statutorily defined range); *In re Ray W. Stiltner III*, Dckt. No. 12 S0014 (June 11, 2012) (one-time payment does not meet statutory requirement that Agreements include periodic payments); *In re Sandy G. Nohra*, Dckt. No. 12 S0019 (June 4, 2012) (Agreement failed to include stipulations mandated by Wash. Admin. Code § 263-12-052(11)); *In re Raymond Prather*, Dckt. No. 12 S0031 (September 10, 2012) (Agreement failed to resolve all aspects of the claim); *In re Lynnetta Castelo*, Dckt. No. 12 S0033 (September 18, 2012) (Agreement failed to include information regarding affect on Claimant’s Social Security benefits); *In re Lorraine A. Findlay*, Dckt. No. 12 S0038 (September 25, 2012) (Agreement ambiguous as to number of claims settled); *In re Gary Gene Beard*, Dckt. No. 12 S0040 (October 8, 2012) (Agreement failed to include amount deducted from final payment due to Social Security overpayment); *In re Robert H. Lund*, Dckt. No. 12 S0049 (November 9, 2012) (Agreement did not contain information regarding amount of attorneys’ fees and other benefits the Claimant was entitled to); *In re Yen Chi Morehead*, Dckt. No. 12 S0050 (November 27, 2012) (Agreement did not include information regarding Claimant’s other benefits, included a payment to an individual other than the Claimant, asked the Board to issue a ministerial order, and failed to include a date for the first periodic payment); *In re Raymond C. Prather*, Dckt. No. 12 S0052 (November 27, 2012) (Board lacked jurisdiction over subject matter of Agreement); *In re Jacquelyn Chany*, Dckt. No. 12 S0054 (December 31, 2012) (Agreement unclear as to affect of Agreement on Claimant’s Social Security benefits and was missing information required under Wash. Admin. Code § 263-12-052).

override a plainly evident legislative mandate to approve CRSSAs absent the criteria listed at RCW 51.04.063(3)(a)-(e). The Board's assertions that a construction of RCW 51.04.063(3) that does not allow it to reject represented worker's CRSSAs for "the best interest of the worker" reduces its role to a "ministerial" one and that its "extensive expertise in workers' compensation matters," AB at 20, should allow it to exceed the authority it is actually given by statute should be rejected.<sup>6</sup>

6. ALLOWING THE BOARD TO EVALUATE THE SETTLEMENT AGREEMENTS OF REPRESENTED WORKERS WOULD UNREASONABLY INFRINGE ON THE PRIVACY RIGHTS OF REPRESENTED WORKERS AND CONFIDENTIAL ATTORNEY-CLIENT COMMUNICATIONS AND WORK-PRODUCT.

Finally, the Board properly notes in its brief that the School District and the Department argued below that allowing the Board to reach beyond the powers explicitly given to it under RCW 51.04.063(3) and conduct an inquiry into whether a CRSSA is in "the best interest of the worker" would unreasonably infringe on the privacy rights of workers and employers and mandate disclosure of protected attorney-client

---

<sup>6</sup> The Employer takes no position in this case in response to the Board's position, articulated at AB 22-23, regarding Board review of the decisions of Industrial Appeals Judges with respect to "the best interest of the worker." ("RCW 51.04.063 should be read as requiring the Board to consider 'the best interest of the worker' when it carries out its responsibility to consider for approval a Claim Resolution Structured Settlement Agreement involving a worker *not* represented by an attorney" AB at 23). While this may or may not be true, a decision by this Court is unnecessary on this issue, as the parties here were both represented by counsel.

communications and work-product. AB at 23. As shown above, when a worker is represented by an attorney, RCW 51.04.063(3) does not allow the Board to make an independent determination of whether the agreement is in the “best interests of the worker.” Instead, that obligation falls to the worker’s attorney. Retaining an attorney allows the worker to both receive advice regarding his or her claim and keep certain information private.

The Board attempts to discount the value of attorney representation and attorney-client privilege in protecting a worker’s personal information in a number of ways. First, the Board argues that workers seeking Board approval of CRSSAs have no privacy rights. AB at 23-26. In support of this position, the Board first notes that “[t]here is nothing in RCW 51.04.063 that evidences any general concern by the Legislature about the privacy of worker’s compensation claimants who enter into Claim Resolution Structured Settlement Agreements.” AB at 23. In essence, the Board argues that, because RCW 51.04.063 does not explicitly give workers privacy rights, no such rights exist. This position ignores the fact that RCW 51.04.063 does not need to spell out a concern for a worker’s privacy for the worker to have a right to privacy. In Washington, both the common law, *Reid v. Pierce County*, 136 Wn.2d 195, 961 P.2d 333

(1998), and the State Constitution, art. I § 7, protect citizens' right to privacy.

The Board provides little, if any, evidence that the simple act of submitting a CRSSA to the Board for approval strips Mr. Zimmerman of his right to privacy. At the outset, the Board fundamentally mischaracterizes the information it demanded when it rejected Mr. Zimmerman and the School District's agreement. In doing so, the Board cites to the fact that Wash. Admin. Code § 263-12-052 requires a CRSSA to include information that might be considered private or confidential. AB at 24. The Board specifically notes the requirements that agreements include the worker's life expectancy, other benefits entitlements, and marital status. *Id.* The Board appears to argue that because Mr. Zimmerman has voluntarily disclosed this specific information in the CRSSA he submitted to the Board, he has forfeited *all* of his privacy rights. AB at 25 (“[N]either the legislature, nor the Board, nor the Department of Labor and Industries<sup>7</sup> considers information about a workers' compensation claimant who is seeking to enter into or obtain approval of a regarding a (sic) Claim Resolution Structured Settlement Agreement private or confidential.”). Such a position is untenable.

---

<sup>7</sup> The Board, while here purporting to articulate the Department's lack of concern with claimant privacy is, in fact, opposed in this case by the Department. As such, any statements by the Board regarding its opinion as to the policies or opinions of the Department should be viewed, at the very least, quite skeptically.

Next, the Board attempts to obscure the fact that it is seeking information well beyond that delineated by both RCW 51.04.063 and Wash. Admin. Code § 263-12-052. The Board dutifully recites the CRSSA requirements contained at Wash. Admin. Code § 263-12-052, but fails to disclose that the CRSSA Mr. Zimmerman and the School District submitted *met all those requirements. Compare CP 56-58 with Wash. Admin. Code § 263-12-052.* The Board has demanded that Mr. Zimmerman and the School District hand over information that the Board has no statutory or regulatory authority to either seek or consider. Such materials include: (1) Mr. Zimmerman’s private financial information, which may include possible spousal support, child support, inheritances, investments, including stocks and property ownership, pensions or retirement plans, and the full gamut of financial investments, Mr. Zimmerman’s debts and obligations including spousal or child support, credit card debts, home foreclosures, debts to friends and family members, or bankruptcies; (2) Mr. Zimmerman’s reasons “why he is willing to relinquish his claim,” including his and his attorney’s candid and confidential assessment of their possibility of full recovery, CP 51; and (3) the School District’s “estimate of the value of the claim or pension reserve.” *Id.* Indeed Mr. Zimmerman and the School District’s own independent assessments of claim value and those of their attorneys and

agents are protected not only by the parties' privacy rights, but also by CR 26(b)(4) and RPC 1.6 which protect attorney-client communications and work-product, especially considering this claim is in the midst of contentious litigation. The Board's assertion that it has not requested any information protected by attorney-client privilege or the work-product doctrine is, simply, demonstrably false. *See* AB at 27.

Though the Board lists two cases in its brief that it says support its unqualified proposition that "an injured worker waives any right to privacy when the worker files a claim for workers' compensation benefits," AB at 25, neither provide authority that allows it to seek private financial information or unquestionably protected litigation claim value estimates. First, the Board cites *Jeffers v. City of Seattle*, 23 Wn.App. 301, 311, 597 P.2d 899 (1979). While *Jeffers* certainly does support the proposition that the right to privacy may be waived, it does not support the Board's case. *Jeffers*'s holding regarding privacy rights is that a civil plaintiff may "by requesting a disability pension and the continuation of it, waive[] his right of privacy *pertaining to his medical condition*, providing that such investigation is carried on in a reasonable manner." *Id.* at 313 (emphasis added). The Board here is seeking information well beyond information relating to Mr. Zimmerman's medical condition. In addition, *Jeffers* involved an investigation by a Police Pension Board which had

statutory investigative authority, something the Board does not possess. *Id.* at 304-08. As a result, *Jeffers* is not instructive in this case.

The Board's reliance on *Mayer v. Huesner*, 126, Wn.App. 114, 121-22, 107 P.3d 152, *review denied*, 155 Wn.2d 1019 (2005) is similarly misplaced. Like *Jeffers*, *Mayer* involved only a very limited waiver of privacy rights related to the claimant's medical condition as a result of her workers' compensation claim. *Mayer*, 126, Wn.App. at 121-22. Indeed, in *Mayer* the claimant had actually signed a medical release, granting her employer the right to access her medical information. *Id.* at 117. As the Court stated, "Ms. Mayer's authorization and application for return to work under the CBA waived *her confidentiality and privacy rights in her medical information.*" *Id.* at 121-22 (internal citations omitted) (emphasis added). Like *Jeffers*, *Mayer* provides no support for the Board's position that Mr. Zimmerman has waived his right to privacy in his financial information or that Mr. Zimmerman and the School District have waived their right to keep attorney-client communications and work-product confidential. Indeed, the Board presents no authority allowing them to demand such information from Mr. Zimmerman and the School District. That the Board feels that it is required to strip the parties of their privacy and confidentiality rights to make its assessment of "the best interest of the

worker,” without any authority permitting such a dramatic intrusion, shows just how far the Board has overstepped its statutory purview.

The Board also dismisses out-of-hand the chilling effect that its ability to sit in judgment of the decisions of attorneys submitting CRSSAs will have on attorneys deciding to submit agreements to the Board. The Board’s decision to reject a claim based upon “the best interests of the worker” standard is a decision by an administrative agency explicitly stating that the worker’s attorney recommended the worker take a bad deal. Indeed, a decision by the Board rejecting an agreement because it is not in “the best interests of the worker” is nothing short of an invitation for a worker to file a Bar complaint or malpractice action against their attorney. Though, as the Board notes, such claims may be frivolous, AB at 28-9, attorneys would be forced to respond to them, expending valuable time, money, and energy. It is likely that would dissuade at least some attorneys from submitting CRSSAs, even if a settlement is in the worker’s best interest.

The Board insinuates that, in doing so, it is trying to protect individuals that fail to hire attorneys “well versed in the specialized field of workers’ compensation law.” AB at 27. What the Board does not state, however, is that the issue of attorney competence is not a matter which the Board has the authority to address, but is instead governed by the Rules of

Professional Conduct and the Washington State Bar Association. The very first rule of professional conduct requires that: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.” RPC 1.1. It is inappropriate for the Board to substitute its judgment for the advice and counsel of a worker’s attorney. In fact, determining whether a lawyer has failed to act in the best interest of their client has never been the role of the Board nor has the Legislature conferred this responsibility upon the Board with RCW 51.04.063(3). This, again, shows the far-reaching negative effects of the Board’s erroneous construction of RCW 51.04.063(3). The Board’s attempt to infringe on Mr. Zimmerman and the School District’s right to privacy and right to keep attorney-client communications and work-product confidential in a misguided attempt to apply an unlawful administrative standard should be rejected by this Court.

**F. CONCLUSION**

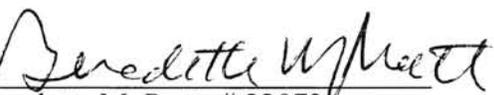
Based on the foregoing points and authorities, the School District requests that this Court affirm the Superior Court’s decision reversing the Board’s Decision and remanding the claim.

/

/

RESPECTFULLY SUBMITTED this 15<sup>th</sup> day of February, 2013.

PRATT, DAY & STRATTON,  
PLLC

By   
Bernadette M. Pratt, # 22073  
Eric J. Jensen, # 43265  
Attorneys for Respondent, South  
Kitsap School District

COURT OF APPEALS  
THE STATE OF WASHINGTON  
DIVISION II

BOARD OF INDUSTRIAL  
INSURANCE APPEALS,

Appellant,

v.

SOUTH KITSAP SCHOOL  
DISTRICT, DANIEL B.  
ZIMMERMAN, and  
DEPARTMENT OF LABOR AND  
INDUSTRIES,

Respondents.

No. 43688-4-II

**CERTIFICATE OF  
SERVICE**

I hereby certify that on the 15<sup>th</sup> day of February, 2013, I filed  
and served the **Brief of Respondent, South Kitsap School District and  
this Certificate of Service** upon the following parties, addressed as  
follows:

**ORIGINAL AND ONE COPY VIA PRIORITY MAIL TO:**

David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300  
Tacoma, WA 98402

ORIGINAL

**COPIES VIA E-MAIL AND FIRST-CLASS MAIL TO:**

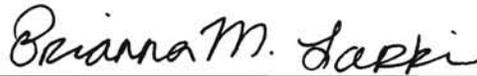
David C. Snell  
Kathryn C. Comfort  
Attorneys At Law  
POB 11303  
Tacoma, WA 98411-0303  
[dsnell@sswc-law.com](mailto:dsnell@sswc-law.com)  
[kcomfort@sswc-law.com](mailto:kcomfort@sswc-law.com)

Penny L. Allen  
Sr. Counsel  
Evelyn Fielding Lopez  
Sr. Assistant Attorney General  
Office of the Attorney General  
POB 40121  
Olympia, WA 98504-0121  
[pennya@atg.wa.gov](mailto:pennya@atg.wa.gov)  
[evelynf@atg.wa.gov](mailto:evelynf@atg.wa.gov)

Spencer W Daniels  
Office of the Attorney General  
POB 40108  
Olympia, WA 98504-0108  
[Spencer.daniels@atg.wa.gov](mailto:Spencer.daniels@atg.wa.gov)

Kathryn Wyatt  
Office of the Attorney General  
POB 40108  
Olympia, WA 98504-0108  
[Kathryn.wyatt@atg.wa.gov](mailto:Kathryn.wyatt@atg.wa.gov)

DATED this 15<sup>th</sup> day of February, 2013, at Tacoma, Washington.



\_\_\_\_\_  
Brianna M. Larkin