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

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BOARD OF INDUSTRIAL INSURANCE APPEALS,

Appellant,

v.

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

Respondents.

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**REPLY BRIEF OF APPELLANT**

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## I. INTRODUCTION

After a hundred years, in 2011 the Legislature for the first time authorized certain injured workers to give up their rights to future workers' compensation benefits in exchange for a cash settlement. The Legislature assigned to the Board of Industrial Insurance Appeals the responsibility to review and approve these settlement agreements.

In this case, the Board was asked to approve a claim resolution structured settlement agreement in which worker Daniel Zimmerman, a single man with one dependent, who had received workers' compensation benefits nearly continuously for almost 20 years and who has 24 more years of life expectancy, is agreeing to give up his right to receive future workers' compensation benefits in exchange for \$60,000. The Board declined to approve the agreement because the parties had given the Board "no explanation of how Mr. Zimmerman will support himself" after the \$60,000 is used up.

The Employer says, because the worker is represented by an attorney, the statutes preclude the Board from concerning itself with the practical problem of how the worker will support himself after the settlement funds have run out. But did the Legislature really intend that the Board should not have sufficient information to make its consideration of such a settlement agreement more than a ministerial act? Did the

Legislature really intend, in this novel statutory departure from its traditional, absolute protection of injured workers, that the Board have no meaningful role in ensuring that workers are protected? The Board urges this Court to reject the Employer's narrow reading of the statutes.<sup>1</sup>

## II. ARGUMENT IN REPLY

### A. **The Board's Decision Is Based on Language in the Statute, Not on Some Inherent Authority, as the Employer Suggests**

Employer South Kitsap School District argues that "the Board does not have the authority to unilaterally add an additional criterion to its own statutory review of" claim resolution structured settlement agreements, and that the Board is relying on some "inherent" authority that it does not have. Brief of Respondent at 20.

Contrary to the Employer's argument, the Board has never taken the position that it has plenary authority over workers' compensation matters unless expressly limited by statute, nor did it rely in this matter on any such claim of inherent authority. As noted by the Board in its decision, the Board relied on the provision in RCW 51.04.063(3)(b), that it may reject a settlement agreement on the basis that: "The agreement does not meet the requirements of a claim resolution structured settlement agreement." With reference to that criterion, the Board stated: "As part of

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<sup>1</sup> Both Respondent Daniel B. Zimmerman and Respondent Department of Labor and Industries have advised the Court that they do not intend to file briefs in this appeal.

that determination, we believe we must evaluate whether the agreement is in the best interest of the worker.” CP 49, AR 3. The Employer may disagree with the Board’s interpretation of the statute, but the Employer is incorrect in suggesting that the Board did not base its decision on language in the statutory section specific to the Board.

**B. Even Under a “Plain Meaning” Analysis, the Board’s Interpretation of the Statute Should Be Upheld**

In this case, a majority of the Board, in a two to one decision, read RCW 51.04.063 as authorizing the Board to consider “the best interest of the worker” in deciding whether to approve a settlement agreement involving a worker represented by an attorney. This absence of unanimity should be some indication that, as the Board argued in its opening brief to this Court, the statute is ambiguous in this regard.

The Employer continues to maintain that the statute is not ambiguous and that the plain language of the statute supports its position. However, even under a “plain meaning” analysis, properly applied, the Board’s interpretation of the statute should be upheld.

The plain meaning of a statute is discernible by examining everything the legislature has said in the statute itself and any related statutes that reveal legislative intent regarding the provision at issue. . . . The meaning of words in a statute is not determined from those words alone but from all the terms and provisions of the act as they relate to “ “ the subject of the legislation, the nature of the act, the general object to be accomplished and consequences that

would result from construing the particular statute in one way or another.” ’ ’ ”

*In re Custody of E.A.T.W.*, 168 Wn.2d 335, 343-44, 227 P.3d 1284 (2010) (citations omitted.) *Accord, Probst v. WA State Dep't of Retirement Sys.*, 167 Wn. App. 180, 186, 271 P.3d 966 (2012).

All of the factors the court is to take into account in a plain meaning analysis favor the Board's interpretation. As to the "terms and provisions of the act," nothing in RCW 51.04.063 expressly states that only an industrial appeals judge may consider the best interest of the worker. That this language appears in the subsection dealing with an industrial appeals judge's review of a claim resolution structured settlement agreement involving an unrepresented worker is not conclusive. The provision in the subsection dealing with Board review upon which the Board majority relied in rejecting the agreement here, that "[t]he agreement does not meet the requirements of a claim resolution structured settlement agreement," RCW 51.04.063(3)(b), is phrased broadly enough to encompass the best interest of the worker as a criterion.

Moreover, other sections of the 2011 act suggest that "the best interest of the worker" standard should be applied by the Board in its review. In RCW 51.04.069 the Legislature directed that an outside researcher conduct a study of the effectiveness of claim resolution

structured settlement agreements, including evaluating “the outcomes of workers who have resolved their claims” through the agreement process. It is difficult to see how the effectiveness of such agreements can be determined if the Board is limited in the information it is provided in its review of agreement for approval. Thus, the language of the statutory provisions do not preclude the Board from considering the best interest of the worker in reviewing an Agreement involving a represented worker.

Turning to “the nature of the act” and “the general subject to be accomplished,” these factors strongly support the Board’s interpretation of the statute. As discussed in the Board’s opening brief, the claim resolution structured settlement agreement process in the 2011 act represented the first time in the history of the state’s workers’ compensation system that a worker has been authorized to waive or compromise his or her right to benefits in any manner. The 2011 act is a departure from the non-waiver principle that has been in the workers’ compensation statutes since their inception and that has been upheld consistently by the courts. In light of this, the provisions of RCW 51.04.063 should be strictly construed to prevent an injured worker from imprudently waiving his or her right to workers’ compensation benefits.

In addition, as noted in the Board’s opening brief, language in the intent sections of the 2011 act supports the Board’s interpretation. The

finding section of the 2011 act states, in part: “The legislature finds that Washington state’s workers’ compensation system should be designed to focus on achieving the best outcomes for injured workers.” Laws of 2011, 1st Spec. Sess., ch. 37, § 1. This language is repeated in RCW 51.04.062, the findings section related to claim resolution structured settlement agreements, which goes on to provide that certain workers would benefit from such agreements “provided that sufficient protections for injured workers are included.” The 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, even when the worker is represented by an attorney, since Board review provides a second, independent look at the agreement.

Looking at “the general subject to be accomplished” under the plain meaning test, RCW 51.04.063 should be read as authorizing the Board to consider the best interest of the worker in such cases. In RCW 51.04.063, the Legislature provided that the Board is to approve all claim resolution structured settlement agreements. Presumably, the Legislature entrusted this responsibility to the Board because the Board has expertise in workers’ compensation matters, and, as an independent

agency from the Department of Labor and Industries, is impartial and has no stake in the outcome.

Interpreting RCW 51.04.063 as limiting the Board 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) reduces the Board's role to a largely ministerial one and fails to use the Board's expertise in any meaningful way. The Employer argues that under its interpretation of the statute the Board still has a meaningful role to play, even if the Board's role is reduced to ensuring that the technical requirements of the statute are complied with. Brief of Respondent at 26-27. The Employer notes that the Board has rejected several proposed agreements for failure to meet these technical requirements. *Id.* at 27 n.5. But this fact supports the Board, not the Employer. If Board review is necessary to ensure that counsel representing injured workers in settlement agreements have done the calculations required by the Act correctly, how much more important is it that the Board review the underlying "deal" that has been arranged for the injured worker?

Again, then, the “general subject to be accomplished” by the Legislature’s providing for Board approval of claim resolution structured settlement agreements in RCW 51.04.063 is best accomplished by reading the statute as authorizing the Board to consider “the best interest of the worker,” whether represented or not.

The Employer argues that if there is a deficiency in the authority granted to the Board under RCW 51.04.063, the remedy is to seek a change from the Legislature. However, in light of the evident legislative intent to protect workers that is reflected in the 2011 act and preserved in the unamended sections of RCW 51.04, any question regarding the Board’s authority should be resolved in favor of giving the most protection possible to the workers.

In sum, even under a plain meaning analysis, properly applied, the Board properly considered the best interest of the worker in deciding whether to approve this structured settlement agreement. The Court should reject the Employer’s invitation to focus on certain words alone, in isolation and removed from the statutory context. *Custody of E.A.T.W.*, 168 Wn.2d at 343; *Probst*, 167 Wn. App. at 186.

**C. That RCW 51.04.063(3) Does Not Include the Term “the Best Interest of the Worker” Is Not Conclusive**

The Employer argues that the Board is precluded from considering “the best interest of the worker” because that term is not included in RCW 51.04.063(3), as it is in RCW 51.04.063(2)(j). This difference is not conclusive, however. It has been held in at least one similar situation that the inclusion of such language in one section of a statute and its not being included in a different section does not mean that the agency cannot consider whether the settlement is in the best interest of the worker. *See People ex rel. PPG Industries, Inc. v. Schneiderman*, 92 Ill. App. 3d 546, 46 Ill. Dec. 906, 414 N.E.2d 1059 (1981).

In the *Schneiderman* case, the employer and the worker argued that the Industrial Commission was required to approve a settlement agreement under a certain section of the statutes. The parties noted that the section under which they sought the Commission’s approval did not contain language that the Commission find that the agreement is “in the best interests of the parties,” as a different section of the statutes required. From this difference in statutory language, the parties argued that the Commission had no authority to deny approval of their agreement, but could only admonish the worker to make he understood what he was

agreeing to. *Schneiderman*, 414 N.E.2d at 1061-62. The court rejected this argument, stating:

Although the statutory wording cited by relator gives some color to its claim, we are unconvinced that section 23 gives no discretion to the Commission in deciding whether to approve settlements. Had the legislature wished for the Commission merely to admonish the claimant, it would have so stated directly. We conclude that the Commission has the power and responsibility to refuse approval of a settlement under section 23 . . . .

*Id.* at 1062. Likewise, here if the Legislature had intended that the Board not be able to consider the best interest of the worker in reviewing settlement agreements involving represented workers, it would have said so more explicitly.

**D. That “the Best Interest of the Worker” Is Not Listed in the Board’s WAC Rule Does Not Mean the Board Cannot Use This Standard**

The Employer argues that because the Board did not set out “the best interest of the worker” in its rule on claim resolution structured settlement agreements, WAC 263-12-052, the Board is precluded from using this standard. Brief of Respondent at 14-16.

The Employer makes too much of “the best interest of the worker” not appearing in the Board’s rule. No requirement exists that the Board’s rule mirror the statute exactly. Moreover, the Board’s rule applies to settlement agreements submitted by both represented and unrepresented

workers. Under the Employer's theory, the omission of "the best interest of the worker" in the rule would mean that the industrial appeals judge could not apply this standard to an agreement involving an unrepresented worker, which would be contrary to the statute, even under the Employer's reading of the statute. Nor does the Board understand the Employer to be suggesting that, if the Board were to add this language to the rule, it would suddenly mean that the Board could consider "the best interest of the worker" in its review of settlement agreements involving represented workers.

**E. To Consider Approval of the Settlement Agreement, the Board Should Have as Much Information as the Parties, Not Less**

The Legislature has charged the Board with the responsibility of approving claim resolution structured settlement agreements. To properly consider whether an agreement should be approved, the Board should have as much information as the parties to the agreement did, not less, as the Employer argues.

From the material submitted to the Board by the Employer and worker in this case, the Board knows the following:

- Mr. Zimmerman is single with one dependent.
- Mr. Zimmerman has received time loss payments nearly continuously between 1991 and 2011, as well as some vocational training benefits.

- Mr. Zimmerman's remaining life expectancy is 24 years.
- The amount of the proposed settlement payout is \$60,000, over a 7-month period.

CP 56-57, AR 10-11.

In order to approve the settlement agreement, the Board reasonably asked the parties to provide it with the following information:

- What is the amount of the pension reserve (i.e., what is the value of the potential workers' compensation benefits that Mr. Zimmerman is giving up)?
- Is there some reason, relating to his claim, why Mr. Zimmerman would not be in a position to receive additional workers' compensation benefits?
- Is there some other source of income that Mr. Zimmerman has or expects that would make it less necessary for him to rely on further workers' compensation benefits?
- Is there some other reason why Mr. Zimmerman needs a lump sum cash payment immediately?

CP 51, AR 5. The Board justifiably believed it needed this information in order to determine whether the agreement was in the best interest of the worker.

The Employer contends that the correct standard for considering agreements involving represented workers is not "the best interest of the worker," but rather, whether the agreement is "unreasonable as a matter of law." RCW 51.04.063(3)(e). Even under the "unreasonable as a matter of law" standard advocated by the Employer, the Board has a reasonable

need for the information it requested here. Yet the Employer's position is that the Board must approve the agreement without any additional information. The standard for Board approval advanced by the Employer is not really the "unreasonable as a matter of law" standard, but rather the "just trust us" standard. The standard actually advocated for by the Employer undercuts any true review role by the Board. It is the Employer's, not the Board's, interpretation that would make portions of the statute surplusage, by making the language in RCW 51.04.063 requiring that the Board's "approve" settlement agreements essentially a meaningless act.

**F. The Board Is Not Invading the Privacy of the Parties to the Settlement Agreement**

The Board is not invading the privacy of the parties to the Settlement Agreement. Contrary to the Employer's suggestion, the Board is not seeking confidential, internal documents from the parties. The Board has not asked for or required the Employer to provide "its confidential claim valuation," as the Employer represents. Brief of Respondent at 4. But the Board does need input from the parties as to why it makes some sense for the injured worker to agree to the settlement.<sup>2</sup>

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<sup>2</sup> Contrary to the Employer's suggestion, the Board has never indicated that in order for it to approve a claim resolution structured settlement agreement, it must "ensure that workers get *maximum* financial benefit from their claims." Brief of Respondent at 18 (emphasis added). *See also* Brief of Respondent at 25.

The information requested by the Board is not secret information as between the parties to the agreement. A section of the Board's rules, which applies to agreements involving both represented and unrepresented workers and which the Employer does not challenge, requires the parties presenting the agreement to the Board for approval to state the following: "The parties have represented the facts and the law to each other to the best of their knowledge." WAC 263-12-052(11)(n). The information requested by the Board presumably was disclosed between the parties; it is only the Board from whom information vital to determining whether the agreement should be approved is being withheld.

The Employer contends that there is a privacy right, based in common law and the state constitution, that protects the parties from providing the information the Board has requested here. Brief of Respondent at 29-30. It is clear, however, that the Legislature does not agree: under RCW 51.04.063 (even as interpreted by the Employer) an industrial appeals judge is authorized, indeed required, to make searching inquiries of unrepresented workers. The Employer never explains how the purported common law and constitutional rights to privacy attach to some workers by not to others. Whether workers represented by counsel have greater privacy because they are represented is a different question from what degree of privacy all workers have.

The Employer's efforts to distinguish the case law relied upon by the Board are misplaced. Brief of Respondent at 32-33. The Employer argues that the case of *Jeffers v. City of Seattle*, 23 Wn. App. 301, 597 P.2d 899 (1979), does not apply because the information involved there was limited to the plaintiff's medical condition and "[t]he Board here is seeking information well beyond information relating to Mr. Zimmerman's medical condition." Brief of Respondent at 32. In the *Jeffers* case the issue was whether the plaintiff still qualified for a disability pension, and his current medical condition was the only relevant factor. In *Mayer v. Huesner*, 126 Wn. App. 114, 107 P.3d 152, review denied, 155 Wn.2d 1019 (2005), the court did not rely solely on the medical release form signed by the employee, as the Employer here suggests, but also on the employee's "application to return to work under the CBA [collective bargaining agreement]." *Mayer*, 126 Wn. App. at 122. As in *Jeffers*, the only issue in the *Mayer* case happened to be the employee's medical condition.

While the information involved in the *Jeffers* and *Mayer* cases happened to be medical records, what the cases stand for is the proposition that an application for benefits or approval puts into issue the information needed by the decision maker to grant the benefits or approval requested. Here, the Employer and Mr. Zimmerman were requesting Board approval

of their proposed settlement agreement. This puts into issue all the information the Board needs to determine whether or not to grant the requested approval. The parties to a claim resolution settlement agreement cannot have it both ways—they cannot submit the agreement to the Board for approval under the statute and at the same time claim a privacy interest in the information the Board needs in order to consider whether the agreement should be approved under the statute.

**G. Any Concerns About a Chilling Effect on Attorneys Agreeing to Represent Injured Workers in Claim Resolution Structured Settlement Agreements Are Best Addressed Through Effective Attorney-Client Communications**

The Employer argues that “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” and will have a chilling effect on attorneys agreeing to represent injured workers in claim resolution structured settlement agreements. Brief of Respondent at 34. The Employer’s concerns, for which it provides no factual support, are overblown and, in any event, can be addressed through effective attorney-client communications.

Many situations exist where an agreement between parties must still be submitted to a court or other tribunal for approval. Frequent

examples are class action settlements and plea bargain agreements. It is incumbent on the attorney to explain to the client that, even though both parties believe the terms of the agreement are mutually beneficial, the proposed agreement still must satisfy the court or other tribunal and might be rejected. Properly explained, this circumstance should not lead to bar complaints or malpractice actions.

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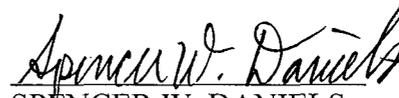
### III. CONCLUSION

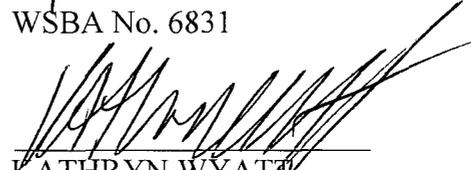
When all is said and done, after all the parsing of the provisions of the statute is over, the question asked by the Board remains: How is an injured worker like Mr. Zimmerman supposed to support himself after the settlement payment has run out? Without the Board's being able to answer that question, any ostensible "approval" by the Board is, at best, meaningless, and, at worst, fundamentally misleading.

For the reasons set forth above, this Court should reverse the trial court and affirm the Board's order.

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

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I certify that on the 15th day of April 2013, I caused a copy of the *Reply Brief of Appellant* to be filed in Division II of the Washington State Court of Appeals.

Signed this 15th day of April, 2013, in Olympia, Washington.



BECKY MITCHELL  
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