

No: 47672-0-II

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

TIMOTHY NELSON

Plaintiff/Appellant

vs.

DEPARTMENT OF LABOR & INDUSTRIES, STATE OF

WASHINGTON

Defendant/Respondent

BRIEF OF APPELLANT

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I. INTRODUCTION.

This is an appeal of a lien order entered by the Department of Labor & Industries with respect to a third party settlement. Plaintiff Nelson respectfully states the decision and order limits his rights under chapter 51.24 RCW in a way that conflicts with the language and purpose of the statute. Specifically, the Department has unilaterally determined certain costs are not to be considered when calculating the distribution formula.

The Department of Labor & Industries has unilaterally limited the cost sharing requirement of RCW 51.24.060 to those costs incurred in relation to the particular settling defendant where a multi-defendant litigation is involved. The limitation is a creation of the Department. The statute contains no such limitation. The impact of the limitation is a disproportionate share of the cost burden being borne by the injured worker in direct contravention of RCW 51.24.060 and in direct contravention of the requirement that Title 51 be interpreted for the benefit of the injured worker.

The facts involved in this cause are not in dispute. Timothy Nelson was injured in the course of his employ. He brought an action against multiple third party defendants. He settled against one of the third party defendants. The Department states its lien can only be reduced by costs

directly attributable to the settling defendant, even though suit had been brought against multiple defendants.

Mr. Nelson contends he is entitled to have all litigation costs applied to the distribution formula, not just the costs attributable to the claim against the defendant who settled.

II. ASSIGNMENTS OF ERROR

J. Nelson assigns error to Finding of Fact 1.2 to the extent that it incorporates the last sentence of Finding of Fact 5 from the Board's order if that sentence is interpreted as meaning \$6,523.23 is the total of all reasonable costs that should have been included in the distribution formula.

K. Nelson assigns error to Conclusion of Law 2.2 to the extent that it adopts Conclusion of Law 3 from the Board's order.

L. Nelson assigns error to Conclusion of Law 2.2 to the extent that it adopts Conclusion of Law 4 from the Board's order.

M. Nelson assigns error to Conclusion of Law 2.3.

N. Nelson assigns error to Conclusion of Law 2.4.

O. Nelson assigns error to 3.1 of the Judgment section of the Superior Court's order.

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Q. Nelson assigns error to 3.3 of the Judgment section of the Superior Court's order.

R. Nelson assigns error to the Superior Court's failure to award him his attorney fees and costs pursuant to RCW 51.52.130.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

G. Whether L&I's interpretation of "reasonable costs" applicable to the distribution formula contained in RCW 46.24.060 is entitled to any deference.

H. RCW 51.24.060(1)(a) provides "reasonable costs" in the course of pursuing third party recovery are to be shared by the Department and the injured worker. The Department has unilaterally limited "reasonable costs" to those costs directly related to the settling third party where multiple third parties are involved in a litigation. Should the Department be permitted to unilaterally define "reasonable costs" in a manner not contained in the language of the statute to the detriment of the injured worker?

I. Whether L&I has discretion to unilaterally determine what "reasonable costs" of a litigation should be included in the RCW 51.24.060 distribution formula where that statute states the Department is to petition a court if it feels costs are not reasonable to include.

J. If L&I can define RCW 51.24.060 to exclude costs related to non-settling third parties, can it do so without going through required rulemaking procedures?

K. If the Department's interpretation of the lien statute does not constitute rulemaking, has the Department erroneously interpreted or applied the lien statute in its adjudication of Mr. Nelson's case?

L. Should Mr. Nelson be awarded attorney fees and costs?

IV. STATEMENT OF CASE

The underlying third party case is founded on a motor vehicle collision. Timothy Nelson was seriously injured when a motor vehicle operated by a third party ran a stop sign and struck the vehicle he was operating in the course of his employ. CP 107.

Suit was filed against various defendants. A road design claim against Pierce County was dismissed on summary judgment. Subsequent to that dismissal, settlement with the negligent third party driver defendant took place. CP 142.

The Department of Labor & Industries made a lien calculation. CP 101-2. Mr. Nelson opposed the Department's calculation, pointing out that the Department had included only costs directly related to the settling defendant in its calculation. CP 100. The Department responded by stating that only those costs directly related to Mr. Nelson's claim against

the settling negligent driver could be considered in the lien calculation. CP 147, lines 19-26. Costs related to the road design claim against Pierce County or any other third party could not be included. When Mr. Nelson asked where in the WAC this rule could be found, he was told there was no rule, the Department was simply applying the statute. CP 149, lines 9-12.

Mr. Nelson told the Department he had no problem with the mathematics of the calculation. He did, however, have a problem with the variables used because not all costs were included. CP 100.

Mr. Nelson asked L&I to reconsider its lien calculation; it denied reconsideration. CP 60. Nelson then appealed to the Board of Industrial Insurance Appeals. CP 57. The Board issued a decision and order confirming L&I's lien calculation. CP 38. Nelson filed a Petition for Review of Proposed Decision and Order. CP 14. The Petition was denied. CP 10. Appeal to Pierce County Superior Court followed. CP 1. Pierce County Superior Court affirmed the Board's decision and order. CP 185. This appeal timely followed. CP 190.

The facts are not in dispute. The issue appealed is a question of law of first impression.

V. ARGUMENT

1. L&I's interpretation of "reasonable costs" in RCW 51.24.060 is entitled to no deference.

L&I's interpretation of the law is reviewed *de novo*. If a statute is ambiguous, weight is given to an agency's interpretation only if it is within L&I's special expertise. An agency cannot by interpretation amend or modify a statute. Hansen Baking Co. v. Seattle, 48 Wn.2d 737, 296 P.2d 670 (1956); Pierce County v. State, 66 Wn.2d 728, 404 P.2d 1002 (1965).

The court has ultimate authority to interpret a statute. Deference is given to an agency's interpretation "only if (1) the particular agency is charged with the administration and enforcement of the statute, (2) the statute is ambiguous, and (3) the statute falls within the agency's special expertise." Bastain v. Good Exp., Inc., 159 Wn.2d 700, 716, 153 P.3d 846 (2007). All three requirements must be met for deference to the agency's interpretation of a statute to be given. The first is met in the case at bar; the second and third requirements are not.

RCW 51.24.060 is unambiguous; it requires cost reduction before lien calculation, and it does not limit reasonable costs to those associated with a particular settling party.

What should constitute "reasonable costs" in a litigation does not fall within L&I's special expertise. L&I's expertise relates to labor and

industries. Its special expertise does not relate to what litigation costs ought to be included for lien calculation purposes.

L&I's interpretation of the meaning of "reasonable costs" in the statute is entitled to no deference.

2. The Department does not have the discretion under RCW 51.24.060 to unilaterally determine which costs of litigation are reasonable to include in the distribution formula.

RCW 51.24.060 controls the lien available to the Department where an injured worker seeks recovery from third persons. It provides reasonable costs and reasonable attorneys' fees are to be paid proportionately by the injured worker and the Department. RCW 51.24.060(1)(a). After proportionate reduction, it provides the injured worker is to be paid 25% of the balance. RCW 51.24.060(1)(b). The remainder is to be paid the Department to the extent necessary to reimburse for benefits paid. RCW 51.24.060(1)(c).

The statute emphasizes the Department is required to pay its proportionate share of the costs and reasonable attorney fees, up to the extent of benefits paid. RCW 51.24.060(1)(c)(i). The Department's proportionate share is determined by dividing the gross recovery amount into the benefits paid amount and multiplying that by the costs and reasonable attorney fees incurred by the injured worker. RCW 51.24.060(1)(c)(ii). The

Department's lien is determined by subtracting the result of the proportionate share calculation from the benefits paid amount. RCW 51.24.060(1)(c)(iii). Any remaining balance belongs to the injured worker. RCW 51.24.060(1)(d). "[T]he department and/or self-insurer may require court approval of costs and attorneys' fees or may petition a court for determination of the reasonableness of costs and attorneys' fees;" RCW 51.24.060(1)(a).

Tobin v. Department of Labor & Industries, 169 Wn.2d 396, 239 P.3d 544 (2010) involved interpretation of RCW 51.24.060. In Tobin the Department argued it was authorized to include pain and suffering in its distribution calculation. As support the Department cited an amendment to the statute which defined "recovery" as "all damages except loss of consortium." RCW 51.24.030(5).

The Supreme Court disagreed with the Department. It stated RCW 51.24.030 needed to be read in context with RCW 51.24.060. The Supreme Court stated, if the legislature intended to include pain and suffering in the "recovery" definition, it could have defined "recovery" to include all non-economic damages except for loss of consortium. Alternatively, the legislature could have expressed which types of damages the statute is meant to provide compensation for by defining "reimburse," which it did not do. Id. at 402.

Similarly, the language of RCW 51.24.060 provides the distribution formula is to include reduction for “reasonable costs.” It does not attempt to define “reasonable costs.” Instead it provides a remedy for the Department if it feels costs might be unreasonable. RCW 51.24.060(1)(a). In this case, and all other cases, the Department has unilaterally determined it not reasonable to include in the distribution formula any cost not directly related to the settling defendant even though the cost was incurred in the same litigation. CP 147, lines 19-26. The Department thus imposes its own limiting definition on “reasonable costs” not contained in the statute. It does not have the discretion to impose its own definition of “reasonable costs.”

Hi-Way Fuel Co. v. Estate of Allyn, 128 Wn.App. 351, 115 P.3d 1031 (Div. 2, 2005) addressed the distribution formula contained in RCW 51.24.060. In that case the Department unilaterally disallowed certain costs. The Court of Appeals found the Department lacked discretion under RCW 51.24.060 to unilaterally deduct certain costs and stated the Board erred in upholding the deduction. The Court of Appeals pointed out that the remedy under the statute was for the Department to petition the court if it found certain costs unreasonable; it did not have the discretion to unilaterally determine certain costs were not includable. The Court of Appeals stated this indicated the legislature had “clearly contemplated and

provided a mechanism for review of attorney fees and litigation costs.” Id. at 363. It noted: “The Department and Hi-Way point to no other authority suggesting a unilateral right to reduce litigation costs.” Id.

The Department’s position is that, where an injured worker brings claims against multiple third parties and settles with one of them, only those costs directly attributable to the claims against the settling defendant may be used to reduce the lien. In the case at bar, for example, Petitioner Nelson brought a claim against Pierce County (among others) as part of the same cause. The claim was dismissed on summary judgment. The Department’s position is that no costs related to the Pierce County claim may be considered a “cost” in its lien calculation applicable to the settlement with the negligent driver. CP 147, lines 19-26.

RCW 51.24.060 makes no such cost limitation. RCW 51.24.060 states “the costs and reasonable attorney fees shall be paid proportionately by the injured worker or beneficiary and the department.” RCW 51.24.060(a). It does not limit costs incurred to those strictly related to the settling third party.

RCW 51.24.060(1)(c)(ii) re-emphasizes that the Department is to pay its proportionate share of costs. The statute nowhere limits the proportionate share of costs to those costs strictly related to the settling third party where multiple third parties are involved.

The Department has unilaterally restricted the language of the statute to the detriment of the injured worker. It has unilaterally limited its share of “reasonable costs” to mean only those costs directly related to the settling third party and has excluded costs incurred in pursuit of other third parties, such as Pierce County. It lacks the discretion to do this.

3. The Department’s interpretation of the lien statute to exclude costs of workers pursuing third party claims other than those litigation costs directly related to the settling third party constitutes rulemaking without following required rulemaking procedures.

The interpretation of RCW 51.24.060 to exclude certain costs by the Department constitutes an invalid exercise of rulemaking. The Department has taken the position that it is merely implementing a scheme imposed by an unambiguous statute. CP 149, lines 9-12. In fact it has imposed an interpretation of certain undefined terms in the statute in a way that limits a worker’s recovery on third party claims to an extent not expressed in the statute.

The significance of the Department’s failure to follow rulemaking procedures is that it renders the Department’s determination of lien in this case invalid. “The remedy when an agency has made a decision which should have been made after engaging in rule-making procedures is invalidation of the action.” Hillis v. State, Dept. of Ecology, 131 Wn.2d

373, 400, 932 P.2d 139 (1997). “Rules are invalid unless adopted in compliance with the APA [Administrative Procedure Act].” Id. at 398. RCW 34.05.570(2)(c) provides a court shall declare a rule invalid if it was adopted without compliance with statutory rulemaking procedures.

The question, thus, is whether the Department’s interpretation of the lien statute constitutes a rule. The definition of “rule” is found at RCW 34.05.010(16). RCW 34.05.010(16) states in relevant part: “‘Rule’ means any agency order, directive, or regulation of general applicability. . . which establishes, alters, or revokes any qualification or requirement relating to the enjoyment of benefits or privileges conferred by law.” RCW 34.05.010(16)(c).

The Department states it has interpreted the lien statute in a way that applies to all individuals settling third party actions. CP 79, paragraph 14. It has general applicability. Accordingly, it meets the initial pre-requisite for being considered a rule. However, for the Department’s interpretation to be considered a rule, it must also meet one of the five rule categories found in RCW 34.05.010(16). Hillis at 399. The Department’s interpretation falls under category (c).

RCW 34.05.010(16)(c) defines as a rule any agency order, directive, or regulation of general applicability which establishes or alters any qualification or requirement relating to the enjoyment of benefits or

privileges conferred by law. In the circumstance of third party claims by injured workers, a statute confers the privilege of bringing a third party claim in addition to receiving industrial insurance benefits. The statute states:

The injured worker or beneficiary shall be entitled to the full compensation and benefits provided by this title regardless of any election or recovery made under this chapter.

RCW 51.24.040. The Department's interpretation of RCW 51.24.060 alters this benefit by limiting the injured worker's lien reducing litigation costs to only those litigation costs related to the settling third party. It is an alteration because RCW 51.24.060 nowhere places a limitation on the third party litigation costs which are to be applied; the limitation is a creation invented by the Department without going through proper rulemaking procedures. The limitation is accordingly invalid.

The Department of Ecology in the Hillis case made decisions without rulemaking regarding water permits. In that case, as is argued here, Ecology argued it was merely implementing the statute, not changing it. The Washington Supreme Court rejected Ecology's position, stating:

While Ecology is correct that the requirements to actually acquire a water permit remain the four requirements set out in the statute, RCW 90.03.290, water applicants have the right under the statute to have the application investigated and decided upon. RCW 90.03.290 creates this right. Therefore, when Ecology sets

out priorities and establishes pre-requisites to those decisions, the agency should engage in rulemaking so the public has some input into those decisions. Rule-making procedures under the APA involve providing the public with notice of the proposed rule and an opportunity to comment on the proposal. See RCW 34.05.320, 325. The purpose of rule-making procedures is to ensure that members of the public can participate meaningfully in the development of agency policies which affect them.

Hillis at 399.

There is an exception to the rulemaking procedure requirement. RCW 34.05.210(4)(c) provides rules adopting Washington statutes “without material change” do not have to go through the process. The exception does not apply. Here the Department’s limitation of “reasonable costs” to be included in the distribution formula is a limitation not described in the language of the statute. The change is material, since it changes the benefit to be received by the injured worker.

The Department’s position results in Nelson paying a disproportionately higher share of the costs than he should under the statute. It also results in Nelson receiving less than the twenty-five percent net recovery RCW 51.24.060 guarantees him.

By stating it does not have to include costs other than those strictly related to the settling third party, the Department has created a limitation which does not appear in the statute. It might be different if it had arrived

at that conclusion after the careful vetting with stakeholders that inevitably takes place during the rulemaking process. It did not. Since it did not, the Department's unilateral costs exclusion should not be allowed to stand. All costs associated with claims against negligent third parties should be included in the Department's lien calculation.

In the case at bar the Department by interpretation has altered the lien statute in a way that reduces the benefit enjoyed by injured workers. This it cannot do, particularly without going through rule-making. Its application of its interpretation against Mr. Nelson is invalid.

4. Even if the court were not to consider the Department's interpretation of the lien improper rulemaking, the application of its interpretation of the statute constitutes an improper adjudication of Mr. Nelson's case.

The judicial standard of review for agency orders in adjudicative proceedings is found at RCW 34.05.570(3). The statute provides the court shall provide relief from an agency order in an adjudicative proceeding on various grounds. In particular the statute provides for judicial relief where the agency has erroneously interpreted or applied the law or where the order is arbitrary and capricious. RCW 34.05.570(3)(3) and (i).

The court reviews the Department's interpretations of law *de novo*. Yakima County v. Yakima County Law Enforcement Officers' Guild, 174

Wn.App. 171, 180, 297 P.3d 745 (Div. 2, 2013). Deference to agency interpretations given in the circumstance where “an agency determination is based heavily on factual matters, especially factual matters which are complex, technical, and close to the heart of the agency’s expertise.” Hillis at 396. The Department’s unilateral decision to interpret the lien statute to limit offsetting litigation costs to those related to the settling defendant is neither complex, technical, nor close to the heart of the Department’s expertise.

In litigation an injured party frequently has multiple causes of action against multiple defendants for a single injury which must be pursued. Frequently some of the claims end up being abandoned after investigation reveals they are not viable, and sometimes the claims are dismissed by a court. A plaintiff does not always know in advance which claims are viable and which are not until money is spent investigating those claims. These costs are reasonable and should not be unilaterally excluded by the Department. If the Department believes such costs are unreasonable, it by statute is authorized to go to the Superior Court for the determination of reasonableness. It does not get to unilaterally decide the issue.

The Department, by limiting litigation costs in this case to those incurred with respect to the settling defendant, avoids sharing the real costs of pursuing an action. The lien statute does not limit costs to those incurred

pursuing the claim against the settling party. RCW 51.24.060. The Department's interpretation is an alteration of the lien statute which diminishes the injured worker's recovery.

The Department's interpretation of the lien statute is arbitrary. There is no rational basis for excluding legitimate litigation costs simply because they are not related to the settling party. The intent of the statute is for the Department to recover money it has expended on behalf of an injured worker with the caveat that the Department also participate in the costs of successful litigation. The statute does not limit the Department's cost participation to the category of costs relating to the settling defendant.

The Department's interpretation of the lien statute constitutes an erroneous interpretation and application of the law.

5. Nelson should be awarded his costs and attorneys fees.

RCW 51.52.130 provides a worker who appeals a decision of the Board of Industrial Insurance Appeals is entitled fees and costs if the Board's decision is reversed or modified and the accident fund or medical and fund are affected by the litigation. RCW 51.52.130. Because a modification of the Board decision will directly affect the fund by reducing the amount the Department may recover as reimbursement, Nelson is entitled to his attorney fees and costs if his appeal is successful.

Tobin v. Department of Labor & Industries, 169 Wn.2d 396, 406, 239

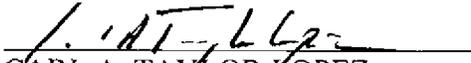
P.3d 544 (2010).

VI. CONCLUSION

The Superior Court decision should be reversed. This case should be remanded to the Department for recalculation of the lien to include all reasonable costs of litigation. Nelson should be awarded his costs and attorney fees.

Dated this 9 day of November, 2015.

LOPEZ & FANTEL, INC., P.S.


CARL A. TAYLOR LOPEZ,
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LOPEZ FANTEL

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TIMOTHY NELSON

Plaintiff/Appellant

vs.

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WASHINGTON

Defendant/Respondent

CERTIFICATE OF SERVICE OF

BRIEF OF APPELLANT

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I, Cynthia Ringo Palmer, declare and state as follows:

1. I am and at all times herein was a citizen of the United States, a resident of Snohomish County, Washington, and am over the age of 18 years.

2. On the 9 day of November, 2015, I caused to be served on counsel as follows:

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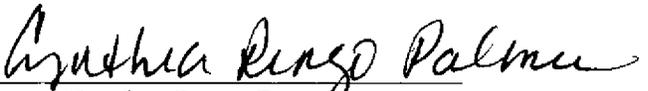
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I declare under penalty of perjury under the laws of the State of Washington that the above is true and correct.

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