

NO. 47672-0-II

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

TIMOTHY NELSON,

Appellant,

v.

DEPARTMENT OF LABOR AND INDUSTRIES OF THE STATE OF
WASHINGTON,

Respondent.

**DEPARTMENT OF LABOR AND INDUSTRIES
BRIEF OF RESPONDENT**

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I. INTRODUCTION

The third party statute, RCW 51.24, is not intended as a mechanism for funding an injured worker's unsuccessful litigation. A "third party" lawsuit is one where a worker injured at work sues the "third party" that caused the workplace injury—provided the party is not an employer or co-worker. Under the third party statute, the worker may personally seek damages from such third parties. Or the worker may opt to assign his or her case to the Department of Labor & Industries, including cases where litigation may be costly and potentially unsuccessful. But if the worker pursues the case, when he or she recovers from a third party, the worker must report to the Department the amount of the recovery and the "costs and reasonable attorneys' fees associated with the recovery." RCW 51.24.060(5). A portion of the recovery reimburses the Department for benefits it has paid on behalf of the worker. The Department, in turn, pays a proportionate share of "the fees and costs incurred in obtaining [the] recovery." *Rhoad v. McLean Trucking Co.*, 102 Wn.2d 422, 424, 686 P.2d 483 (1984).

The Department does not share in litigation costs that are unrelated to a successful recovery. Here, it properly distributed Timothy Nelson's recovery from the third party motorist who caused his injuries. The superior court rejected Nelson's contention that the Department must also

share in costs incurred by Nelson in separate, ongoing lawsuits against a different set of third party defendants that may or may not result in recoveries. Under the plain language of the statute, only costs that are associated with a successful recovery are included when distributing that recovery. This Court should affirm.

II. STATEMENT OF FACTS

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

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

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

While Nelson was receiving workers' compensation benefits, he brought a lawsuit against Amanda Wade, the third party motorist allegedly responsible for his workplace injuries. CP 77. He elected to pursue this claim with his own attorney. *See* CP 77. Nelson settled with Wade and her insurance company for \$525,000. CP 77-78, 81. Of this amount, \$408,000 was allocated as "pain and suffering" and \$117,000 was allocated as "medical aid, time loss compensation and permanent partial disability." CP 81.

The decision to bring a third party lawsuit does not preclude an injured worker from receiving workers' compensation benefits. RCW 51.24.040. But if the worker successfully recovers damages from a third person, the Department is entitled to reimbursement from the recovery for the benefits it has paid.¹ RCW 51.24.060(5) requires the worker to advise the Department of the amount of the recovery and "the costs and reasonable attorneys' fees associated with the recovery."

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

¹ *See Frost v. Dep't of Labor & Indus.*, 90 Wn. App. 627, 631, 954 P.2d 1340 (1998).

totaled \$6,523.23. CP 90-92.

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

The third party distribution statute, RCW 51.24.060, requires that any recovery from a third person be distributed between the injured worker, the worker's attorneys, and the Department. "Recovery" is defined to include "all damages except loss of consortium." RCW 51.24.030(5). Pain and suffering damages are also not subject to distribution.²

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

1. The costs and reasonable attorney fees shall be paid proportionately by the injured worker and the Department. RCW 51.24.060(1)(a).
2. The injured worker shall be paid twenty-five percent of the balance of the award. RCW 51.24.060(1)(b).
3. The Department "shall be paid the balance of the recovery made, but only to the extent necessary to reimburse the department . . . for benefits paid." RCW 51.24.060(1)(c).
4. Any remaining balance shall be paid to the injured worker. RCW 51.24.060(1)(d).

The Department applied RCW 51.24.060(1) to distribute Nelson's

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

recovery from Wade. Because the \$408,000 allocated for pain and suffering did not constitute a “recovery” within the meaning of the third party statute, only the \$117,000 allocated as special damages was a “recovery” subject to distribution. CP 78, 96. The total costs and attorney fees associated with the \$117,000 recovery were \$40,453.75.³ CP 96.

The Department determined its proportionate share of the costs and attorney fees under RCW 51.24.060(1)(c)(ii). This share is calculated by first finding the Department’s percentage share of the recovery—determined by dividing the benefits paid amount by the recovery amount—and then multiplying that percentage share by the total amount of costs and fees. RCW 51.24.060(1)(c)(ii). Here, the Department divided its asserted lien for benefits paid by the \$117,000 recovery, determining that its percentage share of the recovery was 98.25 percent.⁴ CP 96. Multiplying this percentage share by the total costs and attorney fees, the Department calculated that its proportionate share of the costs and fees was \$39,745.81. CP 96.

The Department’s entitlement to reimbursement equals the amount

³ The Department determined the attorney fees relating to Nelson’s recovery by multiplying his lawyer’s one third contingency fee by the \$117,000 recovery. CP 96. It determined the amount of costs relating to the recovery by multiplying the \$6,523.23 in total costs by the ratio of the \$117,000 recovery to the entire \$525,000 settlement. CP 96.

⁴ The Department’s asserted lien for benefits paid was \$114,957.32, slightly less than the \$116,958.64 in total benefits paid under Nelson’s claim. CP 96. Certain administrative expenses are not included when the Department asserts a lien against a third party recovery. *See Ziegler v. Dep’t of Labor & Indus.*, 42 Wn. App. 39, 42, 708 P.2d 1212 (1985) (excluding the costs of independent medical examinations).

of benefits the Department has paid less its proportionate share of the costs and attorney fees. RCW 51.24.060(1)(c)(iii). The Department subtracted its proportionate share of the costs and fees from its asserted lien for benefits of \$114,957.32. CP 96. This resulted in a total reimbursement share of \$75,211.51. CP 96.

Based on these figures, the Department distributed the \$117,000 recovery as follows: \$40,453.75 for attorney fees and costs (of which \$39,745.81 was paid by the Department); \$19,136.56 to Nelson as his 25 percent of the recovery; and the remainder of \$57,409.69 to reimburse the Department for benefits paid. CP 96. Because the recovery was insufficient for the Department to receive its total reimbursement share, there was no remaining balance. CP 96. The Department issued a distribution order reflecting these calculations. CP 98.

In calculating the distribution of Nelson's recovery from Wade, the Department included all costs submitted by Nelson. CP 77-78, 90-92, 96, 100. It did not deduct or exclude any costs reported on the cost ledger. CP 96. In his statement of facts, Nelson suggests that the Department excluded costs relating to a road design claim against Pierce County when calculating the distribution of the recovery from Wade. App's Br. 4-5. However, Nelson made no mention of the Pierce County claim until a summary judgment hearing at the Board. CP 142. He never reported any

costs associated with this claim to the Department. CP 90-92. The first and only reference to the Pierce County claim was the unsworn statement of Nelson's counsel. *See* CP 142.

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

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

The Department affirmed the distribution order, and Nelson appealed to the Board of Industrial Insurance Appeals. CP 57. Both Nelson and the Department moved for summary judgment. CP 39-40.

Nelson reiterated his argument that the distribution order should not be issued until his claims against other third party defendants had been resolved. CP 108. The Department argued that, because only the costs associated with a recovery are properly used when calculating the recovery's distribution, the Department was not required to delay issuing the distribution order until after Nelson's other lawsuits were complete. CP 121-25. It explained that if Nelson made additional recoveries in these lawsuits, it would issue separate distribution orders in which it shared in the costs associated with those recoveries. CP 125.

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

Nelson appeals.

III. STATEMENT OF THE ISSUE

Did the Department correctly calculate the distribution of Nelson's recovery from Wade where Nelson does not dispute that this calculation accurately reflects the costs and reasonable attorney fees that were associated with this recovery?

IV. STANDARD OF REVIEW

In an appeal from the superior court's decision in an industrial insurance case, the ordinary civil standard of review applies. RCW 51.52.140; *Malang v. Dep't of Labor & Indus.*, 139 Wn. App. 677, 683, 162 P.3d 450 (2007). This Court reviews the decision of the superior court rather than the Board's decision. *See Rogers v. Dep't of Labor & Indus.*, 151 Wn. App. 174, 179-81, 210 P.3d 355 (2009); RCW 51.52.140.

Nelson is incorrect that the Administrative Procedure Act (APA), RCW 34.05, provides the standard of review in this case. *See App's Br.* 15. "[T]he judicial review provisions of the [APA] do not apply '[t]o adjudicative proceedings of the board of industrial insurance appeals except as provided in RCW 7.68.110 and 51.48.131.'" *Hill v. Dep't of Labor & Indus.*, 161 Wn. App. 286, 292 n.5, 253 P.3d 430 (2011) (quoting RCW 34.05.030(2)(a)). Neither of those statutes applies here.

On appeal from a summary judgment determination, a court performs de novo review, making the same inquiry as the trial court. *Campos v. Dep't of Labor & Indus.*, 75 Wn. App. 379, 383, 880 P.2d 543 (1994). "Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to

judgment as a matter of law.” *Bennerstrom v. Dep’t of Labor & Indus.*, 120 Wn. App. 853, 858, 86 P.3d 826 (2004); CR 56. There are no disputed facts in this case.

The Board’s interpretation of the Industrial Insurance Act, RCW Title 51, “is entitled to great deference.” *Weyerhaeuser Co. v. Tri*, 117 Wn.2d 128, 138, 814 P.2d 629 (1991). Similarly, as the agency charged with administering the Act, the Department’s interpretation of the third party statute is also accorded great weight. *See Jones v. City of Olympia*, 171 Wn. App. 614, 621, 287 P.3d 687 (2012).

V. ARGUMENT

The superior court correctly determined that the Department properly distributed Nelson’s recovery from Wade. Under the plain language of the distribution statute, RCW 51.24.060, the Department shares only in litigation costs that are associated with a recovery. The statute requires that the Department pay a proportionate share of “the costs and reasonable attorneys’ fees [of the third party recovery].” *Davis v. Dep’t of Labor & Indus.*, 71 Wn. App. 360, 363, 858 P.2d 1117 (1993) (alteration in original) (quoting RCW 51.24.060(1)(a)). Accordingly, the Department was not required to delay issuing its order until Nelson’s costs in separate and ongoing third party lawsuits, the success of which was uncertain, had been determined. Because such costs were not associated

with the recovery from Wade, it would be improper to include them when calculating this distribution. Further, such a delay would harm Nelson by delaying his receipt of settlement proceeds from a successful recovery.

The Department was also not required to petition a court to determine the reasonableness of Nelson's costs and fees because it did not question the reasonableness of the figures he provided. Contrary to Nelson's suggestion, the Department did not deduct or exclude any costs relating to his Pierce County claim, a claim that Nelson asserts was brought in the lawsuit against Wade. Rather, the Department included all of Nelson's reported costs when it distributed this recovery. Nor did the Department affirm its distribution order because it viewed Nelson's costs in other lawsuits as unreasonable. Instead, it affirmed the order because Nelson agreed that he had reported all costs associated with the recovery from Wade. The Department properly utilized these costs when applying the formula of the distribution statute. This Court should affirm.

A. Under the Plain Language of RCW 51.24.060, the Department Shares Only in Costs and Reasonable Attorney Fees That Are Associated with a Recovery

The Department correctly calculated the distribution of Nelson's recovery from Wade. Nelson has never disputed that his reported costs accurately reflect his expenses relating to this litigation. CP 15, 100, 107. Rather, at the Department and at the Board, he argued that the distribution

order understated his costs because it did not include costs he was incurring in other lawsuits against additional third party defendants. CP 100, 108. He requested that the Department delay issuing the distribution order until these costs were known with finality. CP 100, 110. On appeal, Nelson asserts that all costs against third party defendants—regardless of whether those costs are incurred in connection with obtaining a recovery—should be included when the Department calculates a distribution.⁵ App’s Br. 15.

Nelson’s argument contradicts the plain language of the distribution statute. RCW 51.24.060(1) requires that a portion of any third party recovery be used to pay the costs and attorney fees of the recovery:

(1) If the injured worker or beneficiary elects to seek damages from the third person, any recovery made shall be distributed as follows:

(a) The costs and reasonable attorneys’ fees shall be paid proportionately by the injured worker or beneficiary and the department and/or self-insurer: PROVIDED, That the department and/or self-insurer may require court approval of costs and attorneys’ fees or may petition a court

⁵ On appeal, Nelson makes no mention of his request for the Department to delay issuing the distribution order. He likely recognizes that this argument is unsupported by the statute, which requires that any recovery be distributed. RCW 51.24.060(1). Nelson cannot, however, so easily escape his previous arguments. As he has admitted, at the time the Department issued its order, his costs in other third party lawsuits were unknown. CP 108. Thus, in order to include such costs when calculating the distribution, as Nelson asserts that the statute requires, the Department would have been required to delay distributing the recovery until these costs were determined. While Nelson no longer explicitly argues for such action, given the facts of this case, his current arguments also depend on requiring the Department to delay issuing the distribution order.

for determination of the reasonableness of costs and attorneys' fees[.]

Under this plain language, the recovery is distributed to account for expenses incurred in obtaining the recovery. The “costs and reasonable attorneys' fees” noted in subsection (1)(a) are linked to the particular “recovery” identified in subsection (1). Thus, the Department pays a proportionate share of only those costs and fees that are associated with the recovery to be distributed.

The statute is unambiguous. *Davis*, 71 Wn. App. at 363. It is only when a recovery is made that the Department pays a share of costs and attorney fees. RCW 51.24.060(1). And it is the “costs and reasonable attorneys' fees [of the third party recovery]” that are paid proportionately. *Davis*, 71 Wn. App. at 363 (alteration in original) (quoting RCW 51.24.060(1)(a)). “[T]he Department is required to bear a proportionate share of the fees and costs incurred in obtaining . . . a recovery.” *Rhoad*, 102 Wn.2d at 424. But where a worker's litigation costs are not related to obtaining a recovery, such costs are not properly included when calculating a distribution.

This requirement is readily apparent when the statute is considered as a whole. A statute's plain meaning is determined from “all that the Legislature has said in the statute and related statutes which disclose

legislative intent about the provision in question.” *Dep’t of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” *Davis v. Dep’t of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999).

RCW 51.24.060(5) requires that “the person to whom any recovery is paid . . . advise the department or self-insurer of the fact and amount of such recovery [and] the costs and reasonable attorneys’ fees *associated with the recovery.*” (emphasis added). See *Madrid v. Lakeside Indus.*, 98 Wn. App. 270, 272, 990 P.2d 411 (1999). This requirement would be meaningless if costs and fees from other, unrelated lawsuits that did not result in the recovery were also to be included when calculating a distribution. As this statutory provision demonstrates, unless the injured worker’s litigation costs are “associated with the recovery,” such costs are not properly utilized when calculating the recovery’s distribution. In arguing to the contrary, Nelson simply ignores this statutory language.

Nelson does not dispute that he accurately reported all of his expenses in obtaining the settlement from Wade. CP 15, 100, 107. Because Nelson’s costs in his other third party lawsuits were not related to this recovery, the Department was not required to delay issuing the distribution order until these costs were known with finality. Such costs

would not be properly included when calculating the distribution of the recovery from Wade. Contrary to Nelson's assertion, the Department shares only in the costs and reasonable attorney fees that are associated with a recovery.

Our courts have repeatedly noted that the Department's responsibility for costs and fees relates to expenses incurred in obtaining a successful recovery. *See, e.g., Rhoad*, 102 Wn.2d at 424; *Davis*, 71 Wn. App. at 363. As Justice Dore has explained, a "worker does not bear the costs of [third party] litigation alone. To the extent the worker recovers from the third party, he or she is entitled to a proportionate reimbursement for the legal costs expended in making that recovery." *Keenan v. Indus. Indem. Ins. Co. of the Nw.*, 108 Wn.2d 314, 323-24, 738 P.2d 270, 276 (1987) (Dore, J., concurring), *overruled on other grounds by Price v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 490, 946 P.2d 388 (1997). Here, because Nelson's legal costs in his separate third party lawsuits were not expended in making the recovery from Wade, he was not entitled to a proportionate reimbursement for these costs.

B. The Third Party Statute Is Not a Mechanism To Fund Unsuccessful Litigation

The third party statute is not intended as a mechanism to fund unsuccessful third party litigation. Rather, the statute is intended to ensure

that the workers and employers who pay into the accident and medical funds are “not charged for damages caused by a third party” and that “the worker does not make a double recovery.” *Maxey v. Dep’t of Labor & Indus.*, 114 Wn.2d 542, 549, 789 P.2d 75 (1990). It is only when a recovery is made that the Department pays a share of costs and fees because it is only then that the accident and medical funds are reimbursed. *See* RCW 51.24.060(1).

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

By electing to seek damages on his own, with his own attorney, Nelson assumed responsibility for the financing of his case. This was Nelson’s choice. Where a worker wishes to avoid the financial risk of bringing such litigation, the worker may assign his or her third party claims to the Department. RCW 51.24.050(1). But in such circumstances, it is the Department that controls the litigation, determining whether to prosecute or compromise the claims in its discretion. *Id.* Although the

worker avoids potential legal costs, he or she must accede to the Department's choices in what claims it will pursue. *See Burnett v. State Dep't of Corr.*, 187 Wn. App. 159, 172-77, 349 P.3d 42 (2015). Unlike the situation here, in cases where the Department fronts the costs of litigation, the Legislature has granted it authority to direct such litigation, including the ability to make fiscally responsible decisions regarding costs.

The Department's responsibility to share in litigation costs is based on principles of subrogation and fairness.⁶ *See Ravsten v. Dep't of Labor & Indus.*, 108 Wn.2d 143, 149-50, 736 P.2d 265 (1987). Because a third party recovery is used to reimburse the Department, it is only fair that the Department participate in funding the litigation that resulted in repayment. *See Peterson v. Safeco Ins. Co. of Ill.*, 95 Wn. App. 254, 264, 976 P.2d 632 (1999) (discussing principles of equitable subrogation). By contrast, unsuccessful litigation does not result in any reimbursement to the Department. As the third party distribution statute makes clear, where litigation does not reimburse the Department's accident and medical funds for the benefits it has paid, the Department is not required to join in the costs of such litigation.

⁶ While subrogation principles are useful for understanding the Department's responsibility for costs and fees, the nature of this responsibility is ultimately a question of statute. The Department's right to reimbursement from a third party recovery is a statutory right that is enforceable as a statutory lien rather than an equitable subrogation interest. *Rhoad*, 102 Wn.2d at 427.

Nelson's arguments also ignore that he will recover the costs associated with his other lawsuits if that litigation is successful. If he recovers damages from other third parties, the Department will pay its proportionate share of attorney fees and costs associated with those recoveries. CP 78-79. It is common for the Department to issue multiple distribution orders in a given case. *See, e.g., In re Richard Boney (Dec'd)*, Nos. 99 15811, 99 22615, 00 12121, 0012211, 2001 WL 1700379 at *2 (Wash. Bd. Ind. Ins. Appeals Oct. 24, 2001) (multiple third party distribution orders issued when multiple third party recoveries obtained in asbestos-related tort litigation); *In re Todd Hosking*, No. 08 17806, 2009 WL 6268468 at *2 (Wash. Bd. Ind. Ins. Appeals Apr. 24, 2009) (separate distribution orders issued where the worker recovered settlements from a negligent motorist and an employer's underinsured motorist coverage on different dates). As these cases illustrate, where an injured worker makes multiple recoveries, each recovery is distributed separately under the formula in RCW 51.24.060(1). Moreover, it is the costs associated with each recovery, not the costs in other, ongoing litigation, for which the Department pays a proportionate share.

The Department's distribution order correctly distributed Nelson's recovery from Wade. In calculating this distribution, the Department properly utilized Nelson's costs and attorney fees incurred in obtaining

that recovery. If Nelson makes other recoveries from additional third persons, the Department will pay its proportionate share of fees and costs associated with those recoveries. CP 78-79. The Department will not, however, fund additional litigation by Nelson that proves unsuccessful.

C. The Department's Distribution of the Recovery From Wade Did Not Reduce Nelson's 25 Percent Share of That Recovery

The Department's application of RCW 51.24.060 did not result in Nelson receiving less than his 25 percent share of the recovery from Wade. Without explanation, Nelson asserts that the Department somehow reduced this share by failing to include costs incurred in other litigation when calculating the distribution. *See* App's Br. 14. However, if the Department had included additional costs from other, ongoing lawsuits when distributing the \$117,000 recovery, Nelson's share of that recovery would actually have been reduced. Attorney fees and costs are deducted from the recovery before the worker's 25 percent share of the remaining balance is calculated. *See* RCW 51.24.060(1)(b). If additional costs had been included, this would have decreased the remaining balance, and Nelson's share of the recovery would necessarily have been diminished. Contrary to Nelson's assertion, the Department did not reduce his 25 percent of the recovery by including only costs associated with the recovery from Wade.

Indeed, Nelson's reading of the statute would generally work to the detriment of workers. Under his proposed analysis, no distribution of any recovery could be made until "all claims against all potential parties resolve." CP 108. But if the Department were required to delay issuing a distribution order until all a worker's third party litigation was final, it could be months or years until the worker was able to enjoy his or her share of the recovery. The statute is not intended to deprive workers of their shares of successful recoveries in this manner.

The Department did not reduce Nelson's 25 percent share of the recovery from Wade. His reading of the statute would improperly postpone the time at which a worker could receive such share. In calculating the distribution of the recovery from Wade, the Department correctly utilized Nelson's costs and attorney fees incurred in obtaining this recovery.

D. Because the Department Did Not Exclude or Deduct Any Costs Incurred by Nelson in His Lawsuit Against Wade, *Allyn* Is Not Applicable

The Department properly relied on Nelson's reported costs in calculating the distribution of his recovery from Wade. Nelson appears to contend that the Department excluded costs relating to a negligent road design claim against Pierce County, a claim he asserts was dismissed on summary judgment in his lawsuit against Wade. App's Br. 4-5, 10-11.

Relying on *Hi-Way Fuel Co. v. Estate of Allyn*, 128 Wn. App. 351, 115 P.3d 1031 (2005), Nelson argues that the Department lacked discretion to “unilaterally deduct” his costs in pursuing this claim. App’s Br. 9. Nelson’s argument, which this Court should reject because he makes it for the first time in this appeal, misstates both the record and the law. *See* RAP 2.5(a); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995).

Contrary to Nelson’s suggestion, the Department did not deduct or exclude any costs related to the Pierce County claim. The Department included all expenses reported by Nelson in calculating the distribution of his recovery from Wade. CP 77-78, 90-92, 96, 100. Nelson made no mention of the Pierce County claim in his request for reconsideration or in his correspondence with the Department. CP 76-79, 100. His summary judgment motion at the Board did not reference this claim; nor did Nelson file any declarations in support of that motion. CP 40, 107-11.

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

146. There is no evidence that the Department ever excluded any costs relating to the Pierce County claim when distributing the recovery from Wade.⁷ Indeed, given that the only reference to this claim was the unsworn statement of Nelson’s counsel, there is no factual record about the existence of the Pierce County claim or any costs that might be associated with it. *See Green v. A.P.C. (Am. Pharm. Co.)*, 136 Wn.2d 87, 100, 960 P.2d 912 (1998) (“Argument of counsel does not constitute evidence”).⁸

Nelson is also incorrect that *Allyn* applies in the circumstances of this case. There, the injured worker submitted a cost bill to the Department that indicated her expenses associated with a third party recovery were \$76,818.90. *Allyn*, 128 Wn. App. at 355. Before calculating the distribution order, the Department deducted several hundred dollars from the cost bill that related to internal copying and postage. *Id.* The worker

⁷ At the summary judgment hearing, the Department’s counsel stated that costs relating to a dismissed claim—even where the claim was part of the same lawsuit that resulted in a recovery—are not associated with the recovery and thus should not be included when calculating a distribution. CP 147-48. This was inartfully worded. It is possible that many of a litigant’s costs—e.g. investigation expenses, filing fees, deposition transcript costs, and expert fees—will both relate to a dismissed claim and be associated with a successful recovery from a different defendant in the same litigation. Here, Nelson’s reported costs, which included many of the expenses listed above, likely included costs that were associated both with his recovery from Wade and with the Pierce County claim. *See* CP 90-92. Rather than engage in a line-by-line assessment of these costs, however, the Department simply included all costs reported by Nelson when calculating the distribution. Thus, the Department likely paid costs that overlapped with the Pierce County claim. On the other hand, there is no indication that the Department excluded any costs related to this claim.

⁸ The Court should also not consider his arguments about the Pierce County claim because it was not raised at the Department level, and the order did not address it. *See Hanquet v. Dep’t of Labor & Indus.*, 75 Wn. App. 657, 662, 879 P.2d 326 (1994).

appealed, and the Court of Appeals reversed, holding that the Department was not permitted to unilaterally reduce Allyn's litigation costs in this manner. *Allyn*, 128 Wn. App. at 362-63. It explained the Department must petition a court to determine whether a worker's attorney fees and costs are reasonable and that the Department lacked discretion under RCW 51.24.060 to deduct a portion of the worker's costs for internal copying and postage. *Id.* at 363

Here, unlike the situation in *Allyn*, the Department did not unilaterally reduce any costs reported by Nelson. The Department included all of Nelson's reported costs when calculating the distribution. CP 77-78, 90-92, 96, 100. As noted above, there is no evidence that the Department excluded any costs relating to his Pierce County claim when calculating the distribution of Nelson's recovery from Wade. Because the Department did not deduct or exclude any costs incurred in this litigation, *Allyn* does not apply, and Nelson's argument regarding the Pierce County claim is inapposite.

With regard to Nelson's other third party lawsuits, the Department also did not deduct any reported costs. Nelson has never provided a cost bill reflecting the amount of his costs in this litigation. More importantly, however, the Department did not affirm its distribution order because Nelson's costs in these other lawsuits were unreasonable. Instead, it

affirmed the order because Nelson agreed that he had reported all costs associated with his recovery from Wade. *See* CP 100.

In *Allyn*, the court's decision presupposed that all costs and attorney fees reported by the worker were associated with the recovery. The court recognized that such costs and fees must be reported to the Department. *Allyn*, 128 Wn. App. at 362. There was no suggestion in *Allyn* that any reported litigation costs were not incurred in obtaining the recovery, and the court did not address whether the Department must delay distributing a recovery until all a worker's third party actions have resolved. As explained above, because the costs in Nelson's other, ongoing lawsuits were not associated with his recovery from Wade, the Department was not required to wait to issue the distribution order. *Allyn* does not hold to the contrary.

The Department did not deduct or exclude any costs related to Nelson's claim against Pierce County. Nor did it affirm its distribution order because it viewed Nelson's costs in other third party lawsuits as unreasonable. Instead, the Department affirmed its distribution order—rejecting Nelson's contention that it must wait to issue the order until his costs in other third party lawsuits could be determined—because these costs were not associated with his recovery from Wade. The superior court correctly found that the Department properly followed the plain language

of the distribution statute.

E. The Department Did Not Create a Rule When Calculating the Distribution of Nelson’s Recovery From Wade

The Department did not create a “rule” when it applied the formula in the distribution statute. “[F]or rulemaking procedures to apply, an agency action or inaction must fall into the APA definition of a rule.”

Budget Rent A Car Corp. v. Dep’t of Licensing, 144 Wn.2d 889, 895, 31 P.3d 1174 (2001) (quoting *Failor’s Pharmacy v. Dep’t of Soc. & Health Servs.*, 125 Wn.2d 488, 493, 886 P.2d 147 (1994)). A rule is defined to include “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).

Here, the Department’s order distributing Nelson’s settlement with Wade was not an order of “general applicability.” The order applied only to Nelson, his lawyers, and the Department. Because the order affected the legal rights of only these specific parties, it does not constitute a rule within the meaning of RCW 34.05.010(16). *See City of Vancouver v. Pub. Emp’t Relations Comm’n*, 180 Wn. App. 333, 362, 325 P.3d 213 (2014) (comparing agency rules and orders).

Nevertheless, Nelson asserts that the Department promulgated a

rule when, he contends, it interpreted the term “reasonable costs” to include only costs associated with his recovery from Wade. App’s Br. 11-15. However, as discussed above, the statute is plain on its face. *See Davis*, 71 Wn. App. at 363. After Nelson reported the amount of the recovery and the costs and fees associated with it as required by RCW 51.24.060(5), the Department entered an order distributing the recovery in accordance with the formula in RCW 51.24.060(1). In taking this action, no statutory interpretation was necessary. The Department simply applied the statute’s unambiguous distribution scheme.

Nelson’s argument also fails on its own terms. Courts have repeatedly rejected arguments that an agency’s interpretation of statutory language is subject to the rulemaking procedures of the APA. *See, e.g., Budget Rent A Car*, 144 Wn.2d at 895-96; *Regan v. Dep’t of Licensing*, 130 Wn. App. 39, 54-55, 121 P.3d 731 (2005). This is for good reason. As the Supreme Court explained in *Budget Rent A Car*, if even “the simplest and most rudimentary interpretation of a statute . . . require[d] an agency to go through formal rule making procedures,” this “would all but eliminate the ability of agencies to act in any manner during the course of an adjudication.” *Budget Rent A Car*, 144 Wn.2d at 898. The Court concluded that the rulemaking requirements of the APA were not designed to hamper administrative action in this manner. *Id.* at 898.

Nelson's reliance on *Hillis v. Department of Ecology*, 131 Wn.2d 373, 932 P.2d 139 (1997), is misplaced. Contrary to Nelson's assertion, the agency did not implement or interpret a statute in that case. *See* App's Br. 13-14. There, in response to budget cuts, Ecology set priorities for determining which water applications the agency would process first. *Hillis*, 131 Wn.2d at 387-88. Without following rulemaking procedures, it decided to give top priority to applications involving public health emergencies, changes to existing water rights, and short-term uses for public projects such as road building. *Id.* at 387-88, 398-99.

In setting these priorities, Ecology did not apply or interpret any statutory language. Rather, it prioritized the application process based on a "severely reduced budget, the large number of applications pending, and the complex investigation required to determine the availability of water and the rights of senior water rights holders." *Id.* at 394. The Court held that Ecology could not set such priorities—which affected an applicant's right to have his or her application acted upon—without rulemaking. *Id.* at 399-400. But unlike the situation here, in setting these priorities, Ecology did not apply an unambiguous statute; nor did it interpret any statutory language.

Here, insofar as the Department engaged in any statutory interpretation, its action fell well short of promulgating a rule. An

agency's interpretation of statutory language does not constitute a rule because it "does not establish, alter, or revoke any qualification related to a benefit or privilege conferred by law." *Regan*, 130 Wn. App. at 55. Because such routine statutory interpretation does not fall within the APA definition of a rule, the rulemaking procedures of the APA do not apply. *See Budget Rent A Car*, 144 Wn.2d at 895-96. Nelson's contention that the Department was required to follow rulemaking procedures is without merit.⁹

VI. CONCLUSION

The superior court properly affirmed the Board's order granting summary judgment to the Department. Where a worker makes a recovery from a third party, the Department shares only in the litigation costs that are associated with that recovery. Nelson admits that he reported all costs relating to his recovery from Wade, and the Department was not required delay issuing a distribution order until Nelson's costs in other, unrelated lawsuits could be determined. The Department also did not create a rule in

⁹ Nelson is not entitled to costs and attorney fees. Such an award is only proper where the Board's decision is reversed or modified and the accident or medical fund is affected by the litigation. RCW 51.52.130. In cases involving the third party statute, the accident and medical funds are affected when a reversal reduces the amount the Department is able to recover as reimbursement. *Tobin*, 169 Wn.2d at 406. Because Nelson should not prevail, he should not get fees. But even if he does prevail, the accident and medical funds would only be affected if he submits additional costs and those costs are not challenged for reasonableness. Because a reversal of the Board's decision would not necessarily affect the Department's ability to recover reimbursement, an award of attorney fees would not be appropriate at this time.

issuing the distribution order. The order had no general applicability, and the Department simply applied the unambiguous third party distribution statute. Contrary to Nelson's assertion, the rulemaking procedures of the APA are inapplicable. This Court should affirm.

RESPECTFULLY SUBMITTED this 11th day of January, 2016.

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NO.47672-0-II

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

TIMOTHY NELSON,

Appellant,

v.

WASHINGTON STATE
DEPARTMENT OF LABOR AND
INDUSTRIES,

Respondent.

DECLARATION OF
MAILING

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I mailed the Department's Brief of Respondent and this Declaration of Mailing in the below described manner:

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David Ponzoha, Clerk/Administrator
Court Of Appeals, Division II
One Union Square
950 Broadway, Suite 300
Tacoma, WA 98402

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Via First Class United States Mail, Postage Prepaid to:

Carl A. Lopez
Lopez & Fantel
2292 W Commodore Way, Suite 200
Seattle, WA 98199

DATED this 11th day of January, 2016.



KRISTEN HARRIS
Legal Assistant

WASHINGTON STATE ATTORNEY GENERAL

January 11, 2016 - 11:32 AM

Transmittal Letter

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