

No. 81946-7

SUPREME COURT
OF THE STATE OF WASHINGTON

JIM A. TOBIN,

Respondent,

vs.

DEPARTMENT OF LABOR AND INDUSTRIES,

Petitioner.

BRIEF OF AMICUS CURIAE
WASHINGTON STATE LABOR COUNCIL, AFL-CIO

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STATE OF WASHINGTON
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A. INTEREST OF AMICUS CURIAE

Widely considered the voice of labor in the State of Washington, the Washington State Labor Council, AFL-CIO (“WSLC”) represents and provides services for hundreds of local unions and trade councils throughout Washington State. The WSLC’s core programs are legislative advocacy, political action, communications and media relations, and assistance with organizing campaigns.

The WSLC is a voluntary organization. The WSLC is the largest labor organization in Washington State and is the only organization representing all AFL-CIO unions. Currently there are more than 500 local unions affiliated with the WSLC representing approximately 400,000 rank and file union members in Washington State. Some unions outside the AFL-CIO also affiliate with the WSLC via the solidarity charter for the AFL-CIO/NEA labor solidarity partnership. Although not every AFL-CIO local or union is affiliated, the WSLC represents the official position of the AFL-CIO in Washington State.

Officers of the WSLC are elected by affiliated members every four years. The officers include the president, the secretary-treasurer, and twenty-six vice presidents who constitute the WSLC executive board. The board meets quarterly and establishes the WSLC's policies and programs between conventions of the WSLC.

As part of the WSLC's efforts and political advocacy, the WSLC is vitally interested in issues pertaining to Washington's workers compensation system. The WSLC promotes a financially sound worker compensation system that pays appropriate benefits to injured workers. The WSLC is aware that Washington law authorizes injured workers to recover damages for injuries that they sustain on the job when the injuries are the fault of a third party. As part of that system, the Department of Labor & Industries ("Department") may be reimbursed for some of the benefits it paid to injured workers. The WSLC has been active over the years in insuring that injured workers receive the third-party award to which they are entitled and their benefits are not diminished by their effort to secure a third party recovery from a wrongdoer.

B. STATEMENT OF THE CASE

The present case involves the question of whether the Department may be reimbursed from, or have a lien on, any recovery from a third party tortfeasor obtained by an injured worker. In particular, when the Department does not compensate the injured worker for pain and suffering, the WSLC does not believe the Department is entitled to “reimbursement” from an award the injured worker received by that injured worker’s own efforts for benefits the Department never paid the injured worker under Title 51 RCW.

WSLC acknowledges the description of the facts in this case in the brief submitted by the parties.

C. ARGUMENT

As previously noted, the WSLC has been in the forefront of efforts to ensure that injured workers receive appropriate compensation for injuries they sustained on the job. The WSLC believes that any recovery obtained by the injured worker from a third party tortfeasor should be subject to reimbursement for actual benefits paid. Reimbursement is warranted *only* to the extent that

the Department has provided benefits to the injured worker under Title 51 RCW.

In the legislative arena, WSLC has been actively involved for many years in addressing these issues, ensuring that RCW 51.24.060 is a reimbursement statute, that is, the Department should only be entitled to reimbursement from that portion of any award an injured worker receives from a tortfeasor to the extent that the injured worker received actual benefits under Title 51 RCW. Otherwise, an injured worker, who experiences pain and suffering, for example, has little if any incentive to bring a third party action against the person or organization whose fault resulted in that worker's injury. It is illegal to reimburse a benefit that was never paid.

(1) History of Third Party Actions in Washington

Historically, the Department has evidenced little interest in making injured workers whole for the injuries they sustained on the job. More specifically, the Department has not been a friend to private third part actions by injured workers. Instead, the Department focused on maximizing its recovery at the expense of injured workers, until the Legislature intervened. Prior to 1983, the

Department refused to compromise its lien for the benefits that were paid to the injured worker under Title 51 RCW, frustrating settlements between injured workers and tortfeasors. In 1983, the Legislature amended RCW 51.24.060 to create incentives for injured workers to pursue actions against tortfeasors who caused their injuries. SB 3127, introduced that year, ultimately provided that the Department or self-insurer had to pay a proportionate share of the worker's attorney fees incurred to obtain the recovery against a third party tortfeasor and the Department was specifically authorized the compromise its lien. *See* Appendix A.

Despite the enactment of SSB 3127, the Department's third party recovery efforts were modest, totaling a little over \$1.2 million for the 1981-83 biennium. *See* Appendix B. The Department even took the position that it would not recognize comparative fault in compromising its lien, until legislators intervened to correct the Department's actions. *See* Appendix C. Considerable controversy attended the Department's third party recovery efforts. *See* Appendix D.

HB 1386 was introduced and enacted in 1984 to address continuing problems with third party recoveries. That legislation directed the Attorney General to adopt a roster of private attorneys to act as special assistant attorneys general to prosecute third party claims. RCW 51.24.110. Appendix E. In enacting HB 1386, a House floor colloquy addressed the definition of injury in third party recoveries. The prime sponsor of the bill, Rep. Patrick McMullen, made it clear damages meant those damages paid under the Title 51 RCW. Appendix F.

Finally, in 1995, the Legislature again addressed third party actions, SB 5399, a Department request bill, was introduced to make “several technical changes to the worker’s compensation statutes which would improve administration.” As for the provision in the bill relating to loss of consortium damages after *Flanigan v. Dep’t of Labor & Indus.* 123 Wn.2d 418, 869 P.2d 14 (1994),¹ the Senate bill

¹ Courts in other cases than *Flanigan* recognized that such consortium damages may not be reached. *Hi-Way Fuel Co. v. Estate of Allyn*, 128 Wn. App. 351, 357-58, 115 P.3d 1031 (2005); *Gersema v. Allstate Ins. Co.*, 127 Wn. App. 687, 695, 112 P.3d 552 (2005). The Department’s reference to *Fria v. Dep’t of Labor & Indus.*, 125 Wn. App. 531, 105 P.3d 33 (2004), *review denied*, 154 Wn.2d 1018 (2005) is a further example of the Department overstating the holding in a case. The *Fria* court declined to reach an argument on RCW 51.24.060’s constitutionality not on the merits, but because the claimant presented no authority on the issue. 125 Wn. App. at 535.

report for SB 5399 described such a change, among others, as follows:

Minor technical changes are made to clarify legislative intent with regard to third party settlements.

See Appendix G. Even the floor synopsis for the legislator presenting the bill indicated its intent was only to make technical changes to the law. Appendix H. WSIA, an amicus in this case, proposed more expansive changes in the law, changes consistent with the arguments now advanced by the Department. Appendix I. *Those changes were never adopted by the Legislature.*

Historically, the Department has not been friendly toward recoveries by injured workers from third party tortfeasors, preferring to pursue such recoveries on its own, for its own benefit, rather than permitting injured workers to aggressively pursue such recoveries on their own. With the Legislature's involvement in third party recoveries, and this Court's decision in *Flanagan*, the public policy of Washington strikes an appropriate balance between reimbursing the Department sums it paid under Title 51 RCW to the injured worker and the injured worker's right to be made whole. Nothing in the 1995 amendments to the law relating to third parties recoveries

indicates that those amendments were anything but technical in nature, designed merely to recognize this Court's *Flanigan* holding.

(2) Pain and Suffering Damages Are Personal to the Injured Worker

On the job injuries are a major issue in Washington and across the United States. The United States Department of Labor's Bureau of Labor Statistics maintains data on the prevalence of work place injuries in America. In 2007, there were 88 fatal workplace injuries in Washington State involving a variety of circumstances — equipment or contact injuries, falls, exposure to harmful substances or environments, transportation incidents, and even assaults or other violence. For the same year, 2.816 million people were employed in the State. The rate for occupational illness and injuries for that working population was 6.1 per 100 full-time workers, an astoundingly large number. Of that number, 2.9 per 100,000 full-time workers involved days away from work or job transfer or restriction for the injured worker. See <http://www.bls.gov>.

A person reading the Department's brief in this case would conclude that the employer or the Department, not the injured worker, suffered the injury and the pain from it. DOLI

Supplemental Br. at 23-24. Injured workers in Washington experience real pain and suffering from their injuries on the job, pain and suffering for which they ought to be fully compensated.²

To provide incentives to injured workers to endure the inconvenience and expense of third party lawsuits, suits that ultimately benefit the Department and self-insurers who take no action to obtain that benefit, injured workers should not be deprived of their pain and suffering awards. As this Court has held, any doubts or ambiguities in the language of Title 51 RCW must be resolved in favor of the injured worker in order to minimize “the suffering and economic loss” that result from industrial injuries. *Harry v. Buse Timber & Sales, Inc.*, 166 Wn.2d 1, 9, 201 P.3d 1011 (2009) (quoting RCW 51.12.010).³

² The Department *admits* in its Worker’s Guide to Industrial Insurance benefits (<http://www.lni.wa.gov/1PUB/242-10-000.pdf>) that permanent partial disability awards do “not include compensation for pain and suffering.” (p. 14). It further *concedes* that time loss compensation is merely for “wage replacement.” (p. 3).

³ In its supplemental brief at 9, n. 5, the Department cites *Rhoad v. McLean Trucking Co., Inc.*, 102 Wn.2d 422, 686 P.2d 483 (1984) for the proposition that equity does not come into play in interpreting RCW 51.24.060. The Department overstates the reach of this Court’s *Rhoad* holding. The *Rhoad* court observed that the lien created in RCW 51.24.060 is statutory, not equitable. This does not mean this Court turns a blind eye toward equitable principles in interpreting the statute, however. *Harry* dictates no less.

(3) The Ahlborn Decision

A 2006 decision of the United States Supreme Court with respect to an analogous reimbursement statute to RCW 51.24.060 should guide this Court's treatment of the issues here. In *Arkansas Dep't of Health & Human Services v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L.Ed.2d 459 (2006), a rare unanimous opinion, the Court discussed an Arkansas statute that permitted the State to assert a lien for any Medicaid medical expenses paid to a person from any recovery obtained by that person from a tortfeasor.

The Court cited *Flanigan* in that decision for the proposition that "a rule of absolute priority [in favor of the government's lien against a person's entire tort recovery] might preclude settlement in a large number of cases, and be unfair to the recipient in others." *Id.* at 288, n. 19. The Court rejected virtually all of the policy arguments now advanced by the Department through which it seeks to access to the entire recovery of the injured worker from a tortfeasor, including pain and suffering damages. The Court rejected Arkansas's contention that the injured Medicaid recipient had no property interest in the tort recovery because the entire recovery was

“assigned” to that state. *Id.* at 285. The Court further rejected the idea that a recipient lost his or her property right in the recovery upon applying for Medicaid benefits, noting that a lien was inconsistent with the loss of all property rights by the recipient. *Id.* at 285-86. Finally, the Court rejected the contention that the recipient could “game” the settlement process if the entire settlement was not assigned to the government. As with Tobin, the Court noted that *Ahlborn* did not game the settlement process in any fashion.⁴

Ahlborn offers this Court ample grounds to affirm *Flanigan* and the Court of Appeals holding. *Ahlborn* set out the proper template for this Court to address the public policy issues presented by this case.

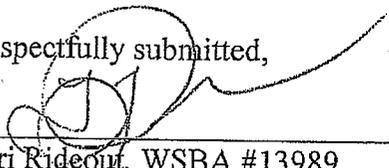
⁴ The Department’s argument that an injured worker may “game” the settlement is insulting to injured workers and is belied in any event by two significant factors. The worker *must* properly allocate the damages between those damages that have their counterpart in Title 51 RCW and those that do not, or the whole award is subject to the Department’s lien. *Gersema*, 127 Wn. App. at 695-96; *Mills v. Dep’t of Labor & Indus.*, 72 Wn. App. 575, 576, 865 P.2d 41, *review denied*, 124 Wn.2d 1008 (1994). The worker may not prejudice the Department’s lien. *Mandery v. Costco Wholesale Corp.*, 126 Wn. App. 851, 855, 110 P.3d 788 (2005) (provision in employee’s contract barring third party actions was void). More critically, *the Department has every right to protect itself*. It is entitled to notice of the worker’s suit and may intervene specifically to protect its interest. RCW 51.24.030(2). *The Department did not do so here.*

D. CONCLUSION

This Court should determine that the reimbursement policy of RCW 51.24.060, as described in *Flanigan*, should continue to apply. Because Washington's worker compensation system does not pay for the pain and suffering of an injured worker after an industrial injury, the Department should not be allowed to seek "reimbursement" from any third party recovery that the injured worker obtains for pain and suffering.

DATED this 27th day of October, 2009

Respectfully submitted,



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APPENDIX

APPENDIX A

FINAL LEGISLATIVE BILL REPORT

SSB 3127

BY Senate Committee on Judiciary (Originally sponsored by Senators Talmadge, Bender, Hemstad, Goltz and Shinpoch)

Modifying the distribution of industrial insurance awards and settlements.

SENATE COMMITTEE on Judiciary

HOUSE COMMITTEE on Judiciary

SYNOPSIS AS ENACTED

BACKGROUND:

Under the Industrial Insurance Act, a worker is prohibited from suing his or her employer or co-workers for causing injuries. A worker, the Department of Labor and Industries, or a self-insurer may, however, bring a lawsuit against a third party for causing the injuries. If the worker obtains a recovery from that third party, the worker must pay the attorney's fees and costs and must repay the Department of Labor and Industries or self-insurer for the benefits that have been advanced. If the Department or self-insurer brings the suit, any award or settlement received is paid to the injured worker after deductions of the Department's or self-insurer's costs in bringing the action and any benefits already paid to the injured worker.

The Department is not authorized to compromise its lien.

SUMMARY:

The distribution of any award received in an action brought by the Department or self-insurer is changed to conform with actions brought by the worker individually. The award is divided as follows: 1) the Department or self-insurer receives back its expenses incurred in bringing the action; 2) the worker receives 25 percent of the balance of the award; 3) the state receives the full amount of the benefits it has already paid the injured worker; and 4) the worker receives the remaining balance.

In actions brought individually by the injured worker, the Department or self-insurer will pay its proportionate share of attorney's fees when an injured worker succeeds in obtaining a recovery. The provision relating to the Department's or self-insurer's payment of attorneys' fees and costs is clarified to include amounts already received and those due under the award. Their proportionate amount of costs will be established at the

outset; if they later pay the worker additional benefits because the injury continues and the damages exceed the amount awarded to the injured worker, the Department's or self-insurer's proportionate costs are not raised.

The Department of Labor and Industries or self-insurer is authorized to compromise its lien when circumstances appear appropriate.

For non-self insurer employers where there is a third party claim recovery, the Department of Labor and Industries shall adjust the employer's experience rating to reflect the reimbursement from the third party.

These changes will apply to all actions where judgment or settlement has not already taken place.

VOTES ON FINAL PASSAGE:

Senate	31	7	
House	98	0	(House amended)
Senate	39	7	(Senate concurred)

EFFECTIVE: 90 days after adjournment of 1983 Regular Session

APPENDIX B



OFFICE OF THE ATTORNEY GENERAL

September 8, 1983

Ms. Kyle Aiken
Staff Attorney
Senate Judiciary Committee
435 Public Lands Bldg. QW 41
Olympia, Washington 98504

Re: Attorney General's Office Labor & Industries
Division Third Party Section

Ms. Kyle Aiken:

Please accept my apology for not previously responding to your June 21, 1983 telephone request. It is my recollection that on behalf of the Senate Judiciary Committee and its chairman, you are interested in statistics relating to the Attorney General's Office Labor and Industries Division Third Party Section ("AG Third Party Section") and its representation of the Department of Labor and Industries in respect "third party" causes of action governed by chapter 51.24 RCW.

As I explained to both you and Senator Talmadge in our telephone conversations, statistics may be misinterpreted absent an understanding of how the Industrial Insurance Act Third Party Chapter is administered by the Departments' Third Party Section ("DLI Third Party Section") and its relationship to the AG Third Party Section. The latter becomes involved only upon referral from the former. There is much that is accomplished by the DLI Third Party Section without involvement of the AG Third Party Section. For statistics relating to the agency's activities under the Third Party Chapter, I recommend that you inquire of Ms. Alga Gabriel, Supervisor, DLI Third Party Section. Her telephone number is (SCAN) 234-7439.

As you may know, where the industrial accident or occupational exposure is the result of the negligence or wrong of a person not in the same employ, each claimant must elect whether to pursue the statutorily preserved civil cause of action against the "third party" or to assign the cause of action to the Department (or self-insured employer). A good deal of effort is expended by the Department to identify the existence of "third party" claims and to obtain the election's execution.

Ken Eikenberry Attorney General
Dexter Horton Building, Seattle, Washington 98104-1749



OFFICE OF THE ATTORNEY GENERAL

Once an election is made by a claimant, a variety of cases confront the DLI Third Party Section. If a claimant chooses to pursue the "third party" (Option A), then the Department monitors the action's progress pursuant to RCW 51.24.070 -.090 with the ultimate goal being the distribution of a successful recovery under RCW 51.24.060 and reimbursement to the trust funds from which the claimant's benefits and compensation were paid. There are many points along the way where assistance and representation is sought from the AG Third Party Section.

If the claimant elects to assign the civil cause of action to the Department, RCW 51.24.050 comes into play. An analogy of this process can be a private law office to which a client has come with a desire to pursue his/her tortfeasor. The DLI Third Party Section staff can be compared to paralegal personnel who work up the case to establish the facts supporting a claim for liability and damages (special and general). Only if a successful settlement of the action cannot be reached by the agency with the "third party" is the case referred to the AG Third Party Section for action. Ideally, when referral is made, the case is ready for commencement of the action in the appropriate court. However, due to a backlog, many cases have been referred to the AG Third Party Section for review, workup, and prosecution if appropriate. Again, similar to a private law office, a settlement without involvement of the judicial system is preferable to the expense of litigation.

The following statistics relate solely to the AG Third Party Section activities and then only from July 1, 1981 when recoverable data commenced to be kept. We are presently converting to a computerized system which will allow a broader data base than that now available. However, these statistics do provide a foundation from which the Section's "gross" activities may be demonstrated. Such activities are broken down into four basic categories excluding Department requests for advice and opinions.

The "A" cases concern the enforcement of the Department's statutory lien (RCW 51.24.060(2)) against a claimant's recovery made from the "third party" to the extent of the benefits and compensation paid under the claim (RCW 51.24.060(1)(c)). These cases are referred by the Department for our action when the Department has been unsuccessful in obtaining reimbursement. Some involve appeals to the Board of Industrial Insurance Appeals and others entail actions commenced originally in the appropriate court to enforce the lien.

OFFICE OF THE ATTORNEY GENERAL

	<u>7/1/81 - 6/30/82</u>	<u>7/1/82 - 6/30/83</u>	<u>TOTAL</u>
Referred	62	255	317
Closed	18	127	145
Recovered	\$136,366.77	\$562,090.10	\$698,456.87

Not all of the "closed" cases resulted in a recovery. In reviewing the referred files, it was concluded that many were not worth pursuing because of factors such as a claim's low monetary value or the ability of a claimant to pay. In such instances, the files are returned to the Department for its continued pursuit at its discretion. Also, where the AG Third Party Section was successful in obtaining reimbursement, not all such cases necessitated utilizing the courts. Unfortunately, without reviewing each closed file, I cannot give you a figure representing how many cases were pursued in court.

The "B" cases concern the Department's prosecution, through the AG Third Party Section, of the assigned civil cause of action against the "third party". As with the "A" cases, not all of those referred had been worked up by the Department because of the large backlog. Upon review by this office, many of the "closed" cases represent our conclusion that the cause of action was not worth pursuing. Although we are unable to give an accurate figure, approximately 80% of the assigned causes of action have proven to be worthless.

	<u>7/1/81 - 6/30/82</u>	<u>7/1/82 - 6/30/83</u>	<u>TOTAL</u>
Referred	57	280	337
Closed	88	165	253
Recovered	\$42,102.00	\$143,222.33	\$185,324.33

In respect to those "B" cases in which we effectuated a recovery, only approximately 20% required commencement of the action by serving and filing a summons and complaint. In all such cases, we have been successful in obtaining a recovery by settlement without having to try the case. We presently have more than 20 cases filed in the courts throughout the state awaiting trial and hopefully amenable to settlement without trial.

The "L" cases concern the filing in the court where a claimant has commenced the civil action a notice of lien by which the court, claimant, and third party are apprised of the rights and obligations created by RCW 51.24.060 in respect to any recovery. Upon receiving a copy of the

OFFICE OF THE ATTORNEY GENERAL

complaint pursuant to RCW 51.24.080, the DLI Third Party Section sends to this office such copy and a statement of the current claim costs. From that information, the AG Third Party Section serves and files the Notice of Lien. Only occasionally are we required to appear in court at this stage to defend the Department's statutory interests.

	<u>7/1/81 - 6/30/82</u>	<u>7/1/82 - 6/30/82</u>	<u>TOTAL</u>
Referred	63	216	279
Closed	1	17	18
Recovered	\$27,793.67	\$269,654.84	\$297,448.51

As a part of our reorganization plan, the DLI Third Party Section will assume the task of filing and monitoring the lien notices.

The "R" cases concern the DLI Third Party Section's request for assistance in obtaining the desired response from a claimant and/or his/her attorney. Not infrequently has the Department been unable to maintain written communication with a claimant regarding the status of the "third party" action. If the AG Third Party Section is successful, further activity at this level is sometimes warranted and has resulted in lien reimbursement.

	<u>7/1/82 - 6/30/82</u>	<u>7/1/82 - 6/30/82</u>	<u>TOTAL</u>
Referred	2	72	74
Closed	1	22	23
Recovered	0	\$66,015.85	\$66,015.85

In our attempts to make the agency's and our office's Sections more efficient and cost effective, we have developed a method by which the Department, through the enforcement provisions of RCW 51.24.070, may obtain the desired responses and action without our involvement.

I trust that the foregoing provides you with the information you desire.

Very truly yours,

Charles R. Bush

CHARLES R. BUSH
Assistant Attorney General

APPENDIX C



Telephone
(206) 855-1045

Patrick R. (Pat) McMullen

Lawyer

P. O. Box 152

116 Woodworth Street

Sedro Woolley, Washington 98284

OCT - 3 1983

September 30, 1983

Philip A. Talmadge
Senate Judiciary Committee
1111 - 3rd Avenue #2500
Seattle, WA 98101

*to Taylor - it ltr to
Kimwille*

Dear Phil:

I am writing in regards to the followup of SSB No. 3127.

As you may recall, this was the bill sponsored by the Honorable (and hopefully Attorney General) Phil Talmadge to cure the defects in the Workers' Compensation Act on Third Party Recovery awards.

It had been my understanding, even to the point of addressing this bill on the House floor, that we were going to enable private attorneys to more easily settle third party claims, because the Department would be willing to reduce their particular claim. One of the major areas of compromise, of course, would be the situation where the plaintiff reduced his settlement offer because of his own negligence in the matter.

Unfortunately, the Department of Labor and Industries has taken the stance that they will not allow comparative or contributory negligence issues to be used in any discussion regarding reducing their particular lien. Apparently, this stance is one which has been taken with the full backing of the assistant attorney general assigned to the Department, Charles Bush.

Obviously, I am one of those naive freshmen who thought I had participated in a great and wonderful "cure". I now see that we only mentioned a possibility without getting the actual results.

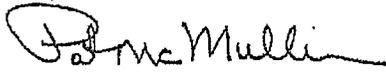
yes

(I would certainly be interest in A) convincing the Department that our intention was to allow for negotiations on comparative negligence issues, or B) additional legislation next session.

September 27, 1983
Page two

Thank you for your kind attention to this matter.

Sincerely,

A handwritten signature in cursive script, appearing to read "P. McMullen".

PATRICK R. McMULLEN
Attorney at Law

JOHN SPELLMAN
Governor



SAM KINVILLE
Director

STATE OF WASHINGTON
DEPARTMENT OF LABOR AND INDUSTRIES

General Administration Building • Olympia, Washington 98504

October 25, 1983

The Honorable Patrick R. McMullen
Washington State Representative
Post Office Box 152
Sedro Woolley, Washington 98284

The Honorable Phil Talmadge
Washington State Senator
4006 53rd Southwest
Seattle, Washington 98116

*we win - copy to Kyle
Kim Potnam*

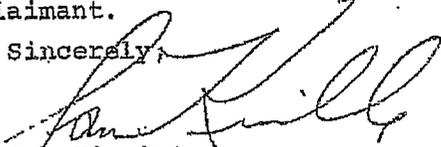
Gentlemen:

I have now had the opportunity to review Department policy relative to our position in the consideration of comparative or contributory claimant negligence issues in the determination of a lien compromise on Third Party claims.

It appears that there may be some misunderstanding as to the Department's application of the compromise authority granted under the recently amended RCW 51.24.060. It is our statutory responsibility to protect the trust funds which we administer, and the lien compromise authority is viewed as a means to promote settlements when potential recovery is in jeopardy absent a compromise. A determination in this regard is to be given prior to settlement and factors such as a claimant's comparative fault considered only when a settlement offer is pending and under consideration by the claimant. Then it would be analyzed in the context as a potential risk to the trust funds' statutory interest in a recovery from the "third party."

In summary, a compromise request will be considered by the Department when received prior to settlement and taking all factors into consideration, including comparative or contributory negligence of the claimant, when absent such a lien reduction, the claimant would proceed to trial and forego the substantial risk of a defense verdict. A reduction to our lien will be favorably considered when such a compromise is to the Department's ultimate advantage in protection of the trust funds and not simply for the purpose of providing more money to the claimant.

Sincerely,


Sam Kinville
Director

SK:ki
cc: Richard Slunaker

APPENDIX D



OFFICE OF THE ATTORNEY GENERAL

September 8, 1983

Ms. Kyle Aiken
Staff Attorney
Senate Judiciary Committee
435 Public Lands Bldg. QW 41
Olympia, Washington 98504

Re: September, 1983 WSTLA Trial News Article/Interview

Dear Ms. Aiken:

Enclosed is the signed and dated letter we discussed in our September 8, 1983 telephone conversation and the copy of the WSTLA Trial News interview with Senator Talmadge. I enclose the latter so that its inaccuracies may be disclosed to your Committee and Sen. Talmadge. It appears that Sen. Talmadge is in agreement with Mr. Aaby's characterization of the status of both the Department of Labor and Industries and Attorney General's Office Third Party Sections.

First, if Mr. Aaby and any other representative of WSTLA did in fact "review . . . the third party situation in industrial injury cases", then Mr. Aaby's conclusions could not be supported. More than 99% of the "third party" civil causes of action not pursued by injured workers and/or their beneficiaries have been assigned to the Department by the execution of a written election to do so, not by "default". The remaining less than one percent came to the Department through the agency's enforcement of RCW 51.24.070.

Second, the assigned causes of action do not necessarily require pursuit by the Attorney General's Office. You are referred to my attached letter which in summary fashion describes the activities within the two Third Party Sections and when cases are referred to the Attorney General's Office.

Third, whether in the past "pursuit by the Attorney General's Office has not been particularly crisp or productive" does not reflect the present to which any proposed legislation would be directed. To the contrary of Mr. Aaby's characterization of past performance, the AG Third Party Section during the preceding two years has been exemplary. Also, the "productivity" is a function of the quality of the causes of action assigned by claimants and

Ken Eikenberry Attorney General
Dexter Horton Building, Seattle, Washington 98104-1749



OFFICE OF THE ATTORNEY GENERAL

Ms. Kyle Aiken
September 8, 1983
Page 2

referred to this office by the Department.

This brings us to a fourth point. Mr. Aaby's comment and Sen. Talmadge's answer assumes that the assignment by claimants to the Department have been consciously executed without the opportunity for or with the assistance of private counsel. That is an erroneous assumption. Although I cannot recite an accurate figure, a good percentage of the assignments are executed following consultation with private attorneys. Furthermore, many claimants consciously decide to avoid dealing with private attorneys and express a desire that the Department pursue the action.

Finally, Sen. Talmadge concludes that bringing in the private bar on the causes of action assigned to the Department would be a "very expeditious and beneficial way for both the state and for injured workers." An example will disclose the error. Assume that the assigned cause of action is pursued to a satisfactory settlement by Department personnel. No contingent fee is incurred and the costs are born by the Department. If the case is referred to the Attorney General's Office which pursues the action to settlement after 15 hours of attorney time, the attorney's fee born by the recovery is 15 x \$37 per hour, the rate at which the Department contributes to the Attorney General Revolving Fund. In respect to a \$50,000 recovery, which is more "beneficial" to both the claimant and the Trust Funds, a one-third contingent fee (\$16,667) or the hourly A.G. fee of \$555? Lastly, should costs be incurred in the pursuit of an assigned cause of action which results in no recovery, they are borne by the Department, not the claimant as they would if the claimant had gone to private counsel. Most claimants who choose to assign their causes of action realize these distinctions. The choice is theirs, granted by statute.

Very truly yours,

FOR THE ATTORNEY GENERAL

Charles R. Bush

CHARLES R. BUSH
Assistant Attorney General

CRB:jlh
Enclosures


ATTORNEYS AT LAW
A Professional Service Corporation

JOHN AABY
ROBERT M. KNIES
DAVID W. ROBINSON
JOSEPH A. ALBO

January 25, 1984

Kim Putnam
Attorney at Law
116 East Legion Way
Olympia, WA 98501

Dear Kim:

In response to your request for background information on SB 4595 and my critique of the Department's and AG's offices handling of third-party cases in general and Charlie Bush's epistles in particular, herewith you will find the following:

- A. A general commentary on Mr. Bush's assertions
- B. A rough draft of a "position paper" giving arguments in favor of the bill, and
- C. Attachments from attorney Frank Stubbs regarding his third-party cases.

In his two letters of September 8, Mr. Bush makes a number of assertions which, boiled to the gist, are these:

1. "A good deal of effort is expended by the Department to identify the existence of 'third party' claims and to obtain the election's execution."
2. "The DLI Third-Party Section staff can be compared to paralegal personnel who work up the case to establish the facts supporting the claim for liability and damages (special and general). Only if a successful settlement of the action cannot be reached by the agency with the 'third party' is the case referred to the AG Third-Party Section for action." Mr. Bush analogizes this to a law firm in which paralegal staff work up a case prior to attorney involvement.
3. Of the cases forwarded to the AG office for pursuit, "approximately 80% of the assigned causes of action have proven to be worthless."
4. Statistics have been kept for only two years. In the entire history of the AG Third-Party Section, they have never pursued a case to trial, or as Mr. Bush more cheerfully puts it, "We have been successful in obtaining a recovery by settlement without having to try the case."
5. Between 7-1-81 and 6-30-83, the entire AG staff has "closed" a total of 253 cases for a total "recovery" of \$185,324.33.

6. Much more impressive financial totals are set forth regarding "A" cases, "L" cases, and "R" cases. However, none of these involve actions on the AG's part to go after a tort feisor on behalf of an injured worker, but instead notification and collection of the liens where the worker has successfully obtained a recovery through the efforts of private counsel. Thus, while Mr. Bush somewhat self-servingly states that "the AG Third Party Section, during the preceding two years, has been exemplary", its total recovery against third parties has amounted to just over \$90,000 per year. Mr. Bush does not provide any figures on staff salaries for the Third-Party Section during that time period.

7. Finally, Mr. Bush summarizes his defense of the Third-Party Section by pointing out the "error" of Senator Talmadge's contention that assignment to private counsel would be in the best interests of the State and the worker. He asks the reader to assume that a cause of action is assigned to the Department and the AG's office "pursues the action to recovery after 15 hours of attorney time", positing the \$37 per hour AG charge to the revolving fund. "In respect to a \$50,000 recovery, which is more 'beneficial' to both the claimant and the trust funds, a 1/3 contingent fee (\$16,667) or the hourly AG fee of \$555?"

To those assertions and facts revealed in Mr. Bush's letter, I would note the following:

1. In 11 years' association with the Department, I have yet to perceive any evidence of "considerable effort" to identify third party cases. Of the more than 20 third party cases our own office is actively pursuing at the present time, not one had been identified by the Department as a potential third party case. An example will suffice: we currently represent an injured ironworker (Joe Bailey, claim H445834) who was gravely injured in a construction fall in January of 1979. His case is set for trial in late February. We have an existing offer of \$750,000 and the Department's lien calculation is in excess of \$558,000. Despite the fact that successful third party cases had resulted in two previous settlements in the neighborhood of \$1,000,000 on the same construction project, no one had identified Mr. Bailey's claim as a potential third party case when he came to our office with approximately 5 months remaining before the statute of limitations had tolled. At that point, the Department's lien was well in excess of \$100,000. As a practical matter, unless something extraordinary occurs in a case, the Department is unlikely to recognize the existence of a third party matter, and thus literally thousands have, over the years, been allowed to go unpursued, with a loss to the Department in the millions of dollars. Active pursuit is not an insurmountable problem. At present, only one obscure question is asked, and that on the claimant's Accident Report. Frequently, the claimant is in extremis, illiterate, or otherwise unable to comprehend or appreciate the sole question asked on the Accident Report. No question, incredibly, is asked on the employer's Accident Report, when that party is the most motivated to see if some alternative

avenue of liability may be available. A simple change in the forms would greatly assist in recognition of third party claims. Similarly, the law now requires vocational intervention on cases involving a significant period of time loss; these are the cases giving rise to large costs and those most likely to warrant third party pursuit. The Department by means of a simple internal mechanism could require a vocational counselor to question the injured claimant as to the existence of any potential third party liability, to include a product liability or medical malpractice aspect of the claim. At present, however, the "good deal of effort" supposedly expended by the Department to discover third party claims is a fiction of Mr. Bush's creation.

2. With reference to Mr. Bush's characterization of the Department's Third-Party Section as analogous to a "paralegal" section within a private legal firm, the comparison apparently betrays Mr. Bush's unfamiliarity with the way law is actually practiced in the private sector. In reality, the Department's Third-Party Section is understaffed and overworked and has no significant legal training in such areas as products liability, medial malpractice, multiple tort feasons, comparative negligence, or other significant factors concerning a potential client. I know of no successful law office in which the file does not reach an attorney for assessment unless the paralegal has been unable to successfully settle the case. Mr. Bush speaks repeatedly of a "backlog of cases", suggesting the reality: there has existed for years literally hundreds of potential cases identified in some way by the Department which have had no meaningful workup. The statute of limitations on many of these has already run and the Department has lost hundreds of thousands; if not millions, of dollars as a result. No competent professional legal office would allow initial and continuing assessment to be delegated to non-legal personnel, nor allow serious negotiation with the defendant prior to review and participation by an attorney. That, however, is the model which Mr. Bush seems to find entirely agreeable.

3. Mr. Bush's contentions with regard to the above collapse in ruin around him as a result of his own statistics: 80% of the cases referred by the "paralegals" prove to be "worthless". Again, however, one wonders about the acuity of the analysis being given to those cases by the AG's Tort Section. As a practical matter, none of its burgeoning members have, to my knowledge, any significant trial or private practice background in the area of tort law, and what may be a "worthless" case to one attorney may be a very meritorious case indeed to another. Additionally, one has to wonder again about the nature of the settlements entered into by the "paralegal" personnel at the Department, if their analysis is such that 80% of the cases they think meritorious are, according to their attorneys, worthless.

4. In the entire history of the Attorney General's office, I have never heard of it successfully pursuing a third-party case to trial, nor pursuing it to trial without success for that

matter. The AG's Third Party Section is a toothless tiger, so far as pursuit of a case to trial is concerned. This is a fact not unknown to defense attorneys or insurance carriers, who realize that, lacking mature and seasoned representation, the Department is unlikely to pursue a matter to trial and will thus be highly likely to accept a low-ball offer on a case. Obviously, in the real world, defendants do not and will not agree to realistic settlements if they know that there is no meaningful threat that they may be taken to Court where they will be answerable for potentially high damage figures. Again, although I do not have statistical proof in hand, it is my understanding that, over the years, a significant number of cases referred to the AG's office have been allowed to languish and die, by tolling of the statute or inattention, with the resultant loss of substantial funds once again.

5. That the AG's staff is ineffectual is again demonstrated by Mr. Bush's own statistics. He points out that in the two years in which statistics have been kept, a total of 253 cases in which the third party action has actually been assigned to the Department have been "closed" by efforts of the AG's Third Party Section, resulting in "recovery" of \$185,324.33. This represents a remarkable average settlement of just over \$811 per case. I know of no serious insurance company or defense counsel that would offer less than \$1,000 as a nuisance value settlement, unless they knew that plaintiff's counsel was not competent enough or did not have the motivation to pursue the matter. It is to be recalled that these "closed" cases represent the viable 20% culled from the referred cases, and we must assume that the AG's assigned to that section were being paid a salary for their work on the unproductive 80% as well. It is significant that Mr. Bush did not provide any statistics regarding the total salaries and staff support costs for the AG Third Party Section during the two year period of time when the \$185,000 was "recovered". Assuming that Mr. Bush had more than one assistant and some staff support, one would be on firm ground supposing that the \$90,000 "recovery" did not meet the cost of paying the AG's salaries. This does not seem to have been a particularly down period for the AGs; Mr. Bush states that the conduct of "the AG Third Party Section during the preceding period has been exemplary." As contrasted with such exemplary efforts which result in \$800 settlements, I would point out that the private Bar has been returning literally hundreds of times the money which the AG's office has generated, without any cost to the Department in salaries. For example, one attorney in Tacoma, H. Frank Stubbs, has reimbursed to the Department (as contrasted with "recovered") between 1979 and late 1983, over \$600,000. In 1983 alone, Mr. Stubbs returned to the Department \$55,000 more than the AG's staff accomplished during its exemplary two year period. Until the long-overdue passage of SB 187, the Department did not even contribute toward its share of costs and attorneys fees on such recoveries, but even at present, they face no ongoing overhead such as Mr. Bush consumes when members of the private Bar effectively pursue third party cases.

6. Much ink is spent discussing "A", "L", and "R" cases, with substantial figures tallied on the board. However, all these are cases in which the "recovery" has been accomplished because a private member of the Bar has pursued a tortfeasor and obtained a settlement or judgment; and the AG's office has subsequently sent a letter or filed a piece of paper so that the Department gets its fair share. Certainly, the Department should aggressively pursue its lien when cases have been successfully concluded, but this is a clerical matter which could be handled by Mr. Bush's "paralegal" staff, as it is in private insurance companies in the real world. These inflated figures with which Mr. Bush sets forth as being the result of a crackerjack Third Party Section is not a legal function, but more of a clerical function. That the Department has been so long in putting together any program of notifying and pursuing such liens, and that Mr. Bush takes such great pride in the current operation, is an admission of the historical malaise in the Third Party area.

7. Finally, in view of all of the above, Mr. Bush calmly sets up a straw man and convincingly thrashes same. What if the AG's crackerjack spent 15 hours, got a \$50,000 settlement, and charged only the bare bones \$555 fee? Wouldn't everybody be better off? The fundamental dishonesty of the example brings into question Mr. Bush's professionalism and the candor with which he has answered the questions posed by the Legislature. The AG's office does not get \$50,000 settlements with 15 hour's work. They get \$800 settlements, with many weeks of work. As a practical matter, four of these mythical \$50,000 settlements over the two year period during which statistics have been kept would top the AG's "recovery" by \$15,000. The only parties that get \$50,000 settlements are competent attorneys in the private sector of the Bar who devote far more than 15 hours of time in accomplishing same. The fatuous nature of Mr. Bush's example cannot be overstated: he has been presiding over an "exemplary" section which averages \$800 per settlement and which, in all probability, returned to the Department substantially less than they have taken out in salaries, much less overhead and costs. He then points his finger at the contingent fee attorney in the private sector who has, over the years, kept the costs of industrial insurance down by actually returning monies to the Department; as indicated, in less than five years, one such attorney has returned in excess of a half million dollars to the Department. Mr. Bush's arrogance telegraphs the underlying fundamental fact: attorneys within the AG's office have a fundamental conflict of interest in representing injured workers in third party claims, in addition to lacking the competence and experience to do so. The AG's office is a defense firm, designed to utilize the medical defense complex to minimize damages to injured workers. At the same time that the AG's Third Party Section is purportedly assisting an injured worker in obtaining a fair settlement, the Department may well be sending him to a Panel exam, terminating time loss, closing his claim, or indeed, forcing him into a hearing in which his entitlement to benefits is disputed by the

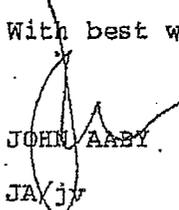
self-same AGs. In point of fact, the attorneys assigned to Mr. Bush have, in fact, been appearing in industrial insurance cases defending the Department orders. It is inconceivable to me that the fundamental conflict of interest cannot stand out from the theoretical perspective. From a practical perspective, the operations of the AG staff illustrate that conflict even more clearly: they have sold out the injured worker for an average of \$800 per head. The Department's only concern is to get back its lien, not to compensate the injured worker for the types of damages available in a third party case, to include pain and suffering, loss of future earning capacity, loss of consortium, and so on. Once the lien, (or some miniscule portion thereof, to judge from the statistics) has been satisfied, the Department "settles" the injured worker's claim, leaving no further right to recovery. Mr. Bush smugly points out that "99%" of the causes assigned to the Department are done so by election by the injured worker and that "a percentage of the assignments are executed following consultation with private attorneys. Furthermore, many claimants consciously decide to avoid dealing with private attorneys and express a desire that the Department pursue the action." I can only comment that the Department, in its notification to the injured worker, is committing the type of consumer fraud which a competent AG's office would be pursuing on its own. That is, the implication arises from the papers which are sent to the injured worker (in that miniscule number of cases in which the Department has recognized a third party claim) that they will receive competent, experienced, and unbiased counsel if they let the Department handle the claim. In point of fact, the vast majority of these cases, according to Mr. Bush, are never even seen by an attorney. Of those that are, 80% are tossed aside as worthless. Of the remaining few, they are settled for an average of \$800 by a staff with no experience in plaintiff representation, which has never actually pursued a case to trial. In the final analysis, the injured workers and the fund in general is subsidizing an ineffectual training school for young attorneys who would be better utilized in their assigned and appropriate defense roles.

Contrasted with this vast historical fiasco is the proposal to establish a more aggressive and effective method of identifying third party cases and assigning them to competent and experienced members of the private Bar. Such attorneys could be selected for competence by rules established jointly by the Department and the Bar association, and the Department and the AG's office could appropriately concentrate upon the clerical efforts involved in making sure that all the paperwork was correctly handled. It is not unrealistic to predict that millions of dollars would be returned to the fund which currently remain in the hands of the wrongdoer, and that a direct savings could be intiated by eliminating the ineffective and inappropriate staffing within the AG's office currently assigned to this task. Certainly, no one can dispute that, historically, the Department and the AG have made a dismal showing in this regard, nor that any effort which can be made to hold down the costs in industrial insurance would

be worth exploring. There are many examples of legal work which have been assigned to Special Assistants Attorney General in other divisions and at other times. Implementation of the proposed Senate Bill would clearly assist the injured worker by seeing to it that his or her interests are protected to the fullest; it would assist the private sector in the free enterprise system by allowing private parties to do more effectively what government cannot, and it would better satisfy society's goal that wrongdoers be held accountable for their actions while innocent parties are compensated insofar as possible for the injuries they sustained.

If it would be of assistance, I know we could obtain literally dozens of examples from private attorneys who have pursued cases which were not recognized by the Department, and I am wondering whether it might be in the best interests of everyone for the Judiciary Committee to audit a fair sampling of the cases designated as "worthless" by the AG staff or settled for the average \$800 stipend. If I may be of further assistance, please advise.

With best wishes,


JOHN AABY

JA/jv

cc: Frank Stubbs

APPENDIX E

FINAL BILL REPORT

BHB 1386

BY Representatives R. King and Betrozoff (by Attorney General request)

Modifying provisions relating to third party actions for industrial injuries.

House Committee on Labor

Senate Committee on Judiciary

AS PASSED LEGISLATURE

BACKGROUND:

A worker covered by the state's industrial insurance laws is prohibited from suing his or her employer or co-workers for causing an injury. However, the worker, the Department of Labor and Industries, or a self-insurer may bring a lawsuit against a "third party" for causing the injury. For instance, a worker can sue the manufacturer of defective equipment which caused an injury.

In 1983, legislation was enacted which modified the law governing the distribution of awards in third-party suits. Awards in suits brought by the department or self-insurers are now distributed sequentially as follows:

- (1) The department or self-insurer receives an amount equal to the expense of bringing the action.
- (2) The worker receives 25% of the balance of the award;
- (3) The department or self-insurer receives the amount of benefits it has already paid to the injured worker; and
- (4) The worker receives the remaining balance.

A similar distribution formula is used in actions brought individually by the injured worker, although the formulas do differ in the provisions dealing with attorneys' fees.

The Attorney General has recommended that a number of technical changes be made in the law governing "third party" lawsuits.

SUMMARY:

A number of changes are made in the law governing "third party" lawsuits involving industrial injuries:

The attorney general is given explicit authority to assign third party actions to "special assistant attorneys general." These special assistant attorneys general shall be selected from a list compiled by the Department of Labor and Industries and the Washington State Bar Association.

The current distribution formulas are modified to apply to the actual "recovery" made in a suit, rather than to a "settlement or award."

Provisions relating to claims by minors are added to the law.

A streamlined line procedure - similar to the procedure used to collect delinquent industrial insurance premiums - may be used to recover improperly distributed awards from claimants.

The legal duties of the person distributing the recovery in a suit brought by a worker (e.g. the claimant's attorney) are increased.

The department or self-insurer may challenge the reasonableness of claimants' attorneys' fees and litigation costs.

The factors to be considered when the Department is deciding whether to compromise a lien are specified.

Procedures are adopted which make it easier for the department or a self-insurer to assume control over a lawsuit when a settlement or compromise by an injured worker is deemed to be void.

The term "injury" is defined. Numerous other language changes and technical changes are made.

VOTES ON FINAL PASSAGE:

House 98 0

Senate 44 0

Free conference Committee

House 98 0

Senate 46 0

EFFECTIVE: Emergency Clause

APPENDIX F

H.B. 1386

Rep. McMullen:

The definition of "injury" in this bill is quite broad. It includes references to mental conditions and ailments--terms which are not defined. Is this definition intended to in any way expand the types of injuries covered by workers' compensation?

Rep. Betrozoff:

No. This bill amends Chapter 51.24 RCW--a chapter dealing with third party lawsuits. The definition of injury contained in this bill is intended to apply only to that chapter. It is not intended to change the traditional definition of injury used to determine eligibility for benefits.

APPENDIX G

SENATE BILL REPORT

SB 5399

As Passed Senate, March 13, 1995

Title: An act relating to refining industrial insurance actions.

Brief Description: Refining industrial insurance actions.

Sponsors: Senators Pelz and Franklin; by request of Department of Labor & Industries.

Brief History:

Committee Activity: Labor, Commerce & Trade: 1/24/95, 2/22/95 [DP, DNP].
Passed Senate, 3/13/95, 25-23.

SENATE COMMITTEE ON LABOR, COMMERCE & TRADE

Majority Report: Do pass.

Signed by Senators Pelz, Chair; Heavey, Vice Chair; Franklin, Fraser and Wojahn.

Minority Report: Do not pass.

Signed by Senators Deccio, Hale and Palmer.

Staff: Jack Brummel (786-7428)

Background: Compensation paid or awarded by another jurisdiction is presently offset against amounts paid or awarded the claimant by Washington State. Other recoveries made to the claimant under another jurisdiction's workers' compensation laws are sometimes not considered to be compensation and cannot be offset against amounts paid or awarded the claimant by Washington.

Injured workers may seek recovery against third parties other than their employer for work-related injuries. If such recoveries are made, the Department of Labor and Industries may seek reimbursement of amounts recovered by injured workers. The state Supreme Court ruled last year that the department's right to reimbursement does not extend to amounts awarded for loss of consortium.

Current law requires that the Department of Labor and Industries make a retroactive adjustment to an employer's experience rating when a third party recovery was made on a claim which changed the rating.

The department believes that there are several technical changes to the workers' compensation statutes which would improve administration.

Summary of Bill: Any settlement proceeds from another jurisdiction are used to offset workers' compensation award payments to claimants in Washington. The department no longer makes retroactive adjustments to an employer's experience rating when a third party recovery is made on claims previously used to calculate experience rating. Health

services providers are allowed 60 days to appeal department orders that do not make demands for repayment of sums paid. Orders and Notices to Withhold and Deliver can be served by certified mail, in addition to personal service. The term "recovery" does not include damages for loss of consortium.

Minor technical changes are made to clarify legislative intent with regard to third party settlements.

Appropriation: None.

Fiscal Note: Available.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: The bill provides several needed technical corrections to industrial insurance statutes and complies with recent court decisions.

Testimony Against: Loss of consortium should be offset against workers' compensation payments. Greater clarity in establishing benefits for the future is needed.

Testified: Mark Brown, Mike Watson, Department of Labor and Industries (pro); Charles Bush, WA Self-Insurers Assn. (con); Clif Finch, AWB (con).

House Amendment(s): The award granted a beneficiary upon the death of a worker is changed from \$2,000 to twice the state average monthly wage.

HOUSE BILL REPORT

SB 5399

As Reported By House Committee On:
Commerce & Labor

Title: An act relating to refining industrial insurance actions.

Brief Description: Refining industrial insurance actions.

Sponsors: Senators Pelz and Franklin; by request of Department of Labor & Industries.

Brief History:

Committee Activity:

Commerce & Labor: 3/22/95, 3/29/95 [DPA].

HOUSE COMMITTEE ON COMMERCE & LABOR

Majority Report: Do pass as amended. Signed by 10 members: Representatives Lisk, Chairman; Hargrove, Vice Chairman; Thompson, Vice Chairman; Romero, Ranking Minority Member; Conway, Assistant Ranking Minority Member; Cairnes; Cody; Cole; Fuhrman and Goldsmith.

Staff: Chris Cordes (786-7117).

Background:

Industrial insurance actions related to out-of-jurisdiction claims

A worker who is injured outside of the territorial limits of Washington and whose employment is principally located in Washington or is under a contract made in Washington is entitled to benefits under Washington industrial insurance law if the injury is one for which benefits would have been paid had the injury occurred in Washington. However, any payment or award received by the worker under the other jurisdiction's workers' compensation law is offset against the benefits received under Washington law.

Benefits in case of the injured worker's death

If an injured worker dies as a result of the industrial injury, burial expenses of \$2,000 are paid and the worker's family receives an immediate payment of \$1,600.

Third party actions

An injured worker, or the Department of Labor and Industries or self-insured employer on behalf of the injured worker, may file a civil action against third parties (not the employer or co-worker) who may be liable for the worker's injuries. The worker is entitled to full benefits under the industrial insurance law and the department or self-insurer has a lien against the third party recovery for benefits that are paid. When benefits are reimbursed from the third party recovery, the department is required to make a retroactive adjustment to the state fund employer's experience rating account.

The Washington Supreme Court has held that the department's right to reimbursement from a third party recovery does not extend to the part of the recovery that is for loss of consortium. The court found that benefits paid under the industrial insurance law do not compensate injured workers for noneconomic damages, such as loss of consortium, and therefore the worker is not obtaining double recovery by retaining both the workers' compensation benefits and the noneconomic damages recovered in the third party action.

If a third party cause of action is settled, the department or the self-insurer must approve any settlement that results in the worker receiving less than he or she is entitled to under the industrial insurance law. "Entitlement" includes benefits paid and payable.

- A notice to withhold and deliver property in a collection action related to a lien against a third party recovery must be personally served by the county sheriff's department or by the director's authorized representative.

Industrial insurance appeals by health services providers

A provider who chooses to file an appeal of a Department of Labor and Industries order that demands repayment from the provider must file the appeal within 20 days of the order being communicated to the provider.

Summary of Amended Bill:

Industrial insurance actions related to out-of-jurisdiction claims

Settlement proceeds and other recoveries that a worker receives under another jurisdiction's workers' compensation law are included as part of the other jurisdiction's compensation that may be offset against compensation received under Washington's law.

Benefits in case of the injured worker's death

The amount of the benefits paid for burial expenses when an injured worker dies as a result of the industrial injury is changed from \$2,000 to 200 percent of the state's average monthly wage (approximately \$4,250). The immediate payment for the injured worker's family is changed from \$1,600 to 100 percent of the state average monthly wage (approximately \$2,125).

Third party actions

The definition of "recovery" in an action against a third party, for purposes of determining the state fund's or self-insurer's lien against the recovery, includes all damages except loss of consortium.

In a compromise or settlement of a third party action, when written approval of the department of self-insurer is required because the settlement results in less than the worker's entitlement, "entitlement" includes benefits that are estimated by the department to be paid in the future.

The provision is deleted that required the Department of Labor and Industries to make a retroactive adjustment to an employer's experience rating account based on reimbursement from a third party recovery.

Notices to withhold and deliver property in a collection action related to a lien against a third party recovery may, in addition to personal service, be served by certified mail with return receipt requested.

Industrial insurance appeals by health services providers

The time period for health services providers to appeal orders of the Department of Labor and Industries is revised. Health services providers are given a 60-day period to file appeals to department orders unless the order is solely a demand for the repayment of amounts paid to the provider.

Amended Bill Compared to Original Bill: The amendment adds provisions that change the method for calculating the award for burial expenses and the immediate payment to the injured worker's family when the worker dies as a result of the industrial injury.

Appropriation: None.

Fiscal Note: Available.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Testimony For: (1) This bill will assist the Department of Labor and Industries and self-insured employers when a settlement results in a deficiency recovery. The department or self-insurer could void the settlement if the recovery fails to account for the future costs that are expected in the claim. This bill also clarifies appeal rights by health care providers, whose period of time in which to file an appeal has been limited by the Board of Industrial Insurance Appeals. Amendments should be added to this bill that would allow a better method to calculate burial benefits if an industrial injury results in the death of an injured worker. (2) The bill should address all noneconomic damages that an injured worker might recover in a third party action, and not provide an exemption for loss of consortium damages. Permitting this exemption from the definition of "recovery" creates an incentive for the parties on both sides of the issue to manipulate settlements and shift the recovery away from economic damages. If this happens, it will complicate settlements to the detriment of the premium payers. (3) The logic behind the lien statute is to protect against double recoveries. Because workers' compensation does not cover every kind of loss suffered by the worker, it is fair that some parts of a third party recovery should not be subject to the department's lien. The department or self-insurer already has the right to void a settlement when it is deficient. However, these procedures are particularly important when the injured party is not represented by counsel. The bill should allow parties who are represented to make whatever settlement fits their circumstances. Allowing the settlement to be voided simply forces an expensive trial without any risk to the department or self-insurer.

Testimony Against: None.

Testified: (In favor) Mike Watson, Department of Labor and Industries, (In favor, with amendments) Lee Eberle, Washington Self-Insurers Association; Cliff Finch, Association of Washington Business; and Wayne Lieb, Washington State Trial Lawyers Association.

APPENDIX H

FLOOR SYNOPSIS

SB 5399 - Refining industrial insurance actions.

A. WHAT THE BILL DOES:

Settlement proceeds from other jurisdictions may be used to offset worker' comp payments. Technical changes are made regarding notice provisions in the industrial insurance code. Recovery made by the Dept. of L&I for third party damages will not include loss of consortium.

B. WHY IT IS NEEDED:

Departmental request to make technical corrections to the code and comply with recent court decisions.

C. FISCAL IMPACT:

Preliminary fiscal note indicated \$15,000. cost.

D. PERSONS SPEAKING ON THE BILL:

PRO: Mark Brown, Mike Watson, Dept. of L&I.

CON: Charles Bush, WA Self-Insurers Assn.; Clif Finch, AWB.

E. COMMENTS:

None.

APPENDIX I



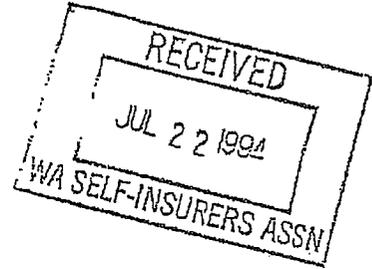
PRESTON GATES & ELLIS
ATTORNEYS

JO, C/SA 13

Proposed
Amended by 5399; I know it

MEMORANDUM

To: WSIA Legal Committee And Interested Persons
From: Charley Bush *Charley*
Date: July 20, 1994
Subject: Department Proposed Third Party Chapter Amendments



The Department is considering two Third Party Chapter (Chapter) amendments. Rather than the agency proceeding independently of the self-insured employer community, it would be appropriate for us presently to consider the proposals and if nothing else at this time, assist in the drafting. James Nylander, Third Party Section supervisor, must have his drafts transmitted up the chain of command by the end of July.

Please consider the following and let me know of your comments as soon as possible. I recognize that any input from us would be informal and not an official position of WSIA.

1. Consortium loss.

Handwritten initials

To stem the damage done by the Supreme Court in *Downey and Flanigan v. Department of Labor & Indus.*, 123 Wn.2d 418 (1994), the Department proposes to amend RCW 51.24.030 so that it specifies only consortium loss damages as exempt from the distribution provisions of RCW 51.24.050 and .060. The court erroneously concluded that because workers' compensation is recompense for only economic loss, only economic damages were subject to the Chapter. As Jim Hailey asserted in a recent WSTLA seminar, that fallacious reasoning will encompass more than mere consortium loss damages.

I question whether the employer community should cave so quickly. After all, we previously have responded with legislation in direct opposition to a Supreme Court's erroneous decision. Please consider whether an amendment should be proposed which specifies all damages, economic or otherwise, as being subject to the Chapter. An amendment exempting only consortium loss damages could be used as a holdout.

Also consider an amendment which creates only a limited exemption for consortium loss damages. In the event a consortium loss spouse seeks workers' compensation in his/her own right, then such a personal injury recovery would be subject to the Chapter's distribution provisions.

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2. Clarification of "payable" as used in RCW 51.24.090(1).

In light of the *Downey/Flanigan* decision, the Department/self-insurer control over settlements provided by RCW 51.24.090(1) is under attack. Because the WSTLA "game" will be to shift a majority of a recovery into the "consortium" category, little will be left that is subject to the Chapter. The Department/self-insurer can disapprove any such settlement which results in less than the "entitlement", "benefits and compensation paid and payable."

Jim Hailey reminds the Department of its argument in *Davis v. Department of Labor & Indus.*, 71 Wn. App. 360 (1993), that "payable" (as used in RCW 51.24.060(1)(c)(i)) merely means awarded, but not paid as of the recovery date. Of course, that position wholly ignores the future benefits and compensation reserve which traditionally has been accepted as the "payable" portion of "entitlement" as used in RCW 51.24.090(1). The Department proposes to head off this thrust by amending the statute by deleting "payable" and adding "estimated to be paid in the future."

The only "red flag" that comes to mind as of this date is the admission tacit in proposing such an amendment. If presented and accepted as a mere clarification amendment, then we may be able to avoid its use as weapon against us.

~~HB 1784~~
Amended to SB 5399

Committee Amendment

Suggested alternative to Department proposed new subsection (5) of RCW 51.24.030

Sec 2, Line 34, P 4. Replace existing sec. 5.

(5) For the purposes of this chapter, "damages" and "recovery" shall include all personal injury ^{compensation} ~~recompense~~ for the injured worker, dependent, or beneficiary, whether in the nature of general or special economic or non-economic.