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

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JIM A. TOBIN,

Respondent,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Appellant.

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DEPARTMENT'S RESPONSE TO RESPONDENT'S  
SUPPLEMENTAL BRIEF

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## I. INTRODUCTION

On February 7, 2008, Jim Tobin filed his “Respondent’s Supplemental Brief.” The Department of Labor and Industries responds.

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## II. ARGUMENT

Tobin’s Supplemental Brief argues that the Court should give little weight to a portion of the legislative history appended to the Department’s Brief of Appellant. Respondent’s Supplemental Brief (SB) 3-4. Specifically, Tobin claims that (a) “[t]he only mention of pain and suffering . . . was in the testimony of non-legislator witnesses before the committees,” SB 2, and that “such evidence should be given little weight.” SB 3.<sup>1</sup>

Tobin’s description of the legislative history of RCW 51.24.030(5) is incomplete.<sup>2</sup> While the specific words “pain and suffering” do not appear in every document, the legislative history indisputably shows that the statute was enacted in response to *Flanigan v. Department of Labor &*

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<sup>1</sup> The Department maintains that RCW 51.24.030(5) is unambiguous and not in need of construction. *See* Brief of Appellant (AB) 20-21. The legislative history of the statute simply confirms that the Legislature intended the law to do exactly what it does: ensure that all damages except those for loss of consortium be included in the distribution of tort recoveries made by workers receiving benefits under Title 51 RCW, the Industrial Insurance Act.

<sup>2</sup> The Department’s Brief of Appellant describes this history in detail at AB 22-31.

*Industries*, 123 Wn.2d 418, 869 P.2d 14 (1994), and the Legislature intend it to limit that decision to damages for loss of consortium.

One example of this written history is the Department's 1995 Request Package Fact Sheet, which states that SB 5399 would "[c]larify that third-party recovery does not include an award for loss of consortium (amenities of marriage, including help and affection) for the spouse, but does include other damages paid by the third party."

This contemporaneous interpretation of a law by the agency that drafted it is entitled to substantial weight:

While we review de novo questions of statutory construction, *see Native Village of Stevens v. Smith*, 770 F.2d 1486, 1487 (9th Cir. 1985), *cert. denied*, 475 U.S. 1121, 106 S.Ct. 1640, 90 L.Ed.2d 185 (1986), we accord substantial deference to interpretations of an agency charged with administering the statute in issue. *Blackfeet Indian Tribe v. Montana Power Co.*, 838 F.2d 1055, 1058 (9th Cir.), *cert. denied*, 488 U.S. 828, 109 S.Ct. 79, 102 L.Ed.2d 56 (1988). Deference is especially appropriate in the present case because the enabling legislation is highly technical and because BPA was intimately involved in drafting much of that legislation. *Dep't of Water & Power of City of Los Angeles v. Bonneville Power Admin.*, 759 F.2d 684, 691 (9<sup>th</sup> Cir. 1985).

*Util. Reform Project v. Bonneville Power Admin.*, 869 F.2d 437, 442 (9<sup>th</sup> Cir. 1989) (underlining added); *see also, e.g., John v. Baker*, 982 P.2d 738, 811 (Alas. 1999) (Matthews, C.J., dissenting) ("In determining a statute's meaning, courts will defer to the contemporaneous construction

of the statute given by an agency charged with its administration. Contemporaneity of construction is important because often agency personnel have assisted in formulating the legislation and are thus knowledgeable of its intent and meaning.”) (footnotes omitted).<sup>3</sup>

A second indication that SB 5399 was intended to limit *Flanigan*'s reach is the Fiscal Note for the bill, which stated as a Fact that:

The recent Supreme Court decision in Flanigan v. Department of Labor & Indus., 123 Wn.2d 418 (1994), excepted damages for loss of consortium from the department's right of reimbursement, and created a potential for attempts at excluding other forms of damages from the department's right of reimbursement.

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<sup>3</sup> Footnote 59 to Chief Justice Matthews' dissent in *John v. Baker* sets out additional authority for deferring to agency construction of laws in situations such as the current appeal, including:

- *Howe v. Smith*, 452 U.S. 473, 485, 101 S.Ct. 2468, 69 L.Ed.2d 171 (1981) (“the [agency's] interpretation of the statute merits greater than normal weight because it was the [agency] that drafted the legislation and steered it through Congress with little debate”);
- *Frontier Airlines, Inc. v. Civil Aeronautics Bd.*, 621 F.2d 369, 372 (10<sup>th</sup> Cir.1980) (holding that the construction of a statute by an agency charged with its administration is entitled to substantial deference by courts, especially where the administrative practice at stake involves the contemporaneous construction of the statute by those charged with the responsibility of setting its machinery in motion); and
- 2B Norman J. Singer, *Sutherland Statutory Construction* § 49.04 at 11 (5<sup>th</sup> ed. 1992) (“[L]egislative history in the form of information as to how draftsmen of a provision understood it and that their meaning was communicated to the Congress which enacted it has been held to be entitled to greater weight than subsequent administrative interpretation.”) (citation omitted).

*See John v. Baker*, 982 P.2d at 811 n.59 (Matthews, C.J., dissenting).

The Fiscal Note included the Assumption – an assumption borne out by this case – that:

Without passage of this amendment, piecemeal attempts to exclude various forms of damages from the Trust Funds' right of reimbursement will be made resulting in increased disputes, costly litigation, and cumbersome administration of the statute.

Washington Courts have turned to fiscal notes on more than one occasion to determine legislative intent. *See, e.g., Qwest Corp v. City of Bellevue*, 161 Wn.2d 353, 367, 166 P.3d 667 (2007) (quoting local government fiscal note as legislative history that “persuades” the Court); *Sebastian v. Dep’t of Labor & Indus.*, 142 Wn.2d 280, 294, 12 P.3d 594 (2000) (“[w]hen dealing with an ambiguous statute, we have looked to legislative bill reports and fiscal summaries to determine the Legislature's intent”); *Cena v. Dep’t of Labor & Indus.*, 121 Wn. App. 915, 923, 91 P.3d 903 (2004), *review denied*, 153 Wn.2d 1015 (2005) (citing assumption from fiscal note associated with amendment to Industrial Insurance Act as helpful legislative history).

Further written evidence of the Legislature’s intent in enacting RCW 51.24.030(5) appears in the Senate Journal Report on the Floor Debate for SB 5399, during which Senator Pelz explained, “[w]hat this bill is doing is making clear that those payments which are recouped to

L&I will not include the loss of consortium in the event that the worker wins a third party lawsuit.”<sup>4</sup>

These documents, which Tobin’s Supplemental Brief does not address, demonstrate that the one and only goal the Legislature had when it enacted RCW 51.24.030(5) was to limit *Flanigan* to damages for loss of consortium. Tobin has never suggested an alternate interpretation of this law, because there is none.

As set out in the Department’s Brief of Appellant at AB 24-31, the testimony before the Senate and House Committees considering SB 5399 unanimously confirms that the bill was intended to codify *Flanigan*’s holding and limit the case to damages for loss of consortium. Tobin’s Supplemental Brief, however, points out several decisions in which courts have given “little weight” to committee testimony in assessing legislative intent.

The Department recognizes that it is for the court to determine what weight to give various indicia of legislative intent. Tobin cites no

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<sup>4</sup> See also Senate Labor, Commerce & Trade Committee’s Report on SB 5399 (discussing *Flanigan*’s holding and stating under “Summary of Bill” that “[t]he term ‘recovery’ does not include damages for loss of consortium”; House Bill Analysis for SB 5399 and House Commerce & Labor Committee’s Report on SB 5399 (both discussing *Flanigan*’s holding and stating under “Summary of Bill” that “[t]he 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”). These committee reports, too, are meaningful sources of legislative intent. *Sebastian*, 142 Wn.2d at 294; see also, e.g., *In re Quackenbush*, 142 Wn.2d 928, 935-36, 16 P.3d 638 (2001).

cases, however, that suggest that a courts must give *no* weight to committee testimony, and the Department has pointed to many cases in which such testimony – along with other indirect resources, such as TVW’s website – have been used to establish what the Legislature intended when it enacted a statute.<sup>5</sup>

When it denied Tobin’s Motion to Strike Documents from Appendix to Appellant’s Brief, this Court stated that “[e]vidence of the legislative history of a statute need not have been filed with the trial court and so it can be appended to a party’s appellate brief.” The Court can decide how much weight to give to this legislative history. Where, as here, that history points to only one construction of a statute – and that construction is consistent with the plain language of the law – the Court should adopt that construction, regardless of how it weighs the legislative history.

### III. CONCLUSION

The plain language of RCW 51.24.030(5) as well as the statute’s legislative history prove that the trial court erred. While Tobin’s Supplemental Brief argues that the Court should give little weight to the committee testimony behind the law, he does not address the other indicia

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<sup>5</sup> See Answer to Respondent’s Motion to Strike Documents from the Appendix to Appellant’s Brief 6-7; Answer to Respondent’s Motion to Modify Ruling 5-7.

of legislative intent, and he has never explained what RCW 51.24.030(5) might mean if it does not mean that *Flanigan* applies only to damages for loss of consortium.

RESPECTFULLY SUBMITTED this 14th day of February, 2008.

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