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STATE OF WASHINGTON
DEPT. OF LABOR & INDUSTRIES
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COURT OF APPEALS
DIVISION II

SUPREME COURT OF THE STATE OF WASHINGTON

JIM A. TOBIN,

Respondent,

v.

DEPARTMENT OF LABOR AND INDUSTRIES,

Appellant.

**DEPARTMENT OF LABOR & INDUSTRIES'
PETITION FOR REVIEW**

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I. INTRODUCTION

The Department of Labor and Industries (Department) requests review of the published Court of Appeals opinion in *Tobin v. Department of Labor & Industries*, No. 36031-4-II (July 1, 2008; copy attached as Appendix A).

Under Title 51 RCW, workers' compensation benefits are the exclusive remedy for individuals injured in the course of their employment. Chapter 51.24 RCW (the Third Party Recovery Statute) provides an exception to this limitation, permitting a worker whose injury is caused by an entity other than his or her employer to pursue a tort claim. "Any recovery" in a third party action is subject to distribution based on a formula set out in RCW 51.24.060. Under this formula the worker's attorney is paid, the worker receives a share free and clear of any Department claim, the Department is reimbursed for workers' compensation benefits paid, and future workers' compensation benefits are offset against the remaining recovery.

In *Flanigan v. Department of Labor & Industries*, 123 Wn.2d 418, 869 P.2d 14 (1994), this Court held that the portion of a third party recovery representing damages for loss of consortium was not subject to distribution under RCW 51.24.060. The Legislature responded immediately, enacting RCW 51.24.030(5) to define "recovery" for

purposes of RCW 51.24 as “all damages except loss of consortium.” This statute was intended to codify *Flanigan’s* holding and to limit the decision’s reach to damages for loss of consortium.¹

Jim Tobin was injured on his job and brought a third party action under RCW 51.24. He recovered \$1.4 million, most of which was allocated to pain and suffering. The Court of Appeals in *Tobin* held that pain and suffering damages are exempt from distribution. With neither briefing from the parties nor case law that is on point, the Court also held that RCW 51.24.060 violates procedural due process by not giving notice to workers that damages for pain and suffering are subject to distribution.

The Court of Appeals decision frustrates the core principles that underlie the Third Party Recovery Statute. The ruling raises questions of substantial public interest that should be determined by this Court, conflicts with decisions of this Court and the Court of Appeals, and involves a significant question of constitutional law. Discretionary review is therefore warranted.

¹ RCW 51.24.030(5) and pertinent portions of RCW 51.24.060 are attached hereto as Appendix B.

II. ISSUES PRESENTED FOR REVIEW

- A. **RCW 51.24.060 Establishes A Mandatory Distribution Formula For “Any Recovery” Made In An Action By An Injured Worker Against A Third Party. RCW 51.24.030(5) Provides That “For Purposes Of [RCW 51.24] ‘Recovery’ Includes All Damages Except Loss Of Consortium.” Is The Pain And Suffering Portion Of An Injured Worker’s Recovery From A Third Party Tortfeasor Subject To Distribution Under This Statute?**
- B. **Relying On Procedural Due Process, The Court Of Appeals Invalidates Application Of The Third Party Recovery Statute To Damages For Pain And Suffering, Apparently Based On The Law’s Alleged Vagueness. Does Application Of The Third Party Recovery Statute’s Distribution Formula To Damages For Pain And Suffering Violate Procedural Due Process?**

III. STATEMENT OF THE CASE

A. **Workers’ Compensation And Third Party Recoveries**

For nearly a century, Washington’s workers’ compensation statute has provided “sure and certain relief” to injured workers and their families. Employers are granted limited liability and tort claims against them are “abolished.” Laws of 1911, ch. 74, § 1; RCW 51.04.010. This is the “great compromise” that underlies all workers’ compensation: injured workers received guaranteed benefits, while employer liability is limited to the payment of industrial insurance premiums. *See, e.g., Stertz v. Indus. Ins. Comm’n*, 91 Wash. 588, 590-91, 158 P. 256 (1916).

The 1911 Industrial Insurance Act contained an exception to its exclusive remedy provisions “if the injury to a workman . . . is due to the

negligence or wrong of another not in the same employ.” Laws of 1911, ch. 74, § 3 (definition of “Workman”). A worker injured by a third party could elect whether to receive workers’ compensation benefits or seek damages from the tortfeasor. *Id.* A worker choosing workers’ compensation benefits assigned the tort claim to the Department; workers pursuing their own tort recovery were limited to workers’ compensation benefits for “the deficiency, if any, between the amount of recovery against such third person actually collected, and the compensation provided or estimated by this act for such case.” *Id.*

The original Industrial Insurance statute thus protected the workers’ compensation funds by reimbursing them dollar-for-dollar from recoveries made against third parties. If a tort recovery exceeded the benefits available under the Act, the funds paid nothing. If the recovery was less than the workers’ compensation benefits, the funds paid only the difference. *See generally Arthun v. City of Seattle*, 137 Wash. 228, 230-231, 242 P. 16 (1926).

In 1977, the Legislature created a new, four-step formula for distributing the proceeds of tort recoveries:

- (i) the worker’s attorney received fees and costs;
- (ii) the worker received 25 percent of the recovery after fees and costs;
- (iii) the balance of the award was paid to the Department, “but only to the extent necessary to reimburse the department . . . for compensation or benefits paid”; and

- (iv) the remaining balance, if any, was paid to the injured worker, with future workers compensation benefits offset against this balance.

See Laws of 1977, 1st ex. sess., ch. 84, § 4 (codified at former RCW 51.24.060). Because injured workers received 25 percent of tort recoveries free from any Department claim, the 1977 legislation ensured that plaintiffs would benefit from and therefore vigorously pursue third party claims. See *Flanigan*, 123 Wn.2d at 434 (Madsen, J., dissenting).

Today, the Third Party Recovery Statute continues to promote several policies: (a) reimbursing the workers' compensation funds so that they "are not charged for damages caused by a third party," *Maxey v. Dep't of Labor & Indus.*, 114 Wn.2d 542, 549, 789 P.2d 75 (1990); (b) ensuring that third parties bear responsibility for the costs of their negligence, *Flanigan*, 123 Wn.2d at 424; (c) allowing injured workers to "recover full damages from the party who is legally and in fact responsible," *Clark v. Pacificorp*, 118 Wn.2d 167, 185, 822 P.2d 162 (1991); and (d) preventing injured workers from receiving "double recover[ies]," *Maxey*, 114 Wn.2d at 549.

B. *Flanigan* And Damages For Loss Of Consortium

In 1994 this Court ruled that "the Department's right of reimbursement does not extend to a spouse's third party recovery for loss of consortium." *Flanigan*, 123 Wn.2d at 426. *Flanigan* was based on

former² RCW 51.24.060(1)(c)'s provision that the Department was to be paid "the balance of the award" after attorneys' fees and the worker's 25 percent share, "but only to the extent necessary to reimburse the department . . . for compensation or benefits paid"

While the language of current and former RCW 51.24.060(1)(c) limits the *amount* of reimbursement due the Department, *Flanigan*, 123 Wn.2d at 437 (Madsen, J., dissenting), *Flanigan* construed the statute to mean that there could be no "reimbursement" from loss of consortium damages because the Industrial Insurance Act does not provide that *type* of benefit. *Flanigan*, 123 Wn.2d at 425-426. In dicta, *Flanigan* suggested that damages for pain and suffering might also not be subject to distribution under the third party statute. *Id.* at 423.

The Legislature responded, passing RCW 51.24.030(5) in its next session. The new law codified the Court's holding, but in a way that explicitly limited it to loss of consortium damages:

For purposes of this chapter, "recovery" includes all damages except loss of consortium.

Laws of 1995, ch. 199, § 2, *codified at* RCW 51.24.030(5). Because RCW 51.24.060 governs the distribution of "any recovery," RCW 51.24.030(5) now ensured that "all damages except loss of

² RCW 51.24.060 has been amended since 1994 in ways not material to the present matter. See Laws of 1995, ch. 199, § 4; Laws of 2001, ch. 146, § 9.

consortium” would be subject to distribution. The statute’s legislative history confirms that this amendment to the Third Party Recovery Statute was a response to *Flanigan* and was intended to limit its reach.³

C. Tobin’s Claim And Third Party Recovery

Jim Tobin suffered a serious on-the-job injury caused by an entity other than his employer, received workers’ compensation benefits, and pursued a third party tort claim. He settled the tort claim for \$1.4 million, allocating approximately \$800,000 to pain and suffering. Board Record (BR) 70, ¶ 6. At the time he settled, Tobin had received \$80,501.40 in workers’ compensation benefits. *Id.*, ¶ 9. The estimated present value of Tobin’s future pension benefits was \$562,732. *Id.*, ¶ 10.

The Department issued an order distributing Tobin’s third party recovery as follows:

Tobin’s attorney (fees and costs):	\$472,262.44
Tobin:	\$874,391.25
Department:	\$ 53,346.31

BR 71, ¶ 8; BR 82. The Department’s share reimbursed it for the workers’ compensation benefits paid less its proportionate share of fees and costs, while Tobin’s share included \$231,934.39 free and clear of any Department claim and \$425,735.62 as an excess recovery against which

³ The legislative history of RCW 51.24.030(5) is discussed in detail in the Department’s Brief of Appellant at 22-31. Particularly relevant excerpts from this legislative history are highlighted in Appendix C to this Petition for Review.

future workers' compensation benefits would be offset. Because this offset inures to the benefit of the funds, the excess recovery was also reduced to reflect the Department's proportionate share of fees and costs. BR 82-83; *see generally* RCW 51.24.060(1)(c), (e).

Tobin appealed to the Board of Industrial Insurance Appeals, arguing that pain and suffering damages were not subject to distribution and that application of RCW 51.24.060 and 51.24.030(5) to his recovery was an unconstitutional taking. BR 85-95. The Department responded that the post-*Flanigan* enactment of RCW 51.24.030(5) required it to include "all damages except loss of consortium" in its distribution of third party recoveries. BR 115-130. The Board's Industrial Appeals Judge affirmed the distribution order, BR 23-26, and the Board rejected Tobin's request for review of the IAJ's decision. BR 2.

Tobin appealed to the Pierce County Superior Court, Clerk's Papers (CP) 1-3, raising the same arguments. *See* CP 4-17; Report of Proceedings (RP) 3-6, 11-13. Based on *Flanigan*, the superior court reversed the Board's decision and did not reach Tobin's takings argument. RP 13-14; CP 45.

The Department appealed, and in a published opinion the Court of Appeals affirmed. The Court holds that RCW 51.24.030(5) had no impact on *Flanigan*, and that damages for pain and suffering are therefore exempt

from distribution (slip op. at 6-8). And while the Court did not adopt Tobin's takings argument, it states that "the real issue is whether the statute gives injured workers adequate notice" that damages for pain and suffering would be subject to distribution. Under this new theory, it concludes RCW 51.24.060 violates due process (slip op. at 10-12).

IV. REASONS WHY REVIEW SHOULD BE GRANTED

A. The Court Of Appeals' Construction Of RCW 51.24.030(5) And RCW 51.24.060 Raises Issues Of Substantial Public Importance And Conflicts With Decisions Of This Court And The Court Of Appeals

1. The Court Of Appeals' Rejection Of The Plain Language Of RCW 51.24.030(5) And RCW 51.24.060 Conflicts With Decisions Of This Court And The Court Of Appeals

RCW 51.24.060 establishes a mandatory mechanism for the distribution of "any recovery" made in a third party action. RCW 51.24.030(5) defines "recovery" as "all damages except loss of consortium." Damages for pain and suffering are a "recovery" in a third party action and are not "loss of consortium." Under the plain language of these statutes, pain and suffering damages are subject to distribution.

Courts look to the plain language of a statute to determine the Legislature's intent. *E.g.*, *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). Although it identifies no part of RCW 51.24.030(5) or RCW 51.24.060 that is ambiguous, the *Tobin* opinion ignores the plain

language of both statutes in favor of a construction that is consistent with neither. Instead, the “recovery” subject to distribution is not the “recovery” that the statute itself defines. *See slip op.* at 7.

If *Tobin* were correct, then the Legislature accomplished nothing when it enacted RCW 51.24.030(5). Indeed, *Tobin* has never suggested what purpose RCW 51.24.030(5) might serve if it does not codify and limit the *Flanigan* ruling to damages for loss of consortium. Likewise, the Court of Appeals opinion provides no indication of what the statutory definition means, holding only that it does not change the result that might follow from *Flanigan* if RCW 51.24.030(5) had not been enacted.

The Legislature, however, “does not engage in unnecessary or meaningless acts, and we presume some significant purpose or objective in every legislative enactment.” *In re Recall of Pearsall-Stipek*, 141 Wn.2d 756, 769, 10 P.3d 1034 (2000) (citation omitted); *see also Yakima Fruit Growers Ass’n v. Henneford*, 187 Wash. 252, 258, 60 P.2d 62 (1936) (legislation enacted immediately after Supreme Court decision and amending statute construed in that decision was a response to that decision; to hold otherwise would mean that “the amendatory language was intended to have no effect whatsoever”). By rejecting the plain language of RCW 51.24.030(5) and adopting a construction that renders the statute meaningless, the opinion below conflicts with decisions

of this and other courts. Moreover, it presents a patently erroneous interpretation of statutory language. Discretionary review is therefore warranted.

2. The Court Of Appeals Decision Thwarts The Policies That Underlie The Third Party Recovery Statute, Raising An Issue Of Substantial Public Importance

a. The Impact Of The Court Of Appeals Decision On The Distribution Of Third Party Recoveries

To understand how the Court of Appeals opinion affects the policies of the Third Party Recovery Statute, it is necessary to examine the impact of various distribution scenarios on an injured worker's total recovery and the workers' compensation funds. While the example that follows uses the figures associated with Tobin's claim, the principles it illustrates apply to any recovery involving damages for pain and suffering.

Tobin's workers' compensation benefits total \$643,233.40, while his tort claim alone would have netted him \$927,737.56.⁴ Distributing his entire tort recovery according to the third party statute's plain language, as the Department originally ordered, leaves Tobin with \$1,091,889.02 in combined workers' compensation benefits and tort damages, an increase of \$448,655.62 over his workers' compensation benefits and \$164,151.46

⁴ The calculations for the figures in this section are set out in Appendix D.

over his tort recovery. The cost to the workers' compensation funds, on the other hand, is reduced from \$643,233.40 to \$164,151.46.

The Court of Appeals decision substantially alters the Legislature's balance. Exclusion of pain and suffering from distribution provides Tobin with a combined recovery of \$1,353,070.24 – an increase of more than \$700,000 over his workers' compensation benefits, \$425,000 more than his tort claim alone, and \$260,000 more than he was awarded under the application of the third party statute as written. Conversely, by excluding Tobin's pain and suffering damages from the distribution of his third party recovery, the Court of Appeals increases the cost of Tobin's claim to the funds by more than 250 percent, to \$425,332.68. The following table summarizes these scenarios:

	Cost to Workers' Compensation Funds	Net to Tobin	Tortfeasor Cost
Workers' Compensation	\$643,233.40	\$643,233.40	\$0
Tort Claim Alone	\$0	\$927,737.56	\$1,400,000
Department's Distribution	\$164,151.46	\$1,091,889.02	\$1,400,000
Court of Appeals Holding	\$425,332.68	\$1,353,070.24	\$1,400,000

b. *Tobin* Results In Reduced Reimbursement To The Funds

These numbers demonstrate the manner in which the Court of Appeals opinion defeats the fundamental purpose of the Third Party

Recovery Statute. That law was created to reimburse the funds so that workers and employers were not forced to bear the cost of injuries inflicted by negligent third parties. RCW 51.24.060 as written accomplishes this goal by reducing the funds' exposure on Tobin's claim from \$643,000 to \$164,000 while at the same time increasing Tobin's total recovery to \$448,000 above his workers' compensation benefits. Under Division II's reasoning, however, the funds will remain responsible for \$425,000 in benefits after distribution of the recovery. The funds thus pay \$260,000 more compared to distribution under RCW 51.24.060 and RCW 51.24.030(5) as written.

This Court should review the lower court's interpretation of the Third Party Recovery Statute. When applied to the thousands of third party claims that are litigated or settled every year, the Court of Appeals decision creates a substantial impact statewide on the public interests reflected in the workers' compensation system.

c. *Tobin* Allows Third Parties To Escape Full Responsibility For The Damages They Cause

Under the Third Party Recovery Statute, tortfeasors are liable for the full harm resulting from their negligence regardless of whether the plaintiff is receiving workers' compensation benefits. Holding third parties fully responsible for the damages they cause is consistent with the

principles of our tort system in general as it discourages negligent conduct. By insulating a significant portion – often more than half – of an injured worker’s tort recovery from distribution under the Third Party Recovery Statute, Division II’s holding distorts this policy.

As defendants come to understand *Tobin*, they will learn that they and injured workers can settle tort claims for less money by artificially allocating a larger amount to pain and suffering. Such allocations will insulate larger portions of settlements from distribution under RCW 51.24.060, resulting in increased total recoveries for injured workers. The damages paid by third party defendants, however, will be lower. In other words, tortfeasors will pay for less than the damages they actually cause – with, again, the workers’ compensation funds being required to make up the difference. That difference can only be funded in one way: via increased taxes on workers and their employers, none of whom caused or were responsible for the tortfeasor’s negligence that caused the workplace injury in the first place.

Particularly troubling about *Tobin* is that injured workers’ own employers will bear the brunt of the manipulation that the decision encourages. The cost of individual claims is one factor in determining the industrial insurance premiums that an employer pays. See WAC 296-17-855. These costs are reduced to reflect injured workers’

third party recoveries. WAC 296-17-870(4). This adjustment allows an employer whose employee is injured by a third party to pay lower premiums than it would if there had been no third party involvement.

Under *Tobin*, there will be less reimbursement from third party recoveries to the funds. There will therefore be smaller credits to employers whose workers are injured by third parties, and those individual employers will pay correspondingly higher taxes. Combined with the fact that *Tobin* allows defendants to pay smaller settlements to injured workers, the cost of third party negligence is effectively shifted onto innocent workers and employers who will be forced to underwrite the negligence of the tortfeasor. Accordingly, this case presents an issue of substantial public interest warranting Supreme Court review.

d. *Tobin* Makes Third Party Plaintiffs More Than Whole At The Expense Of The Workers' Compensation Funds

According to the Court of Appeals, interpreting RCW 51.24.030(5) according to its plain language would create an "unjustified windfall" for the Department by "entitl[ing] it to share in damages for which it has not provided and will never pay compensation." Slip op. at 8. The Court continues in this vein, asserting that distributing *Tobin*'s recovery as defined by statute according to RCW 51.24.060's formula would be "fundamentally unjust." Slip op. at 8. In fact, the opposite is true.

As set out above, proper application of RCW 51.24.060's distribution formula results in Tobin recovering more than he would have in either workers' compensation benefits or from his tort claim. The Department, however, is never fully reimbursed for the benefits that Tobin receives. It is responsible for its share of fees and costs on the reimbursement share as well as on any offset of future benefits. RCW 51.24.060(1)(c), (e). Furthermore, Tobin will receive pension payments from the workers' compensation funds once his excess recovery is exhausted, payments that will continue for his natural life.

Applying RCW 51.24.060 and RCW 51.24.030(5) according to their plain language results in no "windfall" to the Department and is hardly the "fundamentally unjust result" that the Court of Appeals describes. The workers' compensation funds will pay at least \$164,000 for Tobin's claim notwithstanding his third party recovery. The distribution still provides Tobin with \$448,000 more than he would have received with workers' compensation benefits alone, and \$164,000 more than with a tort claim alone. On the other hand, under the Court of Appeals holding, Tobin – who suffered a serious injury and is entitled to substantial compensation – will receive \$700,000 more than workers' compensation benefits alone, and \$425,000 more than he received in his tort settlement.

Division II has construed the Third Party Recovery Statute to mandate that a plaintiff injured at work receive a substantially greater recovery than a plaintiff suffering the exact same injury away from work, with the difference funded by the employers and employees who contribute to Washington's workers' compensation system. The Legislature could not have intended this incongruous result. *Cf. Clark v. PacifiCorp*, 118 Wn.2d 167, 172, 822 P.2d 162 (1991) (“[t]he underlying purposes of the act are defeated if the [Department’s reimbursement] right is eliminated and the plaintiff may be made more than whole at the expense of the compensation fund”).

B. The Procedural Due Process Issue Raises A Significant Question Of Law Under The United States Constitution, Conflicts With Decisions Of This Court And The Court Of Appeals, And Raises An Issue of Substantial Public Importance

The only constitutional argument Tobin raised below is that if RCW 51.24.060’s distribution formula includes his damages for pain and suffering, then it affects an unconstitutional taking. The Court of Appeals concluded that the statute is unconstitutional – but not for the reason argued by Tobin. Instead, without benefit of briefing or on-point authority, the Court reasoned:

the real issue is whether the statute gives injured workers adequate notice that third party settlement funds earmarked as compensation for their personal pain and suffering are

subject to distribution under RCW 51.24.060 to reimburse L&I for payments it made to compensate the worker[s] for other losses. We hold that it does not.

Slip op. at 11.

The Court of Appeals' due process analysis begins with a discussion of notice and an opportunity to be heard. *See* slip op. at 11. RCW 51.24 provides these protections: distributions are confirmed by Department orders which are appealable to the Board. RCW 51.24.060(6). As Tobin's own case shows, injured workers receive notice of how the Department has distributed a third party recovery and have an opportunity to be heard at the Board and in subsequent appeals. *See generally* RCW 51.52.050, .100, .104, .106, .110. This process satisfies procedural due process requirements.

The Court of Appeals concern, however, is with the substantive language of the statute rather than the process it provides. Specifically, the Court states that "injured workers who are not aware that L&I may access their pain and suffering damages following a settlement agreement with a third party would not know to take care to structure their settlement awards accordingly." Slip op. at 12.

While not described as such, this is effectively an assertion that RCW 51.24.060 is unconstitutionally vague. There is no precedent for such an application of the vagueness doctrine, which is limited to "laws

that attempt to ‘proscribe or prescribe conduct.’” *State v. Jacobson*, 92 Wn. App. 958, 966, 965 P.2d 1140 (1998), *review denied*, 137 Wn.2d 1033 (1999). RCW 51.24.060 does not “prohibit or require conduct”; it simply establishes a formula for the distribution of recoveries in the tort claims against third parties that are allowed for by the same statute. The vagueness doctrine does not apply to this statute, and *Tobin*’s holding creates a significant constitutional question and conflicts with decisions of this Court as well as other Court of Appeals rulings.⁵

Review should be granted to address the significant constitutional question that *Tobin* creates and to resolve the conflicts created by this aspect of the Court of Appeals decision. *See* RAP 13.4(b).

C. The Court Of Appeal Decision Has Already Generated A Class Action Lawsuit

The need for review of *Tobin* is best demonstrated here by what the Court of Appeals decision has prompted: a putative class action lawsuit against the Department arguing that every third party distribution order ever issued that includes damages for pain and suffering must be

⁵ *See, e.g., State v. Baldwin*, 150 Wn.2d 448, 458, 78 P.3d 1005 (2003) (Washington State sentencing guidelines not subject to vagueness challenge); *Pacific Wire Works, Inc. v. Dep’t of Labor & Indus.*, 49 Wn. App. 229, 233, 237, 742 P.2d 168 (1987) (void-for-vagueness doctrine does not apply to regulation classifying employees for purposes of calculating workers’ compensation premiums)

reopened and the distribution recalculated. *See Davis v. Dep't of Labor & Indus.* (Thurston County Cause No. 08-2-01647-9).⁶

Relying on *Tobin*, the *Davis* plaintiffs allege that the Department's inclusion of general damages in third party distributions has resulted in unjust enrichment and constitutional violations under 42 U.S.C. § 1983. *Davis* at ¶¶ VI.A – VI.C. The plaintiffs seek damages, including “exemplary damages,” as well as declaratory and injunctive relief. *Davis* at ¶¶ VII.B-G. *Davis* demonstrates that *Tobin* has raised an issue of substantial public interest warranting discretionary review.

V. CONCLUSION

The Department asks the Court to grant the petition for review and reverse of the Court of Appeals.

RESPECTFULLY SUBMITTED this 31st day of July, 2008.

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⁶ Copies of the summons and complaint in *Davis* are attached as Appendix E.

**COURT OF APPEALS FOR DIVISION II
STATE OF WASHINGTON**

JIM A. TOBIN,

Respondent,

v.

DEPARTMENT OF LABOR &
INDUSTRIES,

Appellant.

DATED at Tumwater, Washington:

DECLARATION OF
MAILING

FILED
AUG - 6 - 2008

CLERK OF SUPREME COURT
STATE OF WASHINGTON

The undersigned, under penalty of perjury pursuant to the laws of the State of Washington, declares that on the below date, I served the Department of Labor and Industries' Petition for Review by hand delivering it to:

David Lauman
Small, Snell, Weiss & Comfort, P.S.
4002 Tacoma Mall Blvd., #200
Tacoma, WA 98411

DATED this 31st day of July, 2007.


MICHAEL HALL

APPENDIX A

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LABOR & INDUSTRIES DIVISION
OLYMPIA, WASHINGTON

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DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

JIM A. TOBIN,

Respondent,

v.

DEPARTMENT OF LABOR &
INDUSTRIES,

Appellant.

No. 36031-4-II

PUBLISHED OPINION

QUINN-BRINTNALL, J. — The Department of Labor and Industries (L&I) appeals the superior court's finding that L&I cannot seek reimbursement from the portion of Jim A. Tobin's third party recovery compensating him for his pain and suffering following a work-related injury that he sustained when a crane boom crushed him. L&I argues that the statutory reimbursement use of the term "recovery" includes "all damages except loss of consortium" and that it is entitled to seek reimbursement from the pain and suffering portion of Tobin's damages. We hold that, because L&I did not, and will not, pay pain and suffering damages, it is not entitled to sue for reimbursement from that portion of Tobin's third party recovery compensating him for his pain and suffering; we affirm.

FACTS

FACTUAL BACKGROUND¹

A. TOBIN'S INJURY AND WORKER'S COMPENSATION BENEFITS

In June 2003, while Tobin was working for Saybr Contractors, Inc., he was injured when a crane boom, operated by a third party, swung unexpectedly and crushed him against a post. L&I accepted Tobin's subsequent worker's compensation application and paid him time loss compensation and medical benefits.

In March 2005, L&I determined that Tobin was totally and permanently disabled as a result of this work-related injury and began paying him pension benefits. Tobin is entitled to receive these pension benefits for the rest of his natural life, rather than for the rest of his working life or until he reaches retirement age.

B. TOBIN'S THIRD PARTY RECOVERY AND DISTRIBUTION

Because a third party's negligence had caused his injury, in addition to successfully applying for workers' compensation benefits, he sued the responsible third party for damages.²

In September 2005, Tobin settled his third party claim for \$1.4 million, allocated as follows:

Medical Expenses:	\$29,326.84
Future Medical Expenses:	\$14,647.00
Total wage loss (past & future):	\$562,943.00
Pain and Suffering:	\$793,083.16

¹ The parties stipulated to the facts when they appeared before the Board of Industrial Insurance Appeals.

² RCW 51.24.030(1) states in relevant part:

If a third person, not in a worker's same employ, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title, the injured worker or beneficiary may elect to seek damages from the third person.

Administrative Record (AR) at 70.

On September 29, 2005, L&I applied RCW 51.24.060(1)³ and issued an order calculating the distribution⁴ of Tobin's \$1.4 million third party recovery as follows:

Attorney's share:	\$472,262.44
Claimant's share:	\$874,391.25
[L&I's] share:	\$53,346.31

AR at 71. At the time L&I issued the distribution order, it had paid Tobin workers' compensation benefits totaling \$80,501.40. These benefits included \$25,208.93 in medical treatment, \$42,893.89 in time loss compensation, and \$12,398.58 in pension benefits.

In September 2005, using the distribution formula from the third party recovery statute, RCW 51.24.060, L&I calculated that \$425,735.63 of Tobin's \$874,391.25 share was "excess recovery" which would offset future workers' compensation benefits that L&I would otherwise pay. AR at 71; *see* RCW 51.24.060(1)(a)-(e). L&I's order left Tobin's pension benefits intact.

PROCEDURAL HISTORY

A. THE BOARD OF INDUSTRIAL INSURANCE APPEALS

Tobin appealed L&I's order to the Board of Industrial Insurance Appeals (Board). There, Tobin argued that L&I should have excluded his \$793,083.16 "pain and suffering" damages from the "recovery" figure used to calculate distribution of the proceeds of his third party

³ Under RCW 51.24.060(1)(a)-(c), the recovery is divided and distributed in the following order: (1) attorney fees and costs are paid, (2) 25 percent of the balance goes to the injured employee or beneficiary, and (3) L&I "shall be paid the balance of the recovery made, but only to the extent necessary to reimburse [L&I] for benefits paid." RCW 51.24.060(1)(c). Any remaining balance is paid to the employee or beneficiary. RCW 51.24.060(1)(d).

⁴ L&I does not "distribute" the actual proceeds of an injured worker's tort recovery. Rather, once L&I learns that a recovery has been made, it calculates the distribution according to RCW 51.24.060(1)'s formula and issues an order setting forth the parties' respective shares. The "person to whom any recovery is paid," generally the plaintiff's attorney, must then disburse the funds according to the distribution order. *See* RCW 51.24.060(5), (6).

settlement. Specifically, Tobin argued that L&I did not pay him any compensation for his pain and suffering and it could not be reimbursed for payments it never made. Tobin also argued that including his pain and suffering damages in the distribution formula amounted to an unconstitutional taking.

On June 6, 2006, the Board's industrial insurance appeals judge (IIAJ) issued a proposed decision and order upholding L&I's distribution order. The IIAJ reasoned that RCW 51.24.030 authorizes L&I to assert a right of recovery for third party awards for pain and suffering because RCW 51.24.030(5) defined "recovery" as "all damages except loss of consortium," thereby including the part of Tobin's recovery compensating him for his pain and suffering. Tobin filed a petition for review to the full Board; the Board denied his petition.

B. THE SUPERIOR COURT

Tobin appealed the Board's decision to the Pierce County Superior Court. The superior court reversed the Board, finding that L&I cannot be reimbursed from the pain and suffering portion of Tobin's third party distribution. In making this ruling, the trial court relied on *Flanigan v. Department of Labor & Industries*, 123 Wn.2d 418, 423-24, 869 P.2d 14 (1994), in which our Supreme Court held that L&I's statutory right to reimbursement does not extend to a spouse's recovery for loss of consortium because RCW 51.24.060 provides that L&I can be "reimburse[ed]" only for "benefits paid," and L&I does not compensate the injured worker for loss of consortium. Specifically, here, the superior court found that, because L&I did not pay Tobin for his pain and suffering, the pain and suffering portion of Tobin's third party recovery, like the loss of consortium recovery in *Flanigan*, cannot be subject to distribution.

L&I timely appeals.

ANALYSIS

STANDARD OF REVIEW

L&I argues that the trial court's reasoning is flawed because, under RCW 51.24.030(5), "recovery" includes "all damages except loss of consortium" and necessarily includes all other forms of damages, including pain and suffering. We disagree. Under the *Flanigan* rationale, because L&I did not compensate Tobin for his pain and suffering, it cannot be "reimbursed" from that portion of Tobin's award.

When the Board reviews a case on stipulated facts, any remaining issues are questions of law which we review de novo. *Tunstall v. Bergeson*, 141 Wn.2d 201, 209-10, 5 P.3d 691 (2000), *cert. denied*, 532 U.S. 920 (2001).

Washington workers injured in the course of their employment are entitled to benefits under Title 51 RCW, the Industrial Insurance Act (IIA). These workers' compensation benefits are, with limited exceptions, the exclusive remedy available to injured workers. See RCW 51.04.010. The third party recovery statute, RCW 51.24.030, sets out the few exceptions to Title 51 RCW's exclusive remedy provisions. See *Bankhead v. Aztec Constr. Co.*, 48 Wn. App. 102, 106, 737 P.2d 1291 (1987). RCW 51.24.030(1) permits an injured worker to pursue a tort claim "[i]f a third person, not in a worker's same employ, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title."

Under the third party recovery statute, any recovery is divided and distributed in the following order: (1) attorney fees and costs are paid, (2) 25 percent of the balance goes to the injured employee or beneficiary, and (3) L&I "shall be paid the balance of the recovery made, but only to the extent necessary to reimburse [L&I] for benefits paid." RCW 51.24.060(1)(a)-(c). Any remaining balance is paid to the employee or beneficiary. RCW 51.24.060(1)(d).

Thereafter, the employee or beneficiary is not entitled to receive additional workers' compensation benefits until the additional benefits equal the remaining balance of the recovery paid to the employee or beneficiary. RCW 51.24.060(1)(e).

Allowing these third party actions serves two purposes: first, it spreads responsibility for compensating injured employees and their beneficiaries to third parties who are legally and factually responsible for the injury and, second, it permits the employee to increase his or her compensation beyond the IIA's limited benefits. *Flanigan*, 123 Wn.2d at 424 (citing *Maxey v. Dep't of Labor & Indus.*, 114 Wn.2d 542, 549, 789 P.2d 75 (1990)). Allowing L&I to obtain reimbursement from the proceeds of a third party recovery likewise serves two roles: it ensures that the accident and medical funds are not charged for damages caused by a third party, and it also ensures that the injured employee does not make a double recovery. *Flanigan*, 123 Wn.2d at 425 (citing *Maxey*, 114 Wn.2d at 549). In other words, the injured worker "cannot be paid compensation and benefits from [L&I] and yet retain the portion of damages which would include those same elements." *Flanigan*, 123 Wn.2d at 425 (quoting *Maxey*, 114 Wn.2d at 549). (emphasis omitted).

WORKERS' COMPENSATION BENEFITS AND THIRD PARTY ACTIONS

L&I argues that RCW 51.24.030(5) requires it to *exclude* loss of consortium damages from its distribution of third party recoveries but mandates that it *include* all other damages, such as damages for pain and suffering, regardless of whether it first compensated the injured worker for that portion of his recovery. We disagree.

A. THIRD PARTY RECOVERY STATUTE DISTRIBUTION CALCULATION

Here, relying on *Flanigan*, the trial court held that Tobin's pain and suffering damages were not subject to distribution under the third party distribution statute. We agree. Because

L&I did not, and will not, pay pain and suffering damages, it cannot recover from that portion of Tobin's third party recovery compensating him for his pain and suffering.⁵ See *Flanigan*, 123 Wn.2d at 423. As such, the pain and suffering portion of Tobin's third party damages is not a "recovery" as it is defined under RCW 51.24.030(5).

Shortly after the *Flanigan* decision, the legislature passed RCW 51.24.030(5), which provides: "For the purposes of this chapter, 'recovery' includes all damages except loss of consortium."

L&I argues that the amendment of RCW 51.24.030 codified *Flanigan's*⁶ holding that loss of consortium damages are not subject to distribution and simultaneously rejected our Supreme Court's suggestion that damages for pain and suffering might also be exempt from distribution. As a result, L&I argues that the plain language of RCW 51.24.030(5) requires it to *exclude* loss of consortium damages from its distribution of third party recoveries but it requires that it *include* all other damages. We disagree.

We review questions of law, including statutory construction, de novo. *City of Pasco v. Pub. Employment Relations Comm'n*, 119 Wn.2d 504, 507, 833 P.2d 381 (1992). And we construe statutory language according to its plain and ordinary meaning. *Flanigan*, 123 Wn.2d at 426.

Although RCW 51.24.030(5)'s amendment defines "recovery" as "all damages except loss of consortium," the legislature drafted the statute using the terms "reimbursing" L&I for

⁵ In *Flanigan*, our Supreme Court suggested that non-economic damages other than loss of consortium, such as pain and suffering, could also be excluded from distribution. See 123 Wn.2d at 423.

⁶ As an initial matter, L&I argues that *Flanigan* was wrongly decided. But *Flanigan* is an opinion of our Supreme Court and is, therefore, binding precedent upon this court.

“benefits paid.” See RCW 51.24.060(1)(c). We read these statutes together. *Donovick v. Seattle-First Nat’l Bank*, 111 Wn.2d 413, 415, 757 P.2d 1378 (1988) (holding that statutes are read as a whole, not piecemeal). The term “reimburse” means “to pay back (an equivalent for something taken, lost, or expended) to someone: REPAY.” *Flanigan*, 123 Wn.2d at 426 (quoting WEBSTER’S THIRD NEW INT’L DICTIONARY 1914 (1986)).

Here, L&I’s position would give it an “unjustified windfall” at Tobin’s expense. See *Flanigan*, 123 Wn.2d at 425. Under L&I’s interpretation, it would be entitled to share in damages for which it has not provided and will never pay compensation. We do not interpret these statutes to require such a fundamentally unjust result. See *Flanigan*, 123 Wn.2d at 426 (citing *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 857, 827 P.2d 1000 (1992)). L&I did not, and will never, compensate Tobin for his pain and suffering, therefore it cannot be “reimbursed” from funds designated to compensate him for his pain and suffering. See *Flanigan*, 123 Wn.2d at 426.

B. LEGISLATIVE HISTORY

Next, L&I argues that RCW 51.24.030(5)’s legislative history “provides overwhelming evidence that the Legislature intended [the amendment to RCW 51.24.030(5)] to limit *Flanigan*’s reach, thereby ensuring that damages such as pain and suffering were included in distributions made under the Third Party Recovery Statute.”⁷ Br. of Appellant at 22. Again, we disagree. Contrary to L&I’s assertion, the legislative history of RCW 51.24.030(5) does not

⁷ Tobin urges us to disregard the legislative history that L&I attached to its brief and all related arguments as “outside the record.” But a party need not have filed the legislative history of a statute with the trial court and, thus, it can be properly appended to a party’s appellate brief. But this court may take judicial notice of the legislative history of a statute. ER 201(b); see also *Clean v. State*, 130 Wn.2d 782, 809, 928 P.2d 1054 (1996) (citing *State ex. rel. Humiston v. Meyers*, 61 Wn.2d 772, 779, 380 P.2d 735 (1963)); but cf. *State v. Bernard*, 78 Wn. App. 764, 768-69, 899 P.2d 21 (1995).

“conclusively establish” that the legislature intended that all damages, except for loss of consortium, be included in the distribution calculation, only that L&I intended that it do so.

As legislative history, L&I points this court primarily to its own testimony at various hearings as well as its own proposed legislation summary to support its theory that the legislature intended to allow L&I to seek reimbursement from a portion of an injured workers’ recovery for which it did not provide compensation, such as pain and suffering. At the Senate Labor, Commerce, and Trade Committee hearing, L&I’s then Deputy Director, Mike Watson, testified that L&I sought to codify that the loss of consortium is the only part of a third party recovery for an injury that would not be subject to repayment of the benefits because it is a significant source of replenishment of the fund and provides for additional recovery for injured workers or their survivors. *See* S.B. 5399, 54th Leg., Reg. Sess. (Wash. 1995). Watson described L&I’s wishes similarly in his testimony in front of the House Commerce and Labor Committee.⁸

Although there was some discussion of general damages by witnesses before the committees, it does not appear that any of these discussions took place before the full house or senate. More importantly, these discussions do not appear in the legislative report for the bill or bill analysis. *See* FINAL LEGISLATIVE REPORT, 54th Leg. (Wash. 1995). We note the testimony of an interested party in support of a bill is not suggestive of the legislature’s intent in enacting

⁸ L&I also argues that our decision in *Gersema v. Allstate Insurance Company*, 127 Wn. App. 687, 112 P.3d 552 (2005), “overlooked the fact that [RCW 51.24.030(5)] limited Flanigan[’s loss of consortium holding]” because we “did not have access to the legislative material[s]” which L&I appended to its brief. Br. of Appellant at 33. But, as discussed above, the legislative materials on which L&I relies do not show that the legislature intended to so limit the third party recovery statute.

the statute.⁹ See *In re Marriage of Kovacs*, 121 Wn.2d 795, 807, 854 P.2d 629 (1993) (while suggestive, the statements of individual lawmakers and others before the Senate Judiciary Committee cannot be used to conclusively establish the intent of the legislature as a whole); *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 64, 821 P.2d 18 (1991) (testimony before a legislative committee is given little weight in determining legislative history). Because the legislative history does not provide evidence that the legislature intended to allow L&I to access the pain and suffering portion of a third party recovery to reimburse it for money it paid to compensate an injured worker's other losses, i.e., medical expenses, its argument fails.

C. DUE PROCESS

L&I argues that by excluding Tobin's pain and suffering damages from the distribution formula, Tobin will receive a double recovery. Specifically, L&I argues that it retains a right to reimbursement for all the benefits it has paid Tobin from all sources of recovery, including his pain and suffering, because otherwise he will receive more in combined tort damages and workers' compensation benefits than he would under either system alone. Tobin argues that the pain and suffering damages he recovered are his private property and, if this court permits L&I to include these damages in its distribution under RCW 51.24.060, it would constitute an unconstitutional taking in violation of the state and federal constitutions.

⁹ L&I also points us to testimony from the Washington State Trial Lawyers' Association and the "business community" in support of the bill. Br. of Appellant at 25. But again, testimony in support of a bill is not suggestive of the legislature's intent. See *Wilmot v. Kaiser Aluminum & Chem. Corp.*, 118 Wn.2d 46, 64, 821 P.2d 18 (1991). In addition, L&I points us to the Fiscal Note for S.B. 5399, which stated that *Flanigan* excluded damages for loss of consortium "and created a potential for attempts at excluding other forms of damages" and that "without passage of this amendment, piecemeal attempts to exclude various forms of damages . . . will be made." Fiscal Note for S.B. 5399 (1995). Although these statements illuminate the history behind the proposed amendment, they do not suggest that the legislature intended to allow L&I to be reimbursed from a portion of a third party settlement for which it did not, and will never, compensate the injured worker.

Tobin frames his argument as whether L&I's right to reimbursement from his pain and suffering damages for unrelated payments constitutes an unconstitutional taking in violation of his right to due process. But the real issue is whether the statute gives injured workers adequate notice that third party settlement funds earmarked as compensation for their personal pain and suffering are subject to distribution under RCW 51.24.060 to reimburse L&I for payments it made to compensate the worker for other losses. We hold that it does not.

The fundamental requisites of due process are “the opportunity to be heard,” *Olympic Forest Prods., Inc. v. Chaussee Corp.*, 82 Wn.2d 418, 422, 511 P.2d 1002 (1973) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 58 L. Ed. 1363 (1914)), and “notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Olympic*, 82 Wn.2d at 422 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950)). Thus, at a minimum, the due process clause of the Fourteenth Amendment of the United States Constitution demands that a deprivation property be preceded by “notice and opportunity for hearing appropriate to the nature of the case.” *Olympic*, 82 Wn.2d at 422 (quoting *Mullane*, 339 U.S. at 313). Moreover, this opportunity “must be granted at a meaningful time and in a meaningful manner.” *Olympic*, 82 Wn.2d at 422 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965)).

As an initial matter, although allowing L&I to obtain reimbursement from the proceeds of a third party recovery is meant to ensure that injured workers do not make a double recovery, the legislature expressly sanctioned some form of double recovery for injured workers when it drafted RCW 51.24.060(1) to provide the injured worker with 25 percent of the total recovery before any reimbursement to L&I was calculated. This formula allows for an injured worker to

retain 25 percent of the proceeds after reasonable attorney fees are paid, regardless of whether L&I is fully reimbursed for funds it has paid for medical expenses, lost wages, and the like. Furthermore, injured workers who are not aware that L&I may access their pain and suffering damages following a settlement agreement with a third party would not know to take care to structure their settlement awards accordingly. Specifically, if injured workers were aware of this risk, they would structure their third party settlements to ensure that the medical benefits and lost wages portion of their settlement was sufficient to reimburse L&I entirely, and, thus, preserve the portion compensating them for pain and suffering for the purpose intended.

The award here was obtained via settlement. But we note that had a jury granted Tobin damages to compensate him for his pain and suffering, under L&I's reading of the disbursement statute, it would have the authority to subvert the jury's verdict and divert funds it awarded as compensation for pain and suffering to pay prior medical expenses and lost wages. Here, RCW 51.24.060 does not provide injured workers with sufficient notice that damages so earmarked are assets that may be attached to reimburse and relieve L&I of its responsibility to pay compensation which the injured worker is due for his other losses.

ATTORNEY FEES

Tobin asks this court to uphold the superior court's award of attorney fees under former RCW 51.52.130 (1993) and to award him attorney fees on appeal under RAP 18.1. L&I argues that, because it should prevail on appeal, Tobin is not entitled to attorney fees at the superior court level or on appeal. We affirm the trial court's award of attorney fees and award Tobin

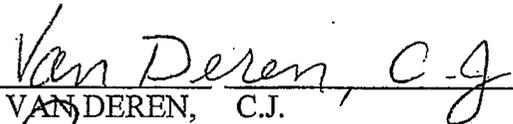
No. 36031-4-II

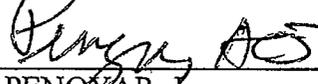
reasonable attorney fees on appeal in an amount to be determined by the commissioners of this court on his timely compliance with RAP 18.1.

Affirmed.


QUINN-BRINTNALL, J.

We concur:


VAN DEREN, C.J.


PENOYAR, J.

APPENDIX B

RCW 51.24.030(5)

For the purposes of this chapter, "recovery" includes all damages except loss of consortium.

RCW 51.24.060

- (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 . . .
 - (b) The injured worker or beneficiary shall be paid twenty-five percent of the balance of the award . . .
 - (c) The department and/or self-insurer shall be paid the balance of the recovery made, **but only to the extent necessary to reimburse the department and/or self-insurer for benefits paid;**
 - (i) The department and/or self-insurer shall bear its proportionate share of the costs and reasonable attorneys' fees incurred by the worker or beneficiary **to the extent of the benefits paid under this title**
 - (ii) The department's and/or self-insurer's proportionate share of the costs and reasonable attorneys' fees shall be determined by dividing the **gross recovery amount** into the **benefits paid amount** and multiplying this percentage times the costs and reasonable attorneys' fees incurred by the worker or beneficiary;
 - (iii) The department's and/or self-insurer's reimbursement share shall be determined by subtracting their proportionate share of the costs and reasonable attorneys' fees from the **benefits paid amount;**
 - (d) Any remaining balance shall be paid to the injured worker or beneficiary; and
 - (e) Thereafter no payment shall be made to or on behalf of a worker or beneficiary by the department and/or self-insurer for such injury until the amount of any further compensation and benefits shall equal any such remaining balance minus the department's and/or self-insurer's proportionate share of the costs and reasonable attorneys' fees in regards to the remaining balance. This proportionate share shall be determined by dividing the **gross recovery amount** into the remaining balance amount and multiplying this percentage times the costs and reasonable attorneys' fees incurred by the worker or beneficiary. Thereafter, such benefits shall be paid by the department and/or self-insurer to or on behalf of the worker or beneficiary as though no recovery had been made from a third person.

...

(emphasis added)

APPENDIX C

20375

FISCAL NOTE

Section 1: This amendment allows an offset of the amount of any recoveries made to the claimant, to include settlement proceeds, from another jurisdiction to amounts paid or awarded the claimant by Washington.

Facts and Assumptions

Amendment to RCW 51.12.120

Fact 1: Compensation paid or awarded a claimant by another jurisdiction are presently offset against amounts paid or awarded the claimant by Washington.

Fact 2: Other recoveries, to include settlement proceeds, made to the claimant under another jurisdiction's workers' compensation laws are sometimes not considered to be "compensation".

Fact 3: Other recoveries, to include settlement proceeds, made to the claimant under another jurisdiction's workers' compensations laws which are not considered to be "compensation" cannot be offset against amounts paid or awarded the claimant by Washington.

Fact 4: Injured workers are not treated equally with regards to moneys received under another jurisdiction's workers' compensations laws when amounts are paid or awarded by Washington.

Fact 5: The amendment allows an offset of the amount of any recoveries made to the claimant, to include settlement proceeds, from another jurisdiction to amounts paid or awarded the claimant by Washington.

Assumption 1: Injured workers who receive moneys under another jurisdiction's workers' compensation laws should be treated equally.

Impact on Agency Operations

This amendment will require a change in department policy with respect to moneys received by claimants under another jurisdiction's workers' compensation laws.

Fiscal Impact

See Fiscal Note.

Section 2: The term loss of consortium does not fall within the definition of "any recovery" under the third party chapter.

Facts and Assumptions

Amendment to RCW 51.24.030

Fact 1: Under the current statute "recovery" is not sufficiently defined.

Fact 2: 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.

Fact 3: The amendment defines "recovery" to include all damages except those for loss of consortium.

Fact 4: In fiscal year 1994 the department recovered \$11,644,479.25 from third parties for the Trust Funds. These are moneys actually received by the department after deducting for attorney fees and litigation costs. In addition, \$21,846,118.39 in potential cost avoidance was established.

Fact 5: Department actuaries consider the amount recovered from third parties when determining the required level of reserves and premium necessary to ensure the solvency of the State Fund.

Assumption 1: 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.

Assumption 2: Without passage of this amendment, the underlying purpose of the third party chapter which is replenishment of the Trust Funds will be significantly hampered.

Assumption 3: Without passage of this amendment, recoveries from third persons will be unpredictable and unreliable in determining actuarial levels of reserve and premium necessary to ensure solvency of the State Fund, leading to potential instability and higher costs of industrial insurance.

Impact on Agency Operations

None.

Fiscal Impact

Indeterminate.

Sections 3 and 4: These amendments repeal RCW 51.24.050 (6) and RCW 51.24.060 (4), which require that the department make a retroactive adjustment to an employer's experience rating when a third party recovery has been made on a claim which previously had been used in calculating an employer's experience factor.

Facts and Assumptions

Repeal of RCW 51.24.050 (6) and RCW 51.24.060 (4)

Fact: WAC 296-17-870 provides for retroactive adjustments, as required by law. Retroactive adjustments will continue to be made after the law is repealed until such time as this rule may be changed.

Assumption: The department will propose and adopt a new rule specifying a method for prospective consideration of third party recoveries, after the current statute is repealed.

In addition, RCW 51.24.060 is being amended to allow for service of an Order and Notice to Withhold and Deliver by certified mail.

Facts and Assumptions

Amendment to RCW 51.24.060

Fact 1: The current statute only provides for service of a Notice and Order to Withhold and Deliver by the sheriff of the county, the sheriff's deputy, or an authorized representative of the director.

Fact 2: The department issues approximately 100 Notice to Withhold and Delivers annually in third party cases.

VERBATIM REPORT OF PROCEEDINGS

FROM TAPE RECORDING

DATED 1/24/95

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1 that I clearly wouldn't be proposing this alternative to
2 you if I personally felt that, in any significant way, it
3 compromised public safety. That was the threshold that I
4 had to reach. And it's my judgment that it would not. I
5 looked at the citation and inspection history and other
6 data. And I just am - I am comfortable with saying that
7 the additional risk is insignificant. Others clearly
8 have the right to disagree with that. If they do, I'd
9 like to see the data that supports their conclusion. It
10 would help me.

11 CHAIRMAN: Thank you very much.

12 MR. BROWN: Thank you.

13 CHAIRMAN: We will move on to Senate Bill 5399.

14 UNIDENTIFIED SPEAKER: Mr. Chairman, members of
15 the committee, under Tab 12, you'll find Senate Bill 5399
16 and the bill report.

17 By way of background, currently if an individual is
18 injured out of state, our state worker's compensation
19 system will compensate that individual. The law provides
20 that other recoveries made to the claimant under another
21 jurisdictions' worker's compensation laws may be offset
22 against the recoveries made in this state.

23 Section one of the bill attempts to adjust for
24 differences in language. Currently the payment or award
25 of compensation is covered. Additional language is

1 included to say compensation or other recoveries,
2 including settlement proceeds. So the Department may now
3 offset those other recoveries.

4 In this state, injured workers may seek recovery
5 against third-party - third parties which may be at fault
6 for an injury. Currently the Department may seek
7 reimbursement of amounts recovered by injured workers.
8 Last year the Supreme Court ruled that such recoveries do
9 not include amounts awarded for loss of consortium.
10 Consortium is considered to be the love and affection of
11 a dear one.

12 Section two of the bill attempts to deal with that
13 by putting in statute for purposes of the statute
14 recovery includes all damages except loss of consortium.
15 I think the intention of the Department - Department can
16 speak to this - but I think the intention of the
17 Department is to specify that loss of consortium is the
18 only exception. And I think they'll be able to talk a
19 little bit more about that.

20 In addition, when third-party recoveries are made,
21 an adjustment to an employee's experience rating is made
22 retroactively. And the Department believes that this is
23 a cumbersome process and you'll see that in section three
24 of the bill, the Department will no longer make
25 retroactive adjustments to an experience rating.

1 In addition to the sections that I pointed out to
2 you, there are a number of other technical changes that
3 the Department thought would be useful and would improve
4 the administration. So for instance, in section four
5 having to do with delivery by certified mail, new
6 language is added. In addition, section five, relating
7 to third-party settlements; and section six, allowing
8 health providers 60 days to appeal Department orders
9 which do not make demands for repayment of sums paid.
10 And those are all fairly minor amendments. Yes?

11 UNIDENTIFIED SPEAKER: (Indiscernible) is that a
12 misprint? It says "an employee."

13 UNIDENTIFIED SPEAKER: That's probably a
14 misprint, yeah. Would be an employer's experience
15 rating.

16 CHAIRMAN: Thank you. Questions for Jack or
17 Mr. Brown? Okay. Mr. Watson, did you want to come
18 forth?

19 MR. WATSON: Mr. Chairman, Mike Watson, Deputy
20 Director for the Department of Labor & Industries. I
21 will be brief and primarily respond to questions, if
22 necessary. I do want to mention with regard to double
23 recovery, you closed a loophole a couple of years ago
24 with regard to certain federal settlements.

25 What we've run into - it's a limited number of

1 cases, but it actually involves where somebody is in a
2 twilight zone of coverage and files with more than one
3 insurer for the same injury. And then in other states
4 and with some federal programs, they have the ability to
5 do something called a compromise and release, where the
6 insurer can pay them money basically to go away and not
7 admit liability. And we have run into problems in terms
8 of considering that money actually for that injury. And
9 so we would like the ability to offset that because it
10 represents a form of double recovery.

11 UNIDENTIFIED SPEAKER: That happened in this
12 state?

13 MR. WATSON: It's happened to us several times,
14 with regard to Oregon Longshore and Harbor Workers Act
15 and others.

16 UNIDENTIFIED SPEAKER: Oh.

17 MR. WATSON: There are several amendments that
18 relate to third-party recovery section of the statute.
19 And that is correct. Our intent is to codify that loss
20 of consortium is the only part of a third-party recovery
21 for an injury that would not be subject to repayment of
22 the benefits that L & I or the self-insured employer has
23 paid out.

24 There was some language in the Supreme Court
25 decision that began to get into an analysis of special

1 versus general damages. And that's a discussion that has
2 never taken place in terms of the law or the application
3 of the law in the past, and we would like to make that
4 clear. This is a significant area of recovery for
5 replenishment of the trust funds, but also provides for
6 additional recovery for injured workers or their
7 survivors as well.

8 The - I would make one correction with regard to the
9 elimination of the restriction on giving - well, the
10 requirement to make a retroactive adjustment to an
11 employer's account. We agreed some time ago that if we
12 could get stability in the third-party recovery area,
13 which is a significant area - it's over 11 million
14 dollars in cash and over 20 million dollars in cost
15 avoidance each year - that we . . . This is a process
16 that can take three to five years, as you know, for a
17 case to be ultimately settled with a private party. That
18 involves going backwards then to recalculate the
19 employer's experience rating when they're with a state
20 fund. What we have agreed is that we'd like to come up
21 with a system for giving prospective credit to the
22 employer so that it can be done much earlier in the
23 process. And this would move that prohibition and allow
24 us to do something by rule that can be agreed upon by
25 various parties.

VERBATIM REPORT OF PROCEEDINGS

FROM TAPE RECORDING

DATED 3/22/95

Transcribed By:

Connie Church, CCR #2555, RPR, CRR
Certified Court Reporter
of

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1 addresses is whether the compensation that could be
2 offset would include settlements and other kinds of
3 recoveries. And this bill clarifies by adding that
4 settlements are also subject to the offset, making it
5 clear that it's not just compensation under the system,
6 but it may be settlements and other recoveries related.

7 CHAIRPERSON: Keep the conversations outside,
8 please. I can't hear. Sorry. Go ahead.

9 UNIDENTIFIED SPEAKER: The next area has to do
10 with third-party action. In the worker's compensation
11 laws, the employer - employee is not permitted to sue his
12 or her employer. That includes a co-worker who may have
13 been involved in the injury. But workers can bring suits
14 against third parties, nonemployment related parties, who
15 may have been also responsible or may be liable for the
16 injuries.

17 There are a number of provisions in this bill that
18 deal with those kinds of actions, those third-party
19 actions. The first one deals with what happens if there
20 is a recovery from a third-party action. The Department
21 has - department or the self-insured if it's a
22 self-insured employer has the right to be reimbursed from
23 the third-party action from any benefits that they've
24 paid under the worker's compensation system. What
25 generally happens is that the worker gets their worker's

1 compensation benefits just under a normal routine manner.
2 But when they bring the third-party recovery and get a
3 third-party action and get a recovery, then the
4 Department or the self-insured has a right to be
5 reimbursed for the benefits that they pay under the
6 system.

7 This - the current law says that the Department will
8 make a retroactive adjustment to the employer's
9 experience rating account after they get the recovery.
10 This bill would delete the requirement that the
11 adjustment be made after there is a reimbursement. And
12 the Department can explain more fully why they want that
13 change. But it's my understanding that they feel that
14 the statute requires them to make the reimbursement
15 afterwards. This limits their ability to make a
16 prospective reimbursement. And they can talk to you
17 about that change.

18 The second thing in the third-party action that this
19 bill addresses has to do with a recent Supreme Court
20 decision. The Supreme Court decided that some recoveries
21 that workers or beneficiaries make in a third-party
22 recovery is not subject to the lien. This particular
23 case dealt with a loss of consortium, which is the
24 recovery that a spouse gets for the loss of the love and
25 affection of their spouse. And just so you know, there's

1 also a parental consortium for the loss of a parent and
2 child, between a parent and child, the loss of love and
3 affection. This one had to do with the spouse's loss of
4 consortium.

5 And the Supreme Court said that is not the kind of
6 recovery that the worker's compensation system can have a
7 lien against, that it is a separate action, that it is a
8 loss that the worker's compensation system doesn't
9 recover for or doesn't pay for. This bill would clarify
10 the Supreme Court's decision in this sense. It would say
11 that the right of recovery, the lien that the Department
12 or self-insurer has, extends to all damages that there
13 are in third-party recovery except for the loss of
14 consortium. That's agreeing with the Supreme Court,
15 putting the loss of consortium outside of the limits of
16 recovery but making sure that all other damages are
17 subject to the right of lien by the Department or
18 self-insurer.

19 The third issue for the third-party action area is
20 that has to do with approving settlements. The
21 Department or self-insured does have to approve a
22 settlement that a worker may enter into if the settlement
23 is less than what the worker may have been entitled to
24 under the worker's compensation law. This provision in
25 the law now defines entitlement as the benefits that are

1 lot of testimony here about what we're doing, what I
2 guess I haven't heard from you is what Labor & Industries
3 has lost because of the lack of having these rule changes
4 or these legal changes and what kind of problems you've
5 had with regard to recovery of third-party settlements.

6 MR. WATSON: In each of the elements? In
7 each --

8 REPRESENTATIVE CONWAY: I'm just - I don't want
9 you to go too specific here. But I mean if you can just
10 give us some overall feeling.

11 MR. WATSON: Just a quick summary in terms of
12 the double recovery issue?

13 CHAIRPERSON: I think that it would be helpful
14 if you would explain the Court case that brought this to
15 a head.

16 MR. WATSON: Which - the --

17 CHAIRPERSON: The one on the loss of consortium.

18 MR. WATSON: Okay. Be happy to. In the case of
19 the double recovery, that is infrequent. I would guess
20 no more than six to 10 cases a year. The committee a
21 couple of years ago closed the last (Indiscernible)
22 which was between the federal compensation system and the
23 state one where the court or the law allowed people to
24 receive benefits from both without being offset.

25 What we're talking about here are states or even in

1 the federal system where they have the ability to do
2 something called a compromise and release and they can
3 agree to pay you \$10,000 if you basically go away and
4 only pursue the claim against the state of Washington.
5 What we're saying is if they do that, that \$10,000 ought
6 to be subject to assertion of a lien because it is
7 recovery for the same injury or accident.

8 In the case that we're talking about is Flannigan
9 and Downey versus the Department of Labor & Industries.
10 It was an asbestos disease case where the spouses
11 recovered money for loss of consortium. The Department
12 asserted liens against those as the recoveries were made
13 from the asbestos manufacturers and distributors. It was
14 taken to the Supreme Court. The Supreme Court
15 distinguished between . . . And I have to say up front
16 I'm not an attorney either. But the Supreme Court
17 distinguished between economic benefits and noneconomic
18 benefits or recoveries. And it's the difference between
19 general and special damages in a lawsuit.

20 They essentially only dealt with the issue of loss
21 of consortium, saying that was a noneconomic damage and
22 the Department didn't pay anything in terms of worker's
23 compensation benefits for that; therefore, there should
24 be no right to assert a lien.

25 The troubling piece of it and the reason for our

1 proposed amendment is they went on to raise the whole
2 issue of economic versus noneconomic damages, and that
3 implied that there was no right to assert a lien against
4 noneconomic damages. Now, if every case went to a jury,
5 this wouldn't be so troubling to us. But in the real
6 world, 90 plus percent of the cases are settled. Our
7 concern is that this created a loophole big enough to
8 drive a truck through that people could simply agree that
9 everything they're paying in terms of a settlement is for
10 noneconomic damages and therefore none of the money could
11 have a lien asserted against it by the Department or the
12 self-insured.

13 The loss of consortium cases are few and far
14 between. And if we find that people are manipulating
15 that, we'd be right back to talk to you about correcting
16 that situation.

17 UNIDENTIFIED SPEAKER: So wouldn't this piece of
18 legislation the Department is requesting - this is the
19 way I understand it - basically the Department is saying,
20 "Okay. You won, setting aside consortium. But from this
21 point forward, we will define what economic and
22 noneconomic damages are and go from there." That's what
23 this legislation --

24 MR. WATSON: We're saying it isn't necessary to
25 define whether they're economic or noneconomic. If you

1 make the recovery, anything other than loss of consortium
2 is subject to the lien of the Department or the
3 self-insured.

4 UNIDENTIFIED SPEAKER: Is this language too
5 broad to make that distinction?

6 MR. WATSON: Not according to the Attorney
7 General's office. The language in the bill?

8 UNIDENTIFIED SPEAKER: So that we all
9 understand, the Department anticipates that most cases
10 now, because of this lawsuit, will be argued as
11 noneconomic damages and no liens will be able to be put
12 against those settlements?

13 MR. WATSON: In context in terms of the money -
14 and I don't have figures on the self-insurers - but we
15 recover something in the neighborhood of about between 10
16 and 12 million dollars a year in cash under the
17 third-party program and up to between 20 and 30 million
18 dollars in cost avoidance because of the excess
19 recoveries per year.

20 UNIDENTIFIED SPEAKER: If the Legislature does
21 not address this issue without a bill, then the Court
22 case will be the precedent setting case and the
23 Department will have to go from there?

24 MR. WATSON: Yes. And I would say that it
25 wasn't on point on that issue, but it opened the door

1 this particular incentive because of the unique
2 characteristics of worker compensation.

3 REPRESENTATIVE COLE: Thank you.

4 CHAIRPERSON: Okay. Thank you. Let's hear from
5 Wayne Lieb. Defend yourself.

6 MR. LIEB: Good morning. My name is Wayne Lieb.
7 I'm here on behalf of the Washington State Trial Lawyers,
8 as was commented on. I'm here with mixed purposes, but I
9 think what I will do is start off to try and address some
10 of the issues that have arisen and I know are of
11 immediate concern to the committee.

12 First can I make some comments about attorney's
13 fees? Because that has come up. Worker's compensation
14 imposes an artificial cap on one side's attorney's fees
15 but not on the other. For third-party cases, the . . .
16 And actually on the worker's comp side, we are regulated
17 twice. We are regulated once by the bar, which has its
18 own ethical rules which are enforced by court and can
19 result in disbarment for a violation of those. And we
20 are also regulated by statute.

21 For third-party cases, we are not regulated by
22 statute, but we are regulated by those same ethical
23 rules, which are quite extensive and which have been
24 litigated. And there's quite a bit of court law both in
25 terms of what a reasonable fee is as well as on

1 that \$10,000. They walk away with no risk whatsoever.
2 And that is - that's one of the tensions that exist is
3 that they get to say yes or no with no risk to
4 themselves, whereas between I and my client, we are
5 trying to calculate the risk/reward ratio of what's a
6 reasonable settlement; what's your likelihood of
7 prevailing; what's the down side; and can you come up
8 with \$10,000 to get through the courthouse door. And
9 that's the real tension that exists there.

10 Those are my comments.

11 CHAIRPERSON: So you support the language by the
12 Department then, as stated by the Department?

13 MR. LIEB: No. With the amendment that it would
14 apply to unrepresented cases, where the worker is not
15 represented. And I believe the Department has agreed in
16 concept to that principle. And we are in the process of
17 working on language.

18 You know, I do want to make one other comment. I
19 think we have offered a very significant concession with
20 this bill. I go back to my point that the Department
21 should not be reimbursed for benefits they do not pay.
22 The Department does not pay for pain and suffering. The
23 Department does not pay for disfigurement. If you get a
24 slash across your face - and there are cases of this -
25 you get zero from the Department. You get it sewn up.

1 But in terms of any kind of compensation whatsoever, you
2 get zero because that's a disfigurement. It's not a
3 disability. And for whatever reason, whether you're a
4 model or whether you're a worker, you get nothing for
5 that.

6 You go to a jury and the jury's reasonably going to
7 say, "Yes, you should be reimbursed for that
8 disfigurement." And that falls in with - within the
9 general damages as opposed to the specific damages. We
10 are conceding that the Department should benefit in that
11 payment even though they don't pay a nickel for it. So
12 if you say - if the jury says, "Yes, you get \$100,000 for
13 that slash across your face," in this bill, we are
14 conceding the Department has a lien on it even though
15 they never paid it in the first instance. So I think
16 there's a very significant concession there.

17 CHAIRPERSON: Okay. Representative Conway has a
18 question.

19 REPRESENTATIVE CONWAY: Well, I guess I'm trying
20 to see what the conflict is here also because actually I
21 assume that the Department wants to recover the actual
22 costs. Is the debate over future costs? Is that what
23 the issue is here?

24 MR. LIEB: The debate is what is actual costs.
25 They are again seeking to recover for costs that they

1 the ability of the individual to handle their own
2 finances. And sometimes your client simply says, "I
3 don't want it." It is discretionary to the client unless
4 there is some kind of - unless they're a minor or unless
5 they're mentally incompetent. But if my client tells me,
6 "I want the cash and I do not want a trust fund," I am
7 bound by that, with those two exceptions.

8 I cannot impose it upon my client. I can say, "Look
9 it, I completely recommend against it." I'll write them
10 a letter to tell them again.

11 But if they tell me, "I don't want a trust fund; I
12 want cash," then that's my ethical duty.

13 REPRESENTATIVE CODY: So when they do the life
14 care planning, consortium isn't calculated into that?

15 MR. LIEB: No. Again, that - that's just the
16 individual that's been hurt. Right.

17 CHAIRPERSON: Representative Romero.

18 REPRESENTATIVE ROMERO: Thank you, Madame
19 Chairman. Wayne, when you were talking about your
20 amendment for unrepresented cases, I guess I got lost
21 because I'm trying to figure where your compromise is in
22 the bill for say the disfigurement issue. Is that in
23 section five, or are we back on recovery?

24 MR. LIEB: No. We're talking apples and
25 oranges. That's back on recovery. The section five

1 language just says that yes, the Department should be
2 entitled to screen for unrepresented people, and the
3 employers, too, to make sure there's not some unfair,
4 on-the-street settlement.

5 The other point is to simply say we are conceding
6 very substantial general damages the Department and the
7 self-insured do not pay for. And we are - I just want
8 that to be known, that that's a very significant
9 concession on our part.

10 CHAIRPERSON: Thank you very much. Let's move
11 on to the next bill. Senate Bill 5402. Kris, would you
12 please explain that.

13 UNIDENTIFIED SPEAKER: This is a second - a
14 requested bill from the Department of Labor & Industries.
15 And it deals with a number of issues having to do with
16 penalties and fraud provisions. Again, I'll go through
17 the issues one by one and explain how the bill changes
18 each one. The first issue that I've described in the
19 bill has to do with the fraud provisions. I've laid out
20 in the background - and I'm not going to go through these
21 - but there are fraud provisions related to both employer
22 fraud, worker fraud and provider fraud. And I've given
23 you some sense of what those are in the background.

24 One provision that is addressed in the bill has to
25 do with the employer fraud provision relating to

APPENDIX D

I. Workers' Compensation Claim Alone

Benefits at time of settlement (BR 71, ¶ 9):	\$ 80,501.40
Present value of future benefits (BR 71, ¶ 10):	+ \$ <u>562,732.00</u>
Total to Tobin:	\$ 643,233.40
Cost to funds:	\$ 643,233.40

II. Tort Claim Alone

Settlement (BR 70, ¶ 6):	\$1,400,000.00
Attorneys' fees and costs (BR 71, ¶ 8; BR 83):	- \$ <u>472,262.44</u>
Net recovery to Tobin:	\$ 927,737.56
Cost to funds:	\$ -0-

III. Workers' Compensation and Tort Claims (Department's Distribution)

Workers' compensation benefits:	\$ 643,233.40
Tort claim:	+ \$ <u>1,400,000.00</u>
Gross recovery:	\$2,043,233.40
Reimbursement to DLI (BR 71, ¶ 8; BR 82):	- \$ 53,346.31
Excess subject to offset (BR 71, ¶ 8; BR 82):	- \$ 425,735.63
Attorneys' fees and costs:	- \$ <u>472,262.44</u>
Net recovery to Tobin:	\$1,091,889.02
Unreduced cost to funds:	\$ 643,233.40
Reimbursement:	- \$ 53,346.31
Excess subject to offset:	- \$ <u>425,735.63</u>
Net cost to funds:	\$ 164,151.46

IV. Workers' Compensation and Tort Claims (Court of Appeals Holding)

A. Pain and suffering distribution

Total tort recovery:	\$1,400,000.00
Pain and suffering (BR 70, ¶ 6):	\$ 793,083.16
Fees and costs on P&S portion (pro-rated):	-\$ 267,550.45
Net recovery from pain and suffering:	\$ 525,532.71

B. Special damages distribution

Total tort recovery:	\$1,400,000.00
Special damages (BR 70, ¶ 6):	\$ 606,916.84
Fees and costs on specials (pro rated)	- \$ 204,711.99
Reimbursement:	- \$ 53,348.42*
Excess subject to offset:	- <u>\$ 164,552.30*</u>
Net recovery from special damages:	\$ 184,304.13

C. Workers' compensation benefits: \$ 643,233.40

TOTAL TO TOBIN (A+B+C): \$1,353,070.24

D. Cost to funds

Workers' compensation benefits:	\$ 643,233.40
Reimbursement:	- \$ 53,348.42
Excess subject to offset:	- <u>\$ 164,552.30</u>
Net cost to funds:	\$ 425,332.68

* Calculations of reimbursement and excess recovery on special damages are set out in attached worksheet. *Note: Figures in worksheet are based on application of statutory distribution formula (RCW 51.24.060) to figures in Board's record (e.g., BR 70, ¶6).*



THIRD PARTY RECOVERY WORKSHEET

Adjudicator	Today's date	Claimant's name
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Claim no.	
Benefits Paid	80,501.40

I. CALCULATION OF DISTRIBUTION SHARES

\$ 606,916.84 Gross recovery

\$ 204,711.99 Less attorney's fee[s] \$ 202,305.81 costs \$ 2,406.18

\$ 402,204.85 Net recovery

\$ 100,551.21 Less claimant's 25% of net recovery

\$ 301,653.64 Balance

DLI/SIE Proportionate Share of Fee and Costs on Reimbursement:

\$ 80,501.40	Benefits Paid	=	13.26	%	(Max. 100%) X	204,711.99	=	27,152.98
\$ 606,916.84	Gross Recovery					Fees+costs		

DLI/SIE Reimbursement Share:

\$ 80,501.40 Benefits Paid - 27,152.98 DLI/SIE Prop. Share Fee + Costs = 53,348.42

\$ 53,348.42 Less DLI/SIE reimbursement share

\$ 248,305.22 Remaining Balance

DLI/SIE Proportionate Share of Fee And Costs On Remaining Balance:

\$ 248,305.22	Remaining Balance	=	40.91	%	X	204,711.99	=	83,752.92
\$ 606,916.84	Gross Recovery					Fees+costs		

\$ 83,752.92 Less DLI/SIE Proportionate Share Of Fee And Costs on Remaining Balance

\$ 164,552.30 Remaining Balance Subject to Offset

II. DISTRIBUTION SHARES

\$ 204,711.99 Attorney (fees + costs)

\$ 53,348.42 DLI/SIE (reimbursement share or balance [whichever is less])

\$ 348,856.43 Claimant (\$ 100,551.21 + \$ 83,752.92 + \$ 164,552.30)

25%
DLI/SIE
Offset

\$ 606,916.84 Gross recovery

Proportionate share
of fee and costs on
Remaining Balance

APPENDIX E

FILED
JUL 11 2008
SUPERIOR COURT
BETTY J. GOULD
THURSTON COUNTY CLERK

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THURSTON COUNTY SUPERIOR COURT FOR THE STATE OF WASHINGTON

SHARON DAVIS, BATYAH CHLIEK and
JAMES BOOTH, individually and on behalf of
all others similarly situated,

Plaintiffs,

vs.

THE WASHINGTON STATE DEPARTMENT
OF LABOR AND INDUSTRIES, an agency of
the State of Washington; and JUDY
SCHURKE, in her capacity as the Director of
the Washington State Department of Labor &
Industries,

Defendants.

08-2-01647-9

No.

SUMMONS (20 DAYS)

THE STATE OF WASHINGTON TO: THE WASHINGTON STATE DEPARTMENT
OF LABOR AND INDUSTRIES

A lawsuit has been started against you in the above-entitled Court by Plaintiffs SHARON
DAVIS, BATYAH CHLIEK and JAMES BOOTH, individually and on behalf of all others
similarly situated. Plaintiffs' claims are stated in writing in the written complaint, a copy of
which is served upon you with this summons.

SUMMONS (20 DAYS) - 1

MYERS & COMPANY, P.L.L.C.
1809 SEVENTH AVENUE, SUITE 700
SEATTLE, WASHINGTON 98101
TELEPHONE (206) 398-1188

COPY



1 In order to defend against this lawsuit, you must respond to the complaint by stating your
2 defense in writing, and by serving a copy upon the person signing this summons within twenty
3 (20) days after the service of this summons, excluding the day of service, or a default judgment
4 may be entered against you without notice. A default judgment is one where plaintiff is entitled
5 to what has been asked for because you have not responded. If you serve a notice of appearance
6 on the undersigned person, you are entitled to notice before a default judgment may be entered.

7 If not previously filed, you may demand that the plaintiff file this lawsuit with the Court.
8 If you do so, the demand must be in writing and must be served upon the person signing this
9 summons. Within fourteen (14) days after you serve the demand, the plaintiff must file this
10 lawsuit with the Court, or the service on you of this summons and complaint will be void.

11 If you wish to seek the advice of an attorney in this matter, you should do so promptly so
12 that your written response, if any, may be served on time.

13 THIS SUMMONS is issued pursuant to Rule 4 of the Superior Court Civil Rules of the
14 State of Washington.

15 DATED this 9th day of July, 2008.

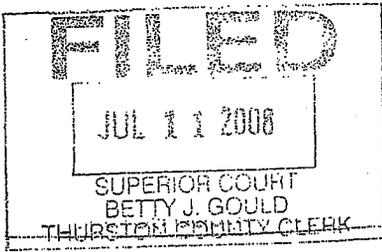
16 MYERS & COMPANY, P.L.L.C.

17 Attorneys for Plaintiffs and Class Members

18
19
20 By: _____


Michael David Myers
WSBA No. 22486
Ryan C. Nute
WSBA No. 32530

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THURSTON COUNTY SUPERIOR COURT FOR THE STATE OF WASHINGTON

SHARON DAVIS, BATYAH CHLIEK and
JAMES BOOTH, individually and on behalf of
all others similarly situated,

Plaintiffs,

vs.

THE WASHINGTON STATE DEPARTMENT
OF LABOR AND INDUSTRIES, an agency of
the State of Washington; and JUDY
SCHURKE, in her capacity as the Director of
the Washington State Department of Labor &
Industries,

Defendants.

08-2-01647-9
No.

CLASS ACTION COMPLAINT

Plaintiffs, by their undersigned attorneys for the Class Action Complaint, allege upon personal knowledge as to themselves and their own acts, and upon information and belief (based upon the investigation of their counsel) as to all other matters (as to which allegations they believe substantial evidentiary support will exist after a reasonable opportunity for further investigation and discovery), hereby allege and assert as follows:



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I. NATURE OF ACTION

1.1 Plaintiffs bring this action as a Class Action pursuant to Rule 23 of the Washington Rules of Civil Procedure on behalf of all persons (1) who received workers' compensation benefits from the Washington Department of Labor & Industries (the "Department") pursuant to RCW Title 51; (2) who asserted third-party claims under RCW Ch. 51.24 (whether elected by the injured worker or assigned to the Department pursuant to RCW 51.24.050), whether litigated, prosecuted or compromised; (3) who received a third-party recovery under RCW Ch. 51.24; (4) who were required to reimburse the Department from third-party recoveries pursuant to RCW Ch. 51.24; and (5) whose recoveries for damages (including general damages, *e.g.*, pain and suffering and hedonic damages) not constituting remedies or a "recovery" for which benefits were payable pursuant to Title 51 (*e.g.*, medical bills and time-loss benefits) were subject to the Department's claims of reimbursement and/or determination of amounts against which their entitlement to future benefits were offset.

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II. PARTIES

2.1 Plaintiff Sharon Davis has at all times material hereto been a resident of Mount Vernon, Skagit County, State of Washington.

2.2 Plaintiff Batyah Chliek has at all times material hereto been a resident of King County, State of Washington and Island County, State of Washington.

2.3 Plaintiff James Booth has at all times material hereto been a resident of Renton, King County, State of Washington.

2.4 Defendant the Washington State Department of Labor & Industries is an agency of the State of Washington and headquartered in Olympia and Tumwater, Thurston County, State of Washington.

1 5.2 Membership in the Class is so numerous as to make it impractical to bring all
2 class members before the Court. The identity and exact number of Class Members is unknown
3 but is estimated to be at least in the hundreds, if not thousands. Plaintiffs believe that members
4 of the Class can be easily identified through the Department's records for third-party recoveries.

5 5.3 Plaintiffs' claims are typical of those of other Class Members, all of whom have
6 suffered harm due to the Department's uniform course of conduct.

7 5.4 Plaintiffs are members of the Class.

8 5.5 There are numerous and substantial questions of law and fact common to all of
9 the members of the Class which control this litigation and predominate over any individual
10 issues pursuant to Rule 23(b)(3). The common issues relate to the Department's determination
11 of the distribution of third-party recoveries pursuant to RCW Ch. 51.24 and interpretation of that
12 Chapter.
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14 5.6 A class action is the appropriate method for the fair and efficient adjudication of
15 this controversy for the following reasons:

16 a. Without a class action, the Class will continue to suffer damage,
17 Defendant's violations of the law or laws will continue without remedy, and Defendant will
18 continue to enjoy the fruits and proceeds of its unlawful misconduct;

19 b. Given (i) the substantive complexity of this litigation; (ii) the size of
20 individual Class members' claims; and (iii) the limited resources of the Class members, few, if
21 any, Class members could afford to seek legal redress individually for the wrongs defendant has
22 committed against them;

23 c. This action will foster an orderly and expeditious administration of Class
24 claims, economies of time, effort and expense, and uniformity of decision;
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1 d. Inferences and presumptions of materiality and reliance are available to
2 obtain class-wide determinations of those elements within the Class claims, as are accepted
3 methodologies for class-wide proof of damages; alternatively, upon adjudication of Defendant's
4 common liability, the Court can efficiently determine the claims of the individual Class
5 members; and

6 e. This action presents no difficulty that would impede the Court's
7 management of it as a class action, and a class action is the best (if not the only) available means
8 by which members of the Class can seek legal redress for the harm caused them by Defendant.
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10 VI. CAUSES OF ACTION

11 A. Unjust Enrichment

12 6.1 Plaintiffs reallege all prior allegations as though fully stated herein.

13 6.2 The Department has been and continues to be unjustly enriched by its
14 misinterpretation and misapplication of RCW Ch. 51.24 in connection with injured workers'
15 third-party recoveries, to the detriment of such injured workers.

16 6.3 The amount of the Department's unjust enrichment and the detriment to Plaintiffs
17 and Class Members shall be determined at trial.

18 B. 42 U.S.C. § 1983: Denial of Due Process and Unconstitutional Taking, in 19 Contravention of the Fifth and Fourteenth Amendments to the U.S. Constitution

20 6.4 Plaintiffs reallege all prior allegations as though fully stated herein.

21 6.5 Plaintiffs and Class Members were deprived of rights secured by the Constitution
22 or laws of the United States: specifically, the right to due process (including sufficient notice)
23 and the right to just compensation for private property taken for public use.

24 6.6 The deprivation was committed by Defendants acting under color of state law.
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1 6.7 Plaintiffs and Class Members proximately sustained damages due to Defendants'
2 violation of their interests protected by the U.S. Constitution and are also entitled to injunctive
3 relief prohibiting such future violations.

4 C. Denial of Due Process and Unconstitutional Taking, in Contravention of Article
5 1, §§ 3 and 16 of the Washington State Constitution

6 6.8 Plaintiffs reallege all prior allegations as though fully stated herein.

7 6.9 Plaintiffs and Class Members were deprived of rights secured by the Washington
8 State Constitution: specifically, the right to due process (including sufficient notice) and the right
9 to just compensation for private property taken for public use.

10 6.10 The deprivation was committed by Defendants acting under color of state law.

11 6.11 Plaintiffs and Class Members proximately sustained damages due to Defendants'
12 violation of their interests protected by the Washington State Constitution and are also entitled to
13 injunctive relief prohibiting such future violations.

14 D. Extraordinary Writs: Certiorari and Mandamus (RCW Ch. 7. 16)

15 6.12 Plaintiffs reallege all prior allegations as though fully stated herein.

16 6.13 The Court should issue extraordinary writs directed to the Department and the
17 Director to comply with the rule of law announced in the *Tobin* case.

18 6.14 A writ of certiorari is appropriate as (1) the Department has exercised judicial
19 functions, (2) the Department has acted in a manner contrary to law¹ and (3) Plaintiffs may lack
20 a plain, speedy and adequate remedy at law.
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24 ¹ Specifically, Plaintiffs and Class Members allege the Department has violated the terms of RCW Ch. 51.24 as
25 construed by the *Tobin* court as well as the requirements of due process and the prohibition against takings
contained in the federal and state constitutions.

- 1 G. A judgment for exemplary damages as may be allowed by law;
2 H. For prejudgment interest on all liquidated amounts as allowed by law;
3 I. For Plaintiffs and Class Members' reasonable costs and attorneys' fees incurred
4 herein, pursuant to all applicable statutory, common law, and equitable theories; and
5 J. For such other and further relief as the Court deems just and equitable.

6 DATED this 9th day of July, 2008.

7 MYERS & COMPANY, P.L.L.C.

8 Attorneys for Plaintiffs and Class Members

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11 By: 

12 Michael David Myers
13 WSBA No. 22486
14 Ryan C. Nute
15 WSBA No. 32530
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DECLARATION OF SHARON DAVIS

COMES NOW Sharon Davis and declares as follows:

1. My name is Sharon Davis. I am over the age of eighteen and I have personal knowledge of the matters set forth in this declaration.

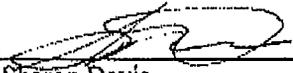
2. I am one of the plaintiffs in the above-entitled cause of action.

3. The factual averments contained in the above-captioned Class Action Complaint are true and correct to the best of and to the extent of my personal knowledge.

4. I apply to the Court for all of the relief requested, pursuant to applicable law, including the issuance of extraordinary writs requiring Defendants to cease and desist from all action contrary to law.

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

DATED at Mount Vernon, Washington, this 9 day of July, 2008.

By: 
Sharon Davis

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DECLARATION OF BATYAH CHLIEK

COMES NOW Batyah Chliek and declares as follows:

1. My name is Batyah Chliek. I am over the age of eighteen and I have personal knowledge of the matters set forth in this declaration.
2. I am one of the plaintiffs in the above-entitled cause of action.
3. The factual averments contained in the above-captioned Class Action Complaint are true and correct to the best of and to the extent of my personal knowledge.
4. I apply to the Court for all of the relief requested, pursuant to applicable law, including the issuance of extraordinary writs requiring Defendants to cease and desist from all action contrary to law.

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

DATED at Mukilteo, Washington, this 9th day of July, 2008.

By: Batyah Chliek
Batyah Chliek

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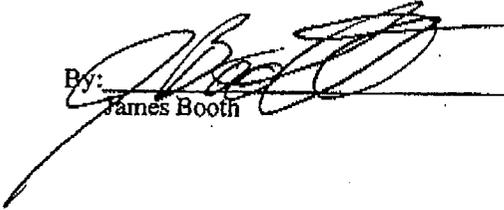
DECLARATION OF JAMES BOOTH

COMES NOW James Booth and declares as follows:

1. My name is James Booth. I am over the age of eighteen and I have personal knowledge of the matters set forth in this declaration.
2. I am one of the plaintiffs in the above-entitled cause of action.
3. The factual averments contained in the above-captioned Class Action Complaint are true and correct to the best of and to the extent of my personal knowledge.
4. I apply to the Court for all of the relief requested, pursuant to applicable law, including the issuance of extraordinary writs requiring Defendants to cease and desist from all action contrary to law.

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

DATED at Renton, Washington, this 7 day of July, 2008.

By: 
James Booth

--- P.3d ----
--- P.3d ----, 2008 WL 2582975 (Wash.App. Div. 2)
(Cite as: --- P.3d ----, 2008 WL 2582975 (Wash.App. Div. 2))

Tobin v. Department of Labor & Industries
Wash.App. Div. 2,2008.
Only the Westlaw citation is currently available.
Court of Appeals of Washington, Division 2.
Jim A. TOBIN, Respondent,
v.
DEPARTMENT OF LABOR & INDUSTRIES,
Appellant.
No. 36031-4-II.
July 1, 2008.

Appeal from Pierce County Superior Court; Honorable
Stephanie A. Arend, Craig C. Stewart, Judges.

Michael King Hall, Office of the Atty. General, Olympia,
WA, for Appellant.
David W. Lauman, Attorney at Law, Tacoma, WA, for
Respondent.

PUBLISHED OPINION

QUINN-BRINTNALL, J.

*1 ¶ 1 The Department of Labor and Industries (L & I) appeals the superior court's finding that L & I cannot seek reimbursement from the portion of Jim A. Tobin's third party recovery compensating him for his pain and suffering following a work-related injury that he sustained when a crane boom crushed him. L & I argues that the statutory reimbursement use of the term "recovery" includes "all damages except loss of consortium" and that it is entitled to seek reimbursement from the pain and suffering portion of Tobin's damages. We hold that, because L & I did not, and will not, pay pain and suffering damages, it is not entitled to sue for reimbursement from that portion of Tobin's third party recovery compensating him for his pain and suffering; we affirm.

FACTS

Medical Expenses:	\$29,326.84
Future Medical Expenses:	\$14,647.00

Factual Background ^{FN1}

^{FN1}. The parties stipulated to the facts when they appeared before the Board of Industrial Insurance Appeals.

A. Tobin's Injury and Worker's Compensation Benefits

¶ 2 In June 2003, while Tobin was working for Saybr Contractors, Inc., he was injured when a crane boom, operated by a third party, swung unexpectedly and crushed him against a post. L & I accepted Tobin's subsequent worker's compensation application and paid him time loss compensation and medical benefits.

¶ 3 In March 2005, L & I determined that Tobin was totally and permanently disabled as a result of this work-related injury and began paying him pension benefits. Tobin is entitled to receive these pension benefits for the rest of his natural life, rather than for the rest of his working life or until he reaches retirement age.

B. Tobin's Third Party Recovery and Distribution

¶ 4 Because a third party's negligence had caused his injury, in addition to successfully applying for workers' compensation benefits, he sued the responsible third party for damages.^{FN2} In September 2005, Tobin settled his third party claim for \$1.4 million, allocated as follows:

^{FN2}.RCW 51.24.030(1) states in relevant part:

If a third person, not in a worker's same employ, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title, the injured worker or beneficiary may elect to seek damages from the third person.

Total wage loss (past & future): \$562,943.00
Pain and Suffering: \$793,083.16

Administrative Record (AR) at 70.

¶ 5 On September 29, 2005, L & I applied RCW 51.24.060(1)^{FN3} and issued an order calculating the distribution^{FN4} of Tobin's \$1.4 million third party recovery as follows:

FN3. Under RCW 51.24.060(1)(a)-(c), the recovery is divided and distributed in the following order: (1) attorney fees and costs are paid, (2) 25 percent of the balance goes to the injured employee or beneficiary, and (3) L & I "shall be paid the balance of the recovery made, but only to the extent necessary to reimburse [L

& I] for benefits paid." RCW 51.24.060(1)(c). Any remaining balance is paid to the employee or beneficiary. RCW 51.24.060(1)(d).

FN4. L & I does not "distribute" the actual proceeds of an injured worker's tort recovery. Rather, once L & I learns that a recovery has been made, it calculates the distribution according to RCW 51.24.060(1)'s formula and issues an order setting forth the parties' respective shares. The "person to whom any recovery is paid," generally the plaintiff's attorney, must then disburse the funds according to the distribution order. See RCW 51.24.060(5), (6).

Attorney's share: \$472,262.44
Claimant's share: \$874,391.25
[L & I's] share: \$53,346.31

AR at 71. At the time L & I issued the distribution order, it had paid Tobin workers' compensation benefits totaling \$80,501.40. These benefits included \$25,208.93 in medical treatment, \$42,893.89 in time loss compensation, and \$12,398.58 in pension benefits.

used to calculate distribution of the proceeds of his third party settlement. Specifically, Tobin argued that L & I did not pay him any compensation for his pain and suffering and it could not be reimbursed for payments it never made. Tobin also argued that including his pain and suffering damages in the distribution formula amounted to an unconstitutional taking.

¶ 6 In September 2005, using the distribution formula from the third party recovery statute, RCW 51.24.060, L & I calculated that \$425,735.63 of Tobin's \$874,391.25 share was "excess recovery" which would offset future workers' compensation benefits that L & I would otherwise pay. AR at 71; see RCW 51.24.060(1)(a)-(e). L & I's order left Tobin's pension benefits intact.

¶ 8 On June 6, 2006, the Board's industrial insurance appeals judge (IIAJ) issued a proposed decision and order upholding L & I's distribution order. The IIAJ reasoned that RCW 51.24.030 authorizes L & I to assert a right of recovery for third party awards for pain and suffering because RCW 51.24.030(5) defined "recovery" as "all damages except loss of consortium," thereby including the part of Tobin's recovery compensating him for his pain and suffering. Tobin filed a petition for review to the full Board; the Board denied his petition.

Procedural History

A. The Board of Industrial Insurance Appeals

*2 ¶ 7 Tobin appealed L & I's order to the Board of Industrial Insurance Appeals (Board). There, Tobin argued that L & I should have excluded his \$793,083.16 "pain and suffering" damages from the "recovery" figure

B. The Superior Court

¶ 9 Tobin appealed the Board's decision to the Pierce County Superior Court. The superior court reversed the

Board, finding that L & I cannot be reimbursed from the pain and suffering portion of Tobin's third party distribution. In making this ruling, the trial court relied on Flanigan v. Department of Labor & Industries, 123 Wn.2d 418, 423-24, 869 P.2d 14 (1994), in which our Supreme Court held that L & I's statutory right to reimbursement does not extend to a spouse's recovery for loss of consortium because RCW 51.24.060 provides that L & I can be "reimburse[ed]" only for "benefits paid," and L & I does not compensate the injured worker for loss of consortium. Specifically, here, the superior court found that, because L & I did not pay Tobin for his pain and suffering, the pain and suffering portion of Tobin's third party recovery, like the loss of consortium recovery in Flanigan, cannot be subject to distribution.

¶ 10 L & I timely appeals.

ANALYSIS

Standard of Review

¶ 11 L & I argues that the trial court's reasoning is flawed because, under RCW 51.24.030(5), "recovery" includes "all damages except loss of consortium" and necessarily includes all other forms of damages, including pain and suffering. We disagree. Under the Flanigan rationale, because L & I did not compensate Tobin for his pain and suffering, it cannot be "reimbursed" from that portion of Tobin's award.

¶ 12 When the Board reviews a case on stipulated facts, any remaining issues are questions of law which we review de novo. Tunstall v. Bergeson, 141 Wn.2d 201, 209-10, 5 P.3d 691 (2000), cert. denied, 532 U.S. 920 (2001).

¶ 13 Washington workers injured in the course of their employment are entitled to benefits under Title 51 RCW, the Industrial Insurance Act (IIA). These workers' compensation benefits are, with limited exceptions, the exclusive remedy available to injured workers. See RCW 51.04.010. The third party recovery statute, RCW 51.24.030, sets out the few exceptions to Title 51 RCW's exclusive remedy provisions. See Bankhead v. Aztec Constr. Co., 48 Wn.App. 102, 106, 737 P.2d 1291 (1987). RCW 51.24.030(1) permits an injured worker to pursue a tort claim "[i]f a third person, not in a worker's same employ, is or may become liable to pay damages on account of a worker's injury for which benefits and compensation are provided under this title."

*3 ¶ 14 Under the third party recovery statute, any recovery is divided and distributed in the following order: (1) attorney fees and costs are paid, (2) 25 percent of the balance goes to the injured employee or beneficiary, and (3) L & I "shall be paid the balance of the recovery made, but only to the extent necessary to reimburse [L & I] for benefits paid." RCW 51.24.060(1)(a)-(c). Any remaining balance is paid to the employee or beneficiary. RCW 51.24.060(1)(d). Thereafter, the employee or beneficiary is not entitled to receive additional workers' compensation benefits until the additional benefits equal the remaining balance of the recovery paid to the employee or beneficiary. RCW 51.24.060(1)(e).

¶ 15 Allowing these third party actions serves two purposes: first, it spreads responsibility for compensating injured employees and their beneficiaries to third parties who are legally and factually responsible for the injury and, second, it permits the employee to increase his or her compensation beyond the IIA's limited benefits. Flanigan, 123 Wn.2d at 424 (citing Maxey v. Dep't of Labor & Indus., 114 Wn.2d 542, 549, 789 P.2d 75 (1990)). Allowing L & I to obtain reimbursement from the proceeds of a third party recovery likewise serves two roles: it ensures that the accident and medical funds are not charged for damages caused by a third party, and it also ensures that the injured employee does not make a double recovery. Flanigan, 123 Wn.2d at 425 (citing Maxey, 114 Wn.2d at 549). In other words, the injured worker "cannot be paid compensation and benefits from [L & I] and yet retain the portion of damages which would include those same elements." Flanigan, 123 Wn.2d at 425 (quoting Maxey, 114 Wn.2d at 549) (emphasis omitted).

Workers' Compensation Benefits and Third Party Actions

¶ 16 L & I argues that RCW 51.24.030(5) requires it to *exclude* loss of consortium damages from its distribution of third party recoveries but mandates that it *include* all other damages, such as damages for pain and suffering, regardless of whether it first compensated the injured worker for that portion of his recovery. We disagree.

A. Third Party Recovery Statute Distribution Calculation

¶ 17 Here, relying on Flanigan, the trial court held that Tobin's pain and suffering damages were not subject to distribution under the third party distribution statute. We agree. Because L & I did not, and will not, pay pain and

suffering damages, it cannot recover from that portion of Tobin's third party recovery compensating him for his pain and suffering.^{FN5} See Flanigan, 123 Wn.2d at 423. As such, the pain and suffering portion of Tobin's third party damages is not a "recovery" as it is defined under RCW 51.24.030(5).

FN5. In Flanigan, our Supreme Court suggested that non-economic damages other than loss of consortium, such as pain and suffering, could also be excluded from distribution. See 123 Wn.2d at 423.

¶ 18 Shortly after the Flanigan decision, the legislature passed RCW 51.24.030(5), which provides: "For the purposes of this chapter, 'recovery' includes all damages except loss of consortium."

*4 ¶ 19 L & I argues that the amendment of RCW 51.24.030 codified Flanigan's^{FN6} holding that loss of consortium damages are not subject to distribution and simultaneously rejected our Supreme Court's suggestion that damages for pain and suffering might also be exempt from distribution. As a result, L & I argues that the plain language of RCW 51.24.030(5) requires it to *exclude* loss of consortium damages from its distribution of third party recoveries but it requires that it *include* all other damages. We disagree.

FN6. As an initial matter, L & I argues that Flanigan was wrongly decided. But Flanigan is an opinion of our Supreme Court and is, therefore, binding precedent upon this court.

¶ 20 We review questions of law, including statutory construction, de novo. City of Pasco v. Pub. Employment Relations Comm'n, 119 Wn.2d 504, 507, 833 P.2d 381 (1992). And we construe statutory language according to its plain and ordinary meaning. Flanigan, 123 Wn.2d at 426.

¶ 21 Although RCW 51.24.030(5)'s amendment defines "recovery" as "all damages except loss of consortium," the legislature drafted the statute using the terms "reimbursing" L & I for "benefits paid." See RCW 51.24.060(1)(c). We read these statutes together. Donovick v. Seattle-First Nat'l Bank, 111 Wn.2d 413, 415, 757 P.2d 1378 (1988) (holding that statutes are read as a whole, not piecemeal). The term "reimburse" means "to pay back (an equivalent for something taken, lost, or expended) to someone: REPAY." Flanigan, 123 Wn.2d at

426 (quoting Webster's Third New Int'l Dictionary 1914 (1986)).

¶ 22 Here, L & I's position would give it an "unjustified windfall" at Tobin's expense. See Flanigan, 123 Wn.2d at 425. Under L & I's interpretation, it would be entitled to share in damages for which it has not provided and will never pay compensation. We do not interpret these statutes to require such a fundamentally unjust result. See Flanigan, 123 Wn.2d at 426 (citing Ski Acres, Inc. v. Kittitas County, 118 Wn.2d 852, 857, 827 P.2d 1000 (1992)). L & I did not, and will never, compensate Tobin for his pain and suffering, therefore it cannot be "reimbursed" from funds designated to compensate him for his pain and suffering. See Flanigan, 123 Wn.2d at 426.

B. Legislative History

¶ 23 Next, L & I argues that RCW 51.24.030(5)'s legislative history "provides overwhelming evidence that the Legislature intended [the amendment to RCW 51.24.030(5)] to limit Flanigan's reach, thereby ensuring that damages such as pain and suffering were included in distributions made under the Third Party Recovery Statute."^{FN7} Br. of Appellant at 22. Again, we disagree. Contrary to L & I's assertion, the legislative history of RCW 51.24.030(5) does not "conclusively establish" that the legislature intended that all damages, except for loss of consortium, be included in the distribution calculation, only that L & I intended that it do so.

FN7. Tobin urges us to disregard the legislative history that L & I attached to its brief and all related arguments as "outside the record." But a party need not have filed the legislative history of a statute with the trial court and, thus, it can be properly appended to a party's appellate brief. But this court may take judicial notice of the legislative history of a statute. ER 201(b); see also Clean v. State, 130 Wn.2d 782, 809, 928 P.2d 1054 (1996) (citing State ex. rel. Humiston v. Meyers, 61 Wn.2d 772, 779, 380 P.2d 735 (1963)); but cf. State v. Bernard, 78 Wn.App. 764, 768-69, 899 P.2d 21 (1995).

¶ 24 As legislative history, L & I points this court primarily to its own testimony at various hearings as well as its own proposed legislation summary to support its theory that the legislature intended to allow L & I to seek reimbursement from a portion of an injured workers'

recovery for which it did not provide compensation, such as pain and suffering. At the Senate Labor, Commerce, and Trade Committee hearing, L & I's then Deputy Director, Mike Watson, testified that L & I sought to codify that the loss of consortium is the only part of a third party recovery for an injury that would not be subject to repayment of the benefits because it is a significant source of replenishment of the fund and provides for additional recovery for injured workers or their survivors. See S.B. 5399, 54th Leg., Reg. Sess. (Wash.1995). Watson described L & I's wishes similarly in his testimony in front of the House Commerce and Labor Committee.^{FN8}

FN8. L & I also argues that our decision in Gersema v. Allstate Insurance Company, 127 Wn.App. 687, 112 P.3d 552 (2005), "overlooked the fact that [RCW 51.24.030(5)] limited Flanigan[']s loss of consortium holding]" because we "did not have access to the legislative material[s]" which L & I appended to its brief. Br. of Appellant at 33. But, as discussed above, the legislative materials on which L & I relies do not show that the legislature intended to so limit the third party recovery statute.

*5 ¶ 25 Although there was some discussion of general damages by witnesses before the committees, it does not appear that any of these discussions took place before the full house or senate. More importantly, these discussions do not appear in the legislative report for the bill or bill analysis. See Final Legislative Report, 54th Leg. (Wash.1995). We note the testimony of an interested party in support of a bill is not suggestive of the legislature's intent in enacting the statute.^{FN9} See In re Marriage of Kovacs, 121 Wn.2d 795, 807, 854 P.2d 629 (1993) (while suggestive, the statements of individual lawmakers and others before the Senate Judiciary Committee cannot be used to conclusively establish the intent of the legislature as a whole); Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 64, 821 P.2d 18 (1991) (testimony before a legislative committee is given little weight in determining legislative history). Because the legislative history does not provide evidence that the legislature intended to allow L & I to access the pain and suffering portion of a third party recovery to reimburse it for money it paid to compensate an injured worker's other losses, i.e., medical expenses, its argument fails.

FN9. L & I also points us to testimony from the

Washington State Trial Lawyers' Association and the "business community" in support of the bill. Br. of Appellant at 25. But again, testimony in support of a bill is not suggestive of the legislature's intent. See Wilmot v. Kaiser Aluminum & Chem. Corp., 118 Wn.2d 46, 64, 821 P.2d 18 (1991). In addition, L & I points us to the Fiscal Note for S.B. 5399, which stated that Flanigan excluded damages for loss of consortium "and created a potential for attempts at excluding other forms of damages" and that "without passage of this amendment, piecemeal attempts to exclude various forms of damages ... will be made." Fiscal Note for S.B. 5399 (1995). Although these statements illuminate the history behind the proposed amendment, they do not suggest that the legislature intended to allow L & I to be reimbursed from a portion of a third party settlement for which it did not, and will never, compensate the injured worker.

C. Due Process

¶ 26 L & I argues that by excluding Tobin's pain and suffering damages from the distribution formula, Tobin will receive a double recovery. Specifically, L & I argues that it retains a right to reimbursement for all the benefits it has paid Tobin from all sources of recovery, including his pain and suffering, because otherwise he will receive more in combined tort damages and workers' compensation benefits than he would under either system alone. Tobin argues that the pain and suffering damages he recovered are his private property and, if this court permits L & I to include these damages in its distribution under RCW 51.24.060, it would constitute an unconstitutional taking in violation of the state and federal constitutions.

¶ 27 Tobin frames his argument as whether L & I's right to reimbursement from his pain and suffering damages for unrelated payments constitutes an unconstitutional taking in violation of his right to due process. But the real issue is whether the statute gives injured workers adequate notice that third party settlement funds earmarked as compensation for their personal pain and suffering are subject to distribution under RCW 51.24.060 to reimburse L & I for payments it made to compensate the worker for other losses. We hold that it does not.

¶ 28 The fundamental requisites of due process are " 'the opportunity to be heard,' " Olympic Forest Prods., Inc. v.

Chaussee Corp., 82 Wn.2d 418, 422; 511 P.2d 1002 (1973) (quoting Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 58 L.Ed. 1363 (1914)), and “ ‘notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.’ ” Olympic, 82 Wn.2d at 422 (quoting Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). Thus, at a minimum, the due process clause of the Fourteenth Amendment of the United States Constitution demands that a deprivation property be preceded by “ ‘notice and opportunity for hearing appropriate to the nature of the case.’ ” Olympic, 82 Wn.2d at 422 (quoting Mullane, 339 U.S. at 313). Moreover, this opportunity “ ‘must be granted at a meaningful time and in a meaningful manner.’ ” Olympic, 82 Wn.2d at 422 (quoting Armstrong v. Manzo, 380 U.S. 545, 552, 85 S.Ct. 1187, 14 L.Ed.2d 62 (1965)).

*6 ¶ 29 As an initial matter, although allowing L & I to obtain reimbursement from the proceeds of a third party recovery is meant to ensure that injured workers do not make a double recovery, the legislature expressly sanctioned some form of double recovery for injured workers when it drafted RCW 51.24.060(1) to provide the injured worker with 25 percent of the total recovery before any reimbursement to L & I was calculated. This formula allows for an injured worker to retain 25 percent of the proceeds after reasonable attorney fees are paid, regardless of whether L & I is fully reimbursed for funds it has paid for medical expenses, lost wages, and the like. Furthermore, injured workers who are not aware that L & I may access their pain and suffering damages following a settlement agreement with a third party would not know to take care to structure their settlement awards accordingly. Specifically, if injured workers were aware of this risk, they would structure their third party settlements to ensure that the medical benefits and lost wages portion of their settlement was sufficient to reimburse L & I entirely, and, thus, preserve the portion compensating them for pain and suffering for the purpose intended.

¶ 30 The award here was obtained via settlement. But we note that had a jury granted Tobin damages to compensate him for his pain and suffering, under L & I's reading of the disbursement statute, it would have the authority to subvert the jury's verdict and divert funds it awarded as compensation for pain and suffering to pay prior medical expenses and lost wages. Here, RCW 51.24.060 does not

provide injured workers with sufficient notice that damages so earmarked are assets that may be attached to reimburse and relieve L & I of its responsibility to pay compensation which the injured worker is due for his other losses.

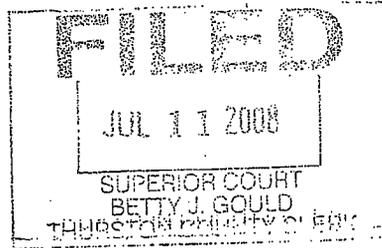
Attorney Fees

¶ 31 Tobin asks this court to uphold the superior court's award of attorney fees under former RCW 51.52.130 (1993) and to award him attorney fees on appeal under RAP 18.1. L & I argues that, because it should prevail on appeal, Tobin is not entitled to attorney fees at the superior court level or on appeal. We affirm the trial court's award of attorney fees and award Tobin reasonable attorney fees on appeal in an amount to be determined by the commissioners of this court on his timely compliance with RAP 18.1.

¶ 32 Affirmed.

We concur: VAN DEREN, A.C.J., and PENOYAR, J.
Wash.App. Div. 2, 2008.
Tobin v. Department of Labor & Industries
--- P.3d ----, 2008 WL 2582975 (Wash.App. Div. 2)

END OF DOCUMENT



CASE TYPE 2 08-2-01647-9

THURSTON COUNTY SUPERIOR COURT
CASE INFORMATION COVER SHEET

Case Number Case Title Davis v. Washington State Dept. of Labor & Industries
Attorney Name Michael David Myers Bar Membership Number 22486

Please check one category that best describes this case for indexing purposes. Accurate case indexing not only saves time in docketing new cases, but helps in forecasting needed judicial resources. Cause of action definitions are listed on the back of this form. Thank you for your cooperation.

APPEAL/REVIEW

- Administrative Law Review (ALR 2)
Appeal of a Department of Licensing Revocation (DOL 2)
Civil, Non-Traffic (LCA 2)
Civil, Traffic (LCI 2)

CONTRACT/COMMERCIAL

- Breach of Contract (COM 2)
Commercial Contract (COM 2)
Commercial Non-Contract (COL 2)
Third Party Collection (COL 2)

MERETRICIOUS RELATIONSHIP

- Meretricious Relationship (MER 2)

PROTECTION ORDER

- Civil Harassment (HAR 2)
Domestic Violence (DVP 2)
Foreign Protection Order (FPO 2)
Sexual Assault Protection (SXP 2)
Vulnerable Adult Protection (VAP 2)

JUDGMENT

- Abstract Only (ABJ 2)
Foreign Judgment (FJU 2)
Judgment, Another County (ABJ 2)
Judgment, Another State (FJU 2)
Tax Warrant (TAX 2)
Transcript of Judgment (TRJ 2)

OTHER COMPLAINT/PETITION

- Action to Compel/Confirm Private Binding Arbitration (MSC 2)
Change of Name (CHN 2)
Deposit of Surplus Funds (MSC 2)
Emancipation of Minor (EOM 2)
Injunction (INJ 2)
Interpleader (MSC 2)
Malicious Harassment (MHA 2)
Minor Settlement (No guardianship) (MST 2)

- Petition for Civil Commitment (Sexual Predator)(PCG 2)
Seizure of Property from Commission of Crime (SPC 2)
Seizure of Property Resulting from a Crime (SPR 2)
Subpoenas (MSC 2)

PROPERTY RIGHTS

- Condemnation (CON 2)
Foreclosure (FOR 2)
Land Use Petition (LUP 2)
Property Fairness (PFA 2)
Quiet Title (QTI 2)
Unlawful Detainer (UND 2)

TORT, MEDICAL MALPRACTICE

- Hospital (MED 2)
Medical Doctor (MED 2)
Other Health Care Professional (MED 2)

TORT, MOTOR VEHICLE

- Death (TMV 2)
Non-Death Injuries (TMV 2)
Property Damage Only (TMV 2)
Victims of Motor Vehicle Theft (VVT 2)

TORT, NON-MOTOR VEHICLE

- Asbestos (PIN 2)
Other Malpractice (MAL 2)
Personal Injury (PIN 2)
Products Liability (TTO 2)
Property Damage (PRP 2)
Wrongful Death (WDE 2)

WRIT

- Habeas Corpus (WHC 2)
Mandamus (WRM 2)
Restitution (WRR 2)
Review (WRV 2)
Miscellaneous Writs (WMW 2)

IF YOU CANNOT DETERMINE THE APPROPRIATE CATEGORY, PLEASE DESCRIBE THE CAUSE OF ACTION BELOW.

Class Action Complaint

COPY

APPEAL/REVIEW

Administrative Law Review-Petition to the superior court for review of rulings made by state administrative agencies.

Appeal of a Department of Licensing Revocation-Appeal of a DOL revocation (RCW 46.20.308(9)).

Lower Court Appeal-Civil-An appeal for a civil case; excludes traffic infraction and criminal matters.

Lower Court Appeal-Infractions-An appeal for a traffic infraction matter.

CONTRACT/COMMERCIAL

Breach of Contract-Complaint involving monetary dispute where a breach of contract is involved.

Commercial Contract-Complaint involving monetary dispute where a contract is involved.

Commercial Non-Contract-Complaint involving monetary dispute where no contract is involved.

Third Party Collection-Complaint involving a third party over a monetary dispute where no contract is involved.

MERETRICIOUS RELATIONSHIP

Meretricious Relationship-Petition for distribution of property from a meretricious relationship (i.e., a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist).

PROTECTION ORDER

Civil Harassment-Petition for protection from civil harassment.

Domestic Violence -Petition for protection from domestic violence.

Foreign Protection Orders-Any protection order of a court of the United States, or of any state, territory, or tribal land, which is entitled to full faith and credit in this state.

Sexual Assault Protection - Petition under RCW 7.90.020.

Vulnerable Adult Protection-Petition for protection order for vulnerable adults, as those persons are defined in RCW 74.34.020.

JUDGMENT

Abstract Only-A certified copy of a judgment docket from another superior court, an appellate court, or a federal district court.

Foreign Judgment-Any judgment, decree, or order of a court of the United States, or of any state or territory, which is entitled to full faith and credit in this state.

Judgment, Another County-A certified copy of a judgment docket from another superior court within the state.

Judgment, Another State-Any judgment, decree, or order from another state which is entitled to full faith and credit in this state.

Tax Warrant-A notice of assessment by a state agency creating a judgment/lien in the county in which it is filed.

Transcript of Judgment-A certified copy of a judgment from a court of limited jurisdiction to a superior court in the same county.

OTHER COMPLAINT/PETITION

Action to Compel/Confirm Private Binding Arbitration-Petition to compel or confirm private binding arbitration.

Change of Name-Petition for a change of name. If change is confidential due to domestic violence/antiharassment see case type 5 instead.

Deposit of Surplus Funds-Deposit of money or other item with the court.

Emancipation of Minor-Petition by a minor for a declaration of emancipation.

Injunction-Complaint/petition to require a person to do or refrain from doing a particular thing.

Interpleader-Petition for the deposit of disputed earnest money from real estate, insurance proceeds, and/or other transaction(s).

Malicious Harassment-Suit involving damages resulting from malicious harassment.

Minor Settlements-Petition for a court decision that an award to a minor is appropriate when no letters of guardianship are required (e.g., net settlement value \$25,000 or less).

Petition for Civil Commitment (Sexual Predator)-Petition for the involuntary civil commitment of a person who 1) has been convicted of a sexually violent offense whose term of confinement is about to expire or has expired, 2) has been charged with a sexually violent offense and who has been determined to be incompetent to stand trial who is about to be released or has been released, or 3) has been found not guilty by reason of insanity of a sexually violent offense and who is about to be released or has been released; and it appears that the person may be a sexually violent predator.

Seizure of Property from the Commission of a Crime-Seizure of personal property which was employed in aiding, abetting, or commission of a crime, from a defendant after conviction.

Seizure of Property Resulting from a Crime-Seizure of tangible or intangible property which is the direct or indirect result of a crime, from a defendant following criminal conviction (e.g., remuneration for, or contract interest in, a depiction or account of a crime).

Subpoenas-Petition for a subpoena.

PROPERTY RIGHTS

Condemnation-Complaint involving governmental taking of private property with payment, but not necessarily with consent.

Foreclosure-Complaint involving termination of ownership rights when a mortgage or tax foreclosure is involved, where ownership is not in question.

Land Use Petition-Petition for an expedited judicial review of a land use decision made by a local jurisdiction (RCW 36.70C.040).

Property Fairness-Complaint involving the regulation of private property or restraint of land use by a government entity brought forth by Title 64 RCW.

Quiet Title-Complaint involving the ownership, use, or disposition of land or real estate other than foreclosure.

Unlawful Detainer-Complaint involving the unjustifiable retention of lands or attachments to land, including water and mineral rights.

TORT, MEDICAL MALPRACTICE

Hospital-Complaint involving injury or death resulting from a hospital.

Medical Doctor-Complaint involving injury or death resulting from a medical doctor.

Other Health Care Professional-Complaint involving injury or death resulting from a health care professional other than a medical doctor.

TORT, MOTOR VEHICLE

Death-Complaint involving death resulting from an incident involving a motor vehicle.

Non-Death Injuries -Complaint involving non-death injuries resulting from an incident involving a motor vehicle.

Property Damage Only-Complaint involving only property damages resulting from an incident involving a motor vehicle.

TORT, NON-MOTOR VEHICLE

Asbestos-Complaint alleging injury resulting from asbestos exposure.

Other Malpractice-Complaint involving injury resulting from other than professional medical treatment.

Personal Injury-Complaint involving physical injury not resulting from professional medical treatment, and where a motor vehicle is not involved.

Products Liability-Complaint involving injury resulting from a commercial product.

Property Damages-Complaint involving damage to real or personal property excluding motor vehicles.

Wrongful Death-Complaint involving death resulting from other than professional medical treatment.

WRIT

Writ of Habeas Corpus-Petition for a writ to bring a party before the court.

Writ of Mandamus-Petition for writ commanding performance of a particular act or duty.

Writ of Restitution-Petition for a writ restoring property or proceeds; not an unlawful detainer petition.

Writ of Review-Petition for review of the record or decision of a case pending in the lower court; does not include lower court appeals or administrative law reviews.

Miscellaneous Writs

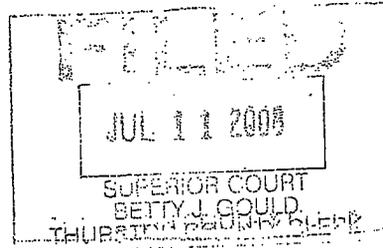
SUPERIOR COURT OF WASHINGTON
FOR THURSTON COUNTY

Davis, et al.

Plaintiff/Petitioner,

vs.

The Washington State Dept. of Labor & Ind.
Defendant/Respondent



NO. 08-2-01647-9

NOTICE OF ASSIGNMENT/ (NTAS)
NOTICE OF STATUS CONFERENCE (NTC)

TO: THURSTON COUNTY CLERK
ATTORNEYS/LITIGANTS

MYERS & COMPANY, P.L.L.C.
RECEIVED

JUL 14 2008

PLEASE TAKE NOTICE:

1. That the above-noted case is assigned to: BY _____

The Honorable Judge Gary R. Tabor

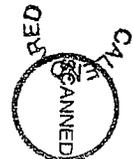
2. That the Status Conference is scheduled for 9:00 a.m. October 10, 2008.

Dated this 11th day of July, 2008.

All parties should be familiar with Local Civil Rule 16(d) which requires in part that parties or lead counsel attend and that the parties or counsel shall communicate with each other concerning the case schedule order before the status conference.

CALENDAR

THURSTON COUNTY SUPERIOR COURT
2000 LAKERIDGE DRIVE SW
OLYMPIA WA 98502
(360) 786 - 5560



NOTICE OF ASSIGNMENT/
NOTICE OF STATUS CONFERENCE