No. 81946-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JIM A. TOBIN,

Respondent,

v.

DEPARTMENT OF LABOR & INDUSTRIES,

Petitioner.

BRIEF OF AMICI CURIAE ASSOCIATION OF WASHINGTON BUSINESS WASHINGTON SELF-INSURERS ASSOCIATION

Kristopher I. Tefft, WSBA #29366
ASSOCIATION OF WASHINGTON BUSINESS
1414 Cherry Street SE
Olympia, WA 98507
(360) 943-1600
Attorney for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Administrative Materials

Miscellaneous Authorities

I. INTRODUCTION

In this amici submission, the Association of Washington Business ("AWB") and Washington Self-Insurers Association ("WSIA"), together the primary institutional representatives of the statewide employer community on workers' compensation law and policy, seek to address the court on two different matters that have arisen since the petition for review was granted. First is the suggestion, raised for the first time in this court by respondent, that common law tort and subrogation principles should apply to industrial insurance. They don't, and they shouldn't. Second is the precarious financial position of the state fund, and of employers generally in this economy, a point that bears practical relevance to the resolution of an issue that could cost employers and the state fund tens of millions of dollars per year in lost reimbursement from recoveries against third party tortfeasors.

Amici urge the court to reverse the Court of Appeals and affirm the Department's distribution order.

II. IDENTITY AND INTEREST OF AMICI CURIAE

A. The Association of Washington Business

The Association of Washington Business ("AWB") is the state's largest general business membership organization and represents over

6,800 businesses from every industry sector and geographical region of the state. AWB member businesses range from large to small and collectively employ over 650,000 people in Washington. AWB is an umbrella organization which also represents over 100 local and regional chambers of commerce and professional associations. AWB frequently appears in this and other courts as amicus curiae on issues of substantial interest to its statewide membership. AWB members are covered under the state's workers' compensation laws, either as employers who obtain industrial insurance through the state fund or who self-insure. Judicial interpretation and application of the laws related to workers' compensation, especially when they impact the costs of industrial insurance coverage, are of fundamental interest to these employers.

B. The Washington Self-Insurers Association

The Washington Self-Insurers Association ("WSIA") is a non-profit business association formed in 1972 to represent the interests of members who self-insure for workers compensation in Washington State. Today, the WSIA has 385 members to whom it provides a variety of educational, training, business assistance, and governmental relations services with respect to workers' compensation law and regulation, workplace safety, and accident prevention. Self-insured employers pay workers' compensation benefits directly from their general assets and pay

an administrative assessment to the Department of Labor & Industries. They operate under the same laws and rules that apply to the state fund. Accordingly, judicial treatment of the Department's right of reimbursement from the third party tort recovery of an injured worker applies with equal force to the same right of self-insured employers.

III. ISSUE OF CONCERN TO AMICI CURIAE

Is the pain and suffering portion of an injured worker's recovery from a third party tortfeasor subject to distribution under RCW 51.24.060(1)?

IV. STATEMENT OF THE CASE

For brevity's sake, AWB adopts, as if set forth herein, the Statement of the Case provided by L&I most recently in its *Petition for Review* at pages 3-9.

V. ARGUMENT

The court's resolution of this case should turn on whether "'recovery' includes all damages except loss of consortium" in the 1995 post-*Flanagan*[1] amendment to RCW 51.24.030(5) really means "all damages except loss of consortium" or, as respondent and his amici contend, and the Court of Appeals erroneously held, the phrase somehow

[1] *Flanigan v. Dept. of Labor & Indus.*, 123 Wn.2d 418, 869 P.2d 14 (1994).

means something much different like "'recovery' only includes economic damages." The Department of Labor & Industries' briefs and our memorandum supporting the petition for review address our view that the Court of Appeals holding is an unwarranted judicial expedition into Title 51 RCW, rewording an unambiguous statutory provision, frustrating the public policy underlying third party recovery, and undermining a key component of the purpose and intent of the workers' compensation system. We won't belabor that point here. Rather, this brief is intended to (a) address a further public policy concern arising in the supplemental briefing – the irrelevance of the "made whole" doctrine from the common law of torts, insurance, and subrogation, and (b) consider the impact of this case on the current precarious financial health of the state funds.

A. LIMITING REIMBURSEMENT FROM THIRD PARTY RECOVERY ON COMMON LAW TORT GROUNDS THREATENS THE "GRAND COMPROMISE" OF WORKERS' COMPENSATION.

Because it is sometimes easy to think of workers' compensation as just another personal injury insurance system operated by an anonymous governmental bureaucracy, a frequent recurrence to fundamental principles is essential to understanding the public policies at stake in workers' compensation. While respondent and amici now attempt to inject common law "made whole" principles into workers' compensation,

they clearly are not part of history or intent of the workers' compensation system.

1. The structure and fundamental public policy of workers' compensation.

Washington's Industrial Insurance Act ("IIA"), Title 51 RCW, has been in existence since 1911. Laws of 1911, ch. 74. Since the Act, and its system of workers' compensation, has been a part of our culture for almost a century, it is easy to forget the creation of this "no fault" system was a marked deviation from the common law of torts. Under the workers' compensation system, "fault" is no longer an issue. Workers receive benefits without regard to their fault. In exchange, employers, even if at fault in causing an injury, are immune from civil liability.

Under the IIA, workers who sustain injuries or develop diseases in the course of their employment are entitled to substantial benefits. In addition to medical benefits, RCW 51.36.010, workers are entitled to receive wage loss benefits, RCW 51.32.090, vocational rehabilitation, RCW 51.32.095, awards for permanent partial disabilities, RCW 51.32.080, and, in the event of permanent inability to work, a lifetime pension, RCW 51.32.060. Where death results, benefits are also paid to the worker's survivors, RCW 51.32.050. All of these benefits are provided without regard to fault on the part of either the employer or the

worker. The worker receives full benefits even if the employer was *not* at fault. The worker receives full benefits even if the worker was at fault in causing his or her injury.

The costs of this industrial insurance program are borne almost exclusively by employers. In the case of a self-insured employer, the employer pays all of the benefits associated with an allowable workers' compensation claim. RCW 51.14.010(2). The expenses of claims by employees of "state fund" employers are paid primarily through the assessment of premiums against employers, based on the relative risk and experience of the industry in which the employer is engaged. RCW 51.16.035. A particular employer can be assessed a premium greater than that applicable to the employer's industry where the employer's claims costs are excessive. WAC 296-17-850. Workers themselves pay only one half of the premium necessary to pay for medical costs (workers of self-insured employers pay no medical aid assessment), RCW 51.16.140, and one half of the premium necessary to support cost-of-living increases to persons receiving monthly benefits. RCW 51.32.073. Accident fund assessments (e.g., for temporary, permanent, or total disability benefits or death) are paid wholly by the employer.

While workers receive the "sure and certain" relief provided under the Act, RCW 51.04.010, employers receive immunity from civil liability

to employees for any personal injuries occurring during the course of employment. Specifically, RCW 51.04.010:

> declares that all phases of the premises are withdrawn from private controversy, and sure and certain relief for workers, injured in their work, and their families and dependents is hereby provided regardless of questions of fault and to the exclusion of every other remedy, proceeding or compensation, except as otherwise provided in this title; and to that end all civil actions and civil causes of action for such personal injuries and all jurisdiction of the courts of the state over such causes are hereby abolished, except as in this title provided.

This quid pro quo is the "grand compromise" of the workers' compensation system, *Birklid v. Boeing*, 127 Wn.2d 853, 859 904 P. 2d 278 (1995) (citing *Stertz v. Indus. Ins. Comm'n*, 91 Wash. 588, 590-91, 158 P. 256 (1916)), "the workman contributing his reduced damages, the employer getting that and conceding more liabilities." *Stertz*, 91 Wash. at 602. That is to say, in exchange for sure and certain relief, injured workers gave up common law damages (e.g., pain and suffering) and employers gave up common law defenses (e.g., the fellow servant rule, voluntary assumption of the risk, and contributory negligence).

To the extent this is an "insurance" system, it is a social insurance system. In Professor Larson's oft-quoted formulation:

> The ultimate social philosophy behind [workers'] compensation liability is belief in the wisdom of providing, in the most efficient, most dignified, and most certain form, financial and medical benefits for the victims of work-connected injuries which an enlightened community would feel obliged to provide in any case

> in some less satisfactory form and of allocating the burden of these payments to the most appropriate source of payment, the consumer of the product.

Arthur Larson & Lex K. Larson, Larson's Workers' Compensation Law § 1.03[2], at 1-5 (1999). Thus workers' compensation spreads the risk for industrial injuries and occupational diseases to society at large as a cost of doing business.

2. The public policy of reimbursement from third party recovery.

More specific public policies are implicated when an on-the-job injury is caused by the negligence of a third party. In that instance, the Department of Labor & Industries or self-insured employer is given a statutory right to reimbursement from an injured worker's recovery from a third party tortfeasor. The purpose of that right is two-fold: to prevent unjust enrichment through double recovery for the same accident and to protect the workers' compensation state fund by ensuring the accident and medical funds (or self-insured employer) are not charged for damages caused by third parties. *Maxey v. Dept. of Labor & Indus.*, 114 Wn.2d 542, 549, 789 P.2d 75 (1990); *Clark v. Pacificorp*, 118 Wn.2d 167, 184, 822 P.2d 162 (1991).

As Justice Madsen pointed out in *Flanigan*:

> Inherent in RCW 51.24, is the legislative intent that industrial insurers should not bear the cost of industrial accidents caused by third parties. This is the essence of the quid pro quo compromise:

> the employer provides sure and certain relief in the form of strict liability in exchange for limitations on that liability and immunity from suit by workers and their beneficiaries. This objective of limited liability to the employer is frustrated if the employer is forced to bear the cost of accidents caused by third parties. In such a case, the injured worker achieves a full recovery at the expense of the industrial insurer and the industrial insurance fund, despite the fact that the third party was liable. In order to avoid this consequence, the Legislature provided that the Department may reimburse the industrial insurance fund with the proceeds of third party actions under the Act. This intent is apparent in the history of third party recovery under the Act.

Flanigan, 123 Wn.2d at 433 (Madsen, J., dissenting). Part of that history is the original choice workers' had to make between proceeding against the third party in tort or taking workers' compensation benefits, then the requirement to reimburse the Department dollar for dollar from third party recovery, and then presently the ability to retain 25% of a recovery after attorney's fees as an incentive to pursue third party recovery. RCW 51.24.060(1).

Given the social context of workers' compensation, and its inherent spreading of cost through society as a whole, the right of recovery from negligent third parties also inures to society as a whole.

3. Respondent's common law tort and subrogation theories are inapplicable.

Respondent's own "made whole" argument, *Resp't Supp. Br.* at 14-16, on the other hand, fails to acknowledge the historical purpose of workers' compensation, and attempts to push a round peg through a square

hole. Respondent claims, by reference to a few insurance subrogation cases, that an insurer may only recover the excess after the insured is fully compensated and accordingly, since respondent has not received pain and suffering damages in his industrial insurance claim, he will not be fully compensated or made whole if the Department lien includes that part of his settlement characterized for pain and suffering. This argument continues to treat workers' compensation as a tort system. It fails to acknowledge the societal interest in reimbursement to the insuring employer or the state fund under the policy judgment that workers and employers should not pay for the negligence of entities outside of the employment relationship. That is the reason third party actions are allowed at all.

4. The *Ahlborn* case is not on point.

Similarly inapplicable are respondent's arguments based upon state reimbursement of Medicaid funds. Suggesting the holding of *Arkansas Department of Health & Human Services v. Ahlborn*, 547 U.S. 268, 126 S. Ct. 1752, 164 L. Ed. 2d 469 (2006) somehow applies to third party recovery under the IIA, respondent analogizes the Department's lien to that of a state's lien for reimbursement for Medicaid payments. But *Ahlborn*, while it cites this court's *Flanigan* decision in a footnote as an example supporting its analysis, is inapposite if for no other reason than it

is based on an express anti-lien provision in federal law. *Ahlborn*, 547 U.S. at 283-85 (citing 42 U.S.C. § 1396p(a)). *Ahlborn* actually returns the analysis in the instant case right back where it started: to the extent RCW chapter 51.24 has an anti-lien provision, its only limitation, post-*Flanigan*, is on loss of consortium.

B. THIS CASE IMPACTS THE FINANCIAL INTEGRITY OF THE STATE FUND IN A RECESSIVE ECONOMY.

As the foregoing discussion demonstrates, the primary purpose of third party recovery is reimbursement to the state fund (or self-insured employer) so that the employers (and workers, as the case may be) who pay the tax premiums that support the fund are not left paying for the negligent acts of entities outside the employment relationship. Removing types of damage awards or settlement allocations beyond loss of consortium, besides being in direct contravention of the plain language of RCW 51.24.030(5), will have a substantial impact on the state funds.

1. Respondent's argument denies $261,000 in reimbursement to the state fund that RCW 51.24.060 and .030(5) would otherwise allow.

The Department's brief depicts the state fund impact in this case alone. *See Pet. for Rev.* at 11-12; *Supp. Br.* at 17-18 and Appendix D. Under the Court of Appeals' rationale, Tobin is made more than whole at the expense of his employer and employers generally through workers'

comp taxes. Under this rationale, the state funds are responsible in Tobin's case for $261,000 – 159% -- more in benefits than compared to a plain language application of RCW 51.24.060 and RCW 51.24.030(5). (Even a plain language interpretation ensures more recovery to respondent than either a workers' compensation claim or a tort claim alone would; *id.* at App. D.). Multiplied across thousands of third party claims litigated or settled each year, this has the potential to divert millions of dollars from the state fund by undermining the legislative purpose to replenish the funds for benefits paid due to the negligence of third party tortfeasors. For self-insured claims, employers themselves would endure the cost-shift.

2. The financial position of the state fund is precarious in this economy and the Court of Appeals holding makes it worse.

This prospect comes at a time when the funds and self-insured employers can least afford it. Since the Court of Appeals decided the case below, the state and national economy descended deep into recession. Washington's unemployment rate has more than doubled, to over 9 percent. *See* Press Release, Washington State Employment Security Department, Washington's Unemployment Rate Rose in September (Oct. 13, 2009) *available at* http://www.esd.wa.gov/newsandinformation /releases/washingtons-unemployment-rate-rose-in-sept-09-081.php. And Washington's state fund, buoyed by premium taxes that are assessed on

the basis of hours worked, has taken a substantial hit. According to the Department, in a September, 2009 briefing to its statutory advisory committee, RCW 51.04.110, the state fund reserves lost approximately $1 billion in fiscal year 2009 due to the economy. PowerPoint, 2010 Proposed Rate Discussion at the Workers' Compensation Advisory Committee (September 21, 2009) at 68 (attached hereto as Appendix A). The reserve is now below the levels established under RCW 51.16.035(3)(a)(i) to reflect an amount "appropriate to maintain actuarial solvency of the accident and medical aid funds, limit premium rate fluctuations, and account for economic conditions." *Id.*

As a result, the Department has proposed to raise the premium taxes on employers and workers by an average of 7.6% in 2010, to bring $117 million more revenue into the state fund. *See* Washington State Register 09-19-137 at 218 (2009). This represents the highest premium rate increase since 2003 and its timing in the midst of an historically bad economy has prompted both legislative review and significant public outcry. *See, e.g.*, "Update from L&I on Proposed Rate Increase," Senate Labor, Commerce, and Consumer Protection Committee Work Session (Oct. 2, 2009) (Committee-requested presentation from L&I officials on 2010 proposed rate increase); Editorial, *Let's Review L&I Operations Before Allowing Tax Increase*, Yakima Herald-Republic, Sept. 25, 2009

(expressing concern over amount and timing of L&I rate increase); Editorial, *Lawmakers Must Reform Workplace Insurance*, The Spokesman Review, Sept. 25, 2009 (same). The uncertainty caused by this case by necessity makes it difficult for the Department to set the accurate rates because it is not known how much premium may be necessary to offset reduced reimbursements should the Court of Appeals decision stand.

The court should take note of the ambient economic circumstances in which the workers' compensation funds presently find themselves. If the court adopts Tobin's interpretation of the third party reimbursement system and affirms the rationale of the Court of Appeals, that action could have significant adverse affects on an already beleaguered fund by carving out large sums of money that the Legislature clearly intended to be available for reimbursement.

VI. CONCLUSION

Workers' compensation is a closed statutory system granting limited benefits to injured workers regardless of fault while generally immunizing employers from tort liability for workplace injuries and occupational diseases. Common law tort and insurance principles, equitable subrogation policies, federal anti-lien statutes – none of these concepts apply to limit the reimbursement rights of the Department or self-insured employers from injured workers' third party recovery beyond

what the Legislature has expressly limited in RCW ch. 51.24. Respondent believes RCW 51.24.030(5) should contain a broader exclusion from allowable "recovery" than it presently does. Such an argument, if upheld, could increase the peril of an already beleaguered state fund. It's an argument that belongs, if anywhere, in the Legislature.

For those reasons, as well as those contained in the briefs of the Department and amici's memorandum supporting the petition for review, the decision of the Court of Appeals should be reversed, the distribution order set forth by the Department should be affirmed.

Respectfully submitted this 19th day of October, 2009.

ASSOCIATION OF WASHINGTON BUSINESS

Kristopher I. Tefft, WSBA #29366
General Counsel
Attorney for Amici Curiae

APPENDIX A

Washington State Department of Labor & Industries

Overall contingency reserve is below the lower policy limit