No. 43688-4-II

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

BOARD OF INDUSTRIAL INSURANCE APPEALS,

Appellant,

v.

SOUTH KITSAP SCHOOL DISTRICT, DANIEL B. ZIMMERMAN, and DEPARTMENT OF LABOR & INDUSTRIES,

Respondents.

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

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I. INTRODUCTION

This case presents an instance of straightforward statutory application. When the Legislature enacted Claim Resolution Structured Settlement Agreements (CRSSAs) as a fundamental component of industrial insurance reforms in 2011, it charged appellant Board of Industrial Insurance Appeals with the administrative approval of all CRSSAs. Out of particular solicitude toward the interests of *pro se* industrial insurance claimants, the Legislature crafted a two-track approval process. On track one, for the *pro se* claimant, the Legislature provided a paternalistic review protocol involving a settlement conference before board quasi-judicial staff, and a finding under specific enumerated criteria that the proposed settlement is in the "best interest of the worker." As an added measure of protection, the settlement would in turn be reviewed by the full three-person board under additional criteria before final approval. On track two, for the claimant represented by an attorney, the Legislature saw no need for this heightened scrutiny and instead provided a simplified approval process whereby the attorney-represented settlement would be submitted directly to the three-person board for review under criteria ensuring the settlement was fairly and knowingly made. This two-track process at the board is unambiguously evident from the structure, plain language, and underlying public policy rationale of the statute.

In this case, however, in one of the first CRSSAs submitted for board review by a represented claimant, a two-person majority of the board, over a dissenting opinion, rejected the proposed settlement on the basis the board lacked sufficient information, such as might have been provided to an industrial appeals judge were Mr. Zimmerman *pro se*, to determine whether the settlement was in Mr. Zimmerman's best interest. For whatever reason, the board majority misconstrued the CRSSA statute, misunderstood the scope of its review authority, and effectively conflated the two review tracks. The trial court readily acknowledged this, granting summary judgment to respondent South Kitsap School District, and remanding the matter back to the board for review under the standards the Legislature specified. Although peculiar for a quasi-judicial body to be the litigant appealing a reversal of its own decision, the board majority nevertheless has sought this court's review. Amici curiae Association of Washington Business and Washington Self-Insurers Association, two trade associations deeply involved in the legislative debate and crafting of CRSSAs, and whose members are directly interested in the availability and viability of the CRSSA program, urge this court to affirm the decision of the trial court and reject the board majority's misinterpretation of the CRSSA statute.

II. IDENTITY AND INTEREST OF AMICI CURIAE

A. THE ASSOCIATION OF WASHINGTON BUSINESS

The Association of Washington Business ("AWB") is the state's chamber of commerce and largest general business membership organization, representing over 8,200 employers from every major industry sector and geographical region of the state. AWB members range from large, highly visible, multi-national corporations to very small businesses. Collectively, AWB members employ over 750,000 people in Washington. AWB is also an umbrella organization which represents over 100 local and regional chambers of commerce and professional associations. AWB frequently appears in the appellate courts as amicus curiae on issues of substantial interest to its statewide membership.

AWB members are covered under Washington's compulsory industrial insurance law, and all but a handful of the largest self-insured companies must purchase insurance through the monopoly state fund. The industrial insurance system is a major labor cost driver for AWB members, and statutory benefit levels, premium costs, program administration, and claims management tools such as the CRSSA program are top public policy concerns. AWB was a primary stakeholder for employers and was intensively involved in the legislative negotiations that gave rise to CRSSAs in 2011.

B. THE WASHINGTON SELF-INSURERS ASSOCIATION

Nearly four hundred public and private sector employers in Washington who meet stringent solvency and capitalization standards are authorized, subject to oversight and audit by the state, to self-insure their employees' risk of industrial injuries. These employers cover over 850,000 employees, nearly one-third of the state workforce. The Washington Self-Insurers Association ("WSIA") is a non-profit association formed in 1972 to represent the interests of these employers. Today, the WSIA has 385 members to whom it provides a variety of educational, training, business assistance, and governmental relations services with respect to industrial insurance laws and regulations, workplace safety, and accident prevention. Self-insured employers pay industrial insurance 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 and may be audited by the Department for compliance. Accordingly, WSIA members have a direct interest in industrial insurance benefit options, claims management tools, and program administration. Like AWB, WSIA was directly involved in the legislative process that gave rise to CRSSAs in 2011. Further, the South Kitsap School District is self-insured under the Educational Service District #114 workers' compensation trust.

III. ISSUE OF CONCERN TO AMICI CURIAE

Does the "best interest of the worker" approval criterion for *pro se* industrial insurance claimants who submit a proposed Claim Resolution Structured Settlement Agreement to the Board of Industrial Insurance Appeals also apply to claimants who are represented by an attorney? *Cf. Br. of Appellant* at 3 (Issue 1); *Br. of Resp't* at 4-5.

IV. STATEMENT OF THE CASE

For brevity's sake, amici adopt, as if set forth herein, the Statement of the Case provided by South Kitsap School District. *Br. of Resp't* at 3-4.

V. ARGUMENT

A. THE CRSSA STATUTE UNAMBIGUOUSLY PROVIDES FOR TWO ADMINISTRATIVE REVIEW TRACKS DEPENDING WHETHER THE CLAIMANT IS *PRO SE* OR REPRESENTED BY COUNSEL.

The board majority erroneously asserts that "RCW 51.04.063 is ambiguous as to whether or not the board should consider the best interest of the worker in reviewing a Claim Resolution Structured Settlement Agreement involving a worker represented by an attorney." *Br. of Appellant* at 17. A statute is ambiguous when it is susceptible to two or more reasonable interpretations. *HomeStreet, Inc. v. Dep't of Revenue,* 166 Wn.2d 444, 452, 210 P.3d 297 (2009). A statute is not ambiguous merely because different interpretations are conceivable. *Id.* "Where

statutory language is plain and unambiguous, a statute's meaning must be derived from the wording of the statute itself." *Wash. State Human Rights Comm'n v. Cheney Sch. Dist. No. 30,* 97 Wn.2d 118, 121, 641 P.2d 163 (1982). "A statute that is clear on its face is not subject to judicial construction." *State v. J.M.,* 144 Wn.2d 472, 480, 28 P.3d 720 (2001). Indeed, "[w]here statutory language is plain and unambiguous, courts will not construe the statute but will glean the legislative intent from the words of the statute itself, regardless of contrary interpretation by an administrative agency." *Agrilink Foods, Inc. v. Dep't of Revenue,* 153 Wn.2d 392, 396, 103 P.3d 1226 (2005).

1. The Two-Track Review Protocol for CRSSAs.

Turning to the words of the statute itself, after setting forth numerous substantive eligibility requirements and restrictions for CRSSAs, RCW 51.04.063 clearly provides two administrative review tracks for CRSSAs depending whether the claimant is *pro se* or represented by an attorney.

a. The pro se track

For CRSSA claimants not represented by an attorney, RCW 51.04.063(2)(h)-(l) provide for heightened scrutiny of a proposed CRSSA by an "industrial appeals judge," a quasi-judicial employee of the board charged with conducting conferences and hearings on industrial insurance

and related appeals. *See* WAC 263-12-045. The *pro se* track follows this course:

- A *pro se* claimant submitting a proposed CRSSA must request a conference with an industrial appeals judge. RCW 51.04.063(2)(h).
- At the conference, the industrial appeals judge must review the terms of the proposed settlement agreement; ensure the worker has an understanding of the benefits generally available under the Industrial Insurance Act; and ensure the worker understands the CRSSA may alter the benefits payable on his or her claim or claims. *Id.*
- The industrial appeals judge must ensure the worker has an "adequate understanding of the agreement and its consequences." RCW 51.04.063(2)(i).
- The industrial appeals judge may only approve the agreement if it is in the best interest of the worker, taking into account four specifically enumerated factors, with no individual factor determinative. RCW 51.04.063(2)(j). Board regulations require that information establishing these factors be included in the agreement that is reviewed at the conference. WAC 263-12-052.

- Within a prescribed time period after the conference, the industrial insurance judge then either allows or rejects the CRSSA, with no appeal rights upon a rejection. RCW 51.04.063(2)(k).

If the industrial appeals judge approves the CRSSA, then as a further measure of protection for the interests of the *pro se* claimant, the order approving the CRSSA is reviewed by the full three-member board RCW 51.04.063(2)(l).

In this instance, under a new subsection of the statute, the board reviews the agreement under a further set of specifically enumerated factors, and within a prescribed time period, either approves or rejects the CRSSA. RCW 51.04.063(3). The criteria the full board uses in giving final review of the agreement are:

- Whether the agreement was "knowingly and willingly" made;
- Whether the agreement meets the "requirements of a [CRSSA];"
- Whether the agreement is a result of "a material misrepresentation of law or fact;"
- Whether the agreement is the result of "harassment or coercion;" or
- Whether the agreement is "unreasonable as a matter of law."

RCW 51.04.063(3)(a)-(e). Understandably, the Legislature provided for a heightened scrutiny of proposed settlements where the claimant is *pro se*.

b. The attorney track

By contrast, the Legislature provided the following review procedure when a claimant proposing a CRSSA is represented by an attorney:

> If a worker is represented by an attorney at the time of signing a claim resolution structured settlement agreement, the parties shall submit the agreement directly to the board without the conference described in this section.

RCW 51.04.063(4). The board then reviews the attorney-submitted CRSSA under the criteria set forth in subsection (3) above, and either approves it or rejects it on that basis. RCW 51.04.063(5).

This is not an ambiguous process as to where "best interest" considerations come into play. "Best interest" considerations come into play at the conference before the industrial appeals judge. Only *pro se* claimants must utilize the conference procedure. Attorney-represented CRSSAs are submitted "directly to the board without the conference described in this section." RCW 51.04.063(4). Accordingly, as a matter of plain language and evident structure of the statute, only *pro se* CRSSAs must be reviewed for determination whether they are in the "best interest of the worker." Taking into account the difference between self-

representation and attorney-representation, the Legislature thus prescribed a simplified process and a lesser degree of paternalistic scrutiny for use in the approval or rejection of attorney-represented CRSSAs.

This two-track design by the Legislature respects the differences between *pro se* and represented parties. Less scrutiny is appropriate for attorney-submitted CRSSAs as "the attorney-client relationship is a fiduciary one as a matter of law and thus the attorney owes the highest duty to the client." *Perez v. Pappas,* 98 Wn.2d 835, 840-41, 659 P.2d 475 (1983). Indeed, "in much of their daily work, lawyers act as a fiduciary for the client, in that they have a duty to act in and for the client's best interests at all times and to act in complete honesty and good faith to honor the trust and confidence placed in them." *Kelly v. Foster*, 62 Wn. App. 150, 154-55, 813 P.2d 598 (1991). Accordingly, a court and other parties are justified in relying upon an attorney's authority to act in a client's best interest. *Tatham v. Rogers*, 170 Wn. App. 76, 109, 283 P.3d 583 (2012). Although the board majority's position is that even represented claimants need a paternalistic review of proposed CRSSAs, the Legislature acted reasonably and with respect of the attorney client relationship in creating a dual track for CRSSA review.

2. The Board Majority Misconstrues its Review Criteria.

The board majority makes at least three critical errors in its analysis that the "best interest of the worker" standard applies to attorney-represented CRSSAs. First, the board majority believes the "best interest of the worker" inquiry is incorporated into its review under RCW 51.04.063(3)(b) whether a CRSSA meets "the requirements of a claim resolution structured settlement agreement." *Br. of Appellant* at 17-18. Second, the board majority believes that a simpler review of an attorney-represented CRSSA under the provisions of RCW 51.04.063(3) would render its services merely ministerial, and the Legislature must not have meant to leave its presumed expertise in industrial insurance untapped. *Id.* at 21. Third, the board majority reads entirely too much into a section of legislative findings and a section calling for a future study of CRSSA practice in Washington, believing the two are evidence of legislative intent that it deploy the "best interest" standard for attorney-represented settlements. *Id.* at 18-19.

a. The "requirements" of a CRSSA do not include a "best interests" determination for attorney-represented settlements.

The board majority contends

> [t]he provision in the subsection dealing with Board review upon which the Board majority relied in rejecting the Agreement here, that '[t]he agreement does not meet the requirements of a claim

> resolution structured settlement agreement,' RCW 51.04.063(3)(b), is phrased broadly enough to encompass the best interest of the worker as a criterion.

Br. of Appellant at 17-18.

This is a misapprehension of subsection (3)(b). A top-to-bottom reading of the CRSSA statute – not a broad interpretation, not a narrow interpretation, but a plain language reading – discloses what the "requirements" of a CRSSA are. The "requirements" of a CRSSA are what a valid CRSSA *requires.* These requirements are set forth in RCW 51.04.063(2)(c):

> The claim resolution structured settlement agreements *shall*:
>
> (i) Bind the parties with regard to all aspects of a claim except medical benefits unless revoked by one of the parties as provided in subsection (6) of this section;
>
> (ii) Provide a periodic payment schedule to the worker equal to at least twenty-five percent but not more than one hundred fifty percent of the average monthly wage in the state pursuant to RCW 51.08.018, except for the initial payment which may be up to six times the average monthly wage in the state pursuant to RCW 51.08.018;
>
> (iii) Not set aside or reverse an allowance order;
>
> (iv) Not subject any employer who is not a signatory to the agreement to any responsibility or burden under any claim; and
>
> (v) Not subject any funds covered under this title to any responsibility or burden without prior approval from the director or designee.

RCW 51.04.063(2)(c) (emphasis added). The only other "requirement" of a CRSSA found outside of subsection (2)(c) is the requirement in subsection (2)(g) that "[a]ny claim resolution structured settlement agreement entered into under this section *must* be in writing and signed by the parties or their representatives and *must* clearly state that the parties understand and agree to the terms of the agreement." (emphasis added). This contrasts with the permissive language in subsection (2)(f) that

> [t]erms of the agreement *may* include the parties' agreement that the claim shall remain open for future necessary medical or surgical treatment related to the injury where there is a reasonable expectation such treatment is necessary. The parties *may also agree* that specific future treatment shall be provided without the application required in RCW 51.32.160.

(emphasis added). These provisions all specify what *must be* in the agreement versus *may be* in the agreement for it to be a valid contract. But these "requirements of a [CRSSA]" set forth in statute are agnostic as to whether it is in the "best interest of the worker." Instead, that is a discretionary legal conclusion about a proposed CRSSA the Legislature empowered the industrial appeals judge to make in the context of the settlement conference with the *pro se* claimant. The board majority misreads this section by believing it broadly incorporates the *pro se* "best interest" review.

b. The Board's role is not merely ministerial if it does not consider "best interest of the worker" in all CRSSAs.

The board majority claims "[i]nterpreting RCW 51.04.063 as limiting the Board to verifying that a [CRSSA] conforms to the technical requirements of the statute . . . reduces the Board's role to a largely ministerial one and fails to use the Board's expertise in any meaningful way." *Br. of Appellant* at 21. But the board majority sells itself short in order to make this argument.

As noted above, subsection (3)(b) plainly refers to the technical requirements of the statute, and the board is directed to ensure that all CRSSAs satisfy them. However, that is not all subsection (3) requires of the board in reviewing CRSSAs. As noted above, the board must also make the following substantive determinations:

- Whether the agreement was "knowingly and willingly" made;
- Whether the agreement is a result of "a material misrepresentation of law or fact;"
- Whether the agreement is the result of "harassment or coercion;" or
- Whether the agreement is unreasonable as a matter of law.

RCW 51.04.063(3)(a), (c)-(e).

In the context of a *pro se* CRSSA, presumably these matters would be fleshed out in the course of the industrial appeals judge's conference to determine if the settlement is in the *pro se* worker's best interest. In the case of the *pro se*, as an additional measure of protection and scrutiny for the unrepresented, the board takes a second look.

But in the case of the attorney-represented CRSSA, which the Legislature expressly exempted from the conference procedure and "best interest of the worker" determination, the board's review under subsection (3) is the first look at the agreement. Here it makes sense that, in addition to examining the document for its technical requirements under subsection (3)(b), the board would also make a determination that the agreement was fairly and knowingly made, was not the product of undue influence, coercion, and so on, under subsections (3)(a), (c)-(e). During the course of legislative negotiations over the parameters of settlements in Washington industrial insurance, policy critics of the practice raised the concern that settlements could be achieved through the Department's or an employer's overreaching, coercion, improper influence, or use of so-called "starve and settle" tactics. The substantive review criteria in subsection (3), employed by an impartial administrative body, were intended to address those concerns.

Although in practice it may be unlikely that a CRSSA submitted by an attorney on behalf of a claimant is going to fail these substantive tests, it is not inconceivable, and so this is hardly a "rubber stamp" or "ministerial" function of the board. Accordingly, the board majority's contention that the Legislature must have intended for it to review all CRSSAs for "best interest" lest its review be incommensurate with its assumed expertise, is invalid. At best, it is a policy concern best aired before the Legislature.

c. The goals of the CRSSA statute do not require "best interest" review of attorney-submitted agreements.

The board majority cherry picks a few statements in the legislative findings sections of the underlying bill containing CRSSAs, as well as a section requiring an independent study in the future of CRSSAs, as evidence that the Legislature must have intended the board majority review attorney-represented CRSSAs as if they were *pro se* CRSSAs. This is a non sequitur.

First, the board majority cherry picks language in the uncodified intent section of EHB 2123, Laws of 2011, 1st Spec. Sess., ch. 37, § 1, in which the Legislature "finds that Washington state's workers' compensation system should be designed to focus on achieving the best outcomes for injured workers." *Br. of Appellant* at 19. However, that

same findings section goes on to say, "[t]he state must ensure that the workers' compensation system remains financially healthy in order to provide needed resources for injured workers." Further, the Legislature specified its intent to "reduc[e] the number and cost of long-term disability and pension claims," which CRSSAs were intended to do by providing a benefit option outside the ordinary disability system. Indeed, the overarching bill title for EHB 2123 is "[a]n Act relating to stabilizing workers' compensation premium rates and claim costs...". While the board majority focuses on worker outcome language to support an interpretation it implies would limit CRSSAs, it omits reference to cost saving goals in long-term disability and pensions, which would support the Legislature's balanced CRSSA enactment.

Similarly, the board majority errs by referencing only "best outcomes" language in the codified intent section for CRSSAs, RCW 51.04.062. Read in full, the Legislature found:

> that Washington state's workers' compensation system should be designed to focus on achieving the best outcomes for injured workers. Further, the legislature recognizes that controlling pension costs is key to a financially sound workers' compensation system for employers and workers. To these ends, the legislature recognizes that certain workers would benefit from an option that allows them to initiate claim resolution structured settlements in order to pursue work or retirement goals independent of the system, provided that sufficient protections for injured workers are included.

Again, the Legislature was balancing competing interests in CRSSAs as a cost-containment tool with concerns that some workers could make poor decisions on their own behalf. If anything, this legislative language supports the balanced approach the Legislature took in providing for a two track review process with heightened scrutiny and protection for the *pro se* claimant. It does not follow at all that, in light of the many "protections for injured workers" built into the CRSSA statute,[1] that the Legislature must have also meant for the board to use *pro se* review standards for attorney-represented CRSSAs.

Finally, the board majority's suggestion that the Legislature's directive that the CRSSA experience be reported and independently studied, RCW 51.04.069, supports its expansive view of its review standards, *Br. of Appellant* at 18, is peculiar. A nod to the novelty of the CRSSA program in Washington and the competing interests that were debated upon its adoption, the Legislature ordered an independent audit

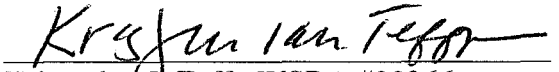
[1] In adopting CRSSAs, the Legislature provided many "protections" for injured workers above and beyond administrative review and approval. For example, only workers of a certain age – currently age 55 and over, down to age 50 by 2016 – are eligible to settle a claim. RCW 51.04.063(1). Workers may not settle a claim for medical benefits. RCW 51.04.063(2). There is a 180 day waiting period before a settlement can be made. *Id.* Settlements are only allowed on final and binding claims (i.e., disputed claim allowance cannot be settled). *Id.* Settlement benefits cannot be paid out in one lump sum, but instead must be paid according to a specified payment plan. RCW 51.04.063(c)(ii). A worker has a 30-day cooling off period in which an approved settlement may be revoked. RCW 51.04.063(6). Any benefits due the worker must be paid during the negotiation and revocation period. RCW 51.04.063(7). Settlements may be reopened for further medical treatment. RCW 51.04.063(10). There are stringent penalties for failing to comply with a settlement agreement, RCW 51.04.063(11), or for using the settlement process to harass or coerce a worker. RCW 51.04.063(12).

with special emphasis on the effectiveness and outcomes of the program. Charitably, this does not suggest legislative intent to do anything other than study a new program in industrial insurance and provide data for potential future legislative changes. It certainly doesn't show legislative intent to grant the board the expansive review authority its majority seeks in this case.

VI. CONCLUSION

In the end, the Department of Labor & Industries' statement submitted to the trial court summarizes this case best: "RCW 51.04.063 does provide for a "best interests" analysis, but that occurs when the worker is not represented by an attorney." CP at 30 (emphasis in original). Amici AWB and WSIA urge the court to affirm the decision of the trial court below and remand Mr. Zimmerman's CRSSA back to the board for appropriate review.

Respectfully submitted this 4th day of November, 2013.



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I hereby certify that on the 4th day of November, 2013, I filed and served the **Motion for Leave to File Brief of Amici Curiae Association of Washington Business and Washington Self-Insurers Association, Brief of Amici Curiae Association of Washington Business and Washington Self-Insurers Association, and this Certificate of Service** upon the following parties, addressed as follows:

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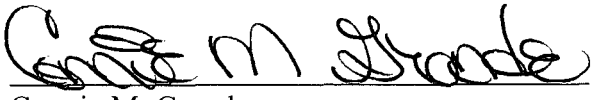

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