Newton, Carma

THIRD PARTY ACTIONS (RCW 51.24)

Recovery limited to injury caused by the third party

When the injury caused by the third party accounts for only a portion of the total injury, the Department and self-insured employer's right to reimbursement for third party recovery is limited to that compensation and benefits that were provided due to the additional injury for which the third party is liable. **….*In re Carma Newton*, BIIA Dec., 00 13742 (2001)**

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: CARMA F. NEWTON	)	**DOCKET NO. 00 13742**
	)	
CLAIM NO. W-167006	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Carma F. Newton, by
Law Offices of Miracle, Pruzan, Pruzan & Baker, per
Steven R. Pruzan

Self-Insured Employer, Renton School District No. 403, by
Law Offices of Wallace, Klor & Mann, P.C., per
Schuyler T. Wallace, Jr. and Linda D. Conratt

The claimant, Carma F. Newton, filed an appeal with the Board of Industrial Insurance Appeals on March 31, 2000, from an order of the Department of Labor and Industries dated March 3, 2000. The order affirmed an order dated December 10, 1999, which indicated the claimant recovered $165,000, and distributed proceeds: (1) net to attorney $68,762.85; (2) net to claimant $32,725.14; and (3) net to Department $405.95. The order declared the self-insured employer's statutory lien against the third party recovery as $56,799.27, and the Department's statutory lien as $695.96. The order made demand for reimbursements by the claimant to the self-insured employer in the amount of $32,725.14, and to the Department in the amount of $405.95. The order declared an excess recovery of $22, 777.48 [no benefits to be paid until this amount has been expended by the claimant for costs incurred as a result of condition(s) covered under the claim]. **REVERSED AND REMANDED.**

PROCEDURAL AND EVIDENTIARY MATTERS

Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review and decision on a timely Petition for Review filed by the self-insured employer to a Proposed Decision and Order issued by the industrial appeals judge March 15, 2001. The industrial appeals judge reversed the order of the Department dated March 3, 2000. The industrial appeals judge remanded the appeal to the Department with directions to recalculate the third party settlement distribution, limiting the Department's and self-insured employer's rights to reimbursement to those claim costs caused by the third party malpractice for which Ms. Newton's settlement award compensates.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. We affirm the rulings.

DECISION

We have granted review to carefully consider the question of law upon which resolution of this appeal must be decided. Does the self-insured employer's and/or Department's right to reimbursement from a third party medical malpractice recovery under Chapter 51.24 RCW include **all** benefits provided the worker on account of the covered industrial injury or occupational disease? Or, to the contrary, is the right to reimbursement limited to reimbursement only for those benefits provided to the worker on account of the malpractice? We agree with the claimant, Carma F. Newton, and our industrial appeals judge. We determine the right to reimbursement is limited to reimbursement for benefits provided on account of the malpractice for which the third party recovery was obtained.

The facts for purposes of legal discussion are not significantly in dispute. Ms. Newton sustained an industrial injury to her right foot and ankle in April 1997. Ms. Newton alleged that a medical center and a radiologist, providing her medical services immediately following her industrial injury, failed to diagnose a heel bone fracture that was caused by the industrial injury. Another physician, Dr. Martin Tullus, made the proper diagnosis about seven weeks later in June 1997. By that time, due to the nature of the tissue changes that had taken place, it was deemed too late for open reduction and internal fixation of the fracture. The latter would have been the treatment of choice had the proper diagnosis been made in the first instance. It was decided the better course was to let the natural, but less desirable, bodily healing take place and to then, later still, provide further repair and treat accompanying adverse side effects that might result.

Ms. Newton sued the medical center and the radiologist for medical malpractice,[1] alleging the missed diagnosis was reflective of services below the accepted standard of care and that the delay in diagnosis, and therefore delay in proper treatment, caused her harm. Through this action, Ms. Newton recovered a settlement of $165,000.

Under Ms. Newton's industrial insurance claim, the self-insured employer, Renton School District No. 403, and the Department of Labor and Industries, became responsible for providing

[1] When injury to the worker occurs on account of a third party, not the employer or a person in the same employ, the worker may elect to pursue the third party action. When the worker elects not to pursue the action, or makes no election, the right to pursue the action devolves to the Department or the self-insured employer. RCW 51.24.030 and .050. Here, Ms. Newton chose to pursue the medical malpractice action. However, regardless of who pursues the action, the Department and/or self-insured employer are entitled to a portion of the proceeds of eventual recovery that remain, if any, from the action after attorneys' fees and costs and an initial one-fourth share is distributed to the worker. RCW 51.24.050 and .060.

Ms. Newton medical and disability benefits for the industrial injury, including those benefits made necessary due to the medical malpractice.[2]

The Department issued an order distributing the settlement, as we described at the outset. In its calculation of the self-insured employer's and the Department's rights to reimbursement out of the medical malpractice settlement proceeds, the Department included the cost of all the benefits paid up to that point under Ms. Newton's workers' compensation claim. Ms. Newton appealed from the Department order. At hearing, Ms. Newton presented testimony, including that of Dr. Tullus, that distinguished Ms. Newton's need for medical services and disability caused by the medical malpractice from her estimated medical services and disability had the medical malpractice not occurred. For instance, although it was estimated the surgical costs remained about the same, according to Dr. Tullus, the delayed diagnosis caused a much longer period of convalescence. And, according to Dr. Tullus, the delay in diagnosis is at least in part a cause of Ms. Newton's arthritis.

We are not aware of any prior Decision and Order of this Board or any decisions published by the appellate courts of this state that have addressed precisely the question before us.[3]

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[2] It is settled law that the consequences of treatment for an industrial injury are considered to be part and parcel of the injury itself. *In re Arvid Anderson*, BIIA Dec., 65,170 (1986), citing *Anderson v. Allison*, 12 Wn.2d 487 (1942) and *Ross v . Erickson Construction Co.*, 89 Wash. 634 (1916).

[3] The bulk of decided cases concerning distribution of third party action proceeds under Ch. 51.24 RCW concern either the arithmetic of third party distribution and/or the matter of what portion of a third party **recovery** is available to satisfy a lien. To illustrate the variety of issues in these two general areas: *Frost v. Department of Labor & Indus.*, 90 Wn. App. 627 (1998), reconsideration denied, review denied 137 Wn.2d 1001 [underinsured motorist recovery is subject to lien]; *Flanigan v. Department of Labor & Indus.*, 123 Wn.2d 418 (1994) [whether recovery for loss of consortium is subject to lien]; W*ashington Ins. Guar. Ass'n v. Department of Labor & Indus.*, 122 Wn.2d 527 (1993) [whether claimant's recovery from Washington Insurance Guarantee Association, standing in the shoes of insolvent insurer, is subject to Department lien]; *Stamp v. Department of Labor & Indus.*, 122 Wn.2d 536 (1993) [whether claimant's recovery from Oregon Insurance Guarantee Association, standing in the shoes of insolvent insurer, is subject to Department lien]; *Clark v. Pacificorp*, 118 Wn.2d 167 (1991) [procedure for determining employer's percentage of fault in third party action in order to proportionately reduce reimbursement right]; *Ravsten v. Department of Labor & Indus.*, 108 Wn.2d 143 (1987) [Department share of attorneys fees]; *Davis v. Department of Labor & Indus.*, 71 Wn. App. 360 (1993), review denied 123 Wn.2d 1016 [calculation of offset against future benefits]; *Tallerday v. Delong*, 68 Wn. App. 351 (1993) [proceeds of legal malpractice suit, for failure to adequately pursue third party, subject to insurer's lien]; and, *In re Richard R. See*, BIIA Dec., 90 0943 (1991) [whether lien adheres to "nuisance value" recovery]. In contrast, the matter of what is included in the **lien** has been the subject of few reported decisions of which we are aware. *Madrid v. Lakeside Indus.*, 98 Wn. App. 270 (1999) considered the inclusiveness of the term "benefits paid" in RCW 51.24.060. Unlike the case before us, however, the benefits paid in *Madrid* were all for the same injury. The court only considered the timing of the benefits—whether the lien for benefits paid was limited to benefits provided up to the time of third party recovery or whether the Department could include later paid benefits. In *Ziegler v. Department of Labor & Indus*., 42 Wn. App. 39 (1985), review denied 105 Wn.2d 1007 (1986), the court determined that administrative costs, such as for a medical examination at the request of the Department, were not "benefits paid," and therefore such costs were not to be included in the insurer's lien on the third party recovery. In *Ziegler*, as in *Madrid*, the court was concerned with only one injury; the harm caused by the third party was one and the same as the harm caused by the industrial injury. The *Ziegler* court, therefore, considered only whether the insurer's expenditures were or were not for "benefits." The issue before us is not whether a particular expenditure is for a "benefit" in the generic sense, but rather the issue is

Resolution of the legal question, whether the workers' compensation insurers' lien is for monies paid for all benefits under the claim or only for those benefits for which monies are paid on account of the medical malpractice, turns upon a proper reading of Ch. 51.24 RCW. More particularly, the determination turns upon the meaning given to those statutory terms that directly identify, and indirectly reference, insurer expenditures for which the lien or right to reimbursement is given.

Chapter 51.24 RCW is a complex statutory scheme, set within the already larger, complex scheme of the Industrial Insurance Act, RCW Title 51. Along with establishing an exception to the exclusive remedy provisions of the Industrial Insurance Act,[4] in Ch. 51.24 RCW the Legislature has dealt with a host of issues concerning when a third party may be sued generally, who may bring suit, notice to the insurers, the collateral source rule within the third party action, loss of consortium claims, underinsured motorist insurance, claims against design professionals, compromise of third party claims, appointment of special attorneys general to prosecute third party claims, in addition to the provisions before us more explicitly dealing with distribution of recoveries. The provisions with which we are primarily concerned relating to distribution of recoveries, are themselves very detailed in setting forth the specific legislatively prescribed balance of financial interests of workers, self-insurers, and the Department, as well as accounting for the fees and costs associated with prosecution of actions against third parties.

It is important that we have in full view at least those terms that identify or reference the expenditures for which the insurers are given reimbursement rights, within their most immediate context in this complex chapter. We have highlighted those terms in the following governing statute.

RCW 51.24.030, pertaining to the worker's right to pursue the third party action, provides:

> (1) 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.

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which benefits are to be considered, all benefits or only those paid on account of the harm caused by the third party. *Ziegler* is not instructive in this regard.

[4] Our Legislature, in RCW 51.04.010, declared that,

> all phases of the premises [remedies for worker injuries received in employment] are withdrawn from private controversy, . . . and to that end all civil actions and civil causes of actions 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.

> (3) For the purposes of this chapter, "injury" shall include any physical or mental condition, disease, ailment or loss, including death, for which **compensation and benefits** are paid or payable under this title.

We do not venture into the task of resolving, a matter of heretofore undecided law, the conflicting interpretations of these terms put before us by the parties without having fully in mind relevant rules of statutory construction. These rules are designed to guard against supplanting legislative judgment with our own judgment, while also assisting us in determining the meaning of the legislated terms of the statute. Well established rules of statutory construction direct that the words of a statute "must be accorded their ordinary meaning" and resort to further statutory construction is warranted only if the statute is ambiguous. *Davis v. Department of Labor & Indus.*, 71 Wn. App. 360, 363 (1993), review denied 123 Wn.2d 1016, citing *State v. Halsen*, 111 Wn.2d 121, 123 (1988) and *State v. McKelvey*, 54 Wn. App. 140, 142 (1989). Absent a contrary legislative intent, we construe statutory language according to its plain and ordinary meaning. *Flanigan v. Department of Labor & Indus.*, 123 Wn.2d. 418, 426 (1994). However, clear legislative intent of an act must control where the terms of a statute are ambiguous. *Tallerday v. Delong*, 68 Wn. App. 351, 359 (1993), citing *Newby v. Gerry*, 38 Wn. App. 812, 814 (1984).

When statutory language is susceptible of more than one reasonable interpretation, it is ambiguous. "The primary goal of statutory construction is to carry out legislative intent." *Cockle v. Department of Labor & Indus.*, 142 Wn.2d 801, 807-808 (2001); *Subcontractors & Suppliers Collection Services v. McConnachie*, Slip Op. No. 19574-1-III (June 14, 2001). We derive legislative intent primarily from the statute's language. *Ibid.,* citing *City of Bellevue v. E. Bellevue Cmty. Council,* 138 Wn.2d 318, 338 (1999). In doing so, we read the statute as a whole. *McConnachie,* citing *Miller v. City of Tacoma,* 138 Wn.2d 318, 338 (1999) (Madsen, J., concurring/dissenting); and, *Clark v. Pacificorp*, 118 Wn.2d. 167, 176 (1991). We try to place the language in the context of the overall legislative scheme. *McConnachie.* "Each provision must be viewed in relation to other provisions and harmonized, if at all possible . . ." *State v. Keller*, 143 Wn.2d 267, 277 (2001), citing *State v. Thorne*, 129 Wn.2d 736, 761 (1996). Statutes must be construed so that all language is given effect with no portion rendered meaningless or superfluous. *Keller* at 277, citing *Davis v. Department of Licensing,* 137 Wn.2d 957, 963 (1999). Statutes are not interpreted to reach absurd and fundamentally unjust results. *Flanigan*, 123 Wn.2d at 425-426. We should avoid constructions of a statute "that yield unlikely, strange, or absurd consequences." *Keller*, 143 Wn.2d at 277, citing *State v. Contreras*, 124 Wn.2d 741, 747 (1994).

We are also mindful of broad, substantive views of our courts in other circumstances having to do with workers' compensation insurers' reimbursement rights under Ch. 51.24 RCW:

> The Department has an unqualified, unrestricted right to all of the balance [of the worker's third party recovery after subtracting statutory amounts] to the extent of the amount of compensation and benefits paid and payable.

Washington Insurance Guarantee Association (WIGA) v. Department of Labor & Indus., 122 Wn.2d 527, 535 (1993), quoting *Maxey v. Department of Labor & Indus.*, 114 Wn.2d 542, 546 (1990). Such reimbursement is mandated so that the accident and medical funds of the workers' compensation insurers are protected and not charged for damages caused by a third party and so that the worker does not make a double recovery. The purposes of the Industrial Insurance Act would be defeated if the workers' compensation insurer's rights to reimbursement were impaired. *WIGA*, 122 Wn.2d at 530-531 and 535. *See also*, *Maxey*, 114 Wn.2d at 549; and, *Pacificorp*, 118 Wn.2d at 184-185. Although the Industrial Insurance Act is to be liberally construed for the purpose of reducing to a minimum the suffering and economic loss arising from injuries and/or death occurring in the course of employment, the doctrine of liberal construction is inapplicable where the injured worker's right to benefits is not at issue. Public policies underlying the Act oppose double recoveries and protect the workers' compensation funds. *Frost v. Department of Labor & Indus.*, 90 Wn. App. 627, 637 (1998).

Potential for differing reasonable[5] understandings of the key statutory terms of concern to us here is apparent upon close examination of the immediate context in which the terms first appear in Ch. 51.24. RCW. In RCW 51.24.030(1), the term, "benefits and compensation" is **followed** by the modifying phrase "are provided under this title." In subsection .030(3), the term "compensation and benefits" is followed by the like modifying phrase "are payable under this title." Terms elsewhere in Ch. 51.24 referencing benefits (see portions earlier quoted) more often than not are used alone without any like modifier. However, "benefits paid" is followed by the modifying phase "under this title" in RCW 51.24.060(1)(c)(i) pertaining to distribution, when identifying the upper limit or "extent" of the insurer's proportionate attorneys' fees. And, "entitlement" is followed by the modifying phrase

[5] A statute is ambiguous if it is susceptible of "reasonably" being interpreted in different ways, but is not ambiguous simply because different interpretations are "conceivable." Courts are not "obliged to discern any ambiguity by imagining a variety of alternative interpretations." *State v. Keller*, 143 Wn.2d at 226-227. We have, above, chosen to refer to a "potential" for different reasonable interpretations. We do believe a working definition of terms such as "benefits and compensation" can be derived from the language of the statute itself, without final resort to legislative history, policy considerations or other sources, to additionally inform us of legislative intent. Such further considerations, however, support our reading of the language of the statute.

"under this title" in RCW 51.24.090(1) when referencing the value of workers' benefits as a threshold settlement amount, beneath which the claimant may not agree without insurer consent.

Self-insurer Renton School District No. 403 argues in effect that all benefits which it has paid "under this title" (i.e., the Workers' Compensation Act) must be included in its lien against Ms. Newton's third party medical malpractice recovery. Renton School District No. 403 argues that any lesser lien is tantamount to a reduction or compromise of the lien to which it is entitled and perceives no authority for such reduction. The insurer's arguably plain reading of the statute at first blush finds some support. The modifying phrase "under this title" may lead a reasonable person to at least initially read the statute to use "benefits and compensation" as all inclusive, particularly if the reader has favorably in mind, or is inclined to buttress their reading with, the policy goal of protecting or replenishing the workers' compensation insurers' funds. *See WIGA*, *Pacificorp*, and *Maxey.*

The attraction of self-insured Renton School District No. 403 to the seemingly simple term "benefits and compensation" and, moreover, to the expansive modifying phrase "under this title," is understandable. We must, however, read subsection .030(1) as a whole, as well as acknowledge its place in context of the overall legislative scheme. *McConnachie.* We perceive no room for dispute about the latter, its place in the overall legislative scheme. The primary legislative purpose of RCW 51.24.030(1) is to establish an exception to the exclusive remedy provision of RCW 51.04.010. See Footnote No. 4, herein. RCW 51.24.030(1) describes under what circumstances, a worker or beneficiary may file suit for damages that are also covered by the otherwise exclusive remedies of the Industrial Insurance Act.

Although the primary purpose of RCW 51.24.030(1) is not that of defining "benefits and compensation," careful reading of the statutory language discloses that, **in Ch. 51.24.RCW**, the Legislature has used the term "benefits and compensation" with a more narrow, particular meaning than urged by the self-insured employer. In .030(1), "benefits and compensation" has three identifying adjective characteristics, rather than only the one focused upon by the self-insured employer. These three characteristics of "benefits and compensation" are that they are: (1) provided for; (2) under the Title; and (3) for damages for an injury to the worker for which a third party may become liable.

Within the conditions precedent described by .030(1), "damages" and "benefits and compensation" are necessarily brought together so as to share characteristics **in common**. They share in common both the third party liability and the worker injured in the workplace. When this

commonality occurs, .030(1) creates an exceptional cause of action otherwise "abolished" by RCW 51.04.010. An exception to the otherwise exclusive workers' compensation remedy for workplace injuries is created **only** when this commonality occurs. The commonality occurs **only** when "a third person, not in a worker's same employ" is, or may become, liable due to injury to the worker.

The construction given by the self-insured employer (that the "benefits and compensation" referenced in RCW 51.24.030(1) are larger, greater or broader than the injury giving rise to the "damages" for which a "third person" . . . is or may become liable to pay") would lead to an absurd interpretation, destroying the commonality necessary to the cause of action. Under the employer's interpretation, the Legislature would be concerning itself in Ch. 51.24. RCW with benefits and compensation that were **not** for damages caused by the third party. This is contrary to the premise of the chapter. The premise of RCW 51.24.030(1), and the entire third party chapter, Ch. 51.24 RCW, is an assumed identity of substance in damage or harm or injury, and the need for benefits and compensation. That identity is in the actual or potential liability of the third person to the worker. The Legislature, in Ch. 51.24 RCW, is not creating an exceptional cause of action related to any benefits **other** than those provided for damages due to the injury for which the third party may become liable.

Thus, the self-insured employer's expansive reading of "benefits and compensation" is not supported upon close examination of the language of the statute with the overall statutory scheme in view. Rather, close reading supports only a narrow interpretation of "benefits and compensation," coincident only with benefits under Title 51 RCW that have been provided on account of damages for which the third party may be liable. This interpretation is also most consistent with policy considerations previously identified by our courts as underlying Ch. 51.24. RCW. The primary considerations are: holding third parties liable so that industrial accident funds are protected and replenished; and, avoiding double recoveries. *Maxey; Frost.* As indicated by the industrial appeals judge in the Proposed Decision and Order, the absence of a lien for workers' compensation benefits not paid on account of third party damages does not amount to a double recovery for the worker.

Conversely, we are not aware of any public policy that would support the protection or replenishment of industrial accident funds by creating a lien upon third party recoveries for benefits that were not provided for third party damages. Indeed, such would be contrary to the legislatively prescribed scheme. For instance, in the prescribed scheme, a worker is distributed any excess

recovery that remains after attorneys' fees and costs, the worker's one-fourth share, and the insurers' shares are distributed from the third party recovery. There is no double recovery when the excess damages distributed to the worker do not share commonality, in the nature we described earlier, with workers' compensation benefits provided to the worker. However, increasing the insurers' liens so as to include benefits not having such commonality would, in equal amount, reduce the excess distributed to the worker. Again, while double recoveries **are** to be avoided, the self-insured employer has **not** identified any policy that would support reducing the excess recovery distributed to the worker in order to reimburse the self-insurer for benefits unrelated to the recovery.

We have noted above that Ch. 51.24 RCW is a complex statute within an already complex web of the Industrial Insurance Act. Including unrelated benefits in a workers' compensation lien on third party recovery intrudes upon the balances struck by the Legislature in Ch. 51.24. RCW. This balance is integral to the very existence of the third party action as an exception to the exclusive remedy provisions of RCW 51.04.010. The insurer's lien does not have any substance beyond the other provisions of Ch. 51.24 RCW as a whole.

This is but a corollary to the view already adopted by our Supreme Court in *Maxey*, 114 Wn.2d at 546, when considering whether a creditor may have a priority lien upon a third party recovery:

> The rights of an injured worker covered by industrial insurance are entirely statutory; all civil causes of action of the injured worker are abolished except as provided in the act. RCW 51.04.010. It follows that all rights of the worker including any "property rights," must be found in RCW Title 51, specifically RCW 51.24 for our analysis.
>
> RCW 51.24.060 provides a mandatory order of distribution from the recovery from a third party. . . . There simply is nothing in the statute to indicate that the worker has any interest of any nature whatsoever in the reimbursement funds [apart from the property rights created upon distribution].

Maxey, at 546. We are compelled to hold the same is true of the workers' compensation insurer. No property right is created except as part of, and necessary to, the statutory scheme as evidenced in Ch. 51.24 RCW. Close reading of the statute provides no basis upon which to believe the Legislature created a property right in the employer in third party distributions for benefits paid that were not on account of damages caused by the third party.

Finally, we agree with the industrial appeals judge that the evidence presented by the parties supports a finding that benefits and compensation were provided on account of the medical

malpractice for which the third party recovery was made, beyond the benefits and compensation that would have been provided had the malpractice not occurred. We also agree that this matter should be remanded to the Department to investigate, and to make a determination, as to the precise difference in benefits provided on account of the malpractice as distinct from those benefits that would have been otherwise provided without such malpractice occurring. This is proper in large part because we are reversing the Department order as a matter of law. Remanding to the Department for this purpose provides the Department the opportunity, not otherwise previously assumed to exist under the law, to consider evidence submitted by both the worker and the self- insured employer concerning the difference in benefits provided on account of the malpractice as distinct from those benefits that would have been otherwise provided. However, we reject those findings of fact in the Proposed Decision and Order that go "half-way" on this score. It is sufficient that we make a general finding reflecting that a difference has been shown to exist. Going beyond this unreasonably hampers the Department's capacity to make a factual determination fair to both the worker and the self-insured employer.

Based upon our review of the Proposed Decision and Order and the claimant's Petition for Review, and upon thorough consideration of the entire record before, we make the following:

FINDINGS OF FACT

1. On June 2, 1997, the claimant, Carma F. Newton, filed an application for industrial insurance benefits with the Department of Labor and Industries, alleging a right ankle and foot injury in the course of her employment with Renton School District No. 403 on April 28, 1997. The claim was allowed and benefits paid. On October 22, 1999, the Department issued an order directing the self-insured employer to pay a permanent partial disability award of 16 percent of the amputation value of the right leg above the knee joint with short thigh stump and closing the claim with time loss compensation paid through October 13, 1998.

   On December 10, 1999, the Department issued an order stating that claimant has recovered $165,000; required distribution of settlement proceeds; net share to attorney $68,762.85; net share to claimant $63,106.05; net share to self-insured employer $32,725.14; net share to Department $405.95; self-insured employer declares statutory lien for $56,799.27; Department declares lien for $695.96; demand made upon the claimant to reimburse the self-insured employer in the amount of $32,725.14 and the Department in the amount of $405.95; no benefits or compensation will be paid to the claimant until excess recovery totaling $22,777.48 has been expended; pursuant to RCW 51.24.060(7) unpaid amount shall bear maximum rate of interest per RCW 19.52.020

beginning 60 days from the date the order is mailed or 60 days from the date the order is communicated.

On January 11, 2000, the claimant filed with the Department a protest and request for reconsideration of the December 10, 1999 Department order. On January 26, 2000, the Department issued an order holding the December 10, 1999 order in abeyance. On March 3, 2000, the Department affirmed the December 10, 1999 order. On March 31, 2000, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals. On April 28, 2000, the Board issued an order granting the appeal, assigning Docket No. 00 13742, and directing that proceedings be held.

2. Carma F. Newton sustained an industrial injury to her right foot and ankle on April 28, 1997, in the course of her employment with Renton School District No. 403. The injury occurred when Ms. Newton slipped and fell down some stairs. No third party is responsible for causing Ms. Newton's industrial injury of April 28, 1997.

3. Ms. Newton sustained a fractured right heel bone, proximately caused by the industrial injury. Although Ms. Newton saw a physician a short time after the injury, that doctor did not diagnose the fracture. It was not until Ms. Newton saw Martin Tullus, M.D., nearly two months later, that the fracture was diagnosed.

4. Ms. Newton filed a third party action under Ch. 51.24 RCW for medical malpractice, related to failure to properly diagnose her condition caused by the industrial injury, against a medical center and a physician. In this action, a recovery of $165,000 for damages caused by the third party(ies) was made.

5. Under Ms. Newton's industrial insurance claim, the self-insured employer Renton School District No. 403, provided some benefits and compensation to Ms. Newton that were not benefits and compensation provided for the injury for which the third party recovery was made. The self-insured employer provided some benefits and compensation that were for the original industrial injury alone as distinct from, and not including, the additional injury caused by the delay in diagnosis for which the medical malpractice recovery was made.

6. In its third party distribution order, the Department included, in the workers' compensation insurers' liens on the third party recovery, amounts that were for benefits and compensation that were not provided for the malpractice injury for which the damages were recovered from the third party.

CONCLUSIONS OF LAW

1. The Board of Industrial Insurance Appeals has jurisdiction over the parties and the subject matter of this timely appeal.

2. Pursuant to the third party statute, RCW 51.24, the Department's and self-insured employer's right to reimbursement from Ms. Newton's third party recovery is limited to compensation and benefits provided for the injury for which the third party is liable to pay damages. The reimbursement lien does not include reimbursement for compensation and benefits that were or would have been provided by the self-insured employer or the Department for the industrial injury alone without the effect of the additional injury for which the third party becomes liable for damages.

3. The Department order of December 10, 1999, is reversed. This claim is remanded to the Department with directions to recalculate the third party settlement distribution, limiting the Department's and self-insured employer's right to reimbursement to those claim costs caused by the third party malpractice injury for which Ms. Newton's third party recovery was made; and to take such further action as is indicated or required by law.

It is so ORDERED.

Dated this 17th day of September, 2001.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
FRANK E. FENNERTY, JR. Member

/s/_____
JUDITH E. SCHURKE Member