Gersema, James

BOARD

Constitutional questions

The Board has no jurisdiction over constitutional issues. To the extent *In re Danny Thomas*, BIIA Dec., 40,665 (1973) concludes the Board may have such authority in certain circumstances, it is overruled. **….*In re James Gersema*, BIIA Dec., 01 20636 (2003)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 03-2-05093-3.]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: JAMES W. GERSEMA	**)**	**DOCKET NO. 01 20636**
	)	
CLAIM NO. W-070923	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, James W. Gersema, by
Rumbaugh Rideout & Barnett, per
Stanley J. Rumbaugh

Self-Insured Employer, Allstate Insurance Company, by
Law Offices of Deborah J. Lazaldi, per
Deborah J. Lazaldi

Department of Labor and Industries, by
The Office of the Attorney General, per
Diane Hunter-Cornell, Assistant

The claimant, James W. Gersema, filed an appeal with the Board of Industrial Insurance Appeals on October 2, 2001, from an order of the Department of Labor and Industries dated September 14, 2001. The order stated:

> WHEREAS, the claimant has recovered $160.000.00, and RCW 51.24.060 requires distribution of the settlement proceeds as follows: 1) Net share to attorney for fees and costs $65,749.32; 2) Net share to claimant $73,416.24; and 3) Net share to Self-Insured Employer $20,834.44;
>
> WHEREAS, the Self-Insured Employer declares a statutory lien against the third party recovery for the sum of $20,834.44;
>
> NOW THEREFORE, demand is hereby made upon the claimant to reimburse the Self-Insured Employer in the amount of $20,834.44;
>
> IT IS FURTHER ORDERED no benefits or compensation will be paid to or on behalf of the claimant or beneficiary as defined in RCW 51.08.020 until such time the excess recovery totalling $29,366.09 has been expended by the claimant or beneficiary for costs incurred as a result of the condition(s), injuries, or death covered under this claim.

The September 14, 2001 Department order is **AFFIRMED.**

DECISION

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 claimant, as well as a response by the

self-insured employer, to a Proposed Decision and Order issued on July 25, 2002, in which the order of the Department dated September 14, 2001, was affirmed.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed, except as stated below. We have granted review for the following reasons: (1) to articulate our rationale for striking Exhibit No. 1 while not striking the testimony of the claimant's witness, Artis Grant; (2) to discuss case law from the United States Supreme Court, our state's Supreme Court and Court of Appeals, and statutory language that is relevant to the issues that have arisen under this appeal; and (3) to acknowledge that *In re Danny Thomas*, BIIA Dec., 40,665 (1973), is no longer valid law because it conflicts with two Washington Supreme Court decisions issued subsequent to *Thomas*.

Evidence Presented

Evidence in this case includes extensive factual stipulations of the parties, the testimony of witnesses, and documentary exhibits. The factual stipulations establish the following: Mr. Gersema sustained an industrial injury, the occurrence of which also formed the basis for a negligence action against the third party upon whose premises he had sustained his injury. In June 2000, the claimant and the third party defendant settled the negligence action for $160,000. The Department closed the claimant's workers' compensation claim on May 25, 2001, by which time the employer had paid medical and permanent partial disability benefits totaling $35,731.61. No time loss compensation was paid because at all times the employer kept the claimant on full salary. On September 14, 2001, the Department issued its order distributing the proceeds of the entire third party settlement, which included a statutory lien on behalf of the employer equaling $20,834.44 and a provision declaring that because of the excess recovery, the claimant or his beneficiary would have to expend $29,366.09 as costs incurred for conditions accepted under this claim before he would become entitled to additional benefits or compensation.

The parties also stipulated to the admission of Exhibit No. 2, a document entitled "Settlement Agreement and Full & Final Release." Mr. Gersema signed this agreement upon the advice of Mr. Artis Grant, the attorney who represented him throughout the life of the third party lawsuit. This document states that it is "intended to cover all past and future injuries, damages or losses, whether or not known to the parties to this Agreement. . ." It is "the full and complete settlement of all liability claims" arising out of the third party action. It "contains the entire Agreement between the parties hereto and that the terms hereof are contractual and not mere recitals." The release of liability was made in consideration for the payment of $160,000 to Mr. Gersema. The document

does not contain a breakdown or allocation of portions of the settlement amount as compensation for the various injuries or types of damages that were alleged by the claimant while the lawsuit was pending.

Additionally, Mr. Gersema offered the testimony of Artis Grant and Exhibit No. 1, a demand letter sent on the claimant's behalf by Mr. Grant to Christopher Keay, the attorney representing the defendant in the third party lawsuit. The self-insured employer presented the testimony of Mr. Keay. This testimony of these witnesses and both exhibits were offered to establish: (1) the different types and amounts of damages that were alleged by the claimant during the lawsuit; and (2) whether or not the parties to the settlement intended specific portions of the settlement proceeds to represent recovery for specific kinds of damages, whether denominated as special or general damages, sustained by the claimant.

Admissibility of Testimony and Exhibit No. 1

The self-insured employer argues that Mr. Grant's testimony and Exhibit No. 1 should be stricken from the record pursuant to the parol evidence rule. That rule has been best described as follows:

> [P]arol or extrinsic evidence is not admissible to add to, subtract from, vary, or contradict written instruments which are contractual in nature and which are valid, complete, unambiguous, and not affected by accident, fraud, or mistake.

Berg v. Hudesman, 115 Wn.2d 657, 670 (1990) [quoting, ultimately, *Buyken v. Ertner*, 33 Wn.2d 334 (1949).]

As noted in *Berg*, the parol evidence rule applies only to a writing intended as an **integration** or final expression of the terms of the agreement. However, if an agreement is only **partially integrated**, i.e., it does not contain the complete expression of all terms agreed upon, then the terms not included in the writing may be proven by parol or extrinsic evidence, provided the additional terms are not inconsistent with the written terms of the agreement. Extrinsic evidence is also admissible in order to assist a court in ascertaining the intent of the parties and in **interpreting** the contract. This is true even when there is no apparent ambiguity in the terms of the contract. *Berg*, at 669; *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565 (1996).

In this case, it appears that the settlement contract was completely integrated. The document itself indicates that it is a "full and complete settlement" and the "entire Agreement between the parties." Both Mr. Grant and Mr. Keay described the agreement as "global." Both agreed that there was no agreement or assigned allocation between general and special damages.

Mr. Keay noted that in some circumstances damages are allocated within a settlement agreement, but that did not happen in this case.

We conclude that Exhibit No. 1 should be stricken and hereby reject that exhibit. In addition to the parol evidence problem, Exhibit No. 1 contains vast amounts of hearsay; almost all of it is irrelevant to the relatively limited issue under appeal. The portions of the exhibit that are relevant are cumulative to the testimony of Mr. Grant and/or Mr. Keay.

We do not strike from the record the testimony of Mr. Grant. His testimony provides probative evidence on the question of whether the settlement agreement was fully integrated. It is helpful in understanding the different types of damages that were alleged in the third party action, which is a matter that is independent of the meaning of terms of the settlement contract.

Segregation of Non-economic Damages Recovered in a Third Party Action

Mr. Gersema does not contend that any of the mathematical calculations used to determine the third party distribution were incorrect. Rather, he believes that the self-insurer's statutory subrogation interest in the settlement proceeds (and therefore the size of its reimbursement and lien) should be decreased by segregating settlement proceeds that allegedly represent payment for damages that were not covered by workers' compensation. The claimant argues that a portion of the third party settlement was intended to reimburse him for damages such as "loss of enjoyment of life," "pain and suffering," and other non-economic damages for which he was not entitled to receive compensation or benefits under the Industrial Insurance Act. There are two reasons why the segregation of non-economic damages requested by the claimant cannot be done: (1) segregation due to the receipt of these damages is not authorized by RCW 51.24.060; and, (2) the record does not contain sufficient evidence to permit such a segregation of the settlement proceeds.

In 1994 the Washington State Supreme Court addressed the similar question of whether the Department's right to reimbursement in a third party action extended to a worker's spouse's recovery for loss of consortium. In *Flanigan v. Department of Labor & Indus.*, 123 Wn.2d 418 (1994), the court held that the Department's right to reimbursement did not extend to recovery of damages attributed to loss of consortium. The court went even further by stating that workers' compensation benefits do not compensate workers or their beneficiaries for any non-economic damages. Any recovery by the Department from the damages paid for loss of consortium would constitute an "unjustified windfall." *Flanigan*, at 425. The ramifications of the sweeping language in *Flanigan* was clearly stated by a dissenting justice, who noted that the court's opinion also would prevent reimbursement from damages obtained for pain and suffering. *Flanigan*, at 430.

Shortly thereafter, the Department requested that the Legislature amend Chapter 51.24, RCW so that the term "recovery" would not include damages for loss of consortium. *Final Legislative Report, 54th Leg.* (Wash., 1995), p. 219 (SB 5399). However, what the Legislature adopted was a definition of "recovery" that included all economic and non-economic damages **other than** loss of consortium. (Laws of 1995, ch. 199, § 2). RCW 51.24.030(5) states: "[f]or the purposes of this chapter, "recovery" includes all damages except loss of consortium." Thus, *Flanigan* is dispositive only on the narrow issue of loss of consortium. Since no damages for loss of consortium were included in the settlement agreement that is presently before us, *Flanigan* is not applicable. RCW 54.24.030(5) is unambiguous. It prevents any segregation of non-economic damages other than loss of consortium from the third party recovery distribution process of RCW 51.24.060.

We note that the appropriateness of governmental and/or employer reimbursement of non-economic damages received as part of a third party recovery by an injured worker or his/her dependent has been addressed by the United States Supreme Court and a majority of state courts. The majority of these jurisdictions have permitted governments to obtain reimbursement for workers' compensation benefits paid from non-economic damages recovered in third party actions. In *United States v. Lorenzetti*, 467 U.S. 167; 104 S. Ct. 2284; 81 L. Ed. 2d 134 (1984), a unanimous court allowed the United States reimbursement under the third party recovery provisions of 5 U.S.C. Sec. 8132 for compensation paid to an employee pursuant to the Federal Employees' Compensation Act for the non-economic damages of "pain and suffering." As stated in 6 A. Larson, *Larson's Workers' Compensation Law*, § 117.05 (2002), "[t]he prevailing rule in the United States refuses to place an employee's third party recovery outside the reach of the employer's lien on the ground that some or all of it was accounted for by damages for pain and suffering."

An additional ground exists to prevent the segregation of non-economic damages from the third party recovery distribution process and the self-insured employer's right to reimbursement therefrom. As indicated earlier, the settlement agreement failed to allocate any portion of the lump sum $160,000 award to non-economic damages. Such a failure to allocate a portion of the lump sum recovery to those damages subjects the entire amount of the recovery to the statutory distribution process and the self-insurer's reimbursement right and lien. *Mills v. Department of Labor & Indus.*, 72 Wn. App. 575 (1994).

Scope of Review—Constitutionality of Statutes

Mr. Gersema contends that the Department's refusal to segregate a portion of the third party settlement allegedly representing recovery for non-economic (general) damages is an unconstitutional taking of property and violation of his substantive due process rights. He argues that the Board has jurisdiction over constitutional issues. He reasons that because the Superior Court only has appellate jurisdiction in workers' compensation appeals, either the Department or the Board must have original jurisdiction over any constitutional issues. The claimant concludes that before the Superior Court may become involved, all administrative remedies must be exhausted. The Proposed Decision and Order did not adopt the claimant's reasoning. However, by citing and discussing our Significant Decision, *In re Danny Thomas*, BIIA Dec., 40,665 (1973), it concluded that in some circumstances the Board may have jurisdiction over constitutional issues. We disagree with this conclusion.

Our jurisdiction in industrial insurance matters is appellate only; the Department must make the initial adjudication. *See*, *e.g.*, *Lenk v. Department of Labor & Indus.*, 3 Wn. App. 977 (1970). However, constitutional questions, even those arising in the context of the Industrial Insurance Act, provide an exception to this general rule regarding our jurisdiction. Like the Department, we are not a court, but an administrative agency engaged in a quasi-judicial administrative function. We have no jurisdiction, original or appellate, to rule on the constitutionality of a statute. In *Yakima County Clean Air Authority v. Glascam Builders, Inc.*, 85 Wn.2d 255 (1975), the Supreme Court addressed the following questions: (1) what, if any, jurisdiction may an administrative agency exercise over constitutional issues?; and (2) must an administrative determination first be made before an appeal regarding a constitutional issue may be heard in Superior Court? The court stated:

> We shall first consider the question of exhaustion of administrative remedies. The rule is well established that one claiming a constitutional right as a defense can proceed directly to assert that right in a judicial proceeding. There are several sound reasons for this rule. An administrative tribunal is without authority to determine the constitutionality of a statute, and, therefore, there is no administrative remedy to exhaust. The administrative remedy is established by the same statute which is being challenged and recourse to an administrative remedy would put the respondent in the position of proceeding under the statute which it seeks to challenge.

Glascam Builders, at 257.

Bare v. Gorton, 84 Wn.2d 380 (1974), at 382-383, contains a similar holding. The holding of each of these subsequent Supreme Court cases is incompatible with the holding in *Danny Thomas*. We consider *Danny Thomas* to have been overruled by them.

FINDINGS OF FACT

1. On September 27, 1996, the self-insured employer received an application for industrial insurance benefits alleging that the claimant, James W. Gersema, sustained an industrial injury on September 13, 1996, during the course of his employment with Allstate Insurance Company. The claim was allowed by an order issued on March 18, 1998. On November 1, 1999, the Department of Labor and Industries issued an order indicating it was closing the claim; medical condition is stable; self-insured employer directed to pay claimant permanent partial disability award for Category 3 permanent cervical and/or cervico-dorsal impairments, less pre-existing Category 2 permanent cervical and/or cervico-dorsal impairments; claim is closed. On November 3, 1999, the claimant received the November 1, 1999 Department order. On January 3, 2000, the claimant mailed a Protest and Request for Reconsideration from the November 1, 1999 order to the Department, which received it on January 4, 2000. On June 5, 2000, the Department issued an order affirming the November 1, 1999 order.

   On June 9, 2000, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals from the June 5, 2000 order. On June 26, 2000, the Board issued an order granting the appeal, assigning it Docket No. 00 12499, and directing that further proceedings be held. On April 4, 2001, a Proposed Decision and Order was issued that reversed and remanded the June 5, 2000 order. On May 10, 2001, the Board issued an Order Adopting Proposed Decision and Order. On May 25, 2001, the Department issued an order indicating that pursuant to the Board order of May 10, 2001, the Department is closing the claim; medical condition is stable; self-insured employer directed to pay permanent partial disability award equal to Category 3 permanent cervical and/or cervico-dorsal impairments; claim is closed. On September 14, 2001, the Department issued an order that indicated:

   > WHEREAS, the claimant has recovered $160.000.00, and RCW 51.24.060 requires distribution of the settlement proceeds as follows: 1) Net share to attorney for fees and costs $65,749.32; 2) Net share to claimant $73,416.24; and 3) Net share to Self-Insured Employer $20,834.44; WHEREAS, the Self-Insured Employer declares a statutory lien against the third party recovery for the sum of $20,834.44; NOW THEREFORE, demand is hereby made upon the claimant to reimburse the Self-Insured Employer in the amount of $20,834.44; IT IS FURTHER ORDERED no benefits or compensation will be paid to or on behalf of the

> claimant or beneficiary as defined in RCW 51.08.020 until such time the excess recovery totalling $29,366.09 has been expended by the claimant or beneficiary for costs incurred as a result of the condition(s), injuries, or death covered under this claim. . . .

On October 2, 2001, the claimant filed a Notice of Appeal of the September 14, 2001 order. On November 1, 2001, the Board issued an order granting the appeal, assigning it Docket No. 01 20636, and directing that further proceedings be held.

2. On September 13, 1996, James W. Gersema, the claimant, suffered an injury to his neck in the course of his employment with Allstate Insurance Company.

3. The circumstances of the industrial injury gave rise to Mr. Gersema's third party negligence action against Titus-Will Ford Sales, Inc. and Titus-Will Ford/Toyota filed under Pierce County Superior Court Cause No. 99-2-11010-8.

4. On or about June 16, 2000, Mr. Gersema settled his third party negligence action against Titus-Will Ford Sales, Inc. and Titus-Will Ford/Toyota under Pierce County Cause No. 99-2-11010-8 in the amount of $160,000. Allstate Insurance Company asserted its statutory lien pursuant to RCW 51.24.030 with respect to Mr. Gersema's settlement without compromise of such lien.

5. Allstate Insurance Company paid benefits for Mr. Gersema's Claim No. W-070923, proximately caused by the industrial injury in the amount of $35,731.61, which included $22,786.97 in medical benefits and $12,944.64 in permanent partial disability benefits (including interest). Benefits payable under Claim No. W-070923 also include $12,876.20 in additional permanent partial disability granted to Mr. Gersema based on the Department's May 25, 2001 order.

6. Allstate Insurance Company continued to pay Mr. Gersema his salary during the entire time his claim was open. Time loss compensation was not paid.

7. On September 14, 2001, the Department issued a statutory order establishing Allstate's reimbursement share of Mr. Gersema's $160,000 third party settlement pursuant to RCW 51.24.060 and directing disbursement of proceeds as follows: (1) net share to attorney for fees and costs $65,749.32; (2) net share to claimant $73,416.24; and (3) net share to self-insured employer $20,834.44, which amount represents Allstate's statutory lien. The Department further ordered that no benefits or compensation will be paid to or on behalf of Mr. Gersema or his beneficiary as defined in RCW 51.08.020 until such time as excess

recovery totalling $29,366.09 has been expended by Mr. Gersema or his beneficiary for costs incurred as a result of the condition covered under the claim.

8. The settlement agreement between the claimant and Titus-Will Ford did not specify separate amounts of the $160,000 settlement for special and general damages.

CONCLUSIONS OF LAW

1. The Board of Industrial insurance Appeals has jurisdiction over the parties to and subject matter of this appeal, except that this Board does not have jurisdiction to determine the constitutionality of RCW 51.24.060.

2. The monetary recovery for the type of non-economic damages alleged by the claimant in his third party action is not subject to segregation from the third party recovery distribution process of RCW 51.24.060.

3. The order issued by the Department of Labor and Industries on September 14, 2001, is correct and is affirmed.

It is so ORDERED.

Dated this 30th day of January, 2003.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
JUDITH E. SCHURKE Member