Armendariz, Marcos

THIRD PARTY ACTIONS (RCW 51.24)

Benefits

The Department's expense in obtaining an ability to work assessment should not be considered in calculating the Department's third party lien because it is not a "benefit" within the meaning of the third party lien statute. ***….In re Marcos Armendariz*, BIIA Dec., 03 11102 (2004)** [*Editor's Note*: The Board's decision was appealed to superior court under King County Cause No. 04-2-19885-2 SEA.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: MARCOS D. ARMENDARIZ	**)**	**DOCKET NO. 03 11102**
	)	
CLAIM NO. X-413701	**)**	**DECISION AND ORDER**

APPEARANCES:

Claimant, Marcos D. Armendariz, by
Grutz, Scott, Kinney & Fjelstad, per
Daniel R. Fjelstad

Employer, SCI Washington Funeral Services, Inc.,
None

Department of Labor and Industries, by
The Office of the Attorney General, per
William J. Blitz, Assistant

The claimant, Marcos D. Armendariz, filed an appeal with the Board of Industrial Insurance Appeals on January 28, 2003, from an order of the Department of Labor and Industries dated January 21, 2003. In this order, the Department indicated that the claimant has recovered $37,650 and required distribution; net share to attorney $12,879.04; claimant $7,805.67; Department of Labor and Industries $16,965.29; Department of Labor and Industries has paid $25,786.14 in benefits and asserts $25,786.14 against recovery; demand is made upon the claimant for recovery of $16,965.29; no benefits or compensation will be paid to or on behalf of the claimant until such time excess recovery of $1,061.71 has been expended as a result of the condition covered under this claim. The Department order is **REVERSED AND REMANDED**.

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 to a Proposed Decision and Order issued on February 20, 2004, in which the industrial appeals judge affirmed the Department order dated January 21, 2003.

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

Mr. Armendariz contests the inclusion, in the Department's statutory lien arising out of a third party lawsuit, the approximately $3,600 it expended to obtain an "ability to work assessment." This assessment resulted in the Department's determination that vocational services were not

required to return Mr. Armendariz to work. We conclude that the holding of *Ziegler v. Department of Labor & Indus.*, 42 Wn. App. 39 (1985) should be extended to prevent the Department from adding this expenditure to its statutory lien because it is done primarily for claims administration purposes and does not constitute any actual service or benefit to the claimant. The Department must exclude the cost of this assessment when calculating its statutory lien.

Mr. Armendariz was a "funeral home technician" at the time of his April 12, 2000 industrial injury. This is heavy work, involving lifting the corpses, which he transported from hospitals and/or morgues to funeral homes or gravesites. He was injured in a motor vehicle accident while in the process of doing this job. Mr. Armendariz received time loss compensation and other benefits. Within three to four months after the injury, the Department assigned a vocational counselor to Mr. Armendariz. The counselor met with him a few times. Mr. Armendariz was told that he must cooperate with the counselor or his time loss compensation and other benefits could be suspended.

Mr. Armendariz cooperated under the belief that retraining would be provided to him. However, the vocational counselor's goals were substantially different. Progress Report No. 2, written less than four months after the industrial injury, described the "action plan" as taking appropriate steps toward claim closure after the receipt of doctors' responses. In part, because the claimant had worked as a telemarketer for one month in the past, the vocational counselor identified the job of "telemarketer" as the employment option. Mr. Armendariz was told about this employment option at the end of the process, but there is no indication that he was consulted about it during the process or approved it. A job analysis was developed and a labor market survey was performed. In the final report, the "ability to work assessment," the vocational counselor recommended that vocational services were not necessary to return Mr. Armendariz to work because he was employable as a telemarketer even though he was not able to work at his job of injury or other employment with his employer of injury.

Stan Owings, a private vocational counselor, and David Erickson, who supervises vocational services consultants for the Department, both testified about the Department's vocational process in effect during the time services were being considered for the claimant. Mr. Erickson divided the process into three phases, each requiring a referral from the claims manager or someone else in authority at the Department and each having specific guidelines for the process to be followed. The initial phase is the ability to work assessment. Retraining cannot occur until such an assessment is done. In this case, the conclusion was that the claimant did not need retraining to return to work so a referral to the next phase, plan development, was not made. The third phase,

plan implementation, could occur only after plan development. The director's discretionary determination was that vocational services were not necessary to return Mr. Armendariz to gainful employment. Mr. Owings agreed with this determination after reviewing the information in the file.

RCW 51.24.060 states, in relevant part:

> (1) If the injured worker or beneficiary elects to seek damages from the third person, any recovery made shall be distributed as follows:
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> . . . .
>
> (c) The department and/or self-insurer shall be paid the balance of the recovery made, but only to the extent necessary to reimburse the department and/or self-insurer for benefits paid;
>
> . . . .
>
> (2) The recovery made shall be subject to a lien by the department and/or self-insurer for its share under this section.

The court of appeals, in *Ziegler*, held that the costs of independent medical examinations (IMEs) ordered pursuant to RCW 51.36.070 did not constitute "benefits" within the meaning of RCW 51.24.060 and therefore could not be included in the Department's third party lien. The court stated:

> The parties do not dispute the wide discretion granted the director in ordering examinations under RCW 51.36.070, but the reason for requesting these examinations arguably differs from the purpose of providing the injured worker with proper and necessary medical and surgical services. (Footnote and citations omitted.) RCW 51.36.070 medical examinations are scheduled in order to resolve medical issues and not to provide treatment. **It is a cost that ordinarily would not be incurred by a worker if it were not for the fact the Department has a duty to properly administer the funds**. (Citations omitted.)
>
> The Department argues and the trial court agreed the worker did receive some benefit from the ordered medical examinations. However, again, **the principal reason for the examination is to allow the Department to properly administer the program and any benefit to Mr. Ziegler was incidental to that purpose**. The word benefits as used in RCW 51.24.060 refers to costs incurred for "proper and necessary medical and surgical services" authorized the worker under RCW 51.36.010. (Citation omitted.) The medical examinations do not fit within that description. Moreover, it should be noted RCW 51.36.070 authorizes the director when ordering such examinations to charge the

> cost to a self-insurer or the medical aid fund. We find the costs of the ordered examinations were administrative expenses, not benefits.

Ziegler, at 42-43. (Emphasis ours.)

We conclude that the vocational "ability to work assessment" phase of the process promulgated by the Department in its administration of RCW 51.32.095 is analogous to an IME ordered pursuant to RCW 51.36.070. There is no functional distinction between an IME and an ability to work assessment. Both are primarily administrative in purpose and required by the Department to properly administer claims. Each type of "assessment" may result in the provision of further benefits for the worker, but if that happens it occurs only during a later step in the claims administration process. Provision of vocational benefits after an ability to work assessment is not mandated by RCW 51.32.095, which gives discretionary authority to the director.

We conclude that the holding of *Ziegler* should be extended to include that limited portion of the vocational assessment process referred to as the "ability to work assessment." Like the IME, the injured worker is required to undergo an ability to work assessment. The worker has no choice in the counselor selected. The worker is required to cooperate under threat of suspension of benefits. The purpose of the assessment is not to provide retraining, but to resolve vocational issues; *i.e.*, claims administration issues. This purpose was substantially proven by the early action plan adopted by the vocational counselor. Mr. Owings candidly admitted that up to the point the vocational process was discontinued in this case, it was evaluative only. He also testified that Mr. Armendariz did not become more employable as a result of the vocational counselor's efforts.

We believe that it is a stretch to say that the ability to work assessment was a "benefit" to Mr. Armendariz. An injured worker would not normally hire a vocational counselor to perform such an assessment. An injured worker would contact his doctor and/or employer directly about his physical ability to return to work rather than hire someone to make those contacts. As with an IME, the cost of such an evaluation is incurred because of the duty the Department has to properly administer the funds.

We do not believe that *Ziegler* can be distinguished from this case merely because IMEs are authorized under a different statute than vocational services. RCW 51.32.095(1) states:

> One of the primary purposes of this title is to enable the injured worker to become employable at gainful employment. To this end, the department or self-insurers shall utilize the services of individuals and organizations, public or private, whose experience, training, and interests in vocational rehabilitation and retraining qualify them to lend expert assistance to the supervisor of industrial insurance in such programs of vocational

> rehabilitation as may be reasonable to make the worker employable consistent with his or her physical and mental status. Where, after **evaluation and recommendation** by such individuals or organizations and prior to final evaluation of the worker's permanent disability and in the sole opinion of the supervisor or supervisor's designee, whether or not medical treatment has been concluded, **vocational rehabilitation** is both necessary and likely to enable the injured worker to become employable at gainful employment, the supervisor or supervisor's designee may, in his or her sole discretion, pay or, if the employer is a self-insurer, direct the self-insurer to pay the cost as provided in subsection (3) of this section. (Emphasis ours.)

RCW 51.32.095 clearly sets up a two-part vocational system: an evaluation/recommendation (the ability to work assessment) followed by vocational rehabilitation (plan development and plan implementation) at the director's discretion. RCW 51.32.095(3) lists the types of costs, expenses, and services the Department will provide. We hold that the term "benefits" in RCW 51.24.060(1)(c) includes only the costs, services, and expenses listed in RCW 51.32.095(3) and, specifically not the evaluation and assessment phase of the vocational process (ability to work assessment), as described in RCW 51.32.095(1).

The Department, in its response to the claimant's Petition for Review, argued that other jurisdictions allow recovery of "vocational services" in third party actions. There are extensive differences in subrogation provisions within the third party recovery statutes of the various states. 6 A. *Larson & L. Larson Workers' Compensation Law*, § 116.01, et seq. (2003). As such, arguments based on other states' statutes and court decisions are of very limited value on this topic.

FINDINGS OF FACT

1. On April 20, 2000, the claimant, Marcos D. Armendariz, filed an application for benefits with the Department of Labor and Industries, in which he alleged he sustained an industrial injury on April 12, 2000, while working in the course of his employment with SCI Washington Funeral Services, Inc.

   On May 23, 2000, the Department issued an order wherein the Department allowed the claim and paid time loss compensation benefits from May 13, 2000 through May 19, 2000.

   On June 19, 2001, the Department issued an order in which it provided that time loss compensation was ended as paid through May 17, 2001; that the claim was closed effective June 19, 2001, as the medical record shows treatment was no longer necessary and that there was no

permanent partial disability; and that the Department of Labor and Industries cannot pay for medical services or treatment rendered after the date of closure.

On January 21, 2003, the Department of Labor and Industries issued an order in which it provided the following: the Department indicated that the claimant has recovered $37,650 and required distribution; net share to attorney $12,879.04; claimant $7,805.67; Department of Labor and Industries $16,965.29; Department of Labor and Industries has paid $25,786.14 in benefits and asserts $25,786.14 against recovery; demand is made upon the claimant for recovery of $16,965.29; no benefits or compensation will be paid to or on behalf of the claimant until such time excess recovery of $1,061.71 has been expended as a result of the condition covered under this claim.

On January 28, 2003, the claimant filed a Notice of Appeal with the Board of Industrial Insurance Appeals from the Department order dated January 21, 2003.

On February 20, 2003, the Board issued an order that granted the appeal, assigned it Docket No. 03 11102, and ordered that further proceedings be held.

2. On April 12, 2000, the claimant sustained an industrial injury to his neck and back while working in the course of his employment with Bleitz Funeral Home.

3. At the time of the injury, the claimant was driving an automobile for his employer and was rear-ended by a third party in a motor vehicle accident.

4. The claimant filed a lawsuit against the third party for the third party's negligence that occurred at the time of the injury on April 12, 2000.

5. As part of the claims administration process, the Department of Labor and Industries assigned a vocational rehabilitation counselor for purposes of conducting an ability to work assessment. The claimant had no choice in the counselor selected. The ability to work assessment was a required step before any vocational services could be offered to the claimant.

6. The claimant met with his assigned vocational rehabilitation counselor on six to seven separate occasions. The claimant was required to cooperate with the counselor under threat of suspension of benefits. The counselor did not test the claimant as part of the assessment. Based in part on past work history, the vocational counselor chose an occupation for the claimant without his approval and researched the

labor market for that occupation. The counselor did not place the claimant in gainful employment in that or any other occupation.

7. The ability to work assessment resulted in a determination that the claimant was not eligible for or in need of vocational services in order to return to reasonably continuous gainful employment. The claimant was not offered vocational plan development, plan implementation, or vocational services by the Department.

CONCLUSIONS OF LAW

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

2. The "evaluation and recommendation" phase of the vocational process set forth in RCW 51.32.095(1) does not constitute "benefits paid" to Mr. Armendariz, within the meaning of RCW 51.24.060(1)(c), and therefore the Department may not include them within its statutory lien.

3. The Department of Labor and Industries' order dated January 21, 2003, is incorrect and is reversed. This matter is remanded to the Department to recalculate its statutory lien on the third party recovery, and if necessary the third party distribution calculation, consistent with this decision, and thereupon issue an appealable order reflecting this (these) calculations.

It is so **ORDERED**.

Dated this 6th day of July, 2004.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

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