Tharaldson, Darrin

THIRD PARTY ACTIONS (RCW 51.24)

Definition of injury

The Department has authority to assert a lien against any third party recovery that involves a condition for which it paid benefits, without regard to whether the condition was caused by the industrial injury. **….*In re Darrin Tharaldson*, BIIA Dec., 04 19948 (2005)** [*Editor's Note*: The Board's decision was appealed to superior court under Pierce County Cause No. 02-2-11626-4.]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS
STATE OF WASHINGTON

IN RE: DARRIN R. THARALDSON	)	**DOCKET NO. 04 19948**
	)	
CLAIM NO. Y-553035	)	**DECISION AND ORDER**

APPEARANCES:

Claimant, Darrin R. Tharaldson, by
Rumbaugh Rideout Barnett & Adkins, per
Stanley J. Rumbaugh

Employer, T & T Trucking, Inc.,
None

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

The claimant, Darrin R. Tharaldson, filed an appeal with the Board of Industrial Insurance Appeals on August 23, 2004, from an order of the Department of Labor and Industries dated August 10, 2004. In this order, the Department affirmed its prior order dated April 29, 2004, wherein the Department distributed the claimant's third-party settlement pursuant to RCW 51.24.060. The 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 to a Proposed Decision and Order issued on March 23, 2005, in which the industrial appeals judge affirmed the order of the Department dated August 10, 2004.

The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no prejudicial error was committed. The rulings are affirmed. Review was granted to add to the industrial appeals judge's discussion in his Proposed Decision and Order concerning why Mr. Tharaldson's third-party recovery is subject to the Department's lien pursuant to RCW 51.24.030. The salient facts contained in this record are that Mr. Tharaldson suffered an industrial injury to his low back, filed a claim, and began seeking conservative treatment and receiving time-loss compensation. His family doctor referred him to a pain specialist. Approximately six weeks after the industrial injury, Mr. Tharaldson was in an automobile accident while coming home from a funeral. His low back pain significantly worsened, with pain radiating down both his legs. The pain specialist evaluated Mr. Tharaldson after the automobile accident and

after additional diagnostic tests, referred him to a surgeon, who then performed low back surgery three months later. The Department continued to provide benefits, including paying for the surgery, time-loss compensation and a permanent partial disability award. The medical doctors maintain that the need for the treatment (low back surgery), provided to Mr. Tharaldson after the automobile accident, was the result of **both** the industrial injury and the automobile accident. Mr. Tharaldson recovered a settlement of $50,000 in his claim against the driver who had caused the auto accident. The Department asserted a lien against this recovery, after subtracting the benefits paid to Mr. Tharaldson prior to the auto accident and then reducing the lien consistent with a 60-40 apportionment between the accident and the industrial injury. The 60-40 apportionment was based on several medical doctors' opinions who treated Mr. Tharaldson and who designated the cause for the surgery and treatment to both the accident and the industrial injury in that ratio.

Mr. Tharaldson maintains that because the automobile accident settlement was for a non-industrial incident occurring after the industrial injury, the Department's authority to assert a lien granted in RCW 51.24.060 does not extend to those settlement proceeds. We disagree. The applicable statute, RCW 51.24.030, allows the Department to assert a lien in these circumstances. The relevant portions of the statute state:

> (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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> . . .
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> (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.**

Emphasis added.

RCW 51.24 was enacted to allow injured workers to sue third parties for damages under certain circumstances, and to extend the Department's ability to recover from the third party proceeds for benefits paid by the Department. The purposes of the statutory scheme are to prevent double recovery and to protect the State Fund. Mr. Tharaldson received a settlement from the third party for damages representing treatment, time-loss compensation, and permanent disability paid for entirely by the Department of Labor and Industries. We find no ambiguity in the statutory language. The statute does not require the third party claim to stem from the industrial injury itself,

as Mr. Tharaldson maintains. The statute provides that when the third party recovery represents damages (paid) **on account of a worker's injury for which benefits and compensation are provided under this title**, the injured worker can seek damages from the third party and the Department then has the authority to assert a lien against that portion of the recovery.

We note further that this statutory scheme contains a definition of "injury" that differs from the definition of "industrial injury." For purposes of RCW 51.24.030, "injury" encompasses anything that causes a physical or mental condition for which the Department pays benefits or compensation. If the third party lien statute was intended to apply only to conditions arising out of the industrial injury, we can think of no legislative purpose for including an alternative definition of the word "injury."

Moreover, the legislative history supports our statutory interpretation. We take judicial notice of the documents contained in the legislative archives of E.H.B. 1386. The bolded portions of the statute cited above were added in the 1984 legislative session. The bill was submitted at the request of the Attorney General. Contained in the materials archived with the bill is a document submitted by Charles Bush, then head of the Labor and Industries division of the Attorney General's office. This "commentary" on the proposed changes states:

> Although compensation and benefits may be provided for pre-existing or intervening physical or mental conditions not caused by the industrial injury but which may be due to negligence or wrong of a "third party", the section's present language is being argued to exclude the Chapter's application to such situations. The proposed amendment will support the Department's present policy to apply the Third Party chapter to such cause of action.
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> . . .
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> In concert with the preceding amendment, "injury" is defined to include all aspects of a claim for which the Act's compensation and benefits have been claimed and paid.

Charles Bush, Section by Section Commentary on Proposed Amendments to Ch. 51.24 RCW, The Ind. Ins. Act Third Party Chapter for the 1984 Legislative Session, § B & C (1984).

Applied to Mr. Tharaldson's case, the injury as defined by RCW 51.24.030(3) includes the car accident. Mr. Tharaldson had a low back condition that was pre-existing the industrial injury, and was also aggravated by his subsequent auto accident. The Department paid benefits and compensation for the treatment of that low back condition. Once the Department paid any benefits related to the physical condition caused in part by the automobile accident and in part by the

industrial injury, the Department had the statutory authority to assert its lien. We, therefore, conclude that there is no restriction in the statute limiting the Department's liens to third party claims arising from the industrial injury itself.

Our interpretation is also consistent with the stated purposes of the lien statute, that the industrial insurance funds are not charged for damages caused by a third party and the worker does not receive a double recovery. *See Tallerday v. Delong,* 68 Wn. App. 351, 360 (1993). In *Tallerday*, the court also noted that the 1986 amendments were intended to make it clear that a third party can be anyone liable on account of a worker's injury. As applied in *Tallerday*, the injury referenced by the court **was** the industrial injury. But the language of the statute does not require the injury to be the industrial injury. The injury can be any intervening event for which benefits are paid.

Mr. Tharaldson also maintains that the record of hearing lacks credible evidence that the Department would not have paid the exact same amount of benefits to Mr. Tharaldson even if the automobile collision had not occurred. We disagree. Dr. Chan S. Hwang saw Mr. Tharaldson in November 2001, and relied on the self-report of Mr. Tharaldson that the October 24, 2001 automobile accident worsened the low back pain, extending the pain down into the lower limbs bilaterally. Dr. Hwang also looked at the prior treatment records, and testified that approximately 40 percent of Mr. Tharaldson's symptoms presented to him on November 14, 2001 (subsequent to the automobile accident) could be attributed to the work-related aggravation and 60 percent could be attributed to the aggravation caused by the motor vehicle collision of October 24, 2001. Dr. Hwang was aware that Mr. Tharaldson had had some back injuries prior to the industrial injury, and acknowledged that both the industrial injury and the automobile accident aggravated Mr. Tharaldson's prior condition. He felt there was no way to separate out the treatment Mr. Tharaldson received for his industrial injury from treatment he received for the automobile accident.

Dr. Steven C. Brack saw Mr. Tharaldson in January 2002 and received a similar history that the claimant had made some progress with his back and right leg symptoms after the industrial injury, but after the auto accident the symptoms involved both legs, the right worse than the left. Within reasonable medical probability, Dr. Brack determined that the auto accident had aggravated the industrial injury condition. Dr. Brack performed an L4-5 microdiscectomy on February 27, 2002, and offered the opinion that the surgery and subsequent permanent impairment of Category 3 was related to both the industrial injury and the auto accident.

Obviously, there is no scientific objective method for determining precisely how much of Mr. Tharaldson's treatment for his low back after the automobile accident was attributable to the industrial injury versus the automobile accident. However, recognizing that both medical doctors who testified have the opinion that both accidents are responsible for the treatment, surgery, time-loss, and permanent disability, the Department applied its statutory authority and correctly asserted a lien against the recovery for amounts it expended for treatment after the automobile accident. The claimant did not dispute the Department's calculations and proportional amounts achieved by calculation under RCW 51.24.060. The record fully supports the Department's application of RCW 51.24.030 to the circumstances of this case. The Department order dated August 10, 2004, is properly affirmed.

FINDINGS OF FACT

1. On September 26, 2001, the Department of Labor and Industries received an Application for Benefits from the claimant, Darrin R. Tharaldson, in which he alleged an industrial injury to have occurred on September 17, 2001, during the course of his employment with T & T Trucking, Inc. The claim was allowed and benefits paid. On June 20, 2002, the Department issued an order wherein the Department closed the claim with time-loss compensation as paid, and a permanent partial disability award equal to Category 3 for permanent dorso-lumbar and/or lumbosacral impairment.

   On April 29, 2004, the Department issued an order in which the Department distributed the claimant's third-party settlement of $50,000 as follows: net share to attorney for fees and costs, $17,953.37; net share to the claimant, $18,138.08; net share to the Department, $13,908.35, and determined an excess of $6,490.87 that the claimant had to expend before any further benefits would be paid. On May 10, 2004, the Board received the claimant's appeal from the April 29, 2004 order, and the Department held the order in abeyance. On August 10, 2004, the Department issued an order in which it affirmed its April 29, 2004 order. On August 23, 2004, the Board received the claimant's appeal from the August 10, 2004 order, and assigned it Docket No. 04 19948.

2. On September 17, 2001, Mr. Tharaldson sustained an industrial injury to his low back during the course of his employment with T & T Trucking, Inc. No third party was responsible for causing the industrial injury. Mr. Tharaldson felt low back pain and complained of pain radiating down his right leg to his knee. He treated with his family practice doctor who referred him to a pain specialist.

3. On October 24, 2001, Mr. Tharaldson sustained an automobile accident caused by a third party. After this accident, Mr. Tharaldson's low back pain increased and he reported pain to his toes down both legs. Surgery was performed on the low back in February 2002. Mr. Tharaldson filed an action against the responsible party following the October 24, 2001 automobile accident, and received a recovery of $50,000.

4. The Department received notice of the third party action under RCW 51.24. The Department paid full benefits to and on behalf of Mr. Tharaldson, including medical costs, time-loss compensation, and a permanent partial disability award. The Department's expenditures to and on behalf of Mr. Tharaldson after October 24, 2001, were for a condition caused in part by the industrial injury and in part by the automobile accident.

CONCLUSIONS OF LAW

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

2. Pursuant to RCW 51.24.030, the Department of Labor and Industries has the right to reimbursement from Mr. Tharaldson's third party recovery for the compensation and benefits provided for the low back injury.

3. The order of the Department of Labor and Industries dated August 10, 2004, is correct and is affirmed.

It is so **ORDERED**.

Dated this 22nd day of August, 2005.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
THOMAS E. EGAN Chairperson

/s/_____
CALHOUN DICKINSON Member