

Cobb, Jill

THIRD PARTY ACTIONS (RCW 51.24)

Underinsured motorist insurance policy owned by employer

A worker's recovery under his employer's underinsured motorist insurance policy is not a third party recovery within the meaning of RCW 51.24 and is not subject to the Department's reimbursement lien provided for in RCW 51.24.060(2).*In re Michael Morrissey*, BIIA Dec., 66,831 (1985) [dissent]; *In re Carl Miller*, BIIA Dec., 68,280 (1985) [dissent]; *In re Jill Cobb*, BIIA Dec., 66,449 (1985) [dissent] [*Editor's Note*: See later statute, RCW 51.24.030(3) as amended 1986 and *In re James Funston*, BIIA Dec., 88 2863 (1990). *Cobb* affirmed *Department of Labor & Indus. v. Cobb*, 59 Wn. App. 360 (1990) review denied 116 Wn.2d 1031 (1991).]

Scroll down for order.

BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

1
2 In Re: JILL A. COBB) DOCKET NO. 66,449
3)
4 CLAIM NO. H-871475)
5)
6 _____) DECISION AND ORDER

7 APPEARANCES:

8
9 Claimant, Jill A. Cobb by
10 Cohoe, Counsell, Murphy and Bottiger, per
11 John P. Murphy

12
13 Employer, M.C. Delivery Services, Incorporated by
14 Andy Laycock, Jr., Vice-President and General Manager

15
16 Department of Labor and Industries by
17 The Attorney General, per
18 John D. Fairley, Assistant
19

20 This is an appeal filed by the claimant on December 8, 1983 from
21 an order of the Department of Labor and Industries dated November 30,
22 1983 which asserted its lien on the proceeds of a recovery made by the
23 claimant from an underinsured motorist provision in her employer's
24 automobile insurance contract. Reversed and remanded.

25 DECISION

26 Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before
27 the Board for review and decision on a timely Petition for Review
28 filed by the Department of Labor and Industries to a Proposed
29 Decision and Order issued on December 7, 1984 in which the order of
30 the Department dated November 30, 1983 was reversed, and remanded to
31 the Department of Labor and Industries with instruction to take such
32 further action as may be necessary or required by law.

33 The general nature and background of this appeal are as set forth
34 in the Proposed Decision and Order, and shall not be reiterated herein.

1 The question which the Board is called upon to decide by this
2 appeal is purely a legal one, to wit: Is a worker's recovery under
3 his employer's underinsured motorist insurance policy a "third person"
4 recovery within the meaning of RCW 51.24, and thereby subject to the
5 Department's reimbursement lien as prescribed by RCW 51.24.060. This
6 same question was most recently addressed by this Board in In re
7 Michael J. Morrissey, Claim No. J-125458, Docket No. 66,831, in a
8 Decision and Order entered March 15, 1985. Accordingly, our decision
9 herein conforms precisely with our holding in Morrissey.

10 Initially, we note that no case law in this state is authoritative
11 on the issue presented. Although one of first impression in this
12 state, the question has been determined in a number of other
13 jurisdictions. As might be expected, those cases come down on both
14 sides of the question. Moreover, because each state has its own
15 peculiar "third party" statutory language, there is no single
16 precedent to provide salutary guidance. In short, we are confronted
17 with a division of persuasive authority.

18 Those jurisdictions which find a recovery under the employer's
19 underinsured motorist policy to be a "third party" recovery, and thus
20 subject to the workers' compensation carrier's lien, do so on either
21 of the following two grounds:

- 22 1. The express language used in the statute to define the
23 term "third person/party" contemplates a recovery
24 under an underinsured motorist policy;
25
- 26 2. The court's refusal to impute to the lawmakers the
27 intent that an employee-accident victim of an
28 underinsured driver should fare better monetarily than
29 an employee-accident victim of an adequately insured
30 driver.
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For an example of each ground see Johnson v. Fireman's Fund Insurance Company, (La.) 425 So.2d 224 (1983); and Montedoro v. City of Asbury Park, (N.J.) 416 Atl.2d 433 (1980), respectively.

On the other hand, those cases which find that an underinsured motorist recovery does not constitute a "third party" recovery and is therefore free of the compensation carrier's lien do so, almost uniformly, on the ground that the statutory "third party" must be a tortfeasor, and an underinsured motorist insurance recovery does not sound in tort, but in contract. The leading case under this rationale, with citations therein to supporting case law from seven other jurisdictions, is Knight v. Insurance Company of North America, 647 F.2d 127 (1981).

Focusing upon the case at hand, RCW 51.24.030, the enabling statutory provision which grants the worker a third party cause of action, reads:

"If the injury to a worker is due to the negligence or wrong of a third person not in the same employ, the injured worker or beneficiary may elect to seek damages from the third person." (Emphasis supplied)

If the cause of action granted by this section is for the "negligence or wrong" of a third person, then it is certainly arguable that any resulting recovery must sound in tort to qualify as a third person/party recovery subject to a departmental lien of reimbursement. This, however, would fail to explain Lundeen v. Department of Labor and Industries, 78 Wn.2d 66 (1970), wherein our court held that a worker's recovery under the Military Claims Act (under which relief is not predicated upon any "fault, negligence, or

1 wrong") constituted a third party recovery under RCW 51.24, and was
2 therefore subject to the Department's lien. Key to the court's
3 decision was the fact that the worker's recovery under the Military
4 Claims Act foreclosed any claim or recovery under the Tort Claims Act,
5 thereby terminating the Department's right of subrogation. From this
6 holding, it may be taken that a recovery that does away with a
7 tortious cause of action, will, in effect, be deemed a substitute
8 therefor, and treated as a recovery against a tortious third party.
9 For a like approach with the same result, see McDowell v. LaVoy, 498
10 N.Y.2d 148 (1978). But in the case before us, the Department's
11 right of subrogation was not terminated by the benefit accruing to the
12 claimant under her employer's underinsured motorist coverage. In
13 fact, the Department could, and did, pursue some partial recovery
14 against the tortfeasor's insurance carrier here.

15 It seems to us the question for decision herein begets a further
16 question of its own. What claim would the Department have against
17 the underinsured motorist carrier had the worker herein made no claim
18 against that carrier, but instead had elected to take solely under the
19 Act? The answer, we believe, is "none". The uninsured motorist
20 carrier did not insure the uninsured motorist (tortfeasor) against
21 liability. The liability of the uninsured motorist carrier itself is
22 strictly contractual. The Department is neither an insured nor a
23 third party beneficiary under the contract of insurance between the
24 underinsured motorist carrier and the employer.

25 Under our proposed hypothetical the Department's only claim would
26 be against the underinsured motorist, the tortfeasor.

1 The same, we think, holds true in the situation before us. As
2 stated in Horne v. Superior Life Insurance Company, 203 Va. 282, 128
3 S.E.2d 401 (1962):

4 "It is not the purpose of the uninsured motorist law to
5 provide coverage for the uninsured vehicle ..."
6

7 The proceeds of the underinsured motorist insurance policy are not
8 paid out as indemnification for, or in discharge of, the underinsured
9 motorist's liability. The liability of the underinsured motorist
10 remains intact, as does the Department's lien rights against any
11 eventual recovery from the underinsured motorist. Although academic
12 to our consideration herein, we would further note that RCW
13 48.22.040(3) of the underinsured motorist statute provides in relevant
14 part:

15 "In the event of a payment to an insured under the coverage
16 required by this chapter and subject to the terms and
17 conditions of such coverage, the insurer making such
18 payment shall, to the extent thereof, be entitled to the
19 proceeds of any settlement or judgment resulting from the
20 exercise of any rights of recovery of such insured against
21 any person or organization legally responsible for the
22 bodily injury, death, or property damage for which such
23 payment is made ..."
24

25 Thus, there could eventuate competing claims between the
26 Department, under its subrogated right of lien under RCW 51.24.060(2),
27 and Commercial Union Assurance Companies, the employer's underinsured
28 motorist carrier, through the latter's entitlement under RCW
29 48.22.040(3), to any recovery secured in the claimant's name against
30 the underinsured motorist. As previously indicated, however, any
31 question as to competing or conflicting claims between the Department
32 and Commercial Union Assurance is academic to the resolution of the

1 legal issue before us. We would end this digression by merely noting
2 that this very question of competing statutory claims was presented
3 for decision in Horne, supra, and it was therein held that the
4 reimbursement claim of the worker's compensation carrier would take
5 precedence over that of the underinsured motorist carrier against any
6 recovery from the underinsured motorist.

7 In sum, we hold that a worker's recovery under his employer's
8 underinsured motorist insurance policy is not a "third person"
9 recovery within the purview of RCW 51.24, and is therefore not subject
10 to the Department's reimbursement lien as prescribed by RCW
11 51.24.060(2).

12 All factual matters having been stipulated, no findings are
13 required. RCW 51.52.106.

14 The order of the Department of Labor and Industries dated November
15 30, 1983, declaring a statutory lien in the sum of \$16,750.00 against
16 the claimant's recovery from his employer's underinsured motorist
17 carrier in the sum of \$32,500.00, and demanding reimbursement in the
18 amount of said lien, is incorrect, and should be reversed.

19 It is so ORDERED.

20 Dated this first day of July, 1985.

21 BOARD OF INDUSTRIAL INSURANCE APPEALS

22
23
24 /s/ _____
25 MICHAEL L. HALL Chairman

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

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32 DISSENTING OPINION

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I disagree with the majority's decision. I believe the holdings set forth by Johnson v. Fireman's Fund Insurance Company, (La.) 425 So.2d 224 (1983), and Montedoro v. City of Asbury Park, (N.J.) 416 Atl.2d 433 (1980), are the principles which should apply in this jurisdiction, also. In addition, I quote from Larson on Workers' Compensation Law, Vol. 2A, Sec. 71.23(i), stating:
"When it is the employer's underinsured motorist policy [not the employee's own such policy] that is involved, one of the strongest arguments against any lien or offset disappears -- the argument that the employee should not be deprived of the benefits of a privately-purchased insurance contract that he has paid for himself..."
(Emphasis added)

The claimant's recovery from her employer's underinsured motorist carrier should be properly considered a third-party recovery subject to the lien and distribution provisions of RCW 51.24. I would affirm the Department's order dated November 30, 1983.

Dated this first day of July, 1985.

/s/ _____
PHILLIP T. BORK Member

