Morrissey, Michael

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).]

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BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS

STATE OF WASHINGTON

In Re: MICHAEL J. MORRISSEY	)	**DOCKET NO. 66,831**
	)	
Claim No. J-125458	)	**DECISION AND ORDER**
	)	

APPEARANCES:

Claimant, Michael J. Morrissey, by
Patrick H. Lepley

Employer, Evergreen General Contractors, Inc.,
None

Department of Labor and Industries, by
The Attorney General, per
John D. Fairley, Assistant

This is an appeal filed by the claimant on January 27, 1984 from an order of the Department of Labor and Industries dated January 11, 1984, which declared a statutory lien against a $35,000.00 recovery made by the claimant from his employer's underinsured motorist insurance carrier and demanded reimbursement. 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 September 4, 1984 in which the order of the Department dated January 11, 1984 was affirmed.

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

The question which the Board is called upon to decide by this appeal is purely a legal one, to wit: Is a worker's recovery under his employer's underinsured (uninsured) motorist insurance policy a "third person" recovery within the meaning of RCW 51.24, and thereby subject to the Department's reimbursement lien as prescribed by RCW 51.24.060(2)?

We begin by noting that there is no Washington case law in point. Although one of first impression in this state, the question has been determined in a number of other jurisdictions. Unfortunately, the

out-of-state cases come down on both sides of the question. Moreover, because each state has its own peculiar "third party" statutory language, there is no single precedent to provide salutary guidance. In short, we are confronted with a division of persuasive authority.

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

1. The express language used in the statute to define the term "third person/party" contemplates a recovery under an uninsured motorist policy;

2. The court's refusal to impute to the lawmakers' the intent that an employee-accident victim of an uninsured driver should fare better monetarily than an employee-accident victim of an insured driver.

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 uninsured 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 uninsured 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 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 wrong") constituted a third party recovery under RCW 51.24, and was therefore subject to the Department's lien. Key to the court's decision was the fact that the worker's recovery under the Military Claims Act foreclosed any claim or recovery under the Tort Claims Act, thereby terminating the Department's right of subrogation. From this holding, it may be taken that a recovery that does away with a tortious cause of action, will, in effect, be deemed a substitute therefor, and treated as a recovery against a tortious third party. For a like approach with the same result, see McDowell v. LaVoy, 498 N.Y.2d 148 (1978). But in the case before us, the Department's right of subrogation is not terminated by the benefit accruing to Mr. Morrissey. In fact, the Department could still pursue direct recovery against the tortfeasor here.

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

Under the hypothetical proposed, the Department's only claim would be against the uninsured motorist, the tortfeasor.

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

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

The proceeds of the uninsured motorist insurance policy are not paid out as indemnification for, or in discharge of, the uninsured motorist's liability. The liability of the uninsured motorist remains intact, as does the Department's lien rights against any eventual recovery from the uninsured motorist. In this regard, it is to be noted that the uninsured motorist carrier, American States Insurance Company, has commenced an action in the claimant's name against the uninsured motorist. Although academic to our consideration herein, we would further note that RCW 48.22.040(3) of the underinsured motorist statute provides in relevant part:

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

Thus, there could eventuate competing claims between the Department, under its subrogated right of lien under RCW 51.24.060(2), and American States, through its entitlement under RCW 48.22.040(3), to any recovery secured in the claimant's name against the uninsured motorist. As previously indicated, however, any question as to competing or conflicting claims between the Department and American States is academic to the resolution of the legal issue before us. We would end this digression by merely noting that this very question of competing statutory claims was presented for decision in Horne, supra, and it was therein held that the reimbursement claim of the

worker's compensation carrier would take precedence over that of the uninsured motorist carrier against any recovery from the uninsured motorist.

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

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

The order of the Department of Labor and Industries dated January 11, 1984, declaring a statutory lien in the sum of $24,377.54 against the claimant's recovery from his employer's underinsured motorist carrier in the sum of $35,000.00, and demanding reimbursement in the amount of said lien, is incorrect, and should be reversed.

It is so ORDERED.
Dated this 15th day of March, 1985.

BOARD OF INDUSTRIAL INSURANCE APPEALS

/s/_____
MICHAEL L. HALL Chairman

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

DISSENTING OPINION

I disagree with the majority's decision. All reasons for doing so are completely and persuasively set forth in the industrial appeals judge's Proposed Decision and Order, and I adopt the entire discussion therein as my own.

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 uninsured 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 the 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 January 11, 1984.

Dated this 15th day of March, 1985.

/s/_____
PHILLIP T. BORK Member