

## McGee, Steven

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### THIRD PARTY ACTIONS (RCW 51.24)

#### Distribution of recovery

In determining the employer's share of a deficiency third party recovery under the 1983 version of RCW 51.24.060, not only must deductions from the recovery first be made for attorneys' fees and costs and the worker's 25 percent guaranteed share, but the employer must pay a proportionate share of the attorneys' fees and costs as an additional charge against its share of the recovery. The Department's distribution formula is most consistent with the legislative intent of encouraging workers to pursue third party actions and the Board will therefore defer to the administrative interpretation of the statutory distribution scheme. ...*In re Edward Herrin*, BIIA Dec., 85 3448 (1987) [dissent]; *In re Steven McGee*, BIIA Dec., 70 119 (1987) [dissent] [*Editor's Note: McGee reversed sub nom Longview Fibre Co. v. Department of Labor & Indus.*, 58 Wn. App. 751 (1989) rev. denied 114 Wn.2d 1030 (1990).]

Scroll down for order.

**BEFORE THE BOARD OF INDUSTRIAL INSURANCE APPEALS  
STATE OF WASHINGTON**

1     **IN RE: STEVEN J. MCGEE**                             )     **DOCKET NO. 70,119**  
2                                                             )  
3     **CLAIM NO. S-316705**                             )     **DECISION AND ORDER**  
4

5 APPEARANCES:  
6

7             Claimant, Steven J. McGee, by  
8             Francis & Ackerman, per  
9             Jack J. Ackerman

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11            Employer, Longview Fibre Company, by  
12            Studley, Purcell, Frey, Spencer & Kenny, per  
13            Wayne D. Purcell

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15            Department of Labor and Industries, by  
16            The Attorney General, per  
17            Charles R. Bush and Maureen A. Mannix, Assistants  
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19            This is an appeal filed by the self-insured employer on March 25, 1985 from an order of the  
20 Department of Labor and Industries dated February 19, 1985 which ordered the self-insured employer  
21 to pay \$15.11 to the claimant and \$1497.12 to the Department, and concluded that the claimant was  
22 to remain entitled to compensation to which he may be entitled under this claim because there was no  
23 excess recovery from his "third party" recovery within the meaning of RCW 51.24.060(1)(d) and (e).  
24 The Department order is **AFFIRMED**.  
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28                                                             **DECISION**  
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30            Pursuant to RCW 51.52.104 and RCW 51.52.106, this matter is before the Board for review  
31 and decision on a timely Petition for Review filed by the employer to a Proposed Decision and Order  
32 issued on August 20, 1986 in which the order of the Department dated February 19, 1985 was  
33 affirmed.  
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35            The Board has reviewed the evidentiary rulings in the record of proceedings and finds that no  
36 prejudicial error was committed and said rulings are hereby affirmed.  
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38            On July 13, 1979, while in the course of his employment with Longview Fibre Company,  
39 claimant sustained an industrial injury for which he received industrial insurance benefits from the  
40 self-insured employer and the Department of Labor and Industries, parties hereinafter referred to as  
41 the "benefit provides." Pursuant to RCW 51.24.060, the claimant elected to bring a civil action for  
42 damages from a third person whose negligence or wrongful action had been the cause of the  
43 industrial injury. On February 16, 1984, this third party action was settled for a total gross cash  
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1 recovery of \$150,000. As of February 16, 1984, the benefit providers had paid \$105,495 in industrial  
2 insurance compensation and benefits. On February 19, 1985, the Department issued an order  
3 directing disbursement of the \$150,000 "third party" recovery as follows: \$61,951.25 as claimant's  
4 attorney's fees and costs, \$49,285.84 to the claimant, and \$38,762.91 to the benefit providers. Over  
5 96% of the benefit providers' share went to the self-insured employer which had contributed a similar  
6 percentage of the dollar value of claimant's benefits.  
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10 The issue in this appeal is whether the Department of Labor and Industries correctly interpreted  
11 the language of RCW 51.24.060(1) when it ordered distribution of the monies recovered in the third  
12 party settlement. As of February 16, 1984, that statute read as follows:  
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- 14 (1) If the injured worker or beneficiary elects to seek damages from the third  
15 person, any recovery made shall be distributed as follows:  
16  
17 (a) the costs and reasonable attorneys' fees shall  
18 be paid proportionately by the injured worker  
19 or beneficiary and the department and/or  
20 self-insurer;  
21  
22 (b) the injured worker or beneficiary shall be paid  
23 25% of the balance of the award....;  
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25 (c) the department and/or self-insurer shall be  
26 paid the balance of the recovery made, but  
27 only to the extent necessary to reimburse the  
28 department and/or self-insurer for  
29 compensation and benefits paid;  
30  
31 (i) the department and/or self-insurer shall bear  
32 its proportionate share of the costs and  
33 reasonable attorneys' fees incurred by the  
34 worker or beneficiary to the extent of the  
35 benefits paid or payable under this title....  
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37 (ii) the sum representing the department's and/or  
38 self-insurer's proportionate share shall not be  
39 subject to subsection (1)(d) and (e) of this  
40 section.  
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42 (d) any remaining balance shall be paid to the  
43 injured worker or beneficiary;....  
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10 This statute is far from being a model of clarity. It is difficult to decipher the overall legislative  
11 intent from the language of the statute. The word "proportionately" and the phrase "proportionate  
12 share," are used in RCW 51.24.060(1)(a) and (c)(i), respectively, in a confusing and possibly  
13 inconsistent manner. It is not clear whether attorneys' fees and costs should be included as part of the  
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1 claimant's gross recovery for the purposes of determining his "proportionate share" of the attorneys'  
2 fees and costs. When faced with ambiguous or unclear statutory language, it is appropriate to look  
3 behind the statutory language to the legislative history surrounding the statute in question in order to  
4 gauge the Legislature's intent therein. See, Paulson v. Pierce County, 99 Wn.2d 645 (1983) and State  
5 Board of Transportation v. State Employee's Insurance Board, 97 Wn.2d 454 (1982).  
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9 When the Industrial Insurance Act was originally enacted, the injured worker had to elect  
10 between pursuing his remedy at law against a third party tortfeasor or pursuing his workers'  
11 compensation claim. Laws of 1911, Ch. 74, § 3. The worker could not receive worker's compensation  
12 benefits during the pendency of that action and was solely responsible for the litigation expenses  
13 incurred, regardless of the outcome. See, Lowry v. Department of Labor and Industries, 21 Wn.2d  
14 538 (1944). The requirement that, if a third party action was to be pursued, the claimant must forego  
15 payment for medical treatment and other worker's compensation benefits pending final disposition of  
16 the action was a major disincentive to the pursuit of third party actions.  
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20 In 1957, the statutory scheme was dramatically changed to allow the claimant to receive  
21 worker's compensation benefits while pursuing a third party action. Laws of 1957, Ch. 70, § 23; RCW  
22 51.24.010. Because of the potential concurrent recovery under the Industrial Insurance Act and from  
23 the third party tortfeasor, the 1957 amendments gave the Department, as the benefit provider, a right  
24 to be reimbursed from the third party recovery and a lien against that recovery.  
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28 In 1961, RCW 51.24.010 was amended to require the Department to share the third party suit  
29 litigation expenses with the injured worker to the extent that its trust funds benefited from the recovery  
30 in the third party action. Laws of 1961, Ch. 274, § 7. The requirement that the Department share the  
31 litigation expenses increased the claimant's net recovery by the amount of the litigation expenses the  
32 Department was required to bear. However, when the Department's lien equaled or exceeded the  
33 gross recovery, it would take the entire recovery, leaving the claimant with only the benefits it provided.  
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37 In 1977, the Legislature repealed RCW 51.24.010 and enacted a new third party suit statute,  
38 including RCW 51.24.060 to govern the distribution of third party recoveries. Laws of 1977, 1st Ex.  
39 Sess., Ch. 85, § 4. Under the new statute, attorney fees and costs were a first charge against the third  
40 party recovery. Rhoad v. McLean Trucking Company, 102 Wn.2d 422 (1984). For the first time,  
41 claimants were guaranteed 25% of the net recovery, after the deduction of litigation expenses. This  
42 prevented the benefit provider from claiming the entire net recovery in satisfaction of its lien, thus  
43 removing a disincentive to a claimant's pursuit of third party tortfeasors that had existed prior to 1977.  
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1 However, the 1977 amendment deleted the requirement that attorney fees and costs be shared  
2 proportionately by the claimant and the benefit providers.  
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4 In 1983, the proportionate sharing of litigation expenses was restored to the statutory scheme.  
5 Laws of 1983, Ch. 211, § 2. However, it was simply tacked onto the 1977 distribution framework; the  
6 priorities of the various statutory shares remain unchanged.  
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8 While the statutory language itself is far from crystal clear, one overriding legislative purpose  
9 emerges from the legislative history. In successive amendments, the Legislature has steadily  
10 increased the claimant's ultimate share of the third party recovery. In 1986, the Legislature continued  
11 this trend by eliminating the benefit provider's lien entirely if the employer or co-employee is at fault.  
12 By maximizing the claimant's ultimate share, the Legislature clearly intends to encourage claimants to  
13 pursue third party actions.  
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18 A close analysis of both the Department's and the employer's methods of calculation shows  
19 that the Department's method more fully follows the Legislature's intent to maximize claimant recovery.  
20 (The step-by-step methods of calculation employed by the claimant, Department, and self-insured  
21 employer are appended to this order). The statutory inconsistencies in the employer's analysis are  
22 more clearly revealed when the amount of benefits provided, exclusive of the attorney's fees and  
23 costs, approaches the amount of the gross recovery. For example, assume that both the benefits  
24 provided and the gross recovery equal \$100,000 and the attorney fees and costs equal \$40,000. All  
25 parties would recognize that under these facts the claimant's 25% share pursuant to RCW  
26 51.24.060(1)(b) equals \$15,000, the minimum amount claimant should receive for litigating the third  
27 party action. Under the employer's method, the attorney's fees would equal 40% of the gross  
28 settlement which would then be multiplied into its "share" (the provider's lien or total benefits paid),  
29 yielding the result that the employer is responsible for \$40,000 or 100% of the attorney's fees and  
30 costs, a non-proportional assessment of those costs which is, ironically, the employer's major  
31 complaint with the Department's calculation. However, this calculation would leave claimant with his  
32 statutorily required minimum share of 25% of the net recovery or \$15,000.  
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40 If, using the employer's method, we were to calculate the claimant's proportional share of the  
41 attorney fees and costs as equal to the proportion of his 25% share when compared to the gross  
42 recovery, the claimant would receive considerably less than the 25% statutory share mandated by  
43 RCW 51.24.060(1)(b). The claimant's 25% net share equals 15% of the gross recovery. Making the  
44 claimant responsible for 15% of the \$40,000 litigation expenses (\$6,000) would leave him with a net  
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1 recovery of \$9,000 (\$15,000-\$6,000), since there would be no contribution to his recovery from monies  
2 received by the benefit providers in excess of the amount of benefits paid. Each of these results,  
3 reached by using the employer's analysis, violates the language and intent of RCW 51.24.060.  
4 Neither of these alternatives would occur under the same facts, if the Department's method of  
5 calculation is used.  
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9 The main conceptual problem with the employer's method of calculation is that it gives primacy  
10 to the benefit provider's lien and ignores the distinction inherent in RCW 51.24.060(1) between the  
11 statutory shares. The employer's analysis necessarily assumes that the benefit provider has some  
12 entitlement to the third party action. However, the injury was to the claimant and any cause of action  
13 belongs to him exclusively. The only basis for the provider's reimbursement is the statutory right of  
14 subrogation. Thus, the employer is not necessarily entitled to a lien in the full amount of the benefits  
15 paid, but rather only to the RCW 51.24.060(1)(c) balance of the recovery after attorney's fees and  
16 costs and the injured worker's 25% of the balance of the award are deducted therefrom, and subject to  
17 a proportion of attorney's fees equal to the same proportion of its 51.24.060(1)(c) balance as  
18 compared to the total gross recovery. Obviously the benefit providers' entitlement can equal the full  
19 amount of benefits paid, but there is no requirement that it must do so. The employer's method of  
20 calculation is merely a more sophisticated version of the old RCW 51.24.010 distribution arrangement  
21 wherein each competing interest shared in the litigation expenses rather than taking subject to the first  
22 charge and deduction of attorney's fees and costs as is mandated by the current RCW 51.24.060.  
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30 The employer relies on some testimony taken at a hearing on the bill which contained the 1983  
31 amendments to RCW 51.24.060 in front of the Senate Judiciary Committee, as well as the Legislative  
32 Bill Report of that act (S.B. 3127) to attempt to advance its arguments. However, a determination of  
33 legislative intent is made, not by reference to unofficial statements of proponents of proposed  
34 legislation, nor by memoranda or reports not read into a legislative journal, but by looking to the  
35 language of the legislation itself. King County v. Taxpayers of King County, 104 Wn.2d 1 (1985) and  
36 LeBeuf v. Atkins, 28 Wn. App. 50 (1980). We fail to find these few statements by one witness to be  
37 dispositive as to what was the Legislature's intent, especially in view of the ease with which we read its  
38 intent by examining the legislative history of that particular provision.  
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43 The employer contends that the Department's method of calculation is unfair because it  
44 constitutes a "double assessment" since the employer's share of the recovery is lowered first by the  
45 deduction of attorney's fees from the gross recovery the then by the additional amount for attorney's  
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1 fees under RCW 51.24.060(1)(c)(i). However, the claimant's recovery also is twice lowered by the  
2 statutory order of distribution of the shares. The claimant's 25% statutory share is taken only after  
3 attorney's fees and costs have been deducted from the total gross recovery. Additionally, the claimant  
4 is responsible for its share of attorney's fees, the amount of which is equal to what remains after a  
5 similar assessment of proportional fees and costs against the benefit providers" RCW 51.24.060(1)(c)  
6 share. This double assessment for attorney's fees is inherent in the order of priority of each interest  
7 within the statute. Attorney's fees and costs, being the first charge against the gross recovery, affect  
8 all other shares of that recovery in a manner quite independent from the requirement of proportional  
9 sharing of fees.

10  
11 The inequity of which the employer complains, occurs only when there is a deficiency recovery  
12 (i.e. when the gross recovery is less than the total of the amounts of attorney's fees and costs, the  
13 claimant's 25% share, and the benefits provided). In cases where there is no deficiency recovery, the  
14 parties would receive the same amount of money regardless of which method is used. However, it is  
15 in the deficiency recovery context, where the recoveries are usually smaller, that greater incentives are  
16 necessary to induce claimants to litigate third party actions. Obviously, any third party recovery which  
17 results from this additional incentive will, in the end, be a benefit to both the claimant and the provider.  
18 The Department's method is consistent with this goal.

19  
20 The claimant also filed a proposed distribution plan. However, his plan is incorrect (in a manner  
21 similar to that of the employer's scheme) inasmuch as it would place the full burden of payment of  
22 attorney's fees and costs on the benefit provider whenever the gross recovery was equal to or less  
23 than the total benefits paid, a result inconsistent with the "proportionate" language of RCW  
24 51.24.060(1)(a) and (c)(i).

### 25 **FINDINGS OF FACT**

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1. On August 1, 1979 the claimant, Steven J. McGee, filed an accident report with the Department of Labor and Industries alleging the occurrence of an industrial injury on July 13, 1979 while in the course of his employment with Longview Fibre Company. The claim was allowed and benefits were paid. On September 11, 1984 the Department issued an order reciting that a civil action against a liable third party pursuant to RCW 51.24.060 had been settled for \$150,000 and that at the time of said settlement, an excess of \$105,495 in benefits had been paid under the claim by the Department and the self-insured employer, and then provided that the settlement recovery had been disbursed as follows: (1) \$61,951 to claimant's attorneys for fees and costs incurred, (2) \$39,519.45 to the self-insured employer in satisfaction of its lien, less its share of attorney's

1 fees and costs, (3) \$1,796.19 to the Department of Labor and Industries in  
2 satisfaction of its lien, less its share of attorney fees and costs, and (4)  
3 \$49,270.73 to claimant, his 25% and the self-insured employer's and  
4 Department's share of attorney's fees and costs, and that the claimant  
5 would be entitled to continued benefits under the Worker's Compensation  
6 Act, demanded reimbursement from the self-insured employer of  
7 \$1,054.76 said to be part of the Department's statutory lien. On  
8 November 8, 1984 the employer filed a protest and request for  
9 reconsideration with the Department. On February 19, 1985, the  
10 Department of Labor and Industries issued the following order:

11 "WHEREAS, the Order entered on September 11, 1984, in this claim, has  
12 been protested by Longview Fibre Company, the protest letter having  
13 been received by the Department on November 8, 1984, and the  
14 Department's prior Order, having been reconsidered;

15 WHEREAS, Steven J. McGee suffered injuries from the July 13, 1979  
16 accident while in the course of his employment with Longview Fibre  
17 Company, a Self-Insured Employer, and which accident was the result of  
18 the negligence or wrong of "third parties" within the meaning of RCW  
19 51.24.030;

20 WHEREAS, for his injuries, Steven J. McGee elected to and did pursue  
21 the civil cause of action against the "third parties" as well as claim and  
22 received Industrial Insurance compensation and benefits under claim  
23 number S316705;

24 WHEREAS, Steven J. McGee settled the personal injury cause of action  
25 after July 24, 1983, for a gross sum of \$150,000.00 and at which time  
26 more than \$105,495.00 had been paid under claim number S316705,  
27 \$101,420.52 by Longview Fibre Company and \$4,074.48 by the  
28 Department;

29 WHEREAS, in pursuing the personal injury cause of action and making  
30 the recovery, a total of \$61,951.25 in attorney fees and costs were  
31 incurred;

32 WHEREAS, the \$150,000.00 gross recovery is subject to RCW  
33 51.24.060(1) which defines the gross statutory shares as follows:

- 34 1. \$61,951.25 for attorney fees and costs  
35 incurred in making the recovery;
- 36 2. \$22,012.19 for Steven J. McGee as his  
37 25% share of the \$88,048.75 net recovery;
- 38 3. \$66,036.56 for the Department and  
39 Longview Fibre Company as reimbursement  
40 for the compensation and benefits paid as of  
41 the date of recovery.



1 WHEREAS, RCW 51.24.060(1)(a) and (c)(i) require the Department and  
2 Longview Fibre Company to bear a proportionate share of the attorney's  
3 fees and costs, which share is \$27,273.65, 44.02437% of \$61,951.25;

4  
5 WHEREAS, the Department's proportionate share of the \$27,273.65  
6 attorney's fees and costs share is \$1,053.38 (3.86225%) and the  
7 Longview Fibre Company's share is \$26,220.27 (96.13773%).

8 WHEREAS, the \$150,000.00 gross recovery is to be disbursed as follows:

9  
10 1. \$61,951.25 to the attorneys for Steven J.  
11 McGee for attorneys' fees and costs  
12 advanced;

13 2. \$49,285.84 to Steven J. McGee, the sum of  
14 his 25% share and the compensation  
15 providers' proportionate share of attorney's  
16 fees and costs,

17 3. \$37,265.78 to Longview Fibre Company  
18 (96.13773% of \$38,762.92) as its net lien  
19 share, and  
20

21 4. \$1,497.12 to the Department (3.86225% of  
22 \$38,762.91) as its net lien share;

23 WHEREAS, Steven J. McGee has distributed to Longview Fibre  
24 Company, \$38,778.02, which sum is \$15.11 greater than the \$38,762.91  
25 net compensation providers share; and

26  
27 WHEREAS, Longview Fibre Company has not remitted to the Department  
28 its \$1,497.12 share of the "third party" recovery;

29 IT IS HEREBY ORDERED, that

30  
31 1. Longview Fibre Company pay to Steven J.  
32 McGee, \$15.11;

33 2. Longview Fibre Company pay to the  
34 Department of Labor and Industries  
35 \$1,497.12; and

36 3. There being no excess recovery within the  
37 meaning of RCW 51.24.060(1)(d) and (e),  
38 Steven J. McGee remains entitled to be paid  
39 for compensations and benefits to which he  
40 may be entitled under this claim."  
41

42 On March 25, 1985 the employer filed a notice of appeal with the Board of  
43 Industrial Insurance Appeals. On April 2, 1985 this Board issued an order  
44 granting the employer's appeal, assigning it Docket No. 70,119 and  
45 directing that further proceedings be held on the matter.  
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- 1 2. On July 13, 1979, while in the course of his employment with Longview  
2 Fibre Company, claimant sustained serious injuries to both hands when  
3 they were caught between ink rollers of a printing press due to the  
4 negligence or wrong of third parties.  
5  
6 3. As of February 16, 1984, the self-insured employer, Longview Fibre  
7 Company, had provided \$101,420.52 and the Department had  
8 provided \$4,074.48 in industrial insurance compensation and benefits to  
9 claimant.  
10  
11 4. Claimant commenced an action at law against the third parties responsible  
12 for his accident of July 13, 1979 and recovered \$150,000 in a settlement  
13 of that action on February 16, 1984.  
14  
15 5. Attorney's fees of \$60,000 and costs of \$1,951.24 were incurred by the  
16 claimant in pursuing the third party action.

17 **CONCLUSIONS OF LAW**

- 18 1. The Board of Industrial Insurance Appeals has jurisdiction over the subject  
19 matter and parties to this appeal.  
20  
21 2. The Department of Labor and Industries order of February 19, 1985 was a  
22 correct application of RCW 51.24.060 and correctly ordered the  
23 distribution of the February 16, 1984 settlement funds.  
24  
25 3. The February 19, 1985 order of the Department of Labor and Industries  
26 which disbursed funds from a February 16, 1984 settlement from third  
27 parties is correct and is affirmed.

28 It is so ORDERED.

29 Dated this 27th day of March, 1987.

30 BOARD OF INDUSTRIAL INSURANCE APPEALS

31  
32 /S/ \_\_\_\_\_  
33 GARY B. WIGGS, Chairperson

34  
35 /S/ \_\_\_\_\_  
36 FRANK E. FENNERTY, JR. Member

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38 **DISSENTING OPINION**

39 Board majority's review of the history of legislative changes which have occurred over the years  
40 in our third-party statutes is instructive and accurate, and for the most part, probably a correct  
41 interpretation of overall legislative intent. However, I do not have the trouble the majority seems to  
42 have in discerning the intent of the 1983 and 1984 amendments to RCW 51.24.060(1), albeit they may  
43 not be perfect "models of clarity."  
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1 As the majority notes, the statute as it existed from 1977 to 1983 provided that (1)  
2 third-party-suit attorney fees and costs were a "first charge" against, and deduction from, the gross  
3 recovery; (2) claimants were guaranteed 25% of the net recovery, after that deduction of litigation  
4 expenses; and (3) proportionate sharing of attorney fees and costs between the claimant and the  
5 benefit providers was not allowed. These observations were confirmed by the Court in Rhoad, supra.  
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9 In 1983, the proportionate sharing of litigation expenses was restored to the distribution  
10 formula. But the 1983 amendments were intended to do more than that, namely, to remove the  
11 attorney fees and costs as a first charge, and deduction from, the gross third-party recovery. The  
12 majority says that this result is "not clear", but it is clear enough to me. The pre-1983 wording of RCW  
13 51.24.060(1)(a) simply said that these litigation costs, as the first step in distribution, "shall be paid." If  
14 this was not to be changed, no amendment to (1)(a) was necessary. However, it was amended, to  
15 provide that these costs be paid "proportionately" by the claimant and the benefit provider. To give  
16 reasonable effect to this change, I look to all the rest of RCW 51.24.060(1) to determine both the  
17 distribution of the gross recovery, and allocation of the proportionate shares of attorney fees and costs  
18 to that distribution, to arrive at the parties' net "in hand" shares. All subsections, treated as a whole,  
19 can thus be harmonized and applied. This version varies from that of any of the parties.  
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22  
23 Per (1)(b) and (c), the claimant's 25% guaranteed share (measured against the gross recovery,  
24 since the litigation costs are no longer a mandatory first charge) is \$37,500.00; and the benefit  
25 providers' (self-insurer and Department) share is \$105,495.00, since that sum is the extent of the total  
26 compensation benefits which were paid at the time of the third party action recovery. The remaining  
27 balance of the gross recovery, \$7,005.00, is distributed to the claimant per subsection (1)(d).  
28 However, this sum cannot be utilized in figuring the respective parties' proportionate share of attorney  
29 fees and costs, because to do so would alter the benefit providers' proportionate share in  
30 contravention of subsection (1)(c)(ii). Thus, the distribution of the gross third-party recovery utilized to  
31 allocate the attorney fees and costs between the parties is \$37,500.00 to the claimant, and  
32 \$105,495.00 to the benefit providers. This is a proportionate distribution of 26.22% to the claimant,  
33 and 73.78% to the benefit providers. Obviously, this is also the proportion by which costs of obtaining  
34 that recovery should be borne.  
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38 26.22% of the attorney fees and costs of \$61,951.25 is \$16,243.62. Therefore, claimant's  
39 proper net recovery is \$37,500.00 less \$16,243.62 or \$21,256.38, plus his \$7,005.00 remaining  
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1 balance, for a total of \$28,261.38. 73.78% of the attorney fees and costs is \$45,707.63. Therefore,  
2 the benefit providers' proper net recovery is \$105,495.00 less \$45,707.63, or \$59,787.37.  
3

4 Therefore, I would reverse and remand the Department's order of February 19, 1985, to  
5 provide for disbursement of the \$150,000.00 gross recovery as follows:  
6

- 7 1. \$61,951.25 to the attorneys for Steven McGee for attorney fees and costs  
8 advanced;
- 9 2. \$28,261.38 to Steven J. McGee, constituting his 25% share less his  
10 proportionate share of attorney fees and costs, plus his remaining balance  
11 under RCW 51.24.060(1)(d).  
12
- 13 3. \$59,787.37 to the benefit providers (self-insurer and Department) as their  
14 net lien share.  
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16 Further, the requirements of RCW 51.24.060(1)(e) should be applied against claimant's remaining  
17 balance of \$7,005.00.  
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19 Dated this 27th day of March, 1987.

20  
21 /S/ \_\_\_\_\_  
22 PHILLIP T. BORK, Member  
23

### 24 APPENDIX

25 All parties agree to the following calculations, comprising a "first step" in the process of  
26 determining the division of the settlement:  
27

28		
29	\$150,000.00	gross settlement
30	<u>-\$61,951.25</u>	attorneys' fees and costs
31	\$88,048.25	net settlement per subsection (a)
32	X <u>25%</u>	per subsection (b)
33	\$22,012.19	claimant's 25% share of net award
34		
35	\$88,048.75	net settlement
36	<u>-\$22,012.19</u>	per subsection (c)
37	\$66,036.56	benefit providers' gross share
38	<u>-105,495.00</u>	worker's comp. benefits paid to claimant
39	-0-	excess recovery paid to claimant per 40 subsection (d)

41 The Department calculates, as follows:

42		
43	\$83,963.44	Claimant's "share" of settlement (fees 44 and costs + 25% share)
45	\$66,036.56	Providers' gross "share" of settlement
46		
47	\$83,963.44	Claimant's share

1	-150,000.00	gross settlement
2	<u>55.97563%</u>	Claimant's proportion of fees and costs
3	\$34,677.60	Claimant's share of fees and costs
4		
5	\$66,036.56	providers, share
6	<u>-150,000.00</u>	gross settlement
7	<u>44.02437%</u>	providers' proportion of fees and costs
8	<u>X61,951.25</u>	total fees and costs
9	\$27,273.65	providers' share of fees and costs
10		
11	Final award division:	
12		
13	\$61,951.25	attorneys' fees and costs
14	\$49,285.84	claimant (\$22,012.19 (25% share) +
15		\$27,273.65 (reimbursement by providers'
16		share of fees))
17	\$38,762.91	providers (\$66,036.56 (providers' gross
18		share) - \$27,273.65 (provider's share of fee))
19		

The employer calculates as follows:

22	\$61,951.25	attorneys' fees and costs
23	<u>-150,000.00</u>	gross settlement
24	<u>41.30083%</u>	percentage of fees to gross settlement
25		
26	\$105,495.00	providers' "share" (total benefits paid)
27	<u>X41.30083%</u>	percentage of fees to gross settlement
28	\$43,570.31	providers' proportion of fees and costs
29		
30	\$44,505.00	claimant's "share" (\$150,000 -\$105,495)
31	<u>X41.30083%</u>	percentage of fees to gross settlement
32	\$18,380.93	claimant's proportion of fees and costs
33		

Final award division:

36	\$61,951.25	attorney's fees and costs
37	\$26,124.07	claimant (claimant's "share" (\$44,505.00) -
38		claimant's proportion of fees (\$18,380.93))
39	\$61,924.69	providers (total benefits paid
40		(\$105,495.00) - providers' proportion of
41		fees (\$43,570.31))
42		

The claimant calculates as follows:

45	\$105,495.00	providers' share (total benefits paid)
46	<u>-150,000.00</u>	gross settlement
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70.33%	providers' percentage of fees and costs
<u>X66,036.56</u>	(gross settlement (\$150,000.00) less sum of fees and costs + claimant's 25% share (\$61,951.25 + \$22,012.19 = \$83,963.44)
\$46,443.51	providers' share of fees and costs
\$61,951.25	attorneys' fees and costs
<u>-46,443.51</u>	providers' share of fees and costs
\$15,507.74	claimant's share of fees and costs

Final award division:

\$61,951.25	attorney's fees and costs
\$68,455.70	claimant (25% share (\$22,012.19) + reimbursement by providers' share of fees (\$46,443.51))
\$19,593.05	providers (providers' share per subsection (c) (\$66,036.56) - providers' share of fees (\$46,443.51))